

# New Rules for a New World: How Technology and Globalization Shape Bankruptcy Venue Decisions

L A U R A N . C O O R D E S \*

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## INTRODUCTION

In 2014, Mt. Gox, a bitcoin exchange,<sup>1</sup> filed for bankruptcy proceedings in Japan.<sup>2</sup> The bankruptcy trustee sought to open concurrent proceedings in the United States and Canada in order to protect Mt. Gox's assets from seizure by creditors in these countries.<sup>3</sup> Both the Canadian and the US courts had to determine the location of Mt. Gox's center of main interests

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<sup>1</sup> Bitcoin is a digital payment system that has features similar to a currency. Bitcoins are stored in a user's "digital wallet," which functions like a bank account. Bitcoin exchanges, such as Mt Gox, function as a medium between bitcoin traders, allowing parties "to buy or sell bitcoins using different currencies." Tal Yellin, Dominic Aratari & Jose Pagliery, "What is Bitcoin?" (2017) *CNN Money*, online: <[money.cnn.com/infographic/technology/what-is-bitcoin](http://money.cnn.com/infographic/technology/what-is-bitcoin)>.

<sup>2</sup> Patrick Riesterer & Waleed Malik, "Recognizing Foreign Proceedings Under the Canadian Bankruptcy and Insolvency Act: Re MtGox Co", (24 November 2014), *Weil Bankruptcy Blog*, online: <<http://bit.ly/2w1Nlkg>> [Riesterer].

<sup>3</sup> *Ibid.*

(“COMI”) in order to decide what protections Mt. Gox could be granted in each country.

Although the US played a relatively small role in Mt. Gox’s liquidation, the Mt. Gox proceedings generated much interest in US bankruptcy circles, with many wondering whether the US Bankruptcy Code was equipped to handle this new type of debtor.<sup>4</sup> Could bankruptcy rules and procedures, developed largely before “bitcoin” became a word, accommodate the challenges posed by this new type of entity?<sup>5</sup> For example, do bitcoins qualify as property of the bankruptcy estate (meaning they are assets that could be distributed to creditors in bankruptcy), or are they merely held in trust by the debtor for customers? Assuming bitcoins are property of the estate, where are they located—on a server, with the customer, or with the debtor? Furthermore, where is the debtor itself located? Is it in its jurisdiction of incorporation? Wherever it operates its principal place of business? What if, as was the case with Mt. Gox, all business was conducted online?

The court’s ability to answer these questions is critical for ensuring the smooth functioning of domestic and cross-border bankruptcies in an increasingly globalized world. Without knowing where a debtor’s assets are or what they consist of, we cannot determine what assets are available in bankruptcy for distribution to creditors. Without being able to determine the debtor’s location, we do not know where a bankruptcy case involving that debtor should proceed. The chief difficulty in dealing with a debtor such as Mt. Gox in the United States is that the Bankruptcy Code does not provide clear guidance for answering these questions.

Globalization and technological change have created new possibilities and new challenges in commercial bankruptcy practice, in both the US and abroad. Debtors may now exist entirely online, with no “brick-and-mortar” presence to anchor them to any particular location. Companies today increasingly amass substantial, valuable assets, including vast amounts of consumer information, which they may seek to sell in bankruptcy to other entities.<sup>6</sup> A bankrupt company’s assets may include intangibles that are

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<sup>4</sup> Scott Bowling, “Would a U.S.-Based Bitcoin Exchange Be Eligible for Bankruptcy?”, (10 April 2014), *Weil Bankruptcy Blog*, online: <<http://bit.ly/2vQbbDZ>>.

<sup>5</sup> For example, a bitcoin exchange may not even be eligible for bankruptcy in the US depending on its business model. There may be an argument that a bitcoin exchange could constitute a stockbroker, a commodity broker, a bank, or a clearing organization, making it ineligible for Chapter 11 bankruptcy relief. See *ibid*.

<sup>6</sup> See Brian Schaller, “RadioShack Bankruptcy Case Highlights Value of Consumer Data”, (8 June 2015), *Information Law Group*, online:

difficult to categorize or value, such as social media accounts, domain names, and electronic data.<sup>7</sup> Using the Internet, even purportedly “local” companies can have a global reach, shipping products all over the world.

Technological change also threatens to alter traditional US bankruptcy legal policy. Location has historically played a significant role in bankruptcy, and in practice, a bankruptcy case’s location can affect how the case proceeds, the amount of information relayed to the judge and other parties, and the stakeholders who can participate in the case.<sup>8</sup> Concerns over the determination of a bankruptcy case’s location contribute to perceptions of the legitimacy and fairness of the bankruptcy system.<sup>9</sup>

Scholars are generally of two minds when it comes to case placement in bankruptcy. Although many scholars believe that location and case placement should not be manipulated,<sup>10</sup> others are not convinced and suggest that forum shopping might, in certain cases, produce beneficial outcomes.<sup>11</sup> For both sides, however, technology and globalization might, at first glance, appear to mitigate any lingering concerns about case placement. For example, increased technological capabilities may make a bankruptcy case’s physical location less important if parties who cannot physically appear in court can appear remotely.

This paper counteracts claims that location is no longer a key consideration in bankruptcy law and emphasizes that technological change and globalization instead have the ability to exacerbate harmful forum shopping trends. Bankruptcy law faces substantial challenges in adapting to globalization and technological change, and this paper demonstrates that these changes threaten to make bankruptcy venue even more manipulable than it already is. Thus, the article argues that bankruptcy venue reform must

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<<http://www.infolawgroup.com/2015/06/articles/privacy-law/radioshack-bankruptcy-case-highlights-value-of-consumer-data/>>. The article describes the sale of RadioShack’s assets, which included consumers’ personal information, to General Wireless.

<sup>7</sup> See John G Loughnane, David Plastino & Evan Altman, “Valuation of Social Media Assets” (2015) 34:12 ABI Journal 36 (on the challenges of accurately valuing social media assets).

<sup>8</sup> See generally Laura N. Coordes, “The Geography of Bankruptcy” (2015) 68 Vand L Rev 381 at 399 [Coordes].

<sup>9</sup> *Ibid.* See specifically the discussion surrounding concerns over forum shopping in bankruptcy.

<sup>10</sup> See Samir D Parikh, “Modern Forum Shopping in Bankruptcy” (2013) 46 Conn L Rev 159 [Parikh]. The author proposes ways to alter the resources and incentives of parties who forum shop.

<sup>11</sup> See David A Skeel Jr, “What’s So Bad about Delaware?” (2001) 54 Vand L Rev 309. Skeel argues that forum shopping, at least to Delaware, has benefits.

occur in order to ensure the integrity of the bankruptcy system in the face of these changes.

Scholars have debated whether to reform the US bankruptcy venue rules for years; however, the debate received renewed attention in 2012, when the American Bankruptcy Institute (“ABI”) created the Commission to Study the Reform of Chapter 11 (“Commission”). The Commission examined the Bankruptcy Code and proposed reforms to Chapter 11 to bring this area of bankruptcy practice up to date with the changes occurring in the business world.<sup>12</sup> In December 2014, the Commission released an extensive final report proposing numerous recommendations.<sup>13</sup> Unfortunately, the Commission did not reach a consensus on what changes, if any, were needed for bankruptcy venue reform and did not include any recommendations for venue reform in its report.<sup>14</sup>

The Commission’s inability to reach a consensus on venue reform is in many ways unsurprising given the strong positions scholars and advocates have staked out on both sides of the debate. Yet, as this paper will demonstrate, it will become increasingly necessary to precisely identify rules that facilitate appropriate access to bankruptcy courts.

