'All the tools in the toolbox': some reflections on the proposed recalibration of corporate insolvency laws for environmental ends

Law Working Paper N° 945/2026
June 2026

Kristin van Zwieten
University of Oxford and ECGI

ECGI Working Paper Series in Law

‘All the tools in the toolbox’: some reflections on the proposed recalibration of corporate insolvency laws for environmental ends

Working Paper N° 945/2026
June 2026

Kristin van Zwieten

Abstract

The climate crisis has provoked a new wave of scholarship on insolvency law and ESG. This scholarship explores how corporate insolvency law rules – both of deployment, and of distribution – could be recalibrated to better incentivise climate change mitigation, and/or reduce environmental harms more generally. In this literature, insolvency laws are positioned as instruments in the environmentally-minded policymaker's toolkit, lying alongside a bundle of other rules for the regulation of corporations, from which the policymaker can make a selection for recalibration, having regard to the salience and stickiness of each segment of the rules from time to time. In this paper, I offer some reflections on this new wave of scholarship, focusing particularly on some methodological questions. I suggest that claims about how insolvency laws might most fruitfully be developed in service of some environmental (or other) end should be framed modestly: not as prescriptions for action by those charged with the interpretation and application of existing rules, but as claims about how, in theory, a different approach to the design of an insolvency rule might be more likely to produce the kind of incentive effects that the environmentally-minded policymaker is aiming at. I question whether, in theory, there is a good case for some of the proposals for recalibration made in the 'new wave' literature, and explain why the so-called 'debate' between 'proceduralist' and 'traditionalist' bankruptcy scholars is of limited utility in answering this question. I find theoretical support for proposals for elevating the priority of environmental claims in the rules governing the realisation and distribution of an insolvent debtor's assets.

Keywords: bankruptcy law, climate change, environment

Kristin van Zwieten
Professor of Law and Finance
University of Oxford
St Cross Building, St Cross Road
Oxford OX1 3UL, United Kingdom
e-mail: kristin.van-zwieten@law.ox.ac.uk

'All the tools in the toolbox': some reflections on the proposed recalibration of corporate insolvency laws for environmental ends

Kristin van Zwieten*

> "The Biden Administration has rightly recognized that in the face of a code red emergency, putting all of one's eggs in a single policy basket is likely not the best approach. The President is instead attempting to push a broad and diverse package of climate measures through Congress and is taking an all-of-government approach, directing every agency to make the thousands of policy changes, big and small, in myriad policy contexts, that will be necessary to begin the massive task of transitioning the global economy to a carbon-free future."[1]

Introduction

The climate crisis has provoked a new wave of scholarship on insolvency law and ESG. This scholarship explores how corporate insolvency laws might be leveraged as a "force for positive environmental change".[2] More specifically, it explores how corporate insolvency law rules - both of deployment, and of distribution[3] - could be recalibrated to better incentivise climate change mitigation, and/or reduce environmental harms more generally.[4] In this literature, insolvency laws are positioned as instruments in the environmentally-minded policymaker's toolkit, lying alongside a bundle of other rules for the regulation of corporations, from which the policymaker can make a selection for

*This paper draws on a presentation I gave at the inaugural meeting of the World Bank/III/INSOL International working group on climate risk and insolvency law, of which I am a member, and a keynote address I gave at the 2023 annual conference of the European Association of Law and Economics. I am very grateful to participants at these events for their feedback. The views expressed here are of course my own.

[1] Amy Sinden, 'All the Tools in the Toolbox: A Plea for Flexibility and Open Minds in Assessing the Costs and Benefits of Climate Rules' (2022) 39 Yale Journal on Regulation 908.

[2] Sarah E Light, 'The Law of the Corporation as Environmental Law' (2019) Stanford Law Review 137, 146.

[3] See Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986), ch 2, distinguishing between "the deployment question" (what should be done with the insolvent debtor's assets?) and "the distributional question" (in what order should claims against the insolvent debtor be satisfied, in circumstances in which assets are expected to be insufficient to discharge liabilities in full?).

[4] See e.g. Light (n 2); Alexander Gouzoules, 'Going Concerns and Environmental Concerns: Mitigating Climate Change through Bankruptcy Reform' (2022) 63 B.C. L. Rev. 2169; Janis Sarra, Stephan Madaus and Irit Mevorach, 'The greening of the insolvency system' (2024) 69(3) Canadian Business Law Journal 231; Joshua Macey and Jackson Salovaara, 'Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law' (2019) 71 Stanford Law Review 879; Tuula Linna, 'Business sustainability and insolvency proceedings – the EU Perspective' (2021) 2(2) J Sustain Res. A range of other recent papers which build on the prior literature on the treatment of non-consensual creditor claims in insolvency to propose changes to the priority of environmental liabilities are referred to at relevant points below.

recalibration, having regard to the salience and stickiness of each segment of the rules from time to time. All of these rules are therefore on one level, or can fruitfully be conceived of as, "environmental law".[5]

In this chapter, I will explore two possible objections to this framing. The first is a kind of general objection to framing laws and legal institutions as mere means to some environmental (or other) end.[6] Of course, those arguing for some recalibration of insolvency laws do not characterise these laws as 'mere' means to an environmental end, and, more generally, may find expressions of hostility to 'instrumentalism'[7] somewhat puzzling in the insolvency context, where reform initiatives are routinely presented by lawmakers as an attempt to produce some sought-after effect on investment incentives.

