
A RETROSPECTIVE LOOK AT BANKRUPTCY'S NEW
FRONTIERS

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It is something between awkward and an honor to be asked, as the creators of this Symposium did, to be the keynote speaker at a gathering called “Bankruptcy’s New Frontiers.” The Symposium, by its very title, is—wholly appropriately—about where bankruptcy is going, and investigating, as well as celebrating, the enormous creativity, hard work, and genius of those who are at the cutting edge of helping bankruptcy law evolve to its “new frontiers.” In that, I am at best a minor player from the perspective of 2017, notwithstanding my recent work in a side area dealing with bankruptcy and SIFIs—systemically important financial institutions—and despite a couple of energizing (for me, at least) pieces with David Skeel over the past half-dozen years.

That doesn’t account for the honor. So, I am resigned (at least in part) to the idea—and hence the awkwardness—that my invitation here, as the keynote speaker, has less to do about my role in the future than the past—although one of my guiding beliefs as an academic has always been that *all* scholarship is never definitive, but is about moving the ball forward so that others, with new and different insights, can pick the ball up and run with exciting, pathbreaking scholarship. The best of the past *is* a part of the future. In that, I have significant pride in thinking my work moved the ball forward, inviting a host of new, and creative, people to become involved. I am “keynote” in the sense of “let’s start with how we got to where we are, in a world in which we could reasonably talk about ‘Bankruptcy’s New Frontiers’ and gather such an incredible group of academics, practitioners, and judges.”¹

And, in doing this, it is, I think, important to remember that not only normative frameworks change with time but, equally, so does the world to which the frameworks are responding. The “creditors’ bargain” may have been the first comprehensive normative framework for thinking about bankruptcy

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¹ Even in that, there is a bit of awkwardness, when one of the panels, with distinguished presenters and panelists, is explicitly entitled “A New Creditors’ Bargain.”

law, as this Symposium postulates, but it was a product not only of the emerging scholastic work at that time, but also of the actual world—of firms, capital structures, and players—that existed at that time. In a recent piece that I resonate with (cogently entitled *Three Ages of Bankruptcy*), Mark Roe suggested that

we see core provisions emerging in practice, dominating for a time, and then fading in importance. Each decision-making method has had its heyday. Each method's rise and fall usually fit with underlying market conditions and basic bankruptcy goals, sometimes mapped to political ideology currents, and often reflected the influence of powerful groups, such as well-organized creditors.²

That is, I believe, true not just of practice but of normative frameworks that respond to the world as we see it. It is an appropriate time to take stock of changes in organizations and practices, as well as theory and new analytical tools, to see to what extent what was novel, perhaps revolutionary, and perhaps normatively persuasive, thirty to forty years ago, needs ongoing adjustment and reform—exactly the work that those gathered here tonight have been so engaged in over the past twenty years.

But as this Symposium, so appropriately, does exactly that, it is at least interesting, and perhaps worthwhile, to travel back forty years in time when, I dare say, there wouldn't have been such a star-studded conference about "Bankruptcy's New Frontiers." (After all, and not irrelevant to what I am about to say, the Bankruptcy Code of 1978, following a brief historical "tradition" of forty-year intervals between major revisions, almost certainly to be broken in 2018, is of that age as well.)

I graduated from law school in 1975, and landed a job at Stanford Law School in early 1976 while clerking for Judge Marvin Frankel in the Southern District of New York.³ A part of my appeal as a candidate, at least as I surmised then, was my interest in, and existing scholarship about, the Uniform Commercial Code, and particularly Article 9, dealing with secured transactions—not exactly a "hot button" topic for budding legal academics of that era. I had, while a third-year student at Yale Law School, coauthored a piece with my classmate Tony Kronman, called *A Plea for the Financing Buyer*, that was published by the Yale Law Journal in its first issue after our

² Mark J. Roe, *Three Ages of Bankruptcy*, 7 HARV. BUS. L. REV. 187, 188 (2017).