By exploring the impact of technology and globalization on bankruptcy venue, this paper raises several broader questions, including how these changes have altered bankruptcy policy, why a bankruptcy case’s location remains relevant in light of technological advances, and how to approach changes to the bankruptcy venue rules. Technological change and globalization have the capacity to fundamentally alter the nature of the businesses that may enter bankruptcy, as well as the number and type of stakeholders that are affected when a business experiences financial distress. While exploring these changes, this article posits that explicit procedures for determining the physical location of a bankruptcy case, currently lacking in the Bankruptcy Code, are more necessary than ever if bankruptcy is to continue to meet the needs of all stakeholders in a case.

Ensuring that US bankruptcy law can accommodate changes due to globalization and technology is important for two additional reasons of particular interest to those outside the United States. First, many countries

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<sup>12</sup> American Bankruptcy Institute, “Purpose of the Commission”, (June 2011) *American Bankruptcy Institute* (website), online: <<http://commission.abi.org/purpose-commission>>.

<sup>13</sup> US, Commission to Study the Reform of Chapter 11, *Final Report and Recommendations* (Virginia, American Bankruptcy Institute, 2014), online: <<https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h>> [Commission Report].

<sup>14</sup> *Ibid* at 310-14.

use US bankruptcy law, and particularly Chapter 11 of the Bankruptcy Code, the chapter used primarily to reorganize business entities, as the model for their own insolvency and restructuring laws.<sup>15</sup> And second, as the Mt. Gox case illustrates, determination of COMI in the cross-border context plays a significant role in the protection debtors can receive around the world. Similarly, understanding where a global debtor is “located” for the purposes of situating a bankruptcy case within the United States has a substantial impact on the progression of the case.

This paper proceeds in four parts. Part I traces the origins of the US bankruptcy venue rules, sketching out how and why they were developed and why Congress designed a national system of bankruptcy courts. Part II discusses the opportunities and challenges that have arisen with respect to bankruptcy venue due to technological change and globalization. Part III explains how process fairness and the interests of justice mandate continued attention to bankruptcy venue reform and analyzes how possible reforms might address the challenges of globalization and technological change. Part IV concludes by emphasizing the need to revisit bankruptcy venue reform in spite of the ABI Commission’s failure to reach an agreement on whether or how reform is needed.

## **I. Location in Bankruptcy Practice and Policy**

This Part describes the rationale behind the traditional importance of location to bankruptcy law and introduces the current bankruptcy venue rules. Although the US bankruptcy system is a federal system of laws, bankruptcy has its roots in the individual states. When bankruptcy law first emerged in the United States in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the states were the “locus of reorganization law”.<sup>16</sup> Any entity that could go bankrupt, whether it was a municipality, a business, an individual, or a railroad, was necessarily subject to both federal bankruptcy law and individual state laws. Eventually, Congress devised a series of uniform, federal laws to

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<sup>15</sup> To take one example, Canada’s Companies’ Creditors Arrangement Act has many similarities to Chapter 11 of the US Bankruptcy Code, including, for instance, allowing for debtor-in-possession financing. See *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36.

<sup>16</sup> Marcus Cole, “‘Delaware is Not a State’: Are We Witnessing Jurisdictional Competition in Bankruptcy?” (2002) 55 Vand L Rev 1845 at 1849.

govern bankruptcies, but the concept of bankruptcy as a predominantly local matter remained prevalent in many respects.<sup>17</sup>

Indeed, the importance of state and local law within the federal bankruptcy system remains obvious today. For example, courts look to state law to determine the extent of the property rights a debtor has in bankruptcy.<sup>18</sup> State law also provides certain remedies to parties in bankruptcy, such as a longer lookback period for fraudulent transfers that federal law does not.<sup>19</sup> Perhaps most importantly, when a company that is a major employer in a city or town goes bankrupt, the entire region can experience negative effects.<sup>20</sup>

Recently, members of Congress have expressed an ongoing interest in ensuring that the bankruptcy process remains “within the regions and communities that have the most significant vested interest in the outcome” of a case.<sup>21</sup> Thus, despite bankruptcy’s status as a federal system, Congress has continually recognized the importance of state and local concerns in a bankruptcy case through both public statements and statutory provisions.

Nowhere is the importance of location more prevalent in the bankruptcy laws than in the bankruptcy venue rules. When Congress created the federal bankruptcy laws, it could easily have designated one federal court to specialize in and address all bankruptcy issues, similar to the way other specialty courts are designed. Instead, Congress created bankruptcy courts in each of the 50 states and designed venue rules to give debtors guidance and limitations on where their bankruptcy cases could be filed. Under the bankruptcy venue statute, a debtor may file in one of three locations: (1) in its state of

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<sup>17</sup> US, American Bankruptcy Institute Commission to Study the Reform of Chapter 11, *Venue Fairness; Written Statement on Behalf of National Ad Hoc Group of Bankruptcy Practitioners in Support of Venue Fairness, Submitted in Support of Testimony of Douglas B. Rosner*, (Austin, 22 November 2013), online:

<<http://commission.abi.org/sites/default/files/statements/22nov2013/Written-Venue%20Statement-for-ABI-Commission.pdf>>.

<sup>18</sup> *Butner v United States* (1979), No. 77-1410, [1979] 99 S Ct 914 at 77-1410, 440 U.S. 48 [Butner]. The judgment holds that a property issue arising in bankruptcy proceedings was resolved by referring to state law rather than a federal rule of equity.

<sup>19</sup> See *Bankruptcy Code*, 11 USC 2012, s 544, which discusses a bankruptcy trustee’s avoidance powers under state law.

<sup>20</sup> See Nancy Sarnoff, “Enron’s Collapse May Have Ripple Effect on Downtown Office Market”, *Houston Business Journal* (Dec 9, 2001), online: <<http://www.bizjournals.com/houston/stories/2001/12/10/newscolumn3.html?page=all>>, which speculates about negative effects on Houston due to the Enron bankruptcy [Sarnoff].

<sup>21</sup> American Bankruptcy Institute, “House Holds Hearing on Proposed Chapter 11 Venue Reform Legislation”, (2011) *Am Bankr Inst J* at 10, 93.

incorporation, (2) in the location of its principal place of business or principal assets, or (3) where a case concerning the debtor's affiliate is pending.<sup>22</sup>

In recognizing the importance of location in bankruptcy, Congress reaffirmed a link between venue and geographic location that dates back to English law, to a time when jurors were required to have personal knowledge of a case.<sup>23</sup> As the court system in England developed, jurors' personal knowledge took on less significance, but the requirement that a plaintiff "lay" an action in the county where his or her claim arose remained.<sup>24</sup> Even in "transitory" actions, those actions (relating to debt or contract) that had no particular tie to a given location, the requirement of linking the location of the lawsuit to another relevant location remained.<sup>25</sup> In these transitory actions, plaintiffs were permitted to situate a case either in the location where the claim arose, or in the location where the defendant or the defendant's property could be found.<sup>26</sup> These rules demonstrate that even in early times, courts recognized the importance of bringing a lawsuit in a location that had some meaningful tie to the source of the dispute or the parties affected by it.

