ESSAY

Bankruptcy's Turn to Market Value

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Chapter 11 was widely viewed as a failure in the first decade of the Bankruptcy Code's operation, the 1980s. Large firms were mired in bankruptcy for years; the process was seen as expensive, inaccurate, and subject to abuse. While basic bankruptcy still has its critics and few would say it works perfectly, the contrast with bankruptcy today is stark: bankruptcies that took years in the 1980s take months in the 2020s.

Multiple changes explain bankruptcy's success—creditor learning, statutory reform, better judging and lawyering, new techniques, fuller integration of the improved mechanisms that the 1978 Code added—and we do not challenge their relevance. But in our analysis, one major change is missing from the current understanding of bankruptcy's success: bankruptcy courts and practice in the 1980s rejected market value; today bankruptcy courts and practice accept and use market value. This shift is a major explanation for bankruptcy's success. It reduces opportunities for conflict in bankruptcy. It speeds up proceedings. It allows firms to be repositioned in market transactions. Deals among claimants and interests are more readily reached and the firm can ride through bankruptcy without the bankruptcy process materially scarring the enterprise.

This switch to market values has multiple channels: more whole-firm sales, wider and deeper access to financing for bidders and bankrupts, growing judicial deference to market valuations, and a bigger and more sophisticated private equity and distressed debt industry that buys bankrupt companies and their securities. We argue that valuation improvements explain much of the increased speed and efficiency of Chapter 11 practice over the decades. We provide evidence that valuation conflicts narrowed and that the corporate reorganization process accelerated.

This market-based-valuation result has implications for bankruptcy law reform around the world. Several European and Asian nations have looked to Chapter 11 to model their own restructuring laws. We urge caution. Chapter 11

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works best in conjunction with institutions that facilitate market valuation and market transactions. The United States developed such institutions only in recent decades; many nations have not developed them yet.

Chapter 11 went from being viewed by many as a deficient legal structure in the 1980s to a substantial success story by the twenty-first century. The switch to market thinking across the bankruptcy spectrum—in bankruptcy transactions, in judging, and in lawyering—goes far in explaining why.

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INTRODUCTION

We advance a set of related claims about bankruptcy's arc in the past four decades to help explain how bankruptcy rose from a suspect corner of transactional practice in the 1980s to a successful business law institution in the twenty-first century. Important to that success, we argue, was bankruptcy's move from rejecting market value as the arbiter of the debtor's value to accepting it. That change has yielded two major, related advantages for large-firm restructurings: (1) it facilitated shorter, less costly bankruptcies; and (2) it narrowed the range of potential valuation disputes. Bankruptcy became quicker and more effective.

In the decade after the Bankruptcy Reform Act[1] passed in 1978, valuation technology was a core debilitating weakness for

[1] Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C.).

business bankruptcy. But valuation technology improved during the next four decades, helping to propel bankruptcy's success.

Foundational to these developments were market-focused changes that came through several bankruptcy channels: (1) courts—which once blocked the sale of whole firms—switched to allow them; (2) judicial doctrine flipped from deeming market value irrelevant to viewing it as presumptively correct; (3) auctions of firms, divisions, and securities directly in market transactions became common, with the bankruptcy judge monitoring the propriety of the sale *process* without opining directly on the firm's value; and (4) the surrounding market-based bankruptcy institutions deepened and widened, as more financial firms traded bankrupt firms' securities or bought and sold the bankrupt firms themselves. The average length of time to resolve large business bankruptcies dropped by 90% from the early 1980s to the early 2020s—from three years to three months.[2] U.S. bankruptcies are much more rapid today than in 1978.

We begin with a brief primer on corporate restructuring and bankruptcy: Distressed firms that cannot keep up with their debt payments typically seek to reduce their debt obligations, often in bankruptcy and sometimes in out-of-court negotiations. Some debts are extinguished, while others are often converted into equity interests in the reorganized business. If the debtor and its creditors cannot come to terms, a bankruptcy court can force a restructuring plan on dissenting creditors.

But to force a nonconsensual restructuring on dissenting creditors, the court must determine that it comports with statutory safeguards meant to protect creditors. The court values the firm to see how much the business can pay back to creditors. It approves distributions to the prebankruptcy claimants, but only to the extent that it expects the firm's value will support those distributions without the firm returning to bankruptcy for another restructuring. The court then confirms a plan distributing that value in accordance with the statute's priority rules. The highest-ranking creditor is compensated in full before the next-ranking creditor is paid at all, and all creditors are fully paid before stockholders receive any value.[3]

To determine which creditors can participate—by receiving cash, debt claims, equity, or warrants on the reorganized firm—and whether stockholders must be zeroed out, the court must find

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2 *See infra* Figure 3.

3 *See* 11 U.S.C. § 1129(b)(2).

the firm's value. Finding that value is challenging; a business's value—even a nondistressed, nonbankrupt business's value—is often uncertain and disputed. When the creditors and debtor determine their negotiating positions prior to settling disputes and assenting to a plan of reorganization, they contemplate what the judge will and will not approve. Creditors' approval and a completed deal depend on what creditors expect the judge will view as the bankrupt debtor's value.

The reigning bankruptcy statute was enacted in 1978. During the 1980s, in the early years of this Bankruptcy Code, many academics were deeply disappointed with the system in action. One of the most widely discussed articles of the era viewed Chapter 11 as "untenable;"[4] another well-known analysis called it a "debacle;"[5] yet another said it had systemically "failed."[6] Bankruptcies took too long—three years on average for a large corporation. Employees lost their jobs and the business's value was thought to be frittered away. Managers loyal to shareholders controlled the process in ways that damaged the bankrupt firm's operations. Creditors were stymied from taking over the firm.[7]

Bankruptcy is viewed more favorably today.[8] Chapter 11 is a business law success story. The amount of time businesses spend

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[4] Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1043 (1992). For a similarly unenthusiastic view of Chapter 11's functioning during the 1980s, see Julian R. Franks & Walter N. Torous, *An Empirical Investigation of U.S. Firms in Reorganization*, 44 J. FIN. 747, 747 (1989).

[5] Barry Adler & Lawrence Weiss, *The Debacle of Corporate Bankruptcy*, 15 REGUL. 54, 54 (1992).

[6] Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 247, 248, 271–72 (1983).

[7] Notwithstanding early Chapter 11's slow pace and high cost to investors, a minority of scholars defended it for giving bankruptcy judges broad discretion to address distributional issues, such as effects on employees. *See, e.g.*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777, 786–88 (1987).

[8] *E.g.*, Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1751 (2020); David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 918 (2003) ("The endless negotiations and mind-numbingly bureaucratic process . . . [of] the 1980s have been replaced by transactions that look more like the market for corporate control."); Varouj A. Aivazian & Simiao Zhou, *Is Chapter 11 Efficient?*, 41 FIN. MGMT. 229, 245 (2012); *cf.* Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 191 (2004); Ken Baird, Katharina Crinson, Guilhem Bremond, Michael Broeders, Charlotte Ausema, Jan-Philip Wilde, Ana López, Silvia Angós, Mark Liscio & Samantha Braunstein, *The EU Adaption of Important Chapter 11 Provisions*, GLOB. RESTRUCTURING REV. (Nov. 27, 2023), https://perma.cc/UU2N-GYLR (stating that until at least 2019, "Chapter 11 was . . . the only successful restructuring option on the global level"); James H.M. Sprayregen, Jonathan Friedland & Roger J. Higgins, *Chapter 11: Not Perfect, but Better than the Alternatives*, 14 J. BANKR. L. & PRAC. 3, 30 (2005) (opining that

in bankruptcy court is on average now three months, not three years.[9]

"Chapter 11 has healed itself . . . . [It] is no longer the long, expensive process that it was in the 1980s, when storied companies like Pan Am slowly wasted away their remaining value in vainglorious attempts to survive in a changed marketplace."[10] Foreign nations seek to emulate Chapter 11. "The United States [now] has the most well-functioning corporate bankruptcy system in the world."[11]

True, litigation remains a source of delay and uncertainty, particularly for newly developed controversies (like new mass tort bankruptcies, aggressive liability management transactions, and new prebankruptcy transactions that generate fraudulent transfer issues). Fairness for nonfinancial creditors remains a source of controversy. But for many, perhaps most, large corporate bankruptcies, especially those with only financial players, the proceedings can be and often are swift. Even counting the new controversies (which induce long bankruptcies when the new controversies are in play), bankruptcy on average now takes about one-tenth the time it took when the statute became law.

What happened?

Bankruptcy courts' reorientation toward market-based valuation was plausibly central to bankruptcy's success. True, many new practices emerged through creative adaptation by bankruptcy practitioners and courts, without much in the way of

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Chapter 11 has become "hugely successful" and has become "the cornerstone of a vibrant private restructuring market . . . that efficiently cycles asset[s] . . . from a financially distressed entity's deathbed to a cradle, whether of the newly recapitalized historic entity or under new ownership after an asset sale").