³ While I was offered and accepted the job in early 1976, it was postponed—as both sides knew at the time—by my 1976–1977 clerkship with Justice William Rehnquist. The job itself was due, in some important ways, directly to a phone call from the Stanford Law School's appointments committee to my co-clerk, Mary Jo White—who has gone on to a very distinguished career of her own, albeit not as a legal academic. When she said "no interest," and the person at the other end of the phone asked whether she knew anyone who might be interested, the phone was handed to me across our two desks that faced each other in a single office.

graduation.⁴ I think no one would claim it was a major work, but it signaled an interest in the field. Then, as I began my clerkship with Judge Frankel, I passed some ideas I had in the general area on to my contracts and commercial law professor at Yale, Ellen Peters (who I had the good fortune of being a teaching assistant for during my final year at Yale). After a bit of back-and-forth, she suggested that we coauthor a piece, which we began to work on during my Frankel clerkship, dealing with intersections between Articles 2 and 9 of the Uniform Commercial Code.⁵

Thus, by the time I talked to Stanford Law School, I was “marked” as a commercial law, and, indeed, as a secured transactions, kind of guy—which didn’t describe many people on the “potential legal academic” circuit at that time. I had never taken bankruptcy (or debtor-creditor) law at Yale from the Law School’s luminary, J.W. Moore (although I did take a course on reorganizations—mostly about the New Haven Railroad—from a corporate law professor, Joe Bishop).⁶ But, and I think reflective of the state of bankruptcy law at that time, Stanford had no one on its regular faculty teaching bankruptcy law. (It was fortunate enough to have one of the great practitioners of that era, George Treister, fly in as an adjunct professor from Los Angeles once a week for several years to teach a course on debtor-creditor relations.)

So, as I arrived at Stanford in 1977, Stanford had its eyes on me to eventually teach bankruptcy law, although in the beginning I occupied myself teaching Contracts, Consumer Law, and Secured Transactions. After taking a two-year leave to practice in San Francisco, I returned to Stanford Law School in the fall of 1981 and, with I suspect relief to those putting together the curriculum, indicated a desire to try my hand at teaching bankruptcy law. In the days of hard-copy books, not Internet-accessible material, all the bankruptcy casebooks at that time were still focused on cases under the Bankruptcy Act of 1898 (as well as its numbering system, so Section 60 instead of Section 547 for preferences). Thus, the presence of a new Bankruptcy Code, brought into being in significant part by my contemporaries—particularly the brilliant collaboration between my classmate Richard Levin and his Harvard counterpart, Ken Klee, working for

⁴ Thomas H. Jackson & Anthony T. Kronman, *A Plea for the Financing Buyer*, 85 YALE L.J. 1 (1975). My student note, inspired by a corporate finance course taught by Marvin Chirelstein, also demonstrated an interest in the general field of reorganizations. Note, *Giving Substance to the Bonus Rule in Corporate Reorganizations: The Investment Value Doctrine Analogy*, 84 YALE L.J. 932 (1975).

⁵ Thomas H. Jackson & Ellen A. Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907 (1978). While the piece was published after I arrived at Stanford Law School, it was in preliminary draft long before.

⁶ And had written a student note involving reorganization law. See Note, *supra* note 4.

opposite sides of the aisle in the House Judiciary Committee—was a major factor in how I decided to approach teaching (and thinking about) bankruptcy law. (I think it is easy to underestimate the galvanizing factor the “new” Bankruptcy Code brought to scholarship. For example, its synthesis of old Chapter X and Chapter XI into a new Chapter 11, with very different language and, to some extent, flexibility, invited not just academic, but also judicial, *de novo* work. In a number of ways, I was in the right place at the right time.)

Because I knew—at least beyond superficially—little actual bankruptcy law, I was not invested in a particular way of teaching the 1898 Bankruptcy Act, and had become increasingly fascinated in the emerging field of law and economics (as particularly evident by my 1978 piece on anticipatory repudiation in contract law⁷ and my 1979 piece with Tony Kronman on secured financing and Priorities Among Creditors),⁸ I concluded none of the then-existing casebooks would do—in retrospect, a rather daring move for a novice about to teach for the first time in the field. So, drawing on some old chestnuts (such as *Case v. Los Angeles Lumber*⁹ and *Local Loan Co. v. Hunt*¹⁰), I fashioned my own set of course materials mostly from the first twelve or so volumes of the Bankruptcy Reporter.

Seeking an organizational theme, I was of course influenced by the then-extant casebooks, but I was also trying to figure out whether and how law and economics as a field might have something to say, and this led me to my crucial organizing theme for the course. That theme was to look at everything through the lens of “why do we have bankruptcy law in the first place?” While it was obvious “why” in the case of a “fresh start” for human beings (in the narrow sense of something that wasn’t available outside of bankruptcy law, without necessarily explaining *why* that something was normatively useful), it was much less obvious “why” in the case of nonhuman entities, such as corporations. There was a robust body of debt collection law outside of bankruptcy, and in a world where shareholders were protected by limited liability, it wasn’t clear what bankruptcy *did* since, for an insolvent company, nonbankruptcy debt collection rules had a clear way of distributing the limited assets of the insolvent corporation.