When Congress enacted the *Federal Judiciary Act of 1789*, it sought to incorporate these English principles.<sup>27</sup> After determining that US public opinion favored even more protections for defendants, however, Congress went one step further, requiring venue to be laid in the location where the defendant in the case resided.<sup>28</sup> To ensure that no party would have to travel too far to litigate a claim, Congress established a series of local, federal courts across the country. These courts, the predecessors to today's bankruptcy and federal district courts, were intended to provide "fairness and convenience to defendants".<sup>29</sup>

These concepts of fairness and convenience underlie today's bankruptcy venue rules even though traditional "defendants" do not exist in a bankruptcy case. Thus, in bankruptcy, the venue rules serve to protect the interests of all

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<sup>22</sup> *Judiciary and Judicial Procedure*, 28 USC 2012, s 1408.

<sup>23</sup> *In re Patriot Coal Corporation, et al., Debtors*, 482 BR 718 at 737 (United States Bankruptcy Court 2012) (No 12-12900 (SCC) [*Patriot Coal*]); see also Willicom Wirt Blume, *Place of Trial of Civil Cases*, 48 Mich L Rev 1 (1949) [Blume].

<sup>24</sup> *Patriot Coal*, *ibid* at 737; see also 92 C.J.S. *Venue* §§ 3, 4, 7-9, 26, 27.

<sup>25</sup> *Patriot Coal*, *ibid* at 737.

<sup>26</sup> Shirley M Sorter, "Venue Problems in Wisconsin" (1972) 56 Marq L Rev 87 at 89.

<sup>27</sup> *Patriot Coal*, *supra* note 23 at 737.

<sup>28</sup> Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789" (1923) 37 Harv L Rev 49 at 72.

<sup>29</sup> *Patriot Coal*, *supra* note 23 at 738. In fact, some citizens threatened to leave the Union if they were not provided with a local court. See Blume, *supra* note 23 at 36.

parties, debtor and non-debtor alike, by ensuring that a case takes place in a geographically relevant location.

Technological change and globalization have brought forth a slew of large, multinational corporations that often seem to have few concrete ties to any particular location. Nevertheless, corporate bankruptcy cases continue to have substantial impacts on the regions out of which the bankrupt debtor primarily operates.<sup>30</sup> These impacts may in turn affect local economies. A case in point is that of the bankruptcy of Evergreen Solar, a solar panel manufacturer based in Massachusetts.<sup>31</sup> Evergreen Solar filed bankruptcy after the State of Massachusetts had invested large amounts of money, resources, and human capital in the company.<sup>32</sup> When Evergreen Solar filed for bankruptcy, about 800 Massachusetts employees were laid off, the State became a creditor in the proceedings, and the State's finances were negatively affected.<sup>33</sup> Other cities have also faced negative consequences from company bankruptcy filings. The City of Detroit filed for bankruptcy a few years after the federal government bailed out the struggling automobile companies headquartered there,<sup>34</sup> and the City of Houston's downtown business district visibly struggled after the very public demise of Enron.<sup>35</sup>

In spite of Congress's evident attempt to prevent debtors from filing a case anywhere they desire, in recent years, debtors have begun using the Bankruptcy Code's venue provisions to forum shop, or file a case in a location that is primarily only convenient for the debtor or senior lenders, rather than for all parties involved in the case. Indeed, from 2005-2011, 70% of the largest two hundred public-company filings took place in just two bankruptcy courts, in the Southern District of New York, and in Delaware.<sup>36</sup>

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<sup>30</sup> See Peter C Califano, "Bankruptcy Venue—Current Law is Going, Going, Going...Gone?" (2012) J Natl Assn Bankr Trustees, online: <<http://bit.ly/2upy80o>>.

<sup>31</sup> HR 2533, *Chapter 11 Bankruptcy Venue Reform Act of 2011*, 112<sup>th</sup> Congress, 2011-2012, exhibits of Hon Frank J Bailey, US Bankr Ct, D Mass. [HR 2533].

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Suzy Khimm, "Why Didn't the Auto Bailout Save Detroit?", MSNBC (19 July 2013), online: <<http://www.msnbc.com/all-in/why-didnt-the-auto-bailout-save-detroit>> (describing both how the auto bailout helped forestall Detroit's demise and how Detroit was affected by the auto bankruptcies in the region).

<sup>35</sup> Sarnoff, *supra* note 20.

<sup>36</sup> Testimony of Melissa Jacoby before the House Judiciary Subcommittee, Sept. 8, 2011, online: <<http://www.morrisanderson.com/company-news/entry/House-Judiciary-Subcommittee-on-Courts-Commercial-and-Administrative-Law-He/>>. The testimony references data coming from the UCLA-LoPucki Bankruptcy Research Database.

The next Part analyzes how technology and globalization may exacerbate the trend of bankruptcy forum shopping, while also examining some ways in which these advances may alleviate some of forum shopping's harmful effects.

## II. Globalization, Technological Change and Bankruptcy

Technology and globalization have changed many aspects of bankruptcy practice. The following subsections explore new challenges and opportunities that have arisen with respect to various components of bankruptcy law, with particular emphasis on the effects on choice of venue.

### i. Debtors

Technological change has broadened the scope of debtor entities eligible to file under the Bankruptcy Code. Entirely new types of companies have emerged in recent years, including businesses based solely online and businesses that specialize in new types of technology. These companies, unlike their more traditional, brick-and-mortar predecessors, may have few tangible assets and may exist in the physical world only as a server in an otherwise empty room. Intangible assets, such as domain names and intellectual property rights, may comprise the bulk of these debtors' property. These companies lack an easily identifiable physical location for venue purposes as the physical location of the server, divorced from any ties to the people who run the company, does not necessarily serve as a logical location for situating a bankruptcy case.

One example of this new type of debtor is Mt. Gox, a now-defunct exchange for bitcoin.<sup>37</sup> When Mt. Gox filed for bankruptcy protection in Japan, it announced that approximately 850,000 bitcoins belonging to the customers and the company had gone missing, likely stolen by hackers.<sup>38</sup> Although the company later found some of the "stolen" bitcoins in a digital

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<sup>37</sup> See generally Scott Bowling, "Bitcoin Bankruptcy" series (11 March 2014-29, June 2015), *Weil Bankruptcy Blog*, online: <<https://business-finance-restructuring.weil.com/category/bitcoin-bankruptcy/>>. Here, Bowling discusses whether a hypothetical US-based bitcoin exchange would be eligible for Chapter 11 relief.

<sup>38</sup> Jake Adelstein & Nathalie-Kyoko Stucky, "Behind the Biggest Bitcoin Heist in History: Inside the Implosion of Mt. Gox" (19 May 2016), *The Daily Beast*, online: <<http://www.thedailybeast.com/behind-the-biggest-bitcoin-heist-in-history-inside-the-implosion-of-mt-gox>>.

wallet, the bulk of the bitcoins remained missing.<sup>39</sup> The struggles that Mt. Gox faced in tracking and valuing its intangible assets may become typical as companies digitize more assets.

The rise of the start-up culture in the past few decades has coincided with many high-technology companies bursting onto the scene and subsequently struggling or failing completely.<sup>40</sup> Thus, it is becoming increasingly critical for the Bankruptcy Code to accommodate new debtor entity types in emerging fields. Companies need to know whether and how they can file for bankruptcy and what will happen to their nontraditional assets if they do.<sup>41</sup>

One difficulty with extending current bankruptcy rules to new types of companies is that companies that exist entirely online operate differently than do companies with a brick-and-mortar presence.<sup>42</sup> This presents a challenge to bankruptcy judges and creditors, who must examine a company's operations and decide whether that company's plan of reorganization treats creditors fairly and is likely to succeed. For example, when Mt. Gox, the bitcoin exchange previously discussed, entered bankruptcy, the court had to determine how to treat this entirely new type of debtor entity: an exchange trading in virtual, digital currency.<sup>43</sup> The Mt. Gox proceedings raised critical questions as to what assets the company actually possessed, where those assets were said to be located,<sup>44</sup> and whether those assets could be considered "property" that Mt. Gox could use to satisfy its creditors.