There is, however, a version of an objection to 'instrumentalism'[8] that is important. Scholarly claims about how a particular part of the law should be developed, which are directed to insiders in the system of rule production but proceed without regard to the law's "self-understanding"[9] (the "internal, participants' point of view"[10]), may either have no effect on the law's development, or produce effects which are harmful to the coherence of that system. This suggests that claims about how insolvency laws might most fruitfully be developed in service of some environmental (or other) end should be couched in modest terms: not as prescriptions for action by those charged with the interpretation and application of existing rules, but as claims about how, in theory, a

---

[5] As argued by Light (n 2).
[6] See e.g. Jacob Eisler, 'The Limits and Promise of Instrumental Legal Analysis' (2020) 47(3) Journal of Law and Society 499, introducing some literature on the limitations of 'instrumentalist' accounts of private law.
[7] This is of course not a meaningful statement without defining 'instrumentalism', as to which see Alan Calnan, 'The Instrumental Justice of Private Law' (2009) 78(3) UMKC L. Rev 559, and below, text to n 16. Nothing turns on this for the purposes of advancing the claims that I develop below.
[8] Which finds some support in Elizabeth Fisher, 'Telling Meaningful Stories about Climate Change and Public Law' (2025) 37 Journal of Environmental Law 1, and Navraj Singh Ghaleigh, 'Climate Constitutionalism of the UK Supreme Court' (2021) 33(2) Journal of Environmental Law 441, both suggesting that 'climate litigation' discourse marginalises internal perspectives on law, and suffers for this, and more generally, in Ernest J. Weinrib, *The Idea of Private Law* (OUP 2012) ch 2, although the account of scholarship on the law and economics of private law in the latter work is a very partial one.
[9] Stephen A. Smith, 'Taking Law Seriously' (2000) 50(2) University of Toronto Law Journal 241; see also Weinrib ibid.
[10] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 14, also cited in Smith ibid.

different approach to the design of an insolvency rule might be more likely to produce the kind of incentive effects that the environmentally-minded policymaker is aiming at.

Understanding these claims for what they probably are (theoretical claims), invites a second objection, and that is that, in theory, it is undesirable to attempt to endow insolvency law systems with new 'pro-environmental', or environmental harm-reducing, functions. In exploring this idea, I want to draw a connection with early debates between so-called 'traditionalist' and 'proceduralist' insolvency law scholars.[11] This literature suggests that it is vital to distinguish claims about what lawmakers are trying to achieve when they supply insolvency rules (in short: lots of things, not all of which are necessarily obviously reconcilable), with what they ought to be trying to achieve. Claims of the former kind are valuable, of course, but they plainly do not provide a complete answer to the question of whether what the lawmaker has done is socially desirable. For that, we need claims of the latter kind, and here I want to express some preliminary doubts about the desirability (in theory) of some proposals that have been made for the recalibration of rules of deployment in insolvency for environmental ends, at least to the extent that they rely on economic theory.[12] I am more enthusiastic about proposals for the recalibration of distributional rules, and suggest further consideration of related adjustments to cross-border insolvency rules, but whether such a recalibration will produce the intended effect on incentives will depend on whether the debtor has any fixed obligation to compensate for harms caused by its activities. When it comes to the harms caused by greenhouse gas ('GHG') emissions, there will not necessarily be such liability.

In exploring these objections, my aim is not so much to critique the nascent literature (noting that at least some of the ideas to which I am responding are presented quite tentatively), but instead to provoke a conversation about how insolvency law scholars might most productively further explore the research questions that this literature

[11] See Douglas G Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale Law Journal 573.
[12] Prescriptions for recalibration may also be derived from other types of theoretical project (for example, one concerned explicitly with distributive justice: see e.g. Anna Lund, 'Elaborate Imaginings: Rethinking Environmental Obligations in Canadian Insolvency Law' (2021) 71(3) University of Toronto Law Journal 301). But the papers cited above (n 4) make the case for recalibration at least in part on efficiency grounds.

helpfully raises. While there will likely be no appetite for recalibrating US bankruptcy law in service of some climate change mitigation (or other environmental harm reduction) goal under the present administration, it may not be long before a climate-related shock provides lawmakers outside of the US with an opportunity to "green"[13] national insolvency rules.[14] Given the potential costs of such a recalibration, and in particular the potential for such changes to compromise the achievement of other functions typically entrusted to insolvency regimes,[15] proposals for greening national insolvency laws warrant urgent and rigorous scholarly interrogation.

I. General objections to 'instrumentalism'

If 'new wave' scholars are arguing for judges to somehow be empowered to decide questions of insolvency law by doing whatever a judge thinks, at the particular time, is most likely to assist with the achievement of a climate change mitigation or other 'pro environmental' goal, untrammelled by legal principle or precedent, then this scholarship could readily be dismissed on the grounds that such "absolute instrumentalism"[16] will be anathema to the system's coherence,[17] and likely on a range of other grounds, too.[18] But this is not, of course, what is being argued for. Instead, the argument is for some change in the way particular rules of insolvency law are interpreted, and/or expressed, so that they can be (consistently) applied in the way that the scholar thinks will be more likely to promote the achievement of the environmental goal.

[13] Sarra et al (n 4).
[14] Conceptually, the role of the insolvency system in facilitating climate change adaptation (as to which, see further AA Gözlügöl, 'Climate risk and corporate rescues' (2025) 26 EBOR 305) is distinct from the role that this system might play in incentivising climate change mitigation. There is no necessary relationship between exposure to a climate-change related physical shock and contributions to GHG emissions: Z Sautner, L van Lent, G Vilkov, and R Zhang, 'Firm-Level Climate Change Exposure' (2023) 78(3) Journal of Finance 1449. In the real world, however, a crisis may provide the lawmaker with the opportunity to make changes beyond those strictly necessary to respond to the shock, as to which see more generally K van Zwieten, 'Mid-crisis restructuring law reform in the United Kingdom' (2023) 24 EBOR 287.
[15] Most obviously, facilitating a coordinated transfer of control rights from an insolvent corporate debtor to its creditors with a view to maximising the value of the debtor's assets.
[16] A Calnan, 'The instrumental justice of private law' (2009) 78 UMKC Law Review 559.
[17] Here I am using 'coherence' in its simplest sense, that is, to connote a fitting together, so as to form an "intelligible" system: Joseph Raz, 'The Relevance of Coherence' (1992) 72(2) Boston University Law Review, 276-77. See Calnan ibid 571.
[18] See Calnan (n 16) 571-2, on the self-defeating properties of absolute instrumentalism (inconsistent applications of the law making it unpredictable, which in turn "dilutes its behavioural mandate"), and the implications for the law's legitimacy.