Criticisms today come from other directions. The rise of private-equity-backed debtor firms, and their managers' intermittent aggressiveness in preserving value for their sponsors at others' expense, has led some to raise concerns about resurgent equity-holder power and process problems, especially in out-of-court restructurings. *See, e.g.*, Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1, 32–35 (2023); Jared A. Ellias, Ehud Kamar & Kobi Kastiel, *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083, 1113–15, 1128–29 (2022).

[9] Greater preparation for bankruptcy prior to filing could reduce time inside bankruptcy. But our impression is that even including preparation time, the total amount of time required to restructure corporate debts has fallen. That is, preparation time does not approach three years, the average length in the early 1980s.

[10] Stephen J. Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839, 840 (2004). While the text quotes one of the best statements of the positive view of bankruptcy's turn for the better, it's from a skeptic—who summarizes a common (and maybe the dominant) view.

[11] Anthony J. Casey, Good-Faith Filing in Chapter 11, at 16 (Aug. 22, 2024) (Wharton Initiative on Fin. Pol'y & Regul. White Paper) (available at https://perma.cc/33EN-QZ3J). *See infra* Part IV.

formal amendments to the written statute. Speed-up provisions embedded in the original 1978 Code (like prebankruptcy consent to an already-packaged plan and structural aspects like the potential for a debtor-in-possession lender to play a central role and encourage a speedier process) were dormant in the early 1980s, but practitioners and courts eventually learned how to use them. The 2005 amendments limited the debtor's period of exclusivity to propose a plan and delay resolution. These changes surely helped to speed up business bankruptcy.

In this panoply of change, one change is, in our view, missing from the discussion. Yet it is important and plausibly preeminent: courts slowly but inexorably turned to market value and to market transactions as increasingly able to deliver more reliable market valuations. The predictability of bankruptcy increased. That increase in predictability plausibly made compromises and deals among creditors easier.

The disputed valuation range among the parties to the bankruptcy is a central issue in many Chapter 11s: How much value can the debtor deliver to its creditors? Low-priority creditors and equity holders have an interest in the assigned value being high (so that the reorganization plan will include them), while others (typically high-priority creditors) have reason to want the court's valuation number to be low (regardless of what the true value is) because that low number would grant them a greater share of ownership in the reorganized debtor. In recent decades, market value became linked to, and often determinative of, that "reorganization value," whereas in the early 1980s, "reorganization value" was largely fictional. It was disconnected from what investors would pay for the business, and it was highly contestable. As market value supplanted fictional, judicially determined value, the plausible valuation dispute range narrowed. When the plausible valuation range narrows enough, many valuation disputes cease to be worth litigating because they will not alter the distributions to the parties.[12] Other valuation disputes become less intense because distributional consequences to the parties become smaller, sometimes minimal. And that reduction in the intensity and frequency of disputes should reduce time spent in bankruptcy.

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12 *See* Mark J. Roe & Michael Simkovic, *Absolute Priority, Relative Priority, and Valuation Uncertainty in Bankruptcy*, 173 U. PA. L. REV. (forthcoming 2025) (manuscript at 40) (on file with author).

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Thus, bankruptcy valuation morphed in the 1980s. The overall bankruptcy process sped up and, we argue here, became more predictable. The dispute range did not narrow to zero, but it narrowed sharply since the Code came into force four decades ago.

Four developments are central: First, modern bankruptcy courts in the early 1980s were reluctant to sell firms in their entirety. Today that reluctance to sell is gone. Objections to sales are not addressed by permanently blocking sales, but rather by procedural safeguards to encourage reasonably open, informed, and competitive sales processes.[13] A sale of the entire firm is a common restructuring resolution. It yields a straightforward point estimate of the firm's value (and cash to distribute to creditors). The potential for a sale also narrows the parties' range of disagreement, especially if the expected sale price has a narrow range. A senior creditor will not insist on an excessively low valuation when juniors can find a buyer who is willing to pay more, nor can juniors credibly insist on an excessively high valuation when no buyer is willing to pay anywhere near that much.

Second, bankruptcy courts in the 1970s and 1980s explicitly rejected the market as an arbiter of bankruptcy firm valuation. Today, their objection to market value is gone.[14] Market values can now be based on the sale of an entire firm or its business units or based on trading prices of securities linked to the overall value of the firm or newly issued in a rights offering. While market values can be hard to ascertain—especially when decisions by bankruptcy courts about value can affect the value of traded claims—the defensible range for value is narrower today than it was formerly, as there was once no need to relate bankruptcy valuation to market value. Equity markets probably provide more precise valuations for distressed firms than they used to, we show below, as evidenced by bid-ask spreads having narrowed. Even though market values are not fully predictable, the new market orientation grounds and limits bankruptcy valuation more than before.

Third, market valuation gives the court a potential ultimatum to invoke against (some) lower-ranking financial creditors: if you think the emerging valuation of the firm is too low, you can

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13 *See* Casey, *supra* note 8, at 1716 ("[T]he system relies mostly on procedural protections.").

14 *See infra* Part I.A–B.

buy the firm (or find someone who will). This ultimatum is not just theoretical; bankruptcy judges use it.[15]

Fourth, multiple institutions today make auctions more competitive than in the past. More players today can provide capital or financing, or buy entire distressed firms, and bankruptcy courts have become sophisticated at policing sales processes to prevent insiders from steering the firm to a favored buyer at an artificially low price.[16] While the process is imperfect, auctions provide clear point estimates of firm value.

These upgrades in valuation technology rippled through the bankruptcy process starting in the mid-1980s to make it more efficient. These improvements contributed, perhaps centrally, to Chapter 11's success.

True, market-oriented scholars could view market valuation favorably, even without its association with shorter, presumably more efficient bankruptcies. And some bankruptcy scholars were skeptical of market valuations when they began to appear in the 1980s—and some remain skeptical today. They fear that the actual processes are too rushed, undercompensate lower-ranked investors and stakeholders, overcompensate insiders, and lead to more business contraction and more lost jobs than is socially appropriate.[17] We do not seek to resolve these opposing views here. Rather, regardless of one's prior perspective, we seek in this Essay to understand how U.S. bankruptcy law has turned over the decades from hostility to market valuations to favoring them, and how this turn contributed to the undeniable speeding up of large-firm bankruptcies.

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A shorter bankruptcy is not a goal, in and of itself. It's a goal because shorter bankruptcies usually arrest the value destruction common in the restructuring process, get firms back on their feet

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15 *See infra* note 51 and accompanying text.

16 *See* Buccola, *supra*, note 8, at 41 n.174 (discussing the potential for insider abuse); *see also* Stuart Gilson, Edith Hotchkiss & Matthew Osborn, *Cashing Out: The Rise of M&A in Bankruptcy* 5, 38 tbl.2 (Harv. Bus. Sch. Working Paper No. 15-057, 2015) (available on SSRN) (documenting the modern increased prevalence of deep-pocketed "financial buyers" such as private equity firms).

17 *E.g.*, Melissa B. Jacoby & Edward J. Janger, *Bankruptcy Sales*, *in* RESEARCH HANDBOOK ON CORPORATE BANKRUPTCY LAW 54, 57 (Barry E. Adler ed., 2020) ("[F]inancial distress can force premature realization on assets. . . . Value maximization sometimes depends on an accelerated process. . . . In other contexts, [ ] realization should be delayed . . . when unusual market forces or financial distress of the debtor suggest that the market will undervalue the debtor's assets.").

more quickly, and reduce the collateral damage of lost jobs and a degraded workplace.[18] Drawn out bankruptcies destroy value for investors and stakeholders. Conflicting investor groups expend more resources battling each other in long bankruptcies than in short ones.[19]

Time in bankruptcy distracts and burdens management. It imposes bureaucratic oversight on operational and financial decisions. Judges, lawyers, and the Bankruptcy Code are involved in basic business decisions inside bankruptcy; outside of bankruptcy, those same business decisions are made by executives, investors, and employees.