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<sup>39</sup> *Ibid.*

<sup>40</sup> Sommer Nicole Louie, "Comment: The Inadequacy of Bankruptcy Protection for the Biotechnology Industry" (2005) 22 *Emory Bankr Dev J* at 337. The author notes that the Code provides inadequate protection to patent licenses as well.

<sup>41</sup> *Ibid.* at 338. See the discussion on particular issues in the biotechnology industry.

<sup>42</sup> See Marjorie Chertok & Warren E Agin, "Restart.com: Identifying, Securing and Maximizing the Liquidation Value of Cyber-Assets in Bankruptcy Proceedings" (2000) 8 *Am Bankr Inst L Rev* 255. The article describes companies whose business plans include generating market attraction rather than profits and whose currency is stock or stock options.

<sup>43</sup> See Rachel Abrams, Matthew Goldstein & Hiroko Tabuchi, "Erosion of Faith Was Death Knell for Mt. Gox", *DealBook* (28 February 2014), online: <[http://dealbook.nytimes.com/2014/02/28/mt-gox-files-for-bankruptcy/?\\_r=0](http://dealbook.nytimes.com/2014/02/28/mt-gox-files-for-bankruptcy/?_r=0)>. The authors describe U.S. prosecutors' lack of understanding of the way money was digitally transferred via Mt. Gox and noting that Bitcoin investors "are left to figure out what, if any, recourse they have against their losses at Mt. Gox".

<sup>44</sup> For example, digital assets may be said to be located on a physical server, or in the owner's principal place of business, or elsewhere. The answer may depend on the type of data at issue—it is arguable, for instance, that bitcoins in digital form may not even constitute "data" in the typical sense of the word. See Paul Gil, "What Are Bitcoins? How Do Bitcoins Work?" (26 May

In addition to fostering the creation of new debtor entities, technology has enabled companies to combine and expand at an astonishing rate, resulting in a greater number of companies with a global reach. Faster, better means of communication and connection have made it easier than ever for companies to interact with businesses outside of their home country. Large, multinational companies now dominate the business landscape. Yet, these companies pose a challenge to the Bankruptcy Code, which has typically been focused on assisting companies based in the United States. Although Chapter 15 of the Bankruptcy Code is designed to allow US courts to work in conjunction with foreign courts for certain cross-border insolvency proceedings, observers have still noted that the Bankruptcy Code remains ill-equipped to address the problems faced by these new types of firms.<sup>45</sup> Specifically, these companies, by their nature, have complex corporate structures and look quite different, on paper and in practice, from businesses with only a US presence.<sup>46</sup> Thus, the Bankruptcy Code clearly must continue to adapt if it is to meet the needs of debtors with locations both within and outside of the United States.

ii. *Assets*

The location and composition of a debtor's property can matter a great deal in bankruptcy. Although the Bankruptcy Code is federal law, bankruptcy courts apply state law with respect to a debtor's property rights.<sup>47</sup> Additionally, it is important for courts to be able to trace the debtor's property to determine whether it has been transferred to another party.<sup>48</sup> When a debtor's assets consisted only of physical property, it was much easier to determine whether property had been transferred.<sup>49</sup> Today, however, when

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2017), *Lifewire*, online: <<https://www.lifewire.com/what-are-bitcoins-2483146>>. The author describes a bitcoin as a "simple data ledger file").

<sup>45</sup> Harvey R Miller & Shai Y Waisman, "Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?" (2004) 78 Am Bankr LJ 153.

<sup>46</sup> "First Quarter Review", (29 July 2015), *Weil Bankruptcy Blog*, online: <<http://business-finance-restructuring.weil.com/quarterly-reviews/2015-first-quarter-review/>>. The review describes changes that have occurred since the enactment of the 1978 Bankruptcy Code, including the rise of intangible assets, more multinational companies, and greater complexity in corporate structures.

<sup>47</sup> *Butner*, *supra* note 18.

<sup>48</sup> See 11 U.S.C. § 547 (covering preferential transfers of debtor's property), § 548 (covering fraudulent transfers).

<sup>49</sup> See *Twyne's Case* (1601) 76 ER 809, which discusses a fraudulent transfer of sheep.

debtors can possess property that lacks a definite geographic base, it can be more difficult to determine who has the property, or even who owns it in the first place.

Even companies that have been around for decades may now possess new types of assets, thanks to technological advances. These assets can include everything from social media accounts to intellectual property rights<sup>50</sup> to domain names, and they may be stored or located all over the world. In addition, companies can now collect and store consumer information, including financial information, on a much broader scale than ever before.<sup>51</sup> When the Bankruptcy Code was created in 1978, these types of assets and enhanced collection abilities were simply unimaginable. Consequently, although the Bankruptcy Code has established some mechanisms for dealing with more traditional intangible assets, such as intellectual property,<sup>52</sup> it is ill-equipped to address the treatment of many of these newer assets, particularly those that lack a recognized registry system or geographic base.

For example, in the case of *In re CTLI LLC*,<sup>53</sup> the bankruptcy court for the Southern District of Texas had to determine whether social media accounts created by the debtor company's former owner were property of the debtor's bankruptcy estate. No clear treatment for social media accounts currently exists in the Bankruptcy Code. The former owner claimed that the social media accounts belonged to him and alleged that he had privacy interests in the accounts that ought to be protected.<sup>54</sup> Because of this, he argued, it would be impossible for him to share control of the accounts with the company without violating these privacy interests.<sup>55</sup> The court acknowledged that social media accounts created by a person for a company can contain a mix of personal and commercial information but noted that the accounts in this case were created in the business's name.<sup>56</sup> Therefore, the court determined that the accounts belonged to the debtor company, rather than to the former

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<sup>50</sup> See *Re Storm Technology, Inc* (2001), No 98-58595-MM, [2001] 260 BR 152 (Bankr ND Cal) (dealing with patents in scanner technology); *Re Lakewood Engineering & Mfg Co, Inc*, (2011), No 09 B 5320, [2011] 459 BR 306 (Bankr ND Ill) (patent and trademark dispute).

<sup>51</sup> Joseph A Guzinski, "Protecting Financial Privacy in Consumer Bankruptcy Cases" (2000) 19 Am Bankr Inst J 16. Guzinski notes that financial privacy is affected by electronic access to financial information contained in consumer bankruptcy case records.

<sup>52</sup> See 11 U.S.C. § 365(n). The code covers the treatment of intellectual property licensing contracts.

<sup>53</sup> *In re CTLI Inc*, 528 BR 359 (Bankr SD Tex 2015) No 14-33564.

<sup>54</sup> *Ibid* at 363.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid* at 367-68.

owner.<sup>57</sup> Although the court in *CTLI* was able to reach a final determination as to the accounts, one can imagine endless variations of the same scenario, each presenting its own unique challenge. For example, what if the company had created an account for the owner's personal use? Or what if the owner had created the account in his own name but used it to promote the company extensively? These questions remain unresolved for the moment, but will likely arise in the future.