Insolvency law rules that have been identified as potential candidates for recalibration include:

(i) transaction avoidance rules, with a view to better enabling the unwinding of pre-commencement transactions for the transfer of assets the ownership of which carries with it some environmental obligation;[19]

(ii) the rules permitting the insolvent debtor to disclaim (or abandon) property the ownership of which carries with it some continuing liability, with a view to restricting the possibility of such disclaimer where the continuing liability is a clean-up, remediation or other environmental liability;[20]

(iii) the rules that determine whether the insolvent debtor's assets can be sold to a third party 'free and clear' of the liabilities arising from the debtor's uses of those assets, and which determine whether such liabilities can be compromised in a restructuring plan promoted by the debtor as an alternative to a realisation (that is, whether they are 'dischargeable' or 'non-dischargeable' claims), with a view to restricting sales free and clear of environmental liabilities, and rendering such liabilities non-dischargeable in a restructuring procedure;[21]

[19] Macey and Salovaara (n 4), focusing on the transfer of land subject to reclamation obligations after coal mining, and arguing for longer look-back periods under US fraudulent conveyance law to better enable the unwinding of such transfers, and for a judicial interpretation of the relevant provisions of the US Bankruptcy Code that supports this application (952-3, 956). As this paper makes clear (see 938-940, 943), a related question is whether such assets, wherever remaining in the hands of the debtor, can be disclaimed (or, in US law, 'abandoned'), so that the asset no longer forms part of the debtor's estate.
[20] ibid; see also J Schytzer, 'What If Polluters Cannot Pay? The Swedish Mining Bankruptcies – Problems and Proposals' in *The 'Insolvent Polluter Still Pays' Principle?* (Boom 2024), analysing the approach in Sweden, Norway, the US, and Canada, and distinguishing between direct and 'indirect' priority for environmental claims, the latter arising where a liability must be satisfied as an expense of the insolvency process. Under English law, those who suffer loss as a result of the disclaimer, in liquidation proceedings under the Insolvency Act 1986, of 'onerous property' (defined to include property that gives rise to a liability to pay money or perform any other onerous act: s.178(3)(b)) are deemed to be an (unsecured) creditor to the extent of the loss, for which they may prove, the debt falling to be treated on a *pro rata* basis with other provable debts. In this way, disclaimer can operate to convert what might otherwise qualify as an expense of the insolvency process into a provable debt.
[21] See Light (n 2), arguing that the ability to sell assets 'free and clear' of environmental liabilities, and to discharge such liabilities in a reorganisation plan, disincentivises compliance (section III(E)), and proposing some legislative change and/or a more restrictive interpretation of the relevant provisions of

(iv) the rules that determine the priority of claims in a realisation (sale of the debtor's assets to a third party for cash) and distribution (of the proceeds to creditors), with a view to elevating the priority of environmental claims;[22]

(v) the rules that regulate the priority of new finance over existing claims against the debtor in a restructuring,[23] with a view to encouraging the provision of new finance to 'green' insolvent debtors;[24]

(vi) the rules that determine the conditions under which a restructuring plan can be confirmed by a court, so as to become binding on dissenters, with a view to making the debtor's expected post-plan environmental performance relevant to the plan confirmation decision;[25]

---

the US Bankruptcy Code (209-210); Macey and Salovaara (n 4), arguing that 'When the social costs of an activity are greater than the market value of the goods produced by a firm, and when a regulatory scheme has been specifically designed to force firms to internalize those social costs', a monetary obligation arising under the regulatory scheme should not be dischargeable in US bankruptcy proceedings unless Congress explicitly so provides (889, and section III(B), (C), 953). See also A Jonkers and R de Weijs, 'Preventing environmental bailouts: Environmental liabilities and non-inclusion and non-dischargeability under the WHOA' in *The 'Insolvent Polluter Still Pays' Principle?* (n 20) 94-5, proposing an EU instrument to restrict the sale of assets free and clear of environmental liabilities; Sarra (n 4) 24, positing that non-dischargeability could constrain credit supply to polluting firms and drive investment in cleaner ones. The latter draws on Michael Ohlrogge, 'Bankruptcy Claim Dischargeability and Public Externalities: Evidence from a Natural Experiment', forthcoming, American Law and Economics Review, discussed briefly below (text to n 71).

[22] Macey and Salovaara (n 4) 956, endorsed by Gouzoules (n 4) who appears to favour some priority for remediation obligations (fn 325 and accompanying text); Sarra et al (n 4), favouring "reasonable priority" for remediation liabilities (19, see also 24). See also M Ohlrogge, 'Environmental Claims in Bankruptcy: Dischargeability, Priority, and Other Policy Responses' in *The 'Insolvent Polluter Still Pays' Principle?* (n 20), surveying some of the literature on firms' incentives to engage in "harm-externalising behaviour" given limited liability and the presence of debt finance and arguing for a super-priority rule for environmental claims; in the same volume, Schytzer (n 20) 35, and Jonker and de Weijs (n 21) 85, 101-102, also argue for priority. Notice that, following on from n 21 immediately above, the question of priority in a realisation and distribution arises wherever assets can be sold to a third party 'free and clear' of the debtor's liabilities.

[23] Such rules respond to the debt overhang problem but, depending on their design, may introduce an overinvestment problem: Kenneth Ayotte and David A Skeel, 'Bankruptcy Law as Liquidity Provider' (2013) 80(4) University of Chicago Law Review 1557.

[24] See Sarra et al (n 4) 25: "… one could utilize green and transition finance classifications to identify 'green debtors', directing financing specifically towards their rescue, for instance by making financing more easily available by granting statutory priority in case of a subsequent insolvency. Where debtors identified as 'brown' are seeking rescue financing, capital should not be available at all or at least not as secured on a priority basis".