⁷ Thomas H. Jackson, “*Anticipatory Repudiation*” and the Temporal Element of Contract Law: *An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance*, 31 STAN. L. REV. 69 (1978). (Douglas Baird was the Managing Editor of the Stanford Law Review who worked closely with me after the “acceptance” of the piece, and who, even as a student, was unafraid of challenging my reasoning.)

⁸ Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979).

⁹ *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

¹⁰ *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).

As I searched for at least tentative answers to this baseline question in existing bankruptcy scholarship, I found what I perceived to be essentially a vacuum. While there were some really interesting “modern” scholarship pieces, such as Vern Countryman’s masterful piece on executory contracts,¹¹ or a lesser-known piece by John McCoid questioning preference law,¹² there was—in my view at least—none of the excitement about “first principles” or even the major intellectual debates of the late 1920s and early 1930s, such as Bonbright and Bergman’s impressive piece that looked into the issues between, what would now be known as, absolute versus relative priorities.¹³ I found the vast majority of academic scholarship of the 1960s and 1970s to be in an unimpressive rut, with the articles essentially talking only to other admitted members of the bankruptcy guild.

I therefore started to organize the course around the central question: “Why?” And putting aside the fresh-start policy for an individual debtor as a discrete issue, I asked the following: “in a world with robust state law debt collection rules (mostly ‘first come, first served’, within a world of priorities such as Article 9), what is the function of bankruptcy?” I had no preconceived answers—I thought the refrain “equality is equity” used by so many academics, practitioners, and judges at that time to be both unanalytical and hopelessly “soft.” So I began to look to my newfound appreciation of law and economics to ask, since the debtor doesn’t—that is, shareholders don’t—really care (the creditors will take everything, at least in theory under either nonbankruptcy law or bankruptcy law with Justice Douglas’ absolute priority rule), what’s the point of bankruptcy law? And that got me to thinking about whether there were any advantages to a collective distribution system, such as bankruptcy, over the “first come, first served” distribution systems reflected in state law.

The answer to that, I decided early on, lay in collective action problems—whether it be thought of in terms of a classical prisoner’s dilemma or an issue with fish in a lake or oil in a common field.¹⁴ It was, if you will, my “eureka” moment. I could suddenly see a reason for a bankruptcy law apart from the fresh start for the individual.¹⁵ And with that simple, and in some ways sole, insight, I

11 Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439 (1973).

12 John C. McCoid, II, *Bankruptcy, Preferences and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249 (1981).

13 See generally James C. Bonbright & Milton M. Bergerman, *Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganization*, 28 COLUM. L. REV. 127 (1928).

14 See Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain*, 91 YALE L.J. 857, 862 (1982) (discussing the characteristics of a classical prisoner’s dilemma).

15 The latter was an issue I postponed for several years, in part because I couldn’t get good insight into it until I also brought in cognitive and volitional psychology—now oftentimes called behavioral economics—which lay in my future. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1934 (1985) (“By blending psychological

suddenly had a lens through which to analyze bankruptcy's myriad provisions. In a move I came to regret—somewhat—I labeled it a “creditors’ bargain” to signify its locus in a hypothetical contract among the likely recipients of a distribution of the bankruptcy estate; that phrase, unfortunately, came to suggest to some that I had a bias in favor of creditors over debtors. In retrospect, I might have better labeled it a “claimants’ bargain” or something broader.

While I didn't think of it at the time, I later really appreciated Douglas Baird's comments at a 2006 event at which I was receiving a Chair appointment, postpresidency, at the University of Rochester. Douglas, in introducing me, said:

For a whole generation of us, the mists suddenly cleared. Our own academic agendas had to be redefined. However, writing suddenly became much easier. . . . [It was an] exhilarating time[] for anyone lucky enough to be in the field. To be honest, you didn't even need to be that good to do great work. It was like knocking Coke bottles over with a baseball bat.¹⁶

The collective action idea was powerful—and, indeed, in retrospect, left an entire field open for rapid scholarship as Douglas Baird suggested (and he and I exploited)—but, in itself, incomplete. A closely related, but ancillary, insight brought clarity—again, that I could not find in the academic literature, although Vern Countryman's executory contract piece was a starting point.¹⁷ It started with what Douglas Baird and I coined the *Butner* principle—grabbing onto a phrase from an otherwise forgettable Supreme Court case that happened to be decided just as I was getting immersed in bankruptcy law. *Butner*, almost as a throw-away, put forth a principle that said (or so we said) bankruptcy shouldn't change nonbankruptcy values without a reason.¹⁸ That

theories and data with economic theories” I was able to “develop[] two principal hypotheses to account for the nonwaivability of discharge.”).