The existence of new asset types demonstrates that technology has outpaced the Bankruptcy Code in many ways.<sup>58</sup> No clear rules exist to guide judges on the treatment of digital goods, electronic data,<sup>59</sup> or domain names.<sup>60</sup> Yet, it is often critical to define, categorize, locate, and value these assets in a bankruptcy case because without an understanding of these assets and their values, a judge has no way to gauge a company's ability to successfully reorganize or pay creditors.

### iii. *Case Participation*

The previous subsections discussed specific challenges that technological change and globalization have brought to bankruptcy practice. Yet, these changes have presented new opportunities as well. Nowhere are these opportunities more evident than in the realm of case participation. It is now easier than ever for parties to access and participate in bankruptcy proceedings, regardless of where they take place.<sup>61</sup> Advances in communication technology have also made it easier for debtors to disseminate information about the existence and progress of their bankruptcy cases.<sup>62</sup> Parties now can communicate with each other and the court through

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<sup>57</sup> *Ibid* at 372.

<sup>58</sup> Gene Goldmintz, "Ctrl + Alt + Delete: Does the Bankruptcy Code Need a Reboot? The Eligibility of Consumer Digital Goods for Liquidation" (2014) 31 *Emory Bankr Dev J* 57.

<sup>59</sup> Jack Seward, "The Debtor's Survival in the Digital Age" (2004) *Am Bankr Inst J* 14.

<sup>60</sup> Warren E Agin, "The Internet Bankruptcy: What Happens When the Bell Tolls for the eCommerce Industry?" (2001) 2001 *Ann Surv of Bankr Law* 11.

<sup>61</sup> This is consistent with one of the goals of bankruptcy in general and the venue rules in particular: facilitating creditor participation. See Bill Rochelle, "Texas Judge Rails Against Big Ch. 11s in NY, Delaware" (6 August 2015), *Bloomberg BNA Bankruptcy Law Resource Center*, online: <<http://bit.ly/2upuCTT>>.

<sup>62</sup> See Pamela Foohey, "Notifying Potential Claimants in Diocese Chapter 11 Cases" (30 June 2015), *Credit Slips*, online: <<http://bit.ly/2upFGA1>> (describing the creditors' committee motion in the Archdiocese of St. Paul and Minneapolis bankruptcy, which sought to have the

the existence of dedicated web pages and email addresses, and parties who are not physically close to where a case is taking place can participate directly in court proceedings using telephone or video chat. Thus, as debtors and assets become more dispersed, technology provides mechanisms to bring parties together in the courtroom.

Unfortunately, technological advances are not without flaws. For example, in recent years, scholars have begun to study court participation via videoconference, with some concluding that even videoconferencing does not equate to the benefits of being physically present.<sup>63</sup>

Technology also has the potential to make the bankruptcy filing process easier for certain low-income and individual debtors; however, a recent court decision illustrates the need to proceed cautiously in this area. In *In re Reynoso*,<sup>64</sup> parties used web-based software to prepare and file a bankruptcy petition, a task usually given to a lawyer. When the petition was challenged in bankruptcy court, the Ninth Circuit Court of Appeals found that the software was performing the functions of a bankruptcy petition preparer<sup>65</sup> and held that the software provider had thereby engaged in the unauthorized practice of law.<sup>66</sup>

Other concerns have arisen in connection with electronic filing (“e-filing”) of cases. Although many praise e-filing software for cutting costs in the long run, the initial learning curve for such software can be steep, even for experienced attorneys, and e-filing programs themselves are expensive to purchase, necessitating high upfront costs.<sup>67</sup> Many small and individual debtors will therefore not be able to meet the initial demands of time, effort, and money to master e-filing. This could leave these debtors at a disadvantage or even discourage them from filing completely.

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bankruptcy court order all parishes within the diocese to play a video in which abuse claimants discuss the necessity of filing a claim by the bar date).

<sup>63</sup> See Erich P Schellhammer, “A Technology Opportunity for Court Modernization: Remote Appearances” (January 2013), CCTJ, online: <<http://bit.ly/2vOS4ZX>> [Schellhammer]. The authors highlight some concerns with using technology in the courtroom, including the concern that participation via teleconference does not allow for the observation of a speaker’s non-verbal cues.

<sup>64</sup> *In re Reynoso*, (2007) No 04-17190, [2007] 477 F3d 1117 (9th Cir).

<sup>65</sup> *Ibid* at 1123-24.

<sup>66</sup> *Ibid* at 1125.

<sup>67</sup> Michael Godlstein, Samantha Einhorn & Jill L Phillips, “The Changing Practice of Bankruptcy Law: An Analysis of How Bankruptcy Practice has Changed in the Last Decade” (2009) 4 S New Eng Roundtable Symp LJ 42 at 73.

Thus, although technology can be a valuable tool for creating access to bankruptcy courts, it also creates division, as not everyone has equal access to technology. Therefore, as technological advances become integrated into bankruptcy processes, a risk arises that those without access to technology may similarly lack access to these bankruptcy procedures. In combination with the new types of debtors and assets described above, these technological changes may result in the bankruptcy system becoming more opaque and inaccessible to increasing numbers of parties.

*iv. Changes to Bankruptcy Law*

In response to technological changes, bankruptcy scholars, judges, and practitioners have begun to work on reforms to the Bankruptcy Code. These parties, firsthand observers of the bankruptcy system at work, have not been ignorant of the need to change the Bankruptcy Code and Rules in order to accommodate the new business models and challenges that have emerged. As previously discussed, the ABI created the Commission to Study the Reform of Chapter 11 and issued a series of proposals in December of 2014. One of the biggest changes the Commission recommended was essentially splitting the Chapter 11 system into two tracks in order to better accommodate the needs of both large, multinational firms<sup>68</sup> and small- to mid-sized businesses. Chapter 11 currently serves as the primary reorganization mechanism for all of these business types, but the Commission recognized that the needs of different entities have changed so much that vast reform was needed. In light of the Commission's sweeping proposed changes to much of Chapter 11, it is disappointing that some venue reform mechanism was not concurrently proposed. Just as technology necessitates changes to many aspects of bankruptcy law, it also affects bankruptcy procedures, including those related to venue.

Indeed, venue reform is desperately needed for Chapter 11 cases. Although scholars have debated about whether bankruptcy forum shopping is a problem for years, technological advances and globalization make it even easier for parties to manipulate the venue rules.<sup>69</sup> For example, large,

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<sup>68</sup> For example, the needs of a large company like Enron, a business whose collapse affected parties around the world, may be quite different than those of a smaller company, which has only one location and a discrete set of assets. For further discussion on the challenges of the Enron case, see *Re Enron Corp* (2002), No 01-16034 (AJG), [2002] 274 BR 327 (Bankr SDNY).

<sup>69</sup> John AE Pottow, "The Myth (and Realities) of Forum Shopping in Transnational Insolvency" (2007) 32 *Brook J Intl L* 785 at 787 [Pottow]. Pottow notes that manipulability is a

multinational companies have a seemingly endless array of venue options available to them, while companies that exist almost entirely in the digital realm may be forced to rely solely on their state of incorporation when choosing a bankruptcy venue. Recent debates in the scholarly literature demonstrate concerns over forum shopping in the transnational context and the extent to which US bankruptcy law ought to discourage such practices.<sup>70</sup> Additionally, technology makes it easier to dismiss objections to venue from smaller stakeholders. These parties often argue that bankruptcies should take place closer to the main locus of the company or closer to key employee groups. Yet, many debtors are easily able to dismiss these arguments by countering that technology allows these parties adequate remote access to the courtroom.<sup>71</sup>

This manipulation need not come solely from the debtor. Lenders, particularly those who hold senior positions as well as those with security interests in most of the debtor's assets, can also influence where the debtor files for bankruptcy. Lenders can take a company's venue options for bankruptcy into account at the time of financing, and lenders do exercise influence over the debtor's venue decision at the time of filing.<sup>72</sup> Thus, the manipulation enabled by technology and globalization can work to the senior

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condition of forum shopping; Adrian Walters, "United States' Bankruptcy Jurisdiction Over Foreign Entities: Exorbitant or Congruent?" (2017) *J Corp Studies* [Walters]. The author states that the "experience in Europe suggests that debtors can easily manipulate COMI for bankruptcy forum shopping purposes."