[25] See Sarra et al (n 4) at 25, positing that sanction could be made conditional on plans satisfying a "transition to net-zero" test, and that where this requires the wind-down of a " 'brown' business activity"

(vii) the rules that determine whether a debtor is eligible to use a state-supplied restructuring procedure at all, with a view to excluding access by certain categories of polluting debtor;[26] and

(viii) in cross-border cases, the rules that determine whether there is jurisdiction to open local proceedings, and the availability of relief in respect of proceedings being conducted abroad, with a view to tempering existing commitments to supporting a coordinated treatment of the debtor's insolvency in the place of its COMI[27], and minimising the opening of rival proceedings elsewhere, with environmental considerations.[28]

To the extent that 'new wave' scholars are simply exploring the capacity of rules of these kinds to affect incentives to invest in climate change mitigation or otherwise to take

---

this could be done on a timetable sufficiently slow to enable "stakeholders to adjust to the change", supported if necessary by a state subsidy (26). Conversely, when it comes to companies "engaged largely in green or transition activities", Sarra et al appear to favour a 'pro-rescue' bias (21), seemingly on the basis that this would best support the continuation of the debtor's socially desirable activities. See also Linna (n 4), arguing, with particular reference to the EU, that restructuring procedures should promote the reduction of environmental externalities by debtors using the procedure, even if reduces expected returns to creditors, provided the law is sufficiently predictable to enable creditors to adjust to it *ex ante*.

[26] See Gouzoules (n 4), arguing that "climate altering fossil fuel firms" (as defined: see 2208-09) should be prevented from filing under Chapter 11 of the US Bankruptcy Code, and for procedural changes to Chapter 7 (liquidation) as applied to such firms, with a view to securing a greener deployment of their assets *ex post* and encouraging investment in renewable power sources *ex ante* (see 2175-6, 2190, Pt IV, and 2213); see also Sarra et al (n 4), suggesting states could introduce a "rebuttable presumption of liquidation" for "high carbon-emitting companies", which could require "a cogent and fair plan to restructure in a manner that does not cause further harm and ensures the remediation of contaminated sites and equipment, and a transition plan to net-zero emissions is part of that restructuring plan" (19, see also 20 and 25).

[27] That is, its "centre of main interests", the connecting factor for the opening of "main" proceedings under the European Insolvency Regulation (see Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, Art.3(1)), and for the recognition of foreign proceedings as "foreign main proceedings" under the UNCITRAL Model Law on Cross-Border Insolvency (1997), Arts 2, 20.

[28] See Sarra et al (n 4) 31-32, tentatively suggesting that a failure by a debtor's 'home' jurisdiction to give sufficient weight to environmental considerations should be relevant to the decision of the courts of other places to recognise, and give relief in respect of, home proceedings (e.g. by declining to give effect to a restructuring plan that does not prioritise, or otherwise provide for the satisfaction of, environmental liabilities), and that "Whilst in principle, multiple proceedings should be avoided to minimize waste and facilitate coordinated, speedy solutions, an environment/climate-focused consideration may suggest in relevant circumstances that local proceedings should be opened in host jurisdictions". Ohlrogge (n 22) also briefly discusses cross-border insolvency law, focusing on introducing some problems of priority that arise when the insolvent debtor has incurred environmental liabilities in more than one jurisdiction.

precautions to minimise environmental harms, there ought to be nothing controversial whatsoever about doing this work, and indeed much to be gained from it. This is ordinary work for those interested in the "the economic approach to law"[29]: work in which rules are received as an output of the legal system, and what is of interest are their effects. Through the application of "economic theories and quantitative techniques",[30] claims can be made about the expected effects of the rules on resource allocation: that is, about their economic relevance.[31]

Although such economic relevance claims may have immediate implications for law reform proposals,[32] they are aimed primarily at an audience of other scholars, and are plainly not susceptible to being defeated by evidence that insiders in the system of rule production (judges, legislators, etc) do not share the scholar's understanding of the relevance of such rules.[33] In short, the domain occupied by these claims is quite a limited one. They essentially (and valuably) may enable us to say that, all else being equal, an insolvency rule of a particular kind is more likely to produce the sought-after effect on incentives to ameliorate environmental harm if the rule takes the form of X, rather than Y.

At least some of the 'new wave' literature appears to go beyond this, however, by inviting judges responsible for applying existing insolvency rules to reinterpret those rules to achieve the kind of recalibration that the scholar expects will improve incentives to ameliorate environmental harm. These prescriptions are derived from economic theory,

[29] Or law and economics: Cento G. Veljanovski, *Economic Principles of Law* (CUP 2007), defining this as the field concerned with "the application of economic theory and quantitative techniques to analyse the rules and remedies of the law" (I).
[30] ibid.
[31] See, consistently with this, Ronald Coase's reflections on his work in 'The Roundtable Discussion' (1997) 64 University of Chicago Law Review 1132, 1138-40.
[32] For example, by demonstrating that a proposed rule is likely to "have the effect of preventing the attainment of the very objectives that [it] is designed to promote": James M. Buchanan, 'Economics and Its Scientific Neighbours' in S Roy Kruppe, *The Structure of Economic Science* (1996, Prentice Hall), 176.
[33] See, consistently with this, Richard A. Posner, 'Some Uses and Abuses of Economics in Law' (1979) 46(2) University of Chicago Law Review 281, 287-8, distinguishing between "studies of behaviour regulated by the legal system" which "generally take for granted the system itself" and "ask how the individuals caught up in the system respond to the constraints it places on their behaviour" (the kind of work that generates claims about the relevance of rules to markets), and the kind of work he was most interested in doing (work to "explain… the structure of the [legal] system itself"). Like relevance claims, the value of this kind of explanatory claim would not necessarily depend on insiders to the legal system recognising the explanation (289-90, 292).

but they are intended to travel beyond the theoretical domain to affect the way in which insiders in the system of rule production understand the rule. So, for example, Macey and Salovaara suggest judges might usefully begin to interpret § 362(b)(4) of the US Bankruptcy Code[34] more "capaciously"[35] with a view to indirectly elevating the priority of environmental obligations[36], not because this is what the law, on a proper understanding, requires,[37] but because such an interpretation would be more consistent with "the notion that regulations designed to force companies to internalize social costs should receive priority in bankruptcy".[38]