¹⁶ Douglas G. Baird, *Introduction of Thomas H. Jackson*, in *OF COMMON POOLS, GAMES, AND AN AFTERLIFE* 9, 10 (2006).

¹⁷ Countryman, *supra* note 11.

¹⁸ *Butner v. United States*, 440 U.S. 48, 55 (1979). The words we glommed onto, from Justice Stevens' opinion for the court, were

[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving “a windfall merely by reason of the happenstance of bankruptcy.” *Id.*

While this was a statement of *interpretation*, following the observation that, apart from certain provisions, “Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law,” we took it (for our purposes) to be expressing a *normative* as well as a positive statement: bankruptcy law shouldn't change state-created rights without a clearly

principle, if you will, captured what had become clear to me: bankruptcy was a different *procedural* resolution forum to resolve disputes among creditors, but should not change nonbankruptcy entitlements without a solid reason related to this new procedural resolution forum. The first starting point: if secured creditors won outside of bankruptcy, there was no identifiable bankruptcy principle (beyond, to me, the flabby, unprincipled, “equality is equity” mantra) to change that outcome in bankruptcy. That was Douglas Baird’s imagery of knocking Coke bottles over with a baseball bat as one went through the process of comparing bankruptcy provisions versus this theoretical model.

But this led to a second, and perhaps equally important, baseline principle: if nonbankruptcy law was the starting point, how clearly could we identify those nonbankruptcy entitlements in terms of rights among claimants? And that, from the old chestnut *Chicago Board of Trade v. Johnson*,¹⁹ turned into a second, and much less appreciated, major insight: what mattered were nonbankruptcy *entitlements* vis-à-vis other creditors, not against the debtor (although, importantly, perhaps against new owners) and not based on whether it was labeled a security interest.²⁰ So, for example, if the Chicago Board of Trade could withhold the debtor’s exchange seat from *any* new owner—including creditors who took over an insolvent entity—it wasn’t really an asset of the estate that the creditors could claim.²¹ This led to an examination of what were truly *assets* of the estate, what were clearly *liabilities* of the estate, and what were either (a) both (think executory contracts, and hence the decision to accept or reject) or (b) neither (such as the seat on the Chicago Board of Trade).²²

But while there were “easy” advances, it also remained the case that parts of bankruptcy law, so envisioned, still had a lot of tough work cut out for it, even without contemplating Chapter 11 reorganization law. For example, as John McCoid had foreseen, there was a tension between undoing prepetition transfers and a goal of creditors in the know forcing an insolvent entity to file

defined *bankruptcy-related* reason for doing so. *Id.* at 54. To us, the admonition applied to Congress as well as to the courts and provided a lens through which to analyze how well Congress had done with the 1978 Bankruptcy Code.

¹⁹ 264 U.S. 1 (1924).

²⁰ See, e.g., Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73, 76 (1985) (explaining what “sound bankruptcy policy” counsels in the absence of full protection of entitlements).

²¹ For a more modern analogue involving airport landing slots allocated by the FAA, see THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 97 n.22 (1986).

²² *Id.* at 97-98.

for bankruptcy.²³ Getting “timing” right struck me then (and still strikes me now) as incredibly difficult.²⁴

Even with these starting pieces, and with the general issues that seemed, to me, to remain difficult as a practical matter, Chapter 11 of the new Bankruptcy Code was, through these lenses, both consistent in the abstract and puzzling in at least some of its details. While it adhered to the absolute priority rule in principle,²⁵ it also clearly identified a distinction between the rights of a dissenting creditor (i.e., what that creditor would get in a Chapter 7 liquidation)²⁶ and the rights of a dissenting class (i.e., what that class would get using the absolute priority rule).²⁷