<sup>70</sup> Lynn M LoPucki, *Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* (Ann Arbor: University of Michigan Press, 2005); Pottow, *ibid* at 786. Here, Pottow challenges LoPucki's contention that universalism will lead to "rampant" forum shopping; see also Honorable Samuel L Bufford, "Global Venue Controls are Coming: A Reply to Professor LoPucki" (2005) 79 *Am Bankr LJ* 105 [Bufford]. Bufford disagrees with LoPucki and supports modified universalism for international insolvency proceedings; Walters, *supra* note 69. Walters states that "by fostering swift and unconstrained access and eschewing barriers to entry that are common in many other countries...the US system is highly conducive to bankruptcy forum shopping."

<sup>71</sup> These casual dismissals come at a distinct cost to small stakeholders. See Patrick Cormier, "The Opportunities and Challenges of Court Remote Appearances", *Slaw* (2013), online: <<http://www.slaw.ca/2013/11/06/the-opportunities-and-challenges-of-court-remote-appearances/>>. Cormier describes the costs and challenges of remote appearances; Schellhammer, *supra* note 63, who observes that technology does not definitively resolve problems of court access.

<sup>72</sup> Susan Mathews, "Corporate Chapter 11 Bankruptcies: The Case for Venue Reform" (October 2014), *ABF Journal*, online: <<http://www.abfjournal.com/articles/corporate-chapter-11-bankruptcies-the-case-for-venue-reform/>>. Mathews notes that "the decision to file in [popular] venues seems to be driven by lenders that find these venues more favorable".

lenders' benefit as well, possibly to the detriment of more junior lenders or smaller stakeholders whose interests may be opposed to those of the senior lenders.

These arguments raise two critical questions, to be explored further in the next Part. First, does technology truly enable all parties to participate in a case regardless of where it is filed? And second, why does it matter where a bankruptcy case is filed at all?

### **III. The Interests of Justice and Process Fairness**

The previous Parts illustrate that the current US bankruptcy venue rules, and perhaps much of US bankruptcy law in general, are ill-equipped to keep pace with a changing world. This Part discusses some of the key questions raised by the changes previously discussed, argues that venue remains a relevant concern in light of the interests of justice and process fairness, and proposes a conception of bankruptcy venue that is flexible and responsive to change.

#### *i. Fundamental Questions*

Changes wrought by technology and globalization have brought to the forefront a question that cuts to the heart of bankruptcy's purpose. As previously discussed, new entities, new assets, and new opportunities for case participation pose both opportunities and challenges to current bankruptcy laws. At the core of these challenges lie questions about the entities the bankruptcy system is designed to serve. If bankruptcy is to continue to meet the needs of companies large and small, virtual and physical, and all of their numerous creditors, employees, and stakeholders, how are the bankruptcy laws to achieve this goal?

The ABI Commission was correct to recognize that bankruptcy laws need to change if the bankruptcy system is to meet the challenges of the digital age. This article posits that reform to the venue rules is a critical part of this change, just as critical as changes to the rest of the Chapter 11 system. New bankruptcy proposals have the potential to embrace technology's advantages while minimizing its limitations and these ideas must be extensively deliberated and debated.<sup>73</sup> Bankruptcy law must rise to meet the challenge of

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<sup>73</sup> Such laws could include everything from provision of a national bankruptcy court to the establishment of local liaisons for large bankruptcy cases.

accommodating new entity and asset types while continuing to facilitate stakeholder participation in cases where the location of a case can make a difference.

Although bankruptcy was initially designed to be a collective process, one where all parties could participate to facilitate a resolution, the debtor today (or a senior lender) may easily select a case venue that serves its own interests while casually dismissing the interests of the rest of the group. Thanks in part to technological advances, debtors and senior lenders are able to dismiss objections from parties who cannot easily participate in a case by pointing to technology that allows for remote access and participation. Manipulation of bankruptcy venue rules contributes to a perception that in many bankruptcy cases, the outcomes are predetermined, and parties are helpless to reverse the tide of decisions made by the very largest players.<sup>74</sup>

ii. *Location in Bankruptcy*

As described in Part I, location has always played an important role in bankruptcy policy and practice. Recently, technological innovation and increased globalization have forced the question of whether this role remains relevant.

Local court rules continue to ensure that location still matters, at least to some degree. Certain jurisdictions require local counsel to participate in all bankruptcy cases. Included among these jurisdictions is Delaware, the location of many large corporate bankruptcy cases.<sup>75</sup> Even in jurisdictions that do not require local counsel to be present, many parties prefer that their lawyers be physically present in the courtroom, particularly if they are arguing a motion that may be difficult or challenging.<sup>76</sup> Other parties may simply

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<sup>74</sup> Coordes, *supra* note 8 at 387. See specifically how “large bankruptcies now cater almost exclusively to the wishes of power players.”

<sup>75</sup> See Francis Pileggi, “Delaware Practice and Procedure for Non-Delaware Lawyers”, (31 July 2012), *Delaware Corporate & Commercial Litigation Blog*, online: <<http://www.delawarelitigation.com/2012/07/articles/commentary/delaware-practice-and-procedure-for-non-delaware-lawyers/>>. Pileggi notes that Delaware courts emphasize “that a Delaware attorney of record is responsible for every action taken by his or her client... [T]he Delaware lawyer who appears in an action always remains responsible to the Court for the case and its presentation”.

<sup>76</sup> *In re Dunmore Homes, Inc* (2008), No 07-13533 (MG), [2008] 380 BR 663 (Bankr SDNY). In contrast, some courts, such as the Bankruptcy Court for the Southern District of New York, have permissive *pro hac vice* provisions that allow “any lawyer admitted to practice in any state or federal court to be admitted *pro hac vice* without requiring local counsel.” *Ibid* at 675.

value their lawyers' presence in court for the benefits of firsthand observation of the court, witnesses, and other parties in interest.

Although many scholars and commentators have criticized the continuing need for local counsel in a globalized, tech-friendly world, local counsel can provide distinct benefits, particularly in complex or international proceedings.<sup>77</sup> In bankruptcy court, local rules and unwritten customs abound, creating the potential for embarrassment for parties unfamiliar with these norms.<sup>78</sup> But perhaps the key benefit of having a local lawyer in a case is having someone familiar with the people involved.<sup>79</sup> Ultimately, bankruptcy, and indeed the practice of all law, is about people.<sup>80</sup> Having a person familiar with the people affected by a case can provide significant benefits. These benefits are compounded when a case crosses borders, exposing litigants to increased cultural differences, language barriers, and unfamiliar processes.<sup>81</sup>

As telephonic and video access to court become increasingly available to parties and their lawyers, questions have arisen as to whether it is necessary for parties to be physically present in the courtroom. Yet, telephonic and video representation carries its own set of expenses, which lawyers pass on to their clients.<sup>82</sup> Thus, representation in this manner may become more difficult to attain for smaller parties who lack the means to pay for the technology to participate in the case. Furthermore, even with all of the advances of technology, the quality of participation may not be the same as it would be if the parties were physically present in the courtroom. Thus, although technology may ameliorate some aspects of forum shopping, it does not entirely resolve the problems associated with situating a bankruptcy case far from many of the key stakeholders.