In a similar vein, Light suggests that, pending statutory reform to render certain forms of environmental claim non-dischargeable, and to ensure that assets cannot be sold to third parties free and clear of environmental liabilities, US bankruptcy judges might usefully make greater use of their "equitable powers" to "balance complex sets of interests among debtors, creditors and the public" to narrow debtors' ability to exit bankruptcy without satisfying their environmental obligations, in service of an "environmental priority principle" that Light argues should be integrated into US law.[39] More generally, Sarra et al identify existing powers for common law courts to have regard to the 'public interest' in making insolvency decisions as a potential site for the development of their proposals for "greening" insolvency systems.[40] In both of these papers, the judicial channel for rule change appears to have been included largely for pragmatic reasons, the authors recognising that certain rule changes could be made quite simply through statutory reform, but that this might not be politically feasible.[41]

---

[34] Exempting the commencement or continuation of actions by governmental units to enforce their police and regulatory power, including the enforcement of a judgment other than a money judgment, from the automatic stay.
[35] Macey and Salovaara (n 4) 954.
[36] Because if the stay does not apply, individual enforcement action can be taken to secure satisfaction.
[37] The authors concede that the authorities are against them: Macey and Salovaara (n 4) 985.
[38] ibid.
[39] Light (n 2) 209-10. This is a "normative environmental priority principle", which, whilst not requiring environmental concerns to be absolutely prioritised, would function to "place weight on the scales in favour of promoting long-term environmental values and goals" (146, 205-6).
[40] Sarra et al (n 4) 25.
[41] See Light (n 2) 208, explaining that the prescriptions of the paper for reform in securities, anti-trust, bankruptcy and corporate law include "options that are available through interpretation of current statutory and regulatory schema", given that "legislative change is unlikely in the current political environment"; Sarra et al (n 4) 22 ("the incremental introduction of certain tools could promote the transition needed in a more challenging political environment").

If prescriptions for judicial rule recalibration are perceived to be insufficiently grounded in the law, they might simply be ignored by the courts. But it is also possible that such prescriptions might come to have some effect on the way in which judges understand and develop the relevant rules. Wherever this is so, there will be some challenges that inevitably arise as judges attempt the task of translating an insight that has not been derived 'bottom up' from an analysis of what the law, properly understood, requires, but from an external perspective on law, into legal doctrine. Existing principles will have to be modified or supplemented to accommodate the scholar's prescription, and this may result in a rule that is less clear, or otherwise less intelligible, than it was. The process of modifying or supplementing existing principles to accommodate the prescription may, of course, also alter the way in which the insolvency system operates in other types of case, well beyond the scope of the scholar's original inquiry. (If the principles that govern the exercise of a power to sanction a restructuring plan should be finessed so as to nudge greener performance by insolvent debtors proposing a plan,[42] then why not also to nudge some other apparently socially desirable change?[43]). Legal rules can be isolated from their context in theory, but not in practice, where a change in one category of case may lead almost inexorably to a change in other categories of case, well beyond the scope of the scholar's original inquiry. Attempts to contain these knock-on effects may lead to arbitrary distinctions being drawn, again harming the coherence of the system.

It may fairly be pointed out that the 'new wave' scholarship I have discussed in this section aims primarily to reveal how a recalibration of insolvency laws might, in theory, improve incentives to reduce environmental harms, and only secondarily to offer up suggestions as to how this recalibration might be achieved in practice. Clearly, the fact that there may be difficulties associated with operationalising scholars' prescriptions for recalibration does not threaten the cogency of the theoretical claim. I turn, then, to begin

[42] See above, (n 25) and below, text to n 63.
[43] I say 'apparently' because what appears to be a socially desirable insolvency rule change from an *ex post* perspective (focusing on the effects of the change in the cases in which the rule is applied), may be found to be undesirable once regard is had to the ways in which sophisticated parties will adapt in response to the change *ex ante*. See Robert K. Rasmussen, 'An Essay on Optimal Bankruptcy Rules and Social Justice' (1994) 1 University of Illinois Law Review 1, and below, Section II.

to explore more directly the question of whether, and if so to what extent, there is a good case in theory for recalibration, or, put another way, whether is a good case for attempting to endow insolvency regimes with new 'green' functions.

II. Particular objections to the recalibration of insolvency rules in furtherance of a climate change mitigation (or other environmental) goal

Some 'new wave' scholars have looked to early debates between US bankruptcy law scholars on insolvency law's function[44] to develop an answer to the question of whether, in theory, it is desirable to attempt to endow these laws with new pro-environmental functions. In a paper proposing that Congress develop a special category of debtor for the purposes of the US Bankruptcy Code ("climate altering fossil fuel firms", or CA3Fs)[45] and legislate to "direct all CA3Fs to liquidate under Chapter 7 rather than reorganize under Chapter 11"[46], and to introduce a "public interest" requirement in these Chapter 7 cases that would be designed to "weigh heavily against the sale of any polluting asset to a competing firm that planned to keep that asset in operation"[47], Gouzoules writes: "Objectors to these reforms will likely argue that environmental policy is a non-bankruptcy matter best addressed outside of bankruptcy"[48]. And yet, he argues, the US Code has always aimed at a range of goals other than providing a procedure to enable creditors to act as a single owner would, with a view to maximising the value of the

[44] This is how Warren herself characterised her debate with Baird in 'Bankruptcy Policy' (1987) University of Chicago Law Review 775, 776 ("In the midst of this attention and noise and clamor, however, there is a quiet but persistent question: what function does bankruptcy serve?… Professor Douglas Baird and I have undertaken to debate in writing the basis of bankruptcy policy").
[45] A draft definition of such firms is offered: Gouzoules (n 4) 2209.
[46] Gouzoules (n 4) 2209. An analogy is drawn with the exclusion of stockbrokers and commodity brokers from Chapter 11, on the basis that the special procedure that applies in the bankruptcy of such persons is designed to minimise negative externalities (in particular, financial contagion effects) associated with their failure (2192). But the process Gouzoules proposes is designed to minimise the negative externalities associated with the *continuation* of a CA3F's projects.
[47] Gouzoules (n 4) 2211-12. It is suggested that the Code be amended to specify that: "in considering the public interest, the court and trustee shall consider the need to protect the public from climate change by reducing greenhouse gas emissions, which necessarily must occur primarily by decreasing fossil fuel production" (2211).
[48] ibid 2214.

