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BANKRUPTCY AND THE ENTITLEMENTS OF THE GOVERNMENT: WHOSE MONEY IS IT ANYWAY?

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ABSTRACT

A debate between two groups of scholars has dominated bankruptcy scholarship for the past decade. The first group, often referred to as the creditors' bargain theorists, argues that creditors' agreements with debtors create entitlements to payment; the proper role of the bankruptcy system, therefore, should be to benefit creditors by enforcing rules to which creditors would have agreed before bankruptcy. The second group of scholars contends that the goals of the bankruptcy system should not be limited to the interests of creditors. Instead, they maintain that the bankruptcy system, as a part of our country's wider system of social protection, should further a variety of social interests. Professor Mann joins the debate by providing a theoretical justification for the position that the bankruptcy system should pursue distributive goals beyond the enforcement of the creditors' bargain. Specifically, Professor Mann examines principles of distributive justice and explains that the government's role in creating and supervising the bankruptcy system entitles it to any value created by that system above what would have been created by state-law remedies. Focusing on utilitarian and autonomy-based perspectives, he suggests that creditors are entitled only to what they could have expected to receive in the absence of a bankruptcy system, and that the government may use any additional value to further any of its legitimate interests.

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