While the firm is in bankruptcy, it's uncertain which investors will ultimately own the firm. But the firm's eventual equity holders will decide who the new corporate directors will be and whether the company will be sold to another company. Those future owners will typically influence high-level corporate strategy and priorities, directly or through their choice of senior management. But uncertainty during a long bankruptcy about who those future postbankruptcy owners will be exacerbates agency costs; in the bankruptcy, executives do not know exactly for whom they are, or will be, working. That uncertainty about postbankruptcy ownership limits the extent to which investors can provide management with effective guidance, exacerbates governance problems, and degrades decision-making. Moreover, extended time in bankruptcy, with the bankrupt firm subject to court rulings, can

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18 *See* Daniel M Covitz, Song Han & Beth Anne Wilson, *Are Longer Bankruptcies Really More Costly?* 20 (Fed. Rsrv. Bd., Working Paper No. 2006-27, 2006) (finding that creditor recovery rates decrease nineteen months after default); Benjamin Iverson, *Get in Line: Chapter 11 Restructuring in Crowded Bankruptcy Courts*, 64 MGMT. SCI. 5370, 5383–85, 5389 (2018) (finding lower charge-offs on banks' business loans when bankruptcy courts became less congested and case duration shrank for large firms); Karsten Müller, *Busy Bankruptcy Courts and the Cost of Credit*, 143 J. FIN. ECON. 824, 832–33 (2022) (finding that a lower bankruptcy-court caseload reduces the duration of bankruptcies and raises creditor recoveries); *see also* Hinh D. Khieu, Donald J. Mullineaux & Ha-Chin Yi, *The Determinants of Bank Loan Recovery Rates*, 36 J. BANKING & FIN. 923, 929 (2012) (finding that prepackaged bankruptcies raise loan recovery rates); Elizabeth Tashjian, Ronald C. Lease & John J. McConnell, *An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. FIN. ECON. 135, 141–43, 147 (1996) (finding that prepackaged bankruptcies are shorter and cost less, with higher creditor recoveries). For a recent source encapsulating this, see Winston Wei Dou, Lucian A. Taylor, Wei Wang & Wenyu Wang, *Dissecting Bankruptcy Frictions*, 142 J. FIN. ECON. 975, 993 (2021) ("Excess delay can destroy going-concern value due to loss of customers, employees, and [ ] other indirect costs . . . . [It] is a primary culprit for low reorganization values.").

19 *See* Dou, Taylor, Wang & Wang, *supra* note 18, at 977 ("[B]y 'playing tough' with each other, creditors delay the case, allowing the direct and indirect costs of bankruptcy to grow.").

undermine the firm's reputation with its stakeholders, customers, vendors, and employees. Professional fees can be substantial.[20] Quicker reorganizations reduce the operational penalties that bankruptcy imposes.[21]

We emphasize that a successful bankruptcy system is not intrinsically about being faster, but about being less expensive to investors and stakeholders in the firm. Yes, a short bankruptcy can be costly, but the usual view is that speed makes it less costly, and evidence suggests this as well.[22] The overarching goal for a successful bankruptcy system is to minimize the cost of capital; to ensure as best as the system can that restructuring is efficient and value-preserving; to minimize the disruptions to employees, managers, and stakeholders; and to better enable stressed firms to put useful products and services out into the economy. Bankruptcy seems to do that better in the 2020s than it did in the 1980s.

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We organize this Essay as follows. In Part I, we show how judicial doctrine on market value developed in bankruptcy: Courts rejected market value in the 1970s and 1980s as the arbiter of value in Chapter 11. Market prices for bankrupt companies and their securities were believed to be too distorted then to properly be the distributional foundation. Market-based transactions—like the whole-firm sale in Chapter 11—were rejected. During the decades since then, bankruptcy courts and institutions came to accept market value as presumptively correct for the bankrupt firm, although they did so without dramatic decisions reversing the early years' market rejection. This acceptance of market value narrowed the potential range of judicial valuation, making judicial cramdowns and creditor settlements easier to obtain. We document this progression of judicial doctrine over the decades.

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[20] Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 AM. BANKR. L.J. 77, 103 (2008).

[21] A shorter bankruptcy typically lowers financing costs. Debt raised during bankruptcy is notoriously expensive even though it is short term and safe. *E.g.*, Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REGUL. 651, 662–63 (2020) (discussing judicial approval of a short-term loan with a steep interest rate). This expensive financing is typically replaced with less expensive financing when the firm emerges from bankruptcy or is sold.

[22] *See generally* Dou, Taylor, Wang & Wang, *supra* note 18.

In Part II, we discuss bankruptcy developments that improved valuation, including the rise of whole-firm sales under § 363[23] and the deepening of financial markets for distressed debt and distressed firms. Sales under § 363 increased steadily since the end of the 1980s and now constitute about 30% of the large-firm bankruptcy resolutions. Over the same period, large-firm bankruptcies went faster: their duration decreased from three years to three months. We hypothesize that the rise of the § 363 sale, the judicial shift toward accepting market value as bankruptcy value, and the rise of capital-markets institutions are each interrelated and underappreciated factors contributing to bankruptcy improving and its duration shortening. These factors should all lead to improved bankruptcy valuation and limit valuation disputes.

In Part III, we test our hypothesis against data more directly. First and most basically, between the first twenty years of the Bankruptcy Code and the most recent twenty years, the dispute range in reported plan-confirmation valuation disputes significantly narrowed, by about one-third. The trend toward narrower disputes over time persisted—and actually strengthened—after we controlled for changes in the composition of bankrupt firms by size, industry, and ownership status (i.e., publicly traded versus privately held), for shifts in which courts handle large bankruptcies, for judicial experience, for interest rates, and for changes in equity volatility. We find evidence linking narrower dispute ranges both to the ease with which markets can value bankrupt firms and to growing judicial experience and specialization.

We also show that the presence of a valuation dispute predicts a longer bankruptcy case duration. A wider valuation dispute correlates more with a longer case duration than a narrower dispute. These findings are consistent with our initial hypothesis that improving valuation through market institutions should reduce valuation conflict, which in turn should make bankruptcy faster, and that the progress of U.S. bankruptcy reflects these developments.

This evidence about the reasons for Chapter 11's success suggests that policymakers around the world who seek to emulate U.S. Chapter 11 should be cautious, as we indicate in Part IV. The Chapter 11 statute itself remains largely unchanged from the 1980s, when bankruptcy took three years, to recent years, when under substantially the same statute the average duration is only

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[23] 11 U.S.C. § 363.

three months. Copying the statute will not assure bankruptcy success. Policymakers around the world who want a fast, efficient system need to consider the capabilities and inclinations of their own courts—and the capacity of their economies' underlying market institutions in selling and determining the value of failed firms.

We then conclude. We seek here to explain Chapter 11's success. The rise of market valuation helps to explain the narrowing dispute range in bankruptcy. Market valuation comes through four major channels: directly in market sales of the full firm or of its securities, indirectly in judicial findings of the firm's market value, tactically in judicial challenges to dissenters to buy the firm, and pervasively through the improvement and deepening of the market institutions surrounding bankruptcy. The narrowing valuation dispute range helps to explain bankruptcy's success over the past four decades.

I. THE BANKRUPTCY JUDGES, 1980–2023: NO LONGER REJECTING MARKET VALUE

In the past four decades, bankruptcy courts moved from skepticism of using a distressed firm's market value to deferring to its market value. This powerful shift has been overlooked. When courts rely more on the market to value the firm, the dispute range over value narrows. That reduced dispute range can make settlement more likely and time spent in bankruptcy shorter.

Table 1 illustrates the basic conflict. If seniors are owed $2 billion, it matters greatly to seniors and juniors whether the court says that the firm is worth $1 billion, $3 billion, or more. If the court says the firm is worth $2 billion or less, the firm belongs entirely to the seniors. If the court decides that the firm is worth more than $2 billion, then juniors must be compensated in the bankruptcy.[24]

[24] Seniority can come from an intercreditor agreement, via which the juniors accept that they will be paid only when the seniors are paid. Such juniors are said to subordinate their position to that of the seniors. Seniority can come from the nature of the corporation: creditors are paid before stockholders and, hence, are senior to stockholders. Seniority can come from property rights—a creditor can take a security interest or mortgage in some of the debtor's property. The secured creditor, or mortgagee, is generally entitled to be paid the value of that property before other creditors are compensated at all. These different natures of seniority interact differently with the thesis here on market value and transaction displacing a constructed, market-rejecting valuation. Security, for example, sometimes cannot readily be severed from the firm and valued apart from the underlying business.

The firm's real value can be less important to the court's distribution of value than the judicially assigned value. Even if the firm is really worth more than $2 billion (hence, entitling juniors to compensation for the overflow), then, if the judge nevertheless concludes that the firm is not worth more than $2 billion, the court normally awards the entire firm to the seniors. Mistaken valuation still determines the bankruptcy distribution.

If the range of possible valuation is wide, there is more room for litigation and delay. In Table 1, if the court quickly determined that the firm was worth $2 billion, there would be little reason for the parties to delay the restructuring: the firm belongs to the seniors.

TABLE 1: WHY JUDGE-ATTRIBUTED VALUE COUNTS

	Scenario *A*: *V*(firm) = $1B	Scenario *B*: *V*(firm) = $3B
Seniors owed $2B	Seniors take $1B (100%)	Seniors take $2B (67%)
Juniors owed next $2B	Juniors take $0	Juniors take $1B (33%)

The firm before bankruptcy owes $2 billion to seniors and $2 billion to juniors. This table shows the distributional outcomes under two different valuation scenarios. In Scenario *A*, the court finds that the firm is worth $1 billion. Since that is less than the seniors are owed, the court cannot approve a plan that gives less than 100% of the firm to the seniors, unless the seniors consent. In Scenario *B*, the court concludes that the firm is worth $3 billion, entitling the seniors to be paid in full and the juniors to receive one-third of the firm's value. If the court were restructuring the firm with a simple capital structure of three hundred shares of common stock, then seniors would obtain all three hundred shares under Scenario *A*, but only two hundred shares under Scenario *B*. Under *A*, juniors would get nothing; under *B* they would obtain one hundred shares and one-third of the underlying value of the firm.