insolvent debtor's assets.[49] Drawing on Elizabeth Warren's seminal paper "Bankruptcy Policy"[50], Gouzoules concludes:

> "Ultimately, the argument that bankruptcy should solely collectivize the process of asset distribution among creditors, however conceptually sound it may be, simply does not align with either the text of the Bankruptcy Code or the intent of its drafters. Nor should it stand in the way of reforming the Code to help mitigate a looming climate disaster."[51]

I agree that the early debate between Elizabeth Warren and Douglas Baird[52] is relevant to evaluating proposals for the recalibration of insolvency law rules in 'new wave' scholarship on the environment and insolvency law, but not in the manner suggested by Gouzoules. Observing, as Warren did, that rule-makers sometimes attempt to endow insolvency regimes with multiple functions, some of which may run counter to creditors' interests, tells us that these rule-makers might be open to further extending these functions, but not whether we ought to advise them to do so. Warren stopped short of providing an answer to this normative question, because her primary objective was to articulate a conception of insolvency law wide enough to be recognised by insiders in the system of rule production.[53] Although Warren described her work as offering both "positive observation" and "normative evaluation"[54], the latter component was focused

[49] The goal identified in Baird and Jackson's seminal paper, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' 51 U. Chi. L. Rev. 97, 103 (1984), and argued in that work to be the only goal with which lawmakers ought to be concerned when supplying insolvency law regimes.
[50] Warren (n 44) above.
[51] Gouzoules (n 4) 2215. The same move is made in Ray Warner, 'Sustainable bankruptcy' (2025) 33 American Bankruptcy Institute Law Review (forthcoming), but this paper stops short of making the kind of granular prescriptions for rule change that are made in the papers that I surveyed in Section I above.
[52] See Douglas G. Baird and Thomas H. Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U. Chi. L. Rev. 97; Warren, 'Bankruptcy Policy' (n 44); Douglas G Baird, 'Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren' (1987) Chicago Law Review 815; Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92(2) Michigan Law Review 336.
[53] See 'Bankruptcy Policymaking' ibid 339: "Ideas from other disciplines and new generations of contrary thinkers invigorate us. When we talk about bankruptcy policy, however, we also need a centre, some sense of shared ideas about the system's purpose. I believe that this requires an articulation of the normative goals of the system that scholars, practitioners, judges and legislators can share".
[54] ibid 338: "This essay is about bankruptcy policy. It attempts to articulate a comprehensive statement about the various and competing goals that underlie the bankruptcy system. The essay offers both a positive observation, drawn from the Code and its operation, and a normative evaluation, designed to outline the difficult value judgments that comprise the bankruptcy system".

on articulating those goals that were understood to guide or animate the existing system of rules[55] - in other words, Warren's account of 'bankruptcy policy' was fundamentally an account of *existing* insolvency law policy.[56] In contrast, Baird and his collaborators were interested in the normative question of what policies *should* animate the supply and design of insolvency rules,[57] in a world in which sophisticated players can be expected to adapt their behaviour in response to the legal framework. In this sense, the 'debate' appears to have proceeded largely at cross-purposes, being concerned with two different questions.[58] Once again, it is no answer to a scholarly claim about the economic relevance of a rule to say that insiders in the system of rule production do not share the scholar's understanding of the rule's relevance.[59]

Of the two scholarly 'camps' (that of the 'traditionalists', said to be exemplified by Warren, and that of the 'proceduralists', said to be exemplified by Baird[60]), it seems to me that only the proceduralist literature is relevant to evaluating whether, in theory, it is desirable to recalibrate insolvency law rules in a bid to strengthen incentives to invest in climate change mitigation or the amelioration of other environmental harms. But this literature counsels extreme caution in writing rules designed to direct the deployment of assets in insolvency other than in accordance with the interests of the general body of creditors, on the basis that such rules are likely to invite workarounds, and to distort the initiation

---

[55] See ibid, pt II, "The Functions of the Business Bankruptcy System", identifying four "principal goals" of the US bankruptcy system.
[56] Consistently with this analysis, Korobkin classified Warren's 'Bankruptcy Policymaking' paper as an example of 'observational work': Donald R. Korobkin, 'The Role of Normative Theory in Bankruptcy Debates' (1996) 82 Iowa Law Review 75, 80-81 (and see also 92: "She [Warren] does not discuss at any length whether bankruptcy law should (or should not) promote its current purposes, whether it should pursue additional purposes, or whether bankruptcy law should rank its purposes differently than it currently does"), in contradistinction to 'normative work', of which Baird and Jackson's work is given as an example.
[57] Baird and Jackson (n 52) 99; Baird (n 52) 822.
[58] See consistently with this, Baird (n 52) 817, "Warren seems to derive what bankruptcy law ought to be from what it is, but one cannot derive the normative from the positive".
[59] See above, text to n 33.
[60] See Baird (n 11) 573. The 'proceduralists' are so described because the central prescription of this body of work is that policymakers should focus solely on supplying a procedure that enables creditors to achieve a value-maximising deployment of the debtor's assets (see also above, n 49). This is both the 'logic' of supplying a collective insolvency procedure, and the 'limits' of what the policymaker should aim to achieve in doing so: Jackson (n 3).

decision.[61] The costs of strategic adjustment to the insolvency rule by sophisticated players must then be weighed against the benefits expected to be secured by the rule.

In the case of the Gouzoules proposal, the benefit that the proposal aims to secure is the removal of assets from fossil fuel production. It seems to me to be very unclear that this result would actually be achieved even in the cases in which the rule was actually applied, unless the idea is to somehow police for all time the subsequent uses to which the assets are put, rather than simply to nudge fossil fuel-reducing deployment through the choice of initial purchaser in the forced sale. There is obvious potential for workarounds: foreclosing the possibility of recourse to Chapter 11 by certain categories of firm does not foreclose the possibility of restructuring by these firms.[62] To the extent that workarounds are expected to be available, this will dilute the capacity of the rule to function as a constraint on investment *ex ante*: if the ultimate objective is to restrict finance to fossil fuel producers through the threat of value-destructive outcomes *ex post*, then the availability of workarounds can be expected to mute this effect.