Allowing companies to file in the jurisdiction where they are incorporated may initially seem to resolve many of the issues associated with these "global" and "digital" companies. Yet, the so-called "state of incorporation" prong of the bankruptcy venue statute has been maligned by

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<sup>77</sup> Timothy Miltenberger, "The Indispensable Local Counsel", *TYL Magazine* (2017) 8.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid* at 9.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> For example, Court Call, a service that provides for telephonic and video remote appearances, charges a fee for each party appearing by telephone. See CourtCall, "CourtCall Remote Court Appearances", online: <<https://courtcall.com/what-is-courtcall/>>.

scholars and policymakers as being the source of harmful forum shopping.<sup>83</sup> Indeed, it is this prong of the venue statute that has faced the most criticism, and many proposals for venue reform have called for its removal. If scholars are correct that the state of incorporation prong promotes harmful forum shopping and should be eliminated from the bankruptcy venue statute, the other prongs of the statute provide little help to these global and digital companies. For example, trying to locate a “principal” place of business or a single location for the debtor’s assets may be difficult for companies with assets located all over the world or for companies that exist almost entirely in the digital realm.

Although technology has arguably reduced the number of locations that can be considered unfair or inconvenient to non-debtor parties, opportunities for harmful forum shopping, or placing a case essentially out of the reach of many smaller stakeholders, still exist. Under the current venue rules, large debtors can now file in virtually any judicial district in the country, even if they lack a physical presence or meaningful connection to that location. Venue law arose in part out of the need to protect parties from unfair or inconvenient locations,<sup>84</sup> and until this need is eliminated entirely, it remains critical for scholars and policymakers to focus on venue and case placement. This need is reflected in the two considerations a court undertakes when deciding whether to change the venue of a bankruptcy case: the court must consider the interest of justice and the convenience of the parties.<sup>85</sup> Furthermore, the US Supreme Court recently affirmed the importance of situating a case in a meaningful location when it ruled that out-of-state plaintiffs could not sue in Montana based solely on the ground that the defendant railroad company did business in the state.<sup>86</sup> Although this was not a bankruptcy case, the Supreme Court’s decision that parties who do not control where a case is placed must be protected has important implications for bankruptcy cases as well.

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<sup>83</sup> HR 2533, *supra* at 31. This proposes to eliminate state of incorporation as a venue option; Samir D Parikh, “Modern Forum Shopping in Bankruptcy” (2013) 46 Conn L Rev 159 at 200. The author advocates restricting venue in corporate cases to the location of the debtor’s principal place of business or principal assets or, in some cases, to the location of the debtor’s affiliate.

<sup>84</sup> *Patriot Coal*, *supra* note 23 at 738. Specifically see the statement that “local federal courts were established to ensure fairness and convenience to defendants.”

<sup>85</sup> *Judiciary and Judicial Procedure*, 28 USC 1984, § 1412.

<sup>86</sup> *BNSF Railway Company v Tyrrell* (2017), No 16-405, at 4-9 (S Ct 2017).

Judicial legitimacy concerns also demand careful consideration of location in the bankruptcy context.<sup>87</sup> Professor Lynn LoPucki has argued that judges compete for cases in their home jurisdiction, calling into question the neutrality of bankruptcy judges when it comes to venue procedures.<sup>88</sup> If the current venue rules do not give clear guidance on where to situate a case, they arguably make it even easier for judges to use what influence they have to obtain the case. Thus, to the extent that the venue rules can be adjusted to discourage this type of judicial behavior, they should be reformed.

Of course, not all scholars agree with Professor LoPucki's characterization of judicial behavior. In fact, some evidence indicates that judges can, and do regulate forum shopping themselves.<sup>89</sup> If this is the case, then perhaps judicial mechanisms that constrain forum shopping should be strengthened.<sup>90</sup> More research is needed to determine whether judges are effectively regulating forum shopping; if they are, allowing for gradual change through the process of judicial review may be an option to explore.

Globalization and technological change have arguably obscured the lines of what is in fact "local" for a particular debtor. Still, there remains significant interest in having bankruptcies adjudicated "at home"—near the company's principal stakeholders and creditors, even though it is now significantly harder to determine the location of the debtor's principal place of business or principal assets.<sup>91</sup> As a result, the "fallback" rule becomes situating a case in the debtor's state of incorporation. Given that the state of incorporation venue prong is already the most ubiquitous prong used for the bankruptcies of large companies, it is critical to ensure that technological change does not further exacerbate this trend. Scholars have acknowledged the disadvantages that can result from a large debtor choosing to file in its state of incorporation, particularly if that debtor has no other meaningful connection to the state.<sup>92</sup>

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<sup>87</sup> See Coordes, *supra* note 8 at 395-96 (discussing how judges may be reluctant to transfer cases).

<sup>88</sup> LoPucki, *supra* note 70.

<sup>89</sup> Walters, *supra* note 69; David L Lawton, "If It Ain't Broke, Don't Fix It: Justifying Forum Shopping: An Argument in Favor of Expansive Chapter 11 Jurisdiction," *INSOL International News Update* (April 2017) (noting that courts often dismiss non-US cases, at least partially because they have determined that the US was not the most appropriate venue in light of local interests).

<sup>90</sup> Walters, *supra* note 69.

<sup>91</sup> Coordes, *supra* note 8 at 390-91 (describing a continued desire among members of Congress to place bankruptcy cases near the debtor's operational center).

<sup>92</sup> See Parikh, *supra* note 10 at 200.

Finally, concerns over process fairness suggest that companies should pay more attention to the needs of smaller stakeholders when undertaking a major restructuring.<sup>93</sup> Process fairness is the idea that stakeholder input matters to the ultimate success or failure of any venture. Whether stakeholders consider a process to be fair or not can directly affect the amount and quality of their support in a case.<sup>94</sup> Case studies have shown that if management is transparent about its decision-making process, this transparency can make a qualitative difference in terms of both employee morale and ultimate company success.<sup>95</sup>

This means that companies must be cognizant of the views of their stakeholders and work to include them whenever the company undergoes a massive change such as bankruptcy reorganization. When employees feel as though they understand what is going on in a case and the reasons behind the decisions that are being made, they are more likely to support those decisions.<sup>96</sup> Situating a bankruptcy case near a company's employees and other key stakeholders, such as suppliers, can help these parties to feel more involved in the process and may in turn make these stakeholders more likely to support, rather than oppose, a company's bankruptcy plan and exit strategy.

Process fairness studies also show that when employees feel betrayed by their companies, they tend to retaliate. These retaliations can, in turn, translate to serious consequences for the company's bottom line.<sup>97</sup> In contrast, when employees feel that they have a voice in the decision-making process, they are more likely to actively support the company's decisions, their bosses, and the direction of the organization as a whole.<sup>98</sup> Thus, the decision over where to situate a bankruptcy case remains significant, as it will undoubtedly be easier for a company to inform and include its stakeholders if the case is taking place in a location where these stakeholders can observe the proceedings and have a chance to become involved in them.

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<sup>93</sup> See Joel Brockner, "Why It's So Hard to Be Fair", *Harvard Business Review* (March 2006) [Brockner].