If the court came quickly to a valuation number, then there would be less room for the creditors to contest the reorganization. This Essay's thesis is that the shift to market valuation facilitates a narrowing of valuation range.

The bankruptcy process was once subject to substantial delay. Valuation uncertainty materially contributed to that delay. While we hardly think that an improved valuation process fully explains the speedup,[25] reducing the number of potentially crippling valuation disputes was necessary (even if insufficient) to

[25] Other contributors include the hard limit on the period of debtor exclusivity to propose a plan, 11 U.S.C. § 1121, the discovery and wide use of the prepackaged plan, the lining up of support prebankruptcy through so-called restructuring support agreements, more concentrated prebankruptcy lenders (reducing the number of parties and thereby

bring the average duration of a large bankruptcy case down from about three years to three months. If valuation had remained as highly contestable, with no objective signposts, it is hard to see how the average duration could have dropped by a factor of ten.

In recent decades, bankruptcy courts have gone through a conceptual revolution.[26] The next two Sections document the conceptual shift. Subsequent Sections document the transactional shift.

A. Bankruptcy's Rejection of the Market in the 1980s

When the Code became law in 1978, bankruptcy rejected market price as dispositive. "[E]xisting market prices, conditions, and comparable sales *need not be significant factors* in determining reorganization value," said one court in a major bankruptcy.[27] With market value rejected, parties could propose, and courts might adopt, widely variant valuations. Widely variant valuation possibilities made settlement difficult.

Consider the court's rejection of market value in *In re Equity Funding Corp. of America*[28]—the bankruptcy of what was then the largest fraud in U.S. financial history. "Instead [of market value], reorganization value is intended to approach the value that would prevail in a perfect market adequately stocked with willing and informed buyers and sellers."[29] But "because of uncertainties associated with a company emerging from [bankruptcy] . . . , individual shares of stock of [the debtor] may trade in the near future at less than reorganization value."[30] Other courts

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making the restructuring renegotiation less complicated), and the rise of the debtor-in-possession lender with substantial post-filing authority. And as time went on, the players became more effective at getting deals done and the judges more effective in inducing faster deals.

Bankruptcy aficionados tend, in our experience, to point to the hard limit to judicial extension of the period of exclusivity or one of the other factors in the last paragraph's list. While we have no doubt about that limit's relevance, it seems unlikely to be the whole story or even its most compelling part. The limit came in 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 106 (codified as amended in scattered sections of 11, 12, 18, and 28 U.S.C.). Bankruptcy duration had *already* shortened from about one thousand days in the early 1980s to about under five hundred days, on average. *See infra* Figure 3.

[26] *See* Mark J. Roe, *Three Ages of Bankruptcy*, 7 HARV. BUS. L. REV. 187, 202–10 (2017) [hereinafter Roe, *Three Ages of Bankruptcy*].

[27] *In re* Equity Funding Corp. of Am., 391 F. Supp. 768, 772 (C.D. Cal. 1975) (emphasis added).

[28] 391 F. Supp. 768 (C.D. Cal. 1975).

[29] *Id.* at 773.

[30] *In re* Equity Funding Corp. of Am., 416 F. Supp. 132, 145 (C.D. Cal. 1975).

were equally skeptical of market value: "As the District Court rightly emphasized, the stock market is daily influenced by factors of a speculative or emotional nature that do not necessarily enter into a realistic evaluation of long-run economic values."[31] And the value of new securities issued in bankruptcy is "not to be tested by reference to market quotations because that yardstick is patently inconsistent with predicating the plan on [nonmarket] reorganization values,"[32] and "reorganization value is what [the bankruptcy process] believe[s] the current market value of the distressed company *ought to be*."[33]

Thus, bankruptcy valuation in an earlier era—bookended by the financial disruptions of the Great Depression in the 1930s and the high inflation, soaring interest rates, and stagnant asset values of the late 1970s—was unmoored from market values. The widely shared bankruptcy assumption back then was that the bankrupt firm faced an inefficient market. The stigma of bankruptcy led investors to shun the failed firm, major regulated creditors were often barred from investing in bankrupt companies (which were perceived as too risky by some insurance regulators), and the distressed debt market was too thin and specialized anyway to be attractive.[34] Consistent with this market skepticism, early case law disfavored whole-company sales.[35]

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31 *In re* Muskegon Motor Specialties, 366 F.2d 522, 528 (6th Cir. 1966).

32 *In re* Barrington Oaks Gen. P'ship, 15 B.R. 952, 964 (Bankr. D. Utah 1981) (quotation marks omitted) (quoting Walter J. Blum, *The Law and Language of Corporate Reorganization*, 17 U. CHI. L. REV. 565, 581–82 (1950)).

33 *Id.* (emphasis added) (quoting Walter J. Blum, *The Law and Language of Corporate Reorganization*, 17 U. CHI. L. REV. 565, 578 (1950)).

34 *E.g.*, *In re* Penn Cent. Transp. Co., 596 F.2d 1102, 1115–16 (3d Cir. 1979) (asserting that investors' perceptions of a firm's value can be unduly distorted by its recent reorganization and the prospect of facing lean years in the future); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527, 575–80 (1983) [hereinafter Roe, *Bankruptcy and Debt*] (examining different ways a market value approach could become distorted in a reorganization); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 379–382 (1993). This sentiment could still be found in a major bankruptcy court in 2003: "[T]he 'taint' of bankruptcy will cause the market to undervalue the . . . [bankrupt firm's] earning capacity." *In re* Exide Techs., 303 B.R. 48, 66 (Bankr. D. Del. 2003).

35 *In re* Lionel Corp., 722 F.2d 1063, 1070–71 (2d Cir. 1983) ("[T]here must be some articulated business justification, other than appeasement of major creditors, for [ ] selling . . . property . . . under section 363(b) . . . . [E]quity interests [should] have a greater voice in reorganization plans—hence, the safeguards of [ ] voting [ ] and confirmation in present Chapter 11."); *id.* at 1071 ("'The need for expedition [ ] is not a justification.'" (quoting Protective Comm. for Ind. S'holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 450 (1968))).

In time, as courts became more comfortable with bankruptcy sales, *Lionel* was reinterpreted. In the actual decision, a sale of a large investment was struck down. Later cases

B. Bankruptcy's Doctrinal Revolution: Market Value Wins in the Twenty-First Century

One could mark the doctrinal beginnings of respect for the market with the 1980 *In re New York, New Haven & Hartford Railroad Co.*[36] decision, culminating two decades later with the Supreme Court's 1999 market-based decision in *Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership*.[37] While the *Hartford Railroad* court did not require a market valuation, and indeed rejected it, the court indicated what kind of market developments could lead it to respect the market's valuation of the debtor:

> [T]he Court does not view the market price and intrinsic value methodologies [the latter of which is standard in bankruptcy—with the court determining the debtor's value for bankruptcy purposes] to be necessarily antithetical, irreconcilable approaches to valuation. If the investing public is well informed, and [if] the securities are seasoned and trading actively in a stable market, [then] . . . market price should approximate the intrinsic value of the securities. If so, the marketplace should be the principal, if not the exclusive, indicator of value. However, the presence of [ ] circumstances[ ] [that] would unduly distort the investors' appraisals . . . requires that the trier assess criteria other than market prices to gauge the worth of an enterprise for reorganization purposes.[38]

Two decades later, *LaSalle* jettisoned bankruptcy's anti-market thinking and more fully supported market valuation. The Supreme Court stated that "the best way to determine value is exposure to a market," not determination by a bankruptcy judge.[39] The fact that a firm was in bankruptcy was not in and of itself enough to doubt that investors could effectively value the firm or its securities. The *LaSalle* Court ruled that a potential failure to respect the statute's absolute priority standard should not be

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saw *Lionel* as endorsing a sale under § 363 if prerequisites such as business purpose or emergency needs were attended to. *See* Jared A. Wilkerson, *Defending the Current State of Section 363 Sales*, 86 AM. BANKR. L.J. 591, 600 (2012).

[36] 4 B.R. 758 (D. Conn. 1980).

[37] 526 U.S. 434 (1999).

[38] *Hartford R.R.*, 4 B.R. at 791. By the time of valuation, the debtor's assets consisted of securities of the reorganized Penn Central. The court considered but rejected their market value as the bankruptcy plan's value. "[M]arket prices of the securities are [not] to be ignored or summarily dismissed." *Id.*

[39] *LaSalle*, 526 U.S. at 457.

assessed by the judiciary but by a market test: Would other businesspeople pay more for the reorganized firm's equity than the price exclusively offered to the prebankruptcy shareholders?