Similar questions are invited by proposals from other scholars to condition judicial sanction of a restructuring plan on evidence of the company's commitment to improving its environmental performance, even if this improvement can only be realised at creditors' expense.[63] What would it take to make such commitments credible?[64] What effect might requiring such a commitment to be made *in* restructuring proceedings have on incentives to ameliorate harm in the lead-up to the commencement of these proceedings? (Might the prospect of such a rule applying have the perverse effect of weakening environmental performance in prior periods?[65]). And whereas Gouzoules'

---

[61] Baird and Jackson (n 52); Baird (n 52).
[62] Gouzoules acknowledges this point but argues that at least restructuring will become more costly for these firms (n 4) 2217-2218.
[63] See the discussion of Linna (n 4) and Sarra et al (n 4) in (n 25) above and accompanying text.
[64] As Armour, Enriques and Wetzer put it, corporate net zero pledges are "rife with fudge": John Armour, Luca Enriques, and Thom Wetzer, 'Green Pills: Making Corporate Climate Commitments Credible' (2023) 65 Arizona Law Review 285.
[65] See TD Hester, 'Spinning off Carbon: Corporate Restructuring in a Climate Bankrupt World' (2024) 32 NYU Environmental Law Journal 339: "A corporation may have a perverse incentive to maintain operations of an inefficient carbon-intensive unit if it receives compensation for reducing emissions at that unit in the future" (387 fn 153).

proposal could in principle be rationalised as a device to alter investment incentives *ex ante* - albeit that it would only be predicted to do so to the extent that workarounds are unavailable - I am uncertain as to whether proposals of this kind can be rationalised as a device to encourage debtors to make stronger environmental pledges to their investors at the outset. Since there is no necessary relationship between environmental performance and subsequent exposure to a shock that necessitates a restructuring,[66] green commitments by debtors *ex ante* cannot undo the effects of the rule: debtors are exposed to its application (and will be charged by sophisticated lenders for its expected costs) whether they are initially 'green' or 'brown'.

In contrast, a targeted recalibration of rules of distribution, so that prescribed categories of environmental liability are elevated to 'super priority' status (senior to secured creditors), could be predicted to induce debtors to take greater precautions to reduce the likelihood of exposure to such liabilities than they otherwise would. There is a large literature[67] pointing to the potential inefficiencies flowing from allowing debtors to grant security interests over assets that give the rights-holder a prior right to look to the asset for satisfaction, ahead of other creditors, including non-consensual creditors. In their seminal work on the subject, Bebchuk and Fried[68] explained how, in a world without priority through security, an adjusting lender who expected their debt claim to rank *pro rata* with the claims of any non-consensual creditors, could be expected to charge the debtor (through an increase in interest rate) to the extent that it anticipated being diluted by non-consensual creditor claims, so that "[The lender] forces Firm to internalize more of the cost of its failure to take precautions", with the overall result that the debtor would have a greater incentive to invest in precautions in the first place.[69] The ability to grant priority through security would undo this effect:

---

[66] Even in the case of a climate-change related physical shock: see (n 14) above.
[67] Some of which is surveyed in Ohlrogge (n 22); see also the earlier review in J Armour, 'The Law and Economics Debate about Secured Lending: Lessons for European Lawmaking?' in *The Future of Secured Credit in Europe*, ECFR Special Volume 2, 3.
[68] Lucian Ayre Bebchuk and Jesse M Fried, 'The Uneasy Case for the Priority of Secured Claims in Bankruptcy' (1996) 105 Yale Law Journal 857, which was followed by 'Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to the Critics' (1997) 82(6) Cornell Law Review 1279.
[69] ibid (1996) 898-899 and (1997) 1319.

> "Because the borrower will not face the prospect of paying the creditor a higher interest rate if more tort claims against it are likely, the borrower will have less incentive to invest in precautions if it knows that it can grant the creditor a security interest giving the creditor's secured claim full priority."[70]

A recent paper by Michael Ohlrogge provides some empirical evidence consistent with Bebchuk and Fried's theoretical framework.[71] After a US court decision[72] that had the effect of elevating the priority of an environmental clean-up obligation[73], firms took steps to reduce their exposure to this kind of liability.[74] Ohlrogge reports evidence of changes in lender behaviour in response to the decision,[75] suggesting a possible creditor channel for the change in debtor behaviour, in line with Bebchuk and Fried's analysis.

This literature provides some theoretical support[76] for proposals in 'new wave' scholarship for elevating the priority of environmental claims in the rules governing the realisation and distribution of an insolvent debtor's assets.[77] Such a recalibration could be fortified by a rule of absolute priority in non-consensual restructuring proceedings (that is, in cases where the restructuring plan is not supported by the requisite majority in every class, and the court is invited to exercise a power to bind the dissenting classes

---

[70] (1997) at 1320; see also CME Painter, 'Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times' (1984) 36(4) Stanford Law Review 1045, 1057, making the same point.
[71] (n 21).
[72] United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009).
[73] More specifically, the decision was that the liability was non-dischargeable. If a liability is non-dischargeable, it cannot be treated in a restructuring plan, with the result that assets cannot remain in the hands of the debtor unless the liability is satisfied (or the claimholder consents to a compromise). See further below, text to n 80.
[74] See above (n 21) at XX.
[75] In particular, Ohlrogge reported a reduction in leverage and, in a sample of loan agreements studied, tighter loan covenants.
[76] I say "some" support only because, if the fundamental concern animating the literature on the effects of security on incentives to take precautions is the concern that limited liability causes the debtor to fail to take sufficient precautions, there are arguably more direct routes to addressing this problem: see Henry Hansmann and Reiner Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) Yale Law Journal 1879. Bebchuk and Fried explicitly framed their analysis as one about how priority for security interests "exacerbates the distortions caused by limited liability" ((1996) (nx) at 899). See also Ohlrogge (n 22).
[77] See above, text to n 22. Baird and Jackson were not inherently opposed to such a rule (though they took a more benign view of security), provided however that the rightsholder would enjoy priority outside of, as well as within, insolvency proceedings, so as to avoid distorting the initiation decision and inviting workarounds. See Baird and Jackson (n 52) 113 and Baird (n 52) 816.