While I was puzzling over what that distinction—which was clearly designed to facilitate both bargaining between creditors and equity owners, and decisionmaking by the bankruptcy judge—meant, others, such as Mark Roe, began to question more broadly the need for negotiations in Chapter 11.²⁸ I, expanding on that, suggested that it was its negotiation *framework* that was called into question, because, if one could use the market to value assets, including selling the assets as a going concern in a Chapter 7 proceeding, there actually was no distinction between what a creditor would get in a liquidation from what it would get in a reorganization.²⁹ But we were all pointing in the same direction; indeed, in my 1986 book, I suggested Chapter 11 was unnecessary in the case of at least publicly traded companies since a Chapter 7 sale would accomplish essentially the same result.³⁰

That’s not to say we were particularly accepted by the bankruptcy bar—as perhaps might be discerned by our extreme quizzical look at the whole Chapter 11 framework. But things were at work that would nudge the edgy

²³ McCoid, *supra* note 12.

²⁴ See JACKSON, *supra* note 21, at 193-208 (addressing the difficulty of timing bankruptcy proceedings properly); Thomas H. Jackson & David Skeel, *Bankruptcy and Economic Recovery*, in FINANCIAL RESTRUCTURING TO SUSTAIN RECOVERY 97 (Martin Neil Brady et al. eds., 2013) (discussing the role bankruptcy plays in economic growth); see also Douglas G. Baird, *The Initiation Problem in Bankruptcy*, 11 INT’L REV. L. & ECON. 223 (1991) (discussing the difficulty of determining who should initiate a bankruptcy proceeding, and when).

²⁵ See 11 U.S.C. §§ 725, 726 (2012); see also *id.* § 1129(a)(9) (2012).

²⁶ 11 U.S.C. § 1129(a)(7) (2012).

²⁷ *Id.* § 1129(a)(9) (2012).

²⁸ Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527 (1983) (proposing a valuation by way of a ten percent stock issuance); see also Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127 (1986) (arguing that the entire law of corporate reorganizations is hard to justify); Lucian Ayre Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988) (proposing the use of a rights-based method to divide the proceeds of a reorganization).

²⁹ JACKSON, *supra* note 21, at 209-24; Thomas H. Jackson, *Of Liquidation, Continuation, and Delay: An Analysis of Bankruptcy Policy and Nonbankruptcy Rules*, 60 AM. BANKR. L.J. 399 (1986).

³⁰ JACKSON, *supra* note 21, at 218-24.

hostility³¹ to a bit of an end. In my case, the most important was the incredible fortuity of Peter Coogan—one of the legendary figures in Article 9's history and a practitioner who always taught on the side—moving to San Francisco because of asthma, where he was “scholar in residence” at a bankruptcy law firm. After checking the Association of American Law Schools' directory to see who might be teaching bankruptcy in the Bay Area, he gave me a cold call shortly after arriving in San Francisco, asking if I might be interested in teaching a course with him. We did so for two years prior to his death as a seminar at Stanford Law School, which was exhilarating for all involved. I, the “young Turk,” was sitting discussing reorganization cases and laws with Peter Coogan, fifty years my senior, in front of our students. Everyone—myself included—learned a lot, and I suspect he told his numerous contemporaries that I didn't actually have horns.³² At some point shortly after all of this, I was invited to join the National Bankruptcy Conference.³³

In spite of that, as a matter of pure reasoning, at least in terms of statutory reform or immediate judicial impact, this emerging academic work on bankruptcy law, and reorganization law in particular, was a bust. I was an active participant, at the urging of Ronald Trost, in the question of compensation for delay for secured creditors in Chapter 11 (due in substantial part to its negotiation framework). Despite my pro se amicus brief, which I had thought was unassailable, the Supreme Court unanimously rejected the question in *Timbers of Inwood Forest*,³⁴ and there were never any statutory reforms cutting down on the 1978 Code's decision to make Chapter 11 a place for judicially overseen negotiations with judge-controlled valuations.

³¹ This tension is perhaps best reflected by the exchange between Alan Schwartz and I, on the one hand, and Homer Kripke, on the other hand. Thomas H. Jackson & Alan Schwartz, *Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke*, 133 U. PA. L. REV. 987, 988 (1985); Homer Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 931 (1985). Professor—now Senator—Elizabeth Warren pointed to this exchange as “[a] recent exception to the practice of ignoring disagreeable policy differences” as she began her own “aggressive and irreverent debate” with Douglas Baird. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 776, 776 n.1 (1987).