LaSalle and related decisions broke with the past.[40] They became part of the foundation of bankruptcy courts' market-oriented thinking.[41] Courts could still consider evidence that critical information had been withheld from the market or that bidding was not competitive.[42] But parties opposing market valuations had to present evidence justifying rejection of the market; they could no longer rely on a presumption against market efficiency.

To be explicit here: when courts rejected market value outright, the range of valuation dispute was presumably wide. As courts came to accept market value in bankruptcy, the range narrowed. For example, if the judge accepts market value and if all the parties know that the market value of the firm is $2 billion, then that ends valuation conflict. Representative of modern judicial views is the Third Circuit's statement that ordinarily "the market price is 'a more reliable measure of the stock's value than the subjective estimates of one or two expert witnesses.'"[43] Or the Southern District of New York bankruptcy court's statement that a "company's stock price is an 'ideal datapoint' for determining value."[44] Or the same court's conclusion that a good auction ended the valuation issue: "Because the Debtors' sale process was heavily marketed and potential buyers were presented with abundant information, the sale process reflects a true test of value."[45] Another court said that "[t]his assertion [to turn to expert testimony] runs counter to the increasingly 'strong preference for market-

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40 On *LaSalle* as a move to the market, see Barry E. Adler, *The Emergence of Markets in Chapter 11: A Small Step on* North LaSalle Street, 8 SUP. CT. ECON. REV. 1, 15–17 (2000); Barry E. Adler & George G. Triantis, *The Aftermath of* North LaSalle Street, 70 U. CINCINNATI L. REV. 1225, 1233 (2002).

41 *See, e.g.*, *In re* Barnes, 615 B.R. 514, 525–26 (Bankr. D. Conn. 2020) ("[Buyers] can be trusted to be value oriented and careful."); *In re* Advanced Contracting Sols., LLC, 582 B.R. 285, 312–15 (Bankr. S.D.N.Y. 2018) (approving a bid following a competitive marketing process).

42 *See, e.g.*, *In re* Tronox Inc., 503 B.R. 239, 300–01 (Bankr. S.D.N.Y. 2013) (finding that "[p]laintiffs have clearly overcome the assumption of market efficiency" because the company failed to disclose material liabilities); *In re* Gulf Coast Oil Corp., 404 B.R. 407, 413, 428 (Bankr. S.D. Tex. 2009) (deciding that "the sale should not be approved" in part because "there [was] virtually no time available for due diligence").

43 VFB LLC v. Campbell Soup Co., 482 F.3d 624, 633 (3d Cir. 2007) (quoting *In re* Prince, 85 F.3d 314, 320 (7th Cir. 1996)).

44 *In re* Iridium Operating LLC, 373 B.R. 283, 346 (Bankr. S.D.N.Y. 2007) (quoting VFB LLC v. Campbell Soup Co., 2005 WL 2234606, at *22 (D. Del. Sept. 13, 2005)).

45 *In re* Bos. Generating LLC, 440 B.R. 302, 324 (Bankr. S.D.N.Y. 2010).

based valuations.'"[46] That court quoted *Collier*—the leading bankruptcy treatise—for the proposition that market value had become mainstream in bankruptcy. Earlier editions of *Collier* said the opposite.[47]

C. Judicial Market Challenge: The Request to Bid

This rise in market-oriented judicial thinking allows judges to short-circuit valuation disputes in crucial ways, not just by orchestrating a sale.

In the Cumulus Media bankruptcy, the debtor sought in 2018 to confirm a plan of reorganization valuing the reorganized business at about $1.6 billion. More than 80% of the company would go to senior lenders. Juniors objected, arguing that the firm was instead worth $2.2 billion and that juniors were therefore entitled to more.[48]

Judge Shelley Chapman asked attorneys for the objecting junior creditors, "Your analysis is that acquirers would see substantial value for the debtor's unique assets. So where are they? Where are the buyers?"[49]

She then asked the objectors why they were not bidding for the company themselves: "There are players in the space that can readily identify opportunities to achieve returns and have access to capital. Participants in your group fit that description and *yet nobody has come forward* seeking to actualize this value," she said.[50]

If the firm were worth $2.2 billion, then any financial investor with access to capital—including but not limited to junior claimants such as private equity firms and hedge funds—could buy it for more than the $1.6 billion valuation and earn a profit.

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[46] *In re* Meruelo Maddux Props., Inc., 2013 WL 4045922, at *5 (C.D. Cal. Aug. 7, 2013) (quoting 7 COLLIER ON BANKRUPTCY ¶ 1129.05[3][b] (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2009)).

[47] *Collier* reflects the trajectory from judicial determination to market value. The revised fifteenth edition, published in 2007, warmed up to market value. By 2009, when its sixteenth edition came out, *Collier* was all about market value. *Compare* 7 COLLIER ON BANKRUPTCY ¶ 1129.06[2][b] (Alan N. Resnik & Henry J. Sommer eds., 15th ed. rev. 2007) ("The Supreme Court originally . . . believed that the market undervalued debtors in bankruptcy . . . . [But] [i]n some cases, a court may spurn [doing its own] earnings-based [projections] and use a market price."), *with* 7 COLLIER ON BANKRUPTCY ¶ 1129.05[3][b] (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2009) (announcing that bankruptcy courts had a "strong preference for market-based valuations").

[48] Alex Wolf, *Cumulus Defends Valuation to Open Ch. 11 Plan Confirmation*, LAW360 (Apr. 12, 2018), https://www.law360.com/articles/1033076.

[49] *At First Day of Confirmation, Judge Chapman Queries, If Cumulus Is Undervalued, 'Where Are the Buyers?'*, REORG RSCH. (Apr. 13, 2018) (available at https://octus.com).

[50] *Id.* (emphasis added).

At a $1.6 billion purchase price, the buyer's profit would be $600 million, equal to more than 30% of the purchase price—a very compelling profit. The judge did not find it credible that investors would leave so much money on the table if they saw Cumulus as worth $2.2 billion. Other judges have acted similarly.[51]

The converse can also be in play. Carl Icahn, the well-known investor-activist, complained in the (famous-at-the-time) E-II Holdings bankruptcy that the proposed reorganization plan grossly undervalued the debtor, with the undervaluation overcompensating the seniors and undercompensating holders of his security, the junior debt. Icahn then bid for the company; in response, the plan proponents rejected the bid but *raised* their valuation and the distributions to Icahn. Still dissatisfied, Icahn bid again; the plan proponents raised their valuation again to match Icahn's.[52]

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51 For other reported judicial market challenges, see *In re* Chemtura Corp., 439 B.R. 561, 587 (Bankr. S.D.N.Y 2010) (viewing negatively an equity committee proposing a valuation range when the committee's members were unwilling to invest in the debtor in that valuation range); *In re* Cent. Ice Cream Co., 836 F.2d. 1068, 1072 n.3 (7th Cir. 1987) (stating that "people who must back their beliefs with their purses are more likely to assess the value of the [item to purchase] accurately than are people who simply seek to make an argument"); *In re* Granite Broad. Corp., 369 B.R. 120, 140–41 (Bankr. S.D.N.Y. 2007) (using the prior quote from *Cent. Ice Cream*); *In re* Genco Shipping & Trading Ltd., 513 B.R. 233, 260 (Bankr. S.D.N.Y. 2014) (citing *Chemtura*, *Granite Broad.*, and *Cent. Ice Cream* for the market challenge proposition).

In *Genco*, a party questioned the juniors' higher valuation with a market challenge. *In re Genco*, 513 B.R. at 260:

> Rothschild's [valuation] suggest[s] almost a half billion dollars of potential difference[ ] [from] our valuation . . . I would think we [should] have a line out the door . . . where people would be clamoring to take advantage of this situation. In particular . . . Och-Ziff and Aurelius [equity owners who sought a higher value] [should] be standing there with their checkbooks buying this company and we don't have that.

See also In re Longview Aluminum, LLC, 2005 WL 3021173, at *7 (Bankr. N.D. Ill. July 14, 2005) ("A powerful indication of contemporary, informed opinion as to value comes from [private investors]."); Davidoff v. Farina, 2005 WL 2030501, at *11 n.19 (S.D.N.Y. Aug. 22, 2005) (it would make "no economic sense for defendants to invest literally billions of dollars in a venture that they knew would fail"); Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 835 (7th Cir. 1985) ("The price at which people actually buy and sell, putting their money where their mouths are, is apt to be more accurate than the conclusions of any one analyst.").

52 Kerry O'Rourke, *Valuation Uncertainty in Chapter 11 Reorganizations*, 2005 COLUM. BUS. L. REV. 403, 439–40. Icahn was rebuffed on his last bid; the judge was uncertain that Icahn could and would follow through with his highest bid. *Id.*

Perhaps the hybrid nature of the *E-II* court's respect for market value in some iterations and disregard for it in others was due to the timing: it was a 1992 restructuring, taking place after the 1980s' strong market rejection and occurring when whole-firm § 363 sales were getting off the ground, but not yet dominant, after bumping along at near-zero in the early 1980s, as Figure 1 shows.