<sup>94</sup> Stephanos Bibas, "Transparency and Participation in Criminal Procedure" (2006) 81 NYU L Rev 911 at 949. Bibas states that "people respect the law more when it is visibly fair and when they have some voice or control over its procedures."

<sup>95</sup> Brockner, *supra* note 93.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

If venue rules become so manipulable, or so meaningless as to become obsolete, this will have a negative impact on the interest of justice, process fairness, and the overall perception of the bankruptcy system. Although the ABI Commission was unable to reach an agreement on how to reform the bankruptcy venue statute,<sup>99</sup> others should pick up where the Commission has left off and continue the conversation about bankruptcy venue reform before it becomes even harder to implement viable reforms.

iii. *Ideas for Bankruptcy Venue Reform*

Advances in technology threaten a location's relevance to bankruptcy law. Yet, as this article has shown, a case's location can still affect the outcome and concerns about process fairness and judicial integrity still dictate a need for consideration of location.<sup>100</sup> The preceding subsection has illustrated the importance of continuing to discuss venue reform in bankruptcy. Although technology has arguably made it somewhat easier for parties to remotely participate in bankruptcy cases, it has also made it more difficult for new types of companies to discern where to situate their cases. As previously discussed, a popular proposal would eliminate the state of incorporation venue prong and require all bankruptcy cases to be filed in a corporation's principal place of business. Technological advances and globalization, however, pose challenges to this proposal. Companies with assets all over the country or globe may have multiple locations that could arguably constitute their "principal place of business." In contrast, companies that exist entirely online may not be able to identify with certainty any physical location that could serve as their principal place of business. This uncertainty creates confusion in the law and may encourage companies to try to devise a way to situate a case in a location that is convenient only to them or their most important lenders.

One potential solution for bankruptcy venue reform is to extend the Commission's recommendation about splitting Chapter 11 into two tracks to the venue rules as well. What this would mean is that there would essentially be two sets of venue rules, one for large, multinational firms (and perhaps digital companies as well), and one for small- and medium-sized businesses.<sup>101</sup> The venue rules could remain largely unchanged for the latter category, but

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<sup>99</sup> Commission Report, *supra* note 13 at 310-14.

<sup>100</sup> Brockner, *supra* note 93.

<sup>101</sup> Commission Report, *supra* note 13 at 310-14.

change dramatically for the former. For example, to address the unique challenges of companies in the former category, some scholars have proposed creating a national bankruptcy court.<sup>102</sup> This court would have ample resources to accommodate claims and interests arising from a variety of locations and would use the best technology. To the extent practical, the court could be staffed by judges who are willing to travel to different parts of the country for hearings.

Of course, the development of a national court does not mean that local courts have no role to play in the new bankruptcy system. These courts would be particularly valuable to smaller debtors and would remain the primary venues for small- and medium-sized bankruptcy cases.

Even if a national bankruptcy court is adopted, provision must still be made to guarantee process fairness and to ensure the integrity of the bankruptcy system. Developing procedural safeguards<sup>103</sup> will naturally invite inquiries into the location of the relevant parties in a bankruptcy case meaning that, although perceptions may have changed about what is “local,” a bankruptcy case’s location will still be given serious consideration.

With advances in technology and globalization, a bankruptcy case’s location at first glance seems to matter less—parties who want to participate in a case can do so via Skype, telephone, or the internet. But digging deeper reveals that many of the problems associated with case participation are not eliminated by technology, and technology in fact can sometimes make the question of where to situate a bankruptcy case much harder. The idea that bankruptcy is a system designed to protect the rights of all parties remains a core principle. This means that as the Bankruptcy Code undergoes revisions, it will be critical to focus on the quality of access to bankruptcy court through the development and revision of venue rules. Even if the nature of the bankruptcy system changes, bankruptcy cases must continue to take place in venues that can meet the needs of all affected parties.

Just because the ABI Commission failed to reach a consensus on how to revise the bankruptcy venue rules does not mean that others cannot pick up

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<sup>102</sup> “Is it Time for a National Bankruptcy Court?” 30 No. 8 Bankr. Ct. Dec. News 1 (11 March 1997).

<sup>103</sup> For examples of procedural safeguards that might be considered, see Coordes, *supra* note 8 (arguing for a hearing on venue at which the United States Trustee is heard); Bufford, *supra* note 70 at 107 (arguing for the separation of the decision to open a case from the decision of where a case takes place and for notice to all parties in interest with respect to the latter decision).

where the Commission has left off.<sup>104</sup> The venue rules and procedures clearly need an update. Current proposals calling for a debtor's choice of venue to be cabined to the location of the debtor's principal place of business may make little sense in light of how technology and globalization have enabled the creation of debtor companies with no clear or primary physical location. Fresh ideas are needed to ensure the consistent treatment of debtors and those who interact with them while in bankruptcy.

Scholars have proposed many ideas for reforming the bankruptcy venue rules and procedures over the years.<sup>105</sup> These proposals should not fall by the wayside simply because the ABI Commission was unable to determine the way forward. Instead, it is more critical than ever to discuss and debate ideas for venue reform before new advances make the current venue rules even more manipulable and obsolete. Although forward-looking legal reforms may be difficult to implement, encouraging proposals to be brought forward will make it more likely that viable changes can be put into place.

Even as technology advances and the world grows more interconnected, physical location will remain relevant in bankruptcy law. A case's physical location still affects who may come to court and participate in the case, the number of witnesses or experts that may gather or interact, and the type and quality of interactions that parties can have with each other. A bankruptcy case can also provide a physical meeting space for companies with an otherwise virtual existence. If bankruptcy venue reform is truly stymied, at a minimum we must find ways to keep local parties involved.

#### IV. Conclusion: Ideas and Further Discussion

As discussed, there are many possible avenues for pursuing bankruptcy venue reform. Congress could make changes directly to the statute to reduce the number of venue options or to make the existing options less manipulable. Reforms might also come through creating procedures for more parties to be heard and involved in a venue decision. Reform could even come from the bankruptcy courts themselves, in the form of new local rules to govern case practices, the establishment of a national court for large cases,

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<sup>104</sup> Commission Report, *supra* note 13 at 310-14.

<sup>105</sup> In fact, in a previous article, I have advocated for venue reform in the form of new venue procedures, with the United States Trustee taking a more active role in venue discussions and proceedings, see Coordes, *supra* note 8. Other proposals have been mentioned throughout this article.

or judges simply cracking down on filings that seem particularly concerning for smaller stakeholders.

Regardless of the particular avenue that is ultimately chosen, technology and globalization are making the status quo particularly unacceptable. Thus, the ABI Commission's lack of consensus on venue reform should not end the debate. In an effort to move the debate forward, this article has shown that problems with venue and case placement will only become more complicated as companies expand globally and virtually.

At the heart of the question about venue reform is a question about the integrity of the bankruptcy system. If bankruptcy is to remain an accessible system to all parties, changes to bankruptcy venue are as necessary as any of the other changes recommended by the ABI Commission.

Technological change and globalization pose great challenges and present great opportunities for bankruptcy practitioners and theorists. As we focus on ways to adapt bankruptcy rules and procedures to the needs of a changing world, it is critical to recognize the role technology and globalization can play in keeping the bankruptcy system accessible to many, as well as the harm they can pose in granting that accessibility only at a high cost. Bankruptcy venue rules and procedures must adapt to address the threat posed to the bankruptcy system's perceived integrity by these external forces.