³² I would pick Peter Coogan up from the train station in Palo Alto prior to our class on the Stanford campus and then take him back to the train station for his return to San Francisco at the end of the class. Week after week, Peter Coogan would get off the train station prior to the class and say essentially: “Last week you made six assertions of which I was skeptical. On reflection, I think you were right on points one, three, and six, but I disagree with you on two, four, and five for the following reasons.” The ensuing discussions were incredibly fruitful to me and, I believe, to him.

³³ I was a member from 1986 to 1999, when I resigned as it became clear to me my administrative career had, at least for the foreseeable future, disrupted my academic work.

³⁴ See *United Savs. Ass'n of Texas v. Timbers of Inwood Forest Ass'n Ltd.*, 484 U.S. 365, 382 (1988) (holding that an undersecured creditor “is not entitled to interest on its collateral” for delay under Chapter 11).

But as David Skeel noted in his masterful history of bankruptcy law, while the law and economic scholars—meaning me, Douglas Baird, Mark Roe, and others—may have lost the battle, in some important respects we won the war.³⁵ David Skeel points out that judges increasingly began to see Chapter 11 as a vehicle for a going-concern sale of the business, which eliminated most of the negotiations over asset valuation issues, and came very close to what we had been advocating.³⁶ Close enough that by the time of Chrysler's bankruptcy, a going-concern sale of the majority of Chrysler's assets, with the buyer favoring certain unsecured health care claims of former employees, was roundly criticized as much for constraining the bidding process as for upsetting the bankruptcy distributional scheme that would have normally ensued in a sale of the business.³⁷

In retrospect, it amazes me how rapidly all of this unfolded. My first piece focusing squarely on the normative underpinnings of bankruptcy law, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*,³⁸ was published in 1982. And although I continued to write occasional pieces in the field thereafter,³⁹ one could say my “culminating” statement was my

35 DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 213 (2001) (“[A]ctual bankruptcy practice has taken on many of the market-oriented characteristics that these scholars have advocated.”).

36 See David A. Skeel, Jr., *From Chrysler and General Motors to Detroit*, 24 WIDENER L.J. 121, 128 (2015) (“Although section 363 [of the Bankruptcy Code] does not say anything about an auction, most judges require that a proposed sale take the form of an auction that gives potential bidders at least thirty days to submit a bid.”); see also Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 699 (2003) (“Modern bankruptcy judges oversee auctions of going concerns and implement prenegotiated plans of reorganization . . .”); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 82 (2004) (recognizing the “ability of bankruptcy judges to conduct sales and their willingness to confirm prenegotiated plans” of reorganization).

37 I was one of the critics. See Jackson & Skeel, *supra* note 24, at 116-20; see also Barry E. Adler, *A Reassessment of Bankruptcy Reorganization After Chrysler and General Motors*, 18 AM. BANKR. L. REV. 305, 307 (2010) (“[T]he restrictions placed on the [Chrysler] bidding process do not appear to be sensible regardless of the sale’s timing.”); Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 730 (2010) (“Chrysler breached appropriate bankruptcy practice in ways that made opaque both Chrysler’s value in bankruptcy and the [reorganization] plan’s allocation to the company’s prebankruptcy creditors.”); Todd J. Zwicki, *Chrysler and the Rule of Law*, WALL ST. J. (May 13, 2009, 12:01 AM) <https://www.wsj.com/articles/SB124217356836613091> [<https://perma.cc/FEV8-EK89>] (“[Chrysler’s] asset-sale plan implements a de facto reorganization but denies to creditors the opportunity to vote on it.”).

38 Jackson, *supra* note 14.

39 See generally Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738 (1988); Thomas H. Jackson, *The Continuing Life of Dean v. Davis*, 1988 ANN. SURV. BANKR. L. 3 (1988); Thomas H. Jackson, *Statutory Liens and Constructive Trusts in Bankruptcy: Undoing the Confusion*, 61 AM. BANKR. L.J. 287 (1987). In addition, Douglas Baird and I wrote a lengthy and note-filled casebook on bankruptcy, the second edition of which was very different than the much thinner first edition, which was published in 1985.