Academics have long argued that such bids reduce the probability of overvaluation in reorganization.[53] The difference today is that judges are more likely to accept such market-oriented perspectives, and the market has more potential bidders and more ways to effectuate such bids.[54]

True, such market-based valuation-by-bidding is imperfect. Some juniors lack the cash to bid.[55] Valuable tax attributes sometimes cannot survive a sale.[56] The sales process might be too hasty and thereby fail to find all the potential buyers. A flawed sales process could lower the sale price in ways that benefit the seniors.[57] Addressing these process-based arguments is now a key part of the bankruptcy court's task.

The judge could not pressure the juniors to settle as successfully in the older bankruptcy milieu that rejected marketplace valuation. Litigation would continue, the proceeding would be delayed, and the firm's business would often suffer until the judge decided on the firm's value for bankruptcy purposes.

II. NARROWING THE VALUATION DISPUTE RANGE: § 363 SALES AND MARKET VALUE

As part of this market move, courts now regularly rule that the sale price of the entire firm is conclusive evidence of the sold firm's value. The rise of whole-firm sales and the parallel rise of

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[53] *See, e.g.*, Walter J. Blum, *Some Marginal Notes on* TMT Trailer Ferry *Reorganization: The New Math?*, 1968 SUP. CT. REV. 77, 85 ("Creditors cannot protect themselves against an overvaluation. . . . [However, the shareholders may] turn[ ] to the market for either debt or equity funds to pay off creditors . . . . [T]hey can even appeal to the market to buy out both the creditors and their own position."); Roe, *Bankruptcy and Debt*, *supra* note 34, at 580 n.172 ("Juniors can also, in principle, always buy out the old seniors by paying off their claims and retain the firm for themselves.").

[54] The more ways include the § 363 sale of the entire firm, the offering of a slice of the firm's equity, and the market dare.

[55] Although true, they or their representatives can find an outside investor with access to cash. Juniors would thereby increase the distribution they would receive in bankruptcy.

With capital market density for distressed firms having increased in recent decades—more distressed debt traders, more private equity investors—it is reasonable to a judge today to think like Judge Chapman: if there's value, there should be a bidder. If there's no bidder, and especially if the juniors could but did not bid, then the judge should be skeptical of juniors' high value assertions. Market values allow judges to make such inferences.

[56] Net operating loss carryforwards disappear if there's a statutory change of control. While tax law softens the standards for insolvents and bankrupts, it does not eliminate the chance of losing the tax asset due to the change-in-control rules. 26 U.S.C. § 382.

[57] Objectors to a sale often denigrate deal protections as excessive and complain about refusals to give competing bidders the same information as insiders or say the time given to prepare competing bids was inadequate.

judicial respect for market values have narrowed the range for valuation disagreement. And they have developed new market transactions and tests, such as rights offerings. (Rights offerings effectively "sell" equity in the reorganized firm back to junior claimants and stockholders on terms that enable them to collectively demonstrate, through their willingness to invest new money, that they believe the firm to be worth more than the senior debt.[58])

Moreover, capital-markets institutions have enhanced the capacity for whole-firm sales. Distressed debt investors and professional turnaround consultants have grown, broadened, and professionalized. They have also developed and deepened routine financing arrangements.

A. The Rise of the § 363 Sale

When the firm is sold in its entirety—or when shares of its stock are sold at the time of plan confirmation—the sale generates a market-based point estimate. Firms can be, and routinely are, sold in bankruptcy. About 30% of large bankruptcies are now resolved through § 363 sales, with a long-term upward trend in such sales, as Figure 1 shows. Many of today's big bankruptcies are market-tested via a sale of the debtor's stock.

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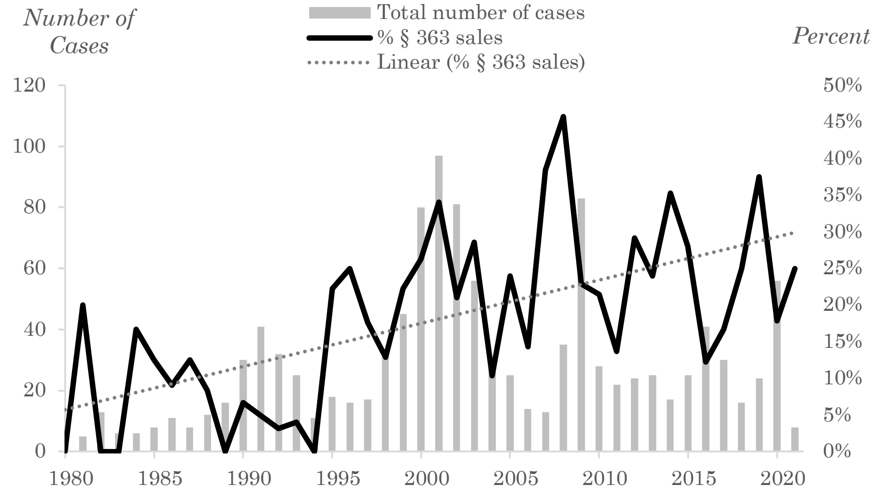
[58] Gunjan Seth, Do Rights Offerings Reduce Bargaining Complexity in Chapter 11? (Oct. 13, 2024) (available at https://perma.cc/L8R8-TSCQ). A similar concept was proposed and analyzed in Roe, *Bankruptcy and Debt*, *supra* note 34, at 559 (proffering a market-based solution of doing an initial public offering (IPO) to sell a portion of a firm's shares to the public from which to extrapolate enterprise value). Selling a thin slice of the debtor's capital structure to value the debtor faces some danger of market manipulation. Juniors might overbid to generate an inflated valuation to increase their bankruptcy distribution. If only a thin slice of the debtor will be sold, outside bidders who are neither beholden to seniors nor juniors should bid at prices closer to market value. *See id.* at 579.

Rights offerings are imperfect. They can, and often do, pay insiders a higher-than-necessary fee to "backstop" the rights offering. Backstop providers commit to buy any unsold debtor-issued securities. Still, rights offerings use market indicators to set a floor on the value of the firm and represent one of the ways market value is now in play in bankruptcy. If the rights offering is fully subscribed, juniors probably believe that the debtor is worth at least as much as the value suggested by the offering price, even after the debtor pays the backstop fee and any other transactions costs. If the rights offering is undersubscribed, then the backstop providers must have believed at the time of their commitment that the debtor's value was high enough to justify buying its securities for the offer price discounted by the backstop fee they received. The backstop fee is loosely analogous to a bid-ask spread for the rights offering. It may well need judicial attention to reduce insider distortions. Our point is not that the rights offering is error-free and fair. Our point is that it is another market value marker.

FIGURE 1: THE INCREASE IN § 363 SALES BY YEAR FILED, 1980–2021[59]



This figure shows the increasing prevalence of § 363 sales. The dark bold line shows § 363 sales as a portion of all large public firm bankruptcies from 1980 to 2021. It is scaled on the right. The dotted trend line shows a 2021 trend at about 30% of all large-firm dispositions. The gray bars show the total number of large-firm bankruptcies. It is scaled on the left.

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Section 363 whole-firm sales are controversial among bankruptcy scholars. Critics see insiders with superior information as better able to buy the firm cheaply in the § 363 sale. Some see the sales as uncompetitive and sometimes unnecessary.[60] Others see

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59 Source: *Download Case Table*, FLA.-UCLA-LOPUCKI BANKR. RSCH. DATABASE (last updated Jan. 12, 2023), https://lopucki.law.ufl.edu/download_cases_table_terms.php. The LoPucki Bankruptcy Research Database tracks large public firm bankruptcies filed through the end of 2022. We end the time series in Figure 1 with cases filed in 2021 because the disposition of most cases filed in 2022 (whether through a § 363 sale or restructuring within bankruptcy) is missing, and the estimate of the percent of § 363 sales for 2022—two out of two cases, or 100%—would exaggerate the sales' importance as compared to the results from prior years. Data in 2023 and beyond is not yet available.

A separate study has § 363 sales as recently constituting more than 50% of large-firm bankruptcy restructurings. Gilson et al., *supra* note 16.

60 *See, e.g.*, Samuel Antill, *Do the Right Firms Survive Bankruptcy?*, 144 J. FIN. ECON. 523, 535–36 (2022) (arguing that § 363 sales lead to reduced creditor recovery); Jacoby & Janger, *supra* note 17, at 63–64 (finding § 363 sales to be particularly risky where uncertainties exist when assets to be transferred are attached to interests that cannot be reduced to monetary value).

There are several related critiques. The first is that a flawed bidding process does not bring in enough qualified bidders; the price ends up too low. The second is that a

them as adequately competitive because there are now financial players—private equity firms and distressed debt investors—who will bid for the firm if it is underpriced. Supporters of § 363 sales also point to rising judicial sophistication about auction processes, with bankruptcy doctrine often mirroring best practices in mergers and acquisitions outside of bankruptcy.