to the plan[78]), which would require the priority class to be satisfied in full before a distribution to a more junior class over the objection of the priority class could be contemplated.[79] Alternatively, the rule giving priority to environmental claims in a distribution could be fortified by making the privileged claims altogether non-dischargeable in a restructuring (so that the class simply cannot be affected by the plan[80]), as suggested by some 'new wave' scholars,[81] although this may come at the expense of achieving a restructuring even where doing so is in the interests of the protected class of environmental claimholder.[82]

Finally, if lawmakers are serious about altering incentives through super-priority, consideration ought to be given to the design of rules on recognition and enforcement in cross-border cases, a point rightly made by Sarra et al.[83] The most obvious way to fortify a super-priority rule, with a view to maximising its effects on incentives in prior periods, would be to condition recognition and relief in respect of foreign proceedings on fidelity to an environmental priority principle. Provision is already made in the European Insolvency Regulation[84] and in the UNCITRAL Model Law on Cross-Border Insolvency[85] for recognition and/or relief to be refused on public policy grounds, but these public policy reservations were intended to be interpreted very restrictively,[86] and a mere

[78] So-called 'cross-class cram-down', now generally available in EU Member States as a result of Directive (EU) 2019/2023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt. See K van Zwieten and S Ellingsæter, 'Rules of priority in restructuring procedures' in J Payne and K van Zwieten (eds) *Corporate restructuring law in flux* (Hart, 2025) ch 4.
[79] See van Zwieten and Ellingsæter ibid 72, arguing that an absolute priority rule may helpfully function to maximise the incentive effects the lawmaker aims at producing when elevating the priority of non-consensual creditor claims.
[80] Above, n 73.
[81] Above, n 21 and accompanying text.
[82] Because the effect of making the claim non-dischargeable is that the law's provision for majority action within a class can no longer be used: van Zwieten and Ellingsaeter (n 78) 81.
[83] (n 4).
[84] Regulation (EU) 2015/848 (n 27) Art.33.
[85] (n 27) Art.6.
[86] See Paul Oberhammer and Florian Scholz-Berger in Reinhard Bork and Kristin van Zwieten (eds) *Commentary on the European Insolvency Regulation* (2nd ed, OUP, 2022) [33.09] et seq; Kristin van Zwieten in Reinhard Bork and Michael Veder (eds), *The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgments* (Edward Elgar, 2025), [1.6.14-1.6.16]. See also Tony Casey, 'The Lure of English Proceedings: Forum Selection from the United States to England' in Kristin van Zwieten and Jennifer Payne (eds) *Corporate Restructuring Law in Flux* (Hart, 2025), ch 10.

difference in the order of priority in distributional rules (however significant) ought not to qualify. This suggests that any move to condition recognition and relief on fidelity to an environmental priority principle would likely require a new agreement between states, at least outside of the EU.[87]

Finally, it is important to emphasise that all of these distributional recalibration strategies assume that the debtor is under a fixed obligation to compensate for environmental harms. At least as a matter of private law, when it comes to the harms caused by GHG emissions, there will not necessarily be any such liability. This is not because harms cannot be attributed to individual emitters in principle,[88] but because there may be an argument that on the balance of probabilities the harm would have occurred anyway. Depending on the applicable law, however, there may be solutions to this causation problem which clear the way for defendants to be fixed with some liability,[89] which would then be eligible for privileged treatment under the recalibrated insolvency rules.

Conclusion

Do questions of environmental policy "belong" in insolvency law? I am not sure that this is a helpful question to ask, in the same way that I am not sure it is helpful to ask in the abstract: "what is insolvency law's domain?", or "what is insolvency law's function?". This form of question tends to elide the positive and the normative, risking the production of claims that are weak doctrinal claims, or weak theoretical claims, or both.

Theoretical claims that a particular rule change in insolvency law would increase incentives to invest in climate change mitigation, or to otherwise take greater precautions against causing environmental harm, need theoretical foundations. These foundations

---

[87] For the EU, Jonkers and de Weijs (n 21) propose a regulation that would function to increase the priority of environmental claims in Member State insolvency proceedings (see 94-5 and above n 21).
[88] See Rupert Stuart-Smith, F Friederike, EL Otto, Aisha I. Saad, Gaia Lisi, Petra Minnerop, Kristian Cedervall Lauta, Kristin van Zwieten, and Thom Wetzer, 'Filling the evidentiary gap in climate litigation' (2021) 11(8) Nature Climate Change 651.
[89] See the illuminating analysis in S Steel and M Geistfeld, 'Causation and Climate Change in Tort' in D Kysar and E Lim (eds) *The Oxford Handbook of Climate Change and Private Law* (OUP forthcoming), identifying solutions to what they term the 'attenuated causation problem' (concerning the "connection between individual responsibility and having 'made a difference' to the occurrence of the harm").

may well be available, such that the environmentally-minded policymaker is quite right to position insolvency law as an instrument in the emergency response ‘toolkit’, although I have argued that care must be taken in translating the insight from theory into a granular prescription for rule change. But these theoretical foundations cannot simply be assumed, suggesting that our most urgent collective task is to build on the nascent literature to explore in more detail the costs and benefits of each proposal for recalibration,[90] and to compare these with the more direct modes of intervention available to policymakers. In a world in which the most direct solutions to the climate change emergency appear politically infeasible, indirect modes of intervention have an intuitive appeal. But given their potential costs, we should at least be reasonably confident as to their capacity to yield the expected benefit before the recalibration exercise is begun.

[90] As Ohlrogge (n 22) similarly argues.

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html