1986 book, *The Logic and Limits of Bankruptcy Law*,⁴⁰ published when I was 36.⁴¹ That said, I think some of these early insights are enduring. Indeed, David Skeel and I wrote a piece, published in 2012, usefully (at least I think so!) analyzing “new” instruments such as repos, derivatives, and swaps through the lens of attributes, assets, and liabilities that was established more than thirty years ago and derived from *Chicago Board of Trade*.⁴² And many of the same insights, particularly the idea of Chapter 11 as a vehicle for a going concern sale, have formed the basis of a proposal I have been heavily involved in as of late for a bankruptcy mechanism to resolve systemically important financial institutions without needing to resort to Title 2 of the Dodd-Frank Act.⁴³

Even recognizing what I believe to be the enduring benefits of some of the analysis, the field moves on, in really important and interesting ways, as reflected by those present at this Symposium—and, indeed, that the Symposium celebrates with its title: “Bankruptcy’s New Frontiers.” Bonbright and Bergeman’s piece on absolute priority versus relative priority,⁴⁴ thought settled by many (including myself) in *Case v. Los Angeles Lumber*,⁴⁵ has come under renewed questioning, in terms (mostly) of cutting off an upside “tail”

DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY (2nd ed. 1990).

⁴⁰ JACKSON, *supra* note 21. I could make a case that the second edition of Douglas Baird’s and my casebook on bankruptcy, BAIRD & JACKSON, *supra* note 38, was that “culminating” statement, although casebooks, by their nature, rarely get the academic attention of articles and “book” books.

⁴¹ Shortly after that, I went into administrative exile, as a Dean, Provost, and university President, for seventeen years—from 1988 to 2005.

⁴² David A. Skeel, Jr. & Thomas H. Jackson, *Transaction Consistency and the New Finance in Bankruptcy*, 112 COLUM. L. REV. 152, 169-92 (2012) (applying “core bankruptcy policies” to repos and derivatives).

⁴³ See, e.g., Thomas H. Jackson, *Building on Bankruptcy: A Revised Chapter 14 Proposal for the Recapitalization, Reorganization, or Liquidation of Large Financial Institutions*, in MAKING FAILURE FEASIBLE: HOW BANKRUPTCY CAN END “TOO BIG TO FAIL” 15, 15-58 (Kenneth E. Scott et al. eds., 2015); see also JOHN F. BOVENZI, RANDALL D. GUYNN & THOMAS H. JACKSON, BIPARTISAN POLICY CTR., TOO BIG TO FAIL: THE PATH TO A SOLUTION 1 (2013) (“[T]he too-big-to-fail problem would be solved if all financial institutions . . . could be resolved, that is, recapitalized, sold or wound down without triggering the type of contagious panic that can severely destabilize or even result in a collapse of the financial system and without resorting to taxpayer-funded bailouts to prevent such a catastrophe.”)(emphasis omitted); Thomas H. Jackson & David A. Skeel, Jr., *Dynamic Resolution of Large Financial Institutions*, 2 HARV. BUS. L. REV. 435, 456 (2012) (“[T]he principal focus of reform should be maximizing the effectiveness and likelihood of use of the bankruptcy process as an alternative to Dodd-Frank resolution . . .”). My involvement has included testifying multiple times before both the House Judiciary Committee and the Senate Banking Committee, and my current status as a member of the Federal Deposit Insurance Corporation’s Systemic Resolution Advisory Committee. The “sale” analogy, in this situation, has been buttressed by the work on “bail-in” debt and the like, around which my bankruptcy proposal for systemically important financial institutions is necessarily built.

⁴⁴ Bonbright & Bergeman, *supra* note 13, at 130.

⁴⁵ *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115-17, 122-23 (1939).

for equity in what is a probability scheme.⁴⁶ Others have revisited my original “reason” for bankruptcy—to solve a collective action problem—by suggesting it can be handled, outside of bankruptcy, by contractual devices or by “bail in” debt and the like⁴⁷ (which, indeed, is a major part of an international conversation about how to best resolve SIFIs in financial distress). Yet others are turning a more critical eye to much of the remaining equality principle⁴⁸ or to reassessing whether a “grab race” by creditors is necessarily undesirable,⁴⁹ particularly where today’s large bankruptcies have capital structures—and a set of players—very different from my 1980s paradigm of a large secured creditor or two and numerous, and diffuse, unsecured creditors. A model built