These controversies are important to assess, but resolving them is not essential to our analysis. Regardless of one's view of whether the rise of the § 363 sale is sound, it is a central part of the current bankruptcy reality. Sales are common and generate an *objectively observable* value. As long as bankruptcy courts continue to *treat* § 363 sale prices as conclusive evidence of value, § 363 sales cut off costly litigation over firm value.[61]

Moreover, negotiated deals under § 1129(a)(8)[62] often operate in the shadow of whole-firm sales and, to the extent they do, they *also* benefit from the rise and prevalence of § 363 sales. If § 363 is in the background, it can herd parties closer to a jointly held point estimate of the debtor's value—even when the firm is not sold, but could have been. That push to a common point estimate could lead them to more readily compromise.[63]

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standalone reorganization could produce a higher value than a sale. The third is an objection that § 363 sales are *too* market-oriented—that they lock in the market price when the cost of capital is high. *See* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 44 (2007) (finding that "on average, reorganizations yielded 80% or 91% of book value, while sales yielded only 35% of book value); *cf.* Anthony J. Casey, *The Creditors' Bargain and Option-Preservation Priority in Chapter 11*, 78 U. CHI. L. REV. 759, 761 (2011) ("[Seniors] have an incentive to sell . . . even when reorganization has a higher expected return for the estate . . . . [T]he result is an inefficient fire sale of the debtor's assets."); Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 717, 730 (2009) (arguing that the "trend" of § 363 sales "has gone too far" and "circumvent[s] the rigors of the plan process"); Diane Lourdes Dick, *Valuation in Chapter 11 Bankruptcy: The Dangers of an Implicit Market Test*, 2017 U. ILL. L. REV. 1487, 1498–1501.

[61] Even if the bankruptcy sales price was usually too low, this might not be grossly inefficient. It would transfer value away from sellers and toward buyers. If society saved value through a less costly reorganization, the result could be beneficial in that dimension. We do not argue that low prices would be efficient and fair, only that they could be.

We also do not say that sales cut off all valuation disputes: disagreements over collateral value or firm insolvency in the face of avoidance litigation persist and can be pernicious.

[62] Section 1129(a)(8) allows the plan to go forward without a formal judicial assessment of value if each class of creditors and interests supports the proposed plan.

[63] Increasingly, debtors sell stock to junior creditors as the debtors exit bankruptcy. Thus, more firms have a market test of their point estimate value. Roughly half of recent large bankruptcies either have a § 363 sale or a stock sale to junior creditors. *See* Seth, *supra* note 58, at 13. An early suggestion for market value was, if whole firm sales were rejected, to then offer a slice of the reorganized debtor's stock to the market—the equivalent of an IPO—and use that as indicating the firm's value. Roe, *Bankruptcy and Debt*, *supra* note 34, at 573–74.

That is, the parties negotiating a deal under § 1129(a)(8)[64] know that (1) the bankrupt firm could be sold—with that sale anchoring valuation—and (2) the judge could take the expected sale value as the firm's value if the judge is called upon to cram down a plan on dissenting creditors. This nudges the parties closer to a similar point estimate for valuation. Recent work in finance shows that a public market for only one of the debtor firm's securities is enough to materially improve reorganization valuation results.[65]

To restate: Sales under § 363 *avoid* and *preempt* valuation disputes. A sale is faster than litigating valuation. And even when the firm is not sold, the judicial shift to market value limits the valuation range more tightly than when market value was rejected and reorganization value unmoored. Parties can anchor their valuation estimate on what they believe the firm would sell for.

With more potential buyers—both strategic and financial—the risks of a noncompetitive or poorly timed sale are lower. Figure 1 shows the increase in § 363 sales during the past four decades: first bumping along at near-zero in the early 1980s—when courts such as the one in *In re Lionel Corp.*[66] were skeptical—and then rising to about 30% on the trend line by 2020. The rejection of market value and then its rise and acceptance parallel the sea change in judicial bankruptcy doctrine about markets and about § 363 sales that we reported in Part I.

B. The Growth of Capital Markets for Distressed Securities and Companies

It's plausible that market skepticism in the 1980s and prior decades was correct then—*and* that the new deference to market value is also correct. The new deference to market value followed

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64 This statutory section is core to the modern Chapter 11. If all classes of creditors approve the restructuring plan, the judge can (if some other requirements are satisfied) approve the plan. Each creditor class votes to approve or reject the plan. 11 U.S.C. §§ 1126, 1129(a)(8). A major consideration militating a class toward rejecting the plan would be in play if a class thought that a judicial valuation and cramdown would provide them a larger payment than the proposed plan would. *Id.* § 1129(b).

65 *See* Cem Demiroglu, Julian Franks & Ryan Lewis, *Do Market Prices Improve the Accuracy of Court Valuations in Chapter 11?*, 77 J. FIN. 1179, 1180, 1184 (2022) (finding a significant reduction in misevaluations for firms that publicly disseminated corporate bonds while in bankruptcy). The authors measured the accuracy of valuation by the difference between the judicial determination and the postrestructuring trading price.

66 722 F.2d 1063 (2d Cir. 1983).

several decades of improvements in the depth and liquidity of capital markets for distressed firms.[67]

A central example of the market widening and deepening: In the Bankruptcy Code's early years, potential bidders for bankrupt firms were assumed to be from the same industry as the debtor. When one firm went bankrupt, the chances were high that the other firms in that industry were also stressed, with limited funds to bid to buy the distressed debtor.[68] Fire-sale prices were presumed to be common and analyzed in a well-known 1992 article by Professors Andrei Shleifer and Robert Vishny.[69] But the range of potential buyers is wider today. Professors Stuart Gilson, Edith Hotchkiss, and Matthew Osborn found that starting a decade later, from 2002 to 2011, the acquirer in over 30% of bankruptcy sales was a financial buyer rather than a strategic buyer from the debtor's industry.[70] Moreover, junior claimants can—and increasingly do—effectively value bankrupt firms if and when the juniors buy the debtor's stock through a rights offering.[71]

Capital market conditions for distressed debtors have deepened and widened. Financing to support bids for debtor firms is more readily available now. And specialized lenders that can finance the bankrupt firm have arisen. It's not just banks today, as

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67 On the other hand, even if market valuation was spotty in the 1980s, it might *still* have been superior to judicial valuation at the time. One of this Essay's authors thought so in the 1980s. *See* Roe, *Bankruptcy and Debt*, *supra* note 34, at 601 ("[T]he post-reorganization market falls short as an ideal basis for accurate valuation. But judicial valuation . . . faces some of these same debilities [as markets], as well as others."). Others had similar views. *See* Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 146 (1986) (noting the trade-off "between creating additional uncertainty and gaining the most for the assets"); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 789–90 (1988) (arguing that markets are effective even if the market underestimates the company's value); Daniel R. Fischel, *Market Evidence in Corporate Law*, 69 U. CHI. L. REV. 941, 946–47 (2002) (arguing that market price can be relied on in appraisal proceedings); Allen Ferrell, *Hidden History of Securities Damages*, 1 U. CHI. BUS. L. REV. 97, 110–11 (2022) (noting the rising use of market evidence for securities law nondisclosure damages post-2005).

68 *See* Andrei Shleifer & Robert W. Vishny, *Liquidation Values and Debt Capacity: A Market Equilibrium Approach*, 47 J. FIN. 1343, 1355 (1992) [hereinafter Shleifer & Vishny, *Liquidation Values*]; *see also* Andrei Shleifer & Robert W. Vishny, *Fire Sales in Finance and Macroeconomics*, 25 J. ECON. PERSPS. 29, 32 (2011); *cf.* Douglas G. Baird, *Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy*, 165 U. PA. L. REV. 785, 789 (2017) (stating that problems arise when the only bidders for the debtor are in the same distressed industry as the debtor).

69 *See generally* Shleifer & Vishny, *Liquidation Values*, *supra* note 68.

70 Gilson et al., *supra* note 16, at 38 tbl.2.

71 *See* Seth, *supra* note 58, at 7, 31. In the 1980s, such valuations by sale were on the bankruptcy academic wish list. *See* Roe, *Bankruptcy and Debt*, *supra* note 34, at 559. Today such market mechanisms are available and used.

it disproportionately was when the Code became law in 1978. Nonbank, distressed debt, financial firms buy and sell the debt of bankrupt firms. Bankrupt firms that were once unsaleable attract multiple bidders today. The number of distressed debt investment shops has more than tripled from the early 1990s.[72] Ever larger pools of private capital are in the hands of sophisticated financial buyers, such as private equity funds, distressed debt funds, and multi-industry conglomerates. The growth of these financial players provides competitive bidders that are unaffected by shocks to the bankrupt firm's industry.

Figure 2 illustrates part of the growing market for risky corporate debt securities that can finance a bid, specifically showing the volume of issuance of high yield corporate debt, so-called junk bonds.