⁴⁶ See, e.g., Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930, 1935 (2006) (“Applying the absolute priority rule in the context of a corporate reorganization requires the enterprise to be valued.”); Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 828 (2017) (“The debate should shift from the question of how to find a bankruptcy mechanism that best vindicates the absolute priority rule to the question of identifying the priority rule that minimizes the costs of bankruptcy itself.”); Anthony J. Casey, *The Creditors’ Bargain and Option-Preservation Priority in Chapter 11*, 78 U. CHI. L. REV. 759, 806 (2011) (“[T]he absolute priority rule is not supported by the foundational theory upon which it is built. Rather, that theory—the creditors’ bargain—produces an alternative distribution rule that looks quite different from absolute priority.”). At least some of this may stem from a “more modern” view of “who” triggers bankruptcy. At the time I was developing my work—and I suspect even in the days of Justice Douglas’ *Case v. Los Angeles Lumber Products Co.* opinion—the debtor seemed to be in control. To the extent that modern bankruptcy is about creditors “in control” and jockeying for positions among themselves, the roadmap through that may look distinct. And other features of firms in distress factor into the renewed interest in relative priority. See Baird, *supra*.

⁴⁷ See, e.g., Viral V. Acharya, Barry Adler, Matthew Richardson & Nouriel Roubini, *Resolution Authority*, in REGULATING WALL STREET: THE DODD-FRANK ACT AND THE NEW ARCHITECTURE OF GLOBAL FINANCE 213, 231-37 (Viral V. Acharya, Thomas F. Cooley, Matthew Richardson & Ingo Walter eds., 2011) (discussing the best methods for approaching bankruptcy at large, complex financial institutions); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1050 (1992) (“Our proposal . . . is quite simply to repeal Chapter 11 of the Bankruptcy Code (insofar as it pertains to corporations) and thereby abolish court-supervised corporate reorganizations, effectively reassigning a ‘failing’ firm’s property rights to those with the best incentive to allocate the firm’s resources efficiently.”); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1851 (1998) (“This Essay’s central claim is captured in a variation on a trendy slogan: Privatize bankruptcy.”); Alan Schwartz, *Bankruptcy Workouts and Debt Contracts*, 36 J.L. & ECON. 595, 597-99 (1993) (offering new approaches to holdouts, coercive offers, and debt contracts in the context of bankruptcy).

⁴⁸ David A. Skeel, Jr., *The Empty Idea of “Equality of Creditors,”* 166 U. PA. L. REV. 699 (2017). Compare this with the position of Professors Baird, Casey, and Picker that there are few reasons to depart from bankruptcy’s distributional rules—currently, absolute priority and pro-rata distribution—and, instead, suggest that much of what looks like distributional deviations are better analyzed by focusing on the (sometimes complex) issues of what should be considered to be “inside” as opposed to “outside” the bankruptcy estate, which they call the “bankruptcy partition.” Douglas G. Baird, Anthony J. Casey & Randal C. Picker, *The Bankruptcy Partition* 166 U. PA. L. REV. 1675 (2018).

⁴⁹ Barry Adler, *The Creditors’ Bargain Revisited* 166 U. PA. L. REV. 1853 (2018).

for one needs to be reconsidered when its foundations change⁵⁰—and today's scholars are doing that.

And new features of the world in the twenty-first century—referring more to the increasing globalization of finance and the reality that any resolution scheme needs to deal with entities in multiple countries than to “new” instruments (such as derivatives, repos, and swaps, which can still be usefully analyzed using “old” tools)⁵¹—raise important new questions and considerations. In addition, the reality that municipalities, states, and other governmental entities (such as Detroit and Puerto Rico), can become functionally insolvent, and require some form of reorganization or resolution, raise incredibly interesting and difficult questions—such as the interplay between democratic institutions and the rights of claimants—that were never really a focus of the work during “my” time (despite New York City's mid-1970s flirting with default) and with which the scholarship of my period has only a tangential relationship.

All this ensures that the field for scholarship in bankruptcy is alive, well, and—going beyond simply well—robust. I think this Symposium can celebrate that robustness, as well as the excitement, and—unlike when I first started teaching bankruptcy law thirty-six years ago—*relevance* of bankruptcy scholarship as we move beyond bankruptcy law's statutory forty-year cycle, which seems now to have been a historical accident, not a prophesy of the future. Bring on the “New Frontiers”—bankruptcy law and practice will be the better for it.

⁵⁰ For an interesting piece, essentially making the same point in terms of bankruptcy practice over a much longer period of time, see Roe, *supra* note 2.

⁵¹ See Skeel & Jackson, *supra* note 42.

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