While the central issue is that more money—much more—is now available to finance buyouts in bankruptcy and the like, we add that the risky debt market has not had to pay more for this increased volume of debt. The interest rate in the lower-quality bond market—the junk bond market—has long been higher than that of higher-quality, investment-grade debt. But that difference in interest rates has not widened over the years. That is, the widening pool of users of risky debt are not paying for the increased volume with a raised interest rate.[73]

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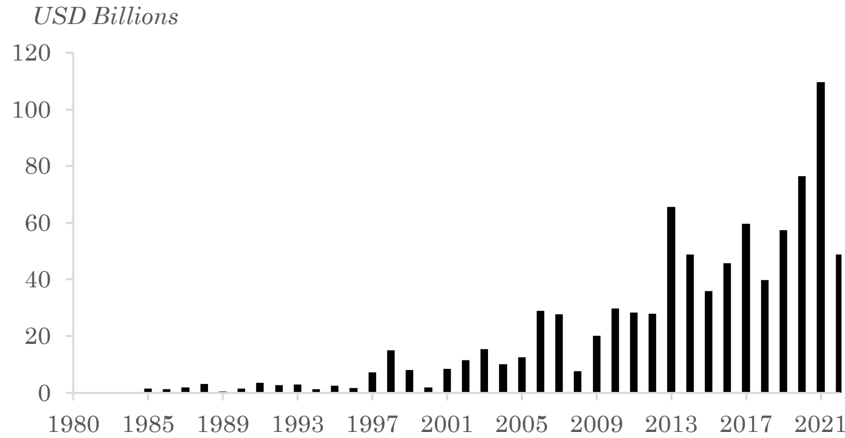
[72] EDWARD I. ALTMAN, EDITH HOTCHKISS & WEI WANG, CORPORATE FINANCIAL DISTRESS, RESTRUCTURING, AND BANKRUPTCY 268 (4th ed. 2019) (identifying sixty "vulture" shops in the early 1990s, but two hundred such U.S. firms and one hundred such international firms in 2018).

[73] To wit: the major rise in volume did not force up the difference in rates between elements of the investment-grade market and elements of the high yield junk bond market. *See Moody's Seasoned BAA Corporate Bond Yield*, FED. RSRV. BANK OF ST. LOUIS (last updated Aug. 1, 2024), https://perma.cc/MY4G-PMFN (showing the historical yield on BAA-rated bonds); *(ICE BofA CCC & Lower US High Yield Index Effective Yield)–(ICE BofA BBB US Corporate Index Effective Yield)*, FED. RSRV. BANK OF ST. LOUIS (last updated Aug. 1, 2024), https://perma.cc/7LBL-E5M9 (showing the historical yield on CCC-rated bonds).

FIGURE 2: GROWTH IN RISKY, HIGH YIELD CORPORATE DEBT ISSUANCE, 1980–2022[74]



High yield debt is defined as debt rated by S&P as less than BBB– at issuance. High yield corporate debt issuances have grown greatly in the past quarter century.

C. The Operational Costs of Valuation Complexity

Valuation uncertainty encourages costly litigation and conflict. It enables parties that could have been forced to concede under a clear and certain valuation to continue to fight instead. The earlier rejection of market value made valuation more subjective and less susceptible to external validation. Litigants and their counsel can come to believe as true what they originally saw as aggressive advocacy. When each side has such contrasting beliefs favorable to their own clients, settlement becomes difficult.[75] This difficulty would seem particularly acute when these views relate to fundamental distributional issues arising from contested valuation.

If the parties cannot come to terms, the court can impose a plan if the plan comports with the Code.[76] To do so, the court must estimate the firm's value. Valuation hearings and disputes are notorious for taking time and for triggering a contest of experts

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[74] Source: S&P Capital IQ dataset.

[75] *See* Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 170–73 (1996) (observing that attorneys can play a powerful role in encouraging clients to settle depending on how they frame the stakes of settlement decisions).

[76] 11 U.S.C. § 1129(b) (describing the so-called cramdown provision).

who bring different valuation methods and results into the courtroom.

Restructuring aims to stabilize the wounded firm, but delay increases the risk and cost of the process and delays operational recovery. The firm cannot reenter the normal stream of commerce until the bankruptcy is resolved. But the bankruptcy cannot be resolved until a plan or market sale is confirmed. And a contested plan cannot be confirmed until the court values the debtor.

That delay is costly. Suppliers and customers are wary of dealing with the firm in bankruptcy. Management attends to the bankruptcy negotiations, and therefore attends less to operations. Able employees often seek new jobs. Investment decisions are delayed or distorted. The most recent evidence is that delay in bankruptcy degrades the value of the firm overall, and speeding it up increases that value.[77] With offers, counteroffers, and posturing, "creditors delay the case, allowing the . . . costs of bankruptcy to grow."[78] Slowing the process makes the bankrupt firm less valuable. Disputes over priority slow the process and disputes over valuation slow the process more. Valuation mechanisms that end the disputes more quickly and effectively speed up the process. They thereby preserve value.

But the pace of bankruptcy during the past four decades has become much faster. Figure 3 shows the speedup: large-firm bankruptcies needed three years to go from filing to confirmation in the early 1980s. In the past five years, large bankruptcies needed fewer than two hundred days on average to do the same. The improved valuation process, and the greater reliance on market value, can explain much about the substantial speedup in bankruptcy during the past four decades.

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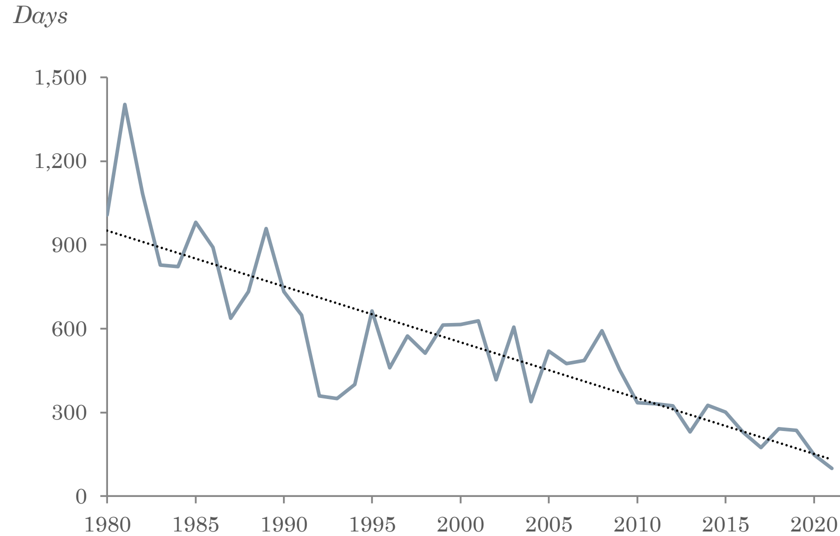
[77] Dou, Taylor, Wang & Wang, *supra* note 18, at 993. The evidence is that the delay destroys going-concern value, not that the disputes lead to unwarranted liquidation or unwarranted continuation of the firm that ought to have been liquidated.

[78] *Id.* at 977.

FIGURE 3: THE DECREASE IN AVERAGE TIME FROM FILING TO CONFIRMATION, 1980–2021[79]



This figure shows the average duration in days for large bankruptcies of publicly traded firms with $100 million or more in debt (in inflation-adjusted 1980 dollars), for each year since the Bankruptcy Code became effective. On average, large bankruptcies took more than one thousand days in the early years and about one hundred days in the most recent year. The slope of the pictured trendline represents an annual decrease of twenty days for large-firm bankruptcy duration. Since more bankruptcies today—like prepackaged bankruptcies and prenegotiated plans—entail more work before the filing, the functional slope is somewhat shallower. But the prebankruptcy work is surely not taking up an additional nine hundred days to even up the current timing with the 1980s duration. Appendix Figure 1 shows that duration declined even for "free fall" bankruptcies—those that are not prepackaged or prenegotiated nor handled via a § 363 sale. Mark J. Roe & Michael Simkovic, Appendix to Bankruptcy's Turn to Market Value, https://perma.cc/54AT-GE97.

Several other developments sped up the bankruptcy process in recent decades, including the willingness of courts to accept prepackaged plans with prebankruptcy consents, the increasing number of § 363 sales, the rise of the powerful debtor-in-possession lender who could override insider stockholder-managers' tactical delays (which were seen as common in the

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[79] Source: *A Window on the World of Big-Case Bankruptcy*, FLA.-UCLA-LOPUCKI BANKR. RSCH. DATABASE, https://lopucki.law.ufl.edu/index.php. For a similar, sharply downward-sloping trend found in a wider sample of business bankruptcies, including those of smaller firms, see Edith Hotchkiss, Karin S. Thorburn & Wei Wang, *The Changing Face of Chapter 11 Bankruptcy: Insights from Recent Trends and Research*, 15 ANN. REV. FIN. ECON. 351, 354 fig.3 (2023).

1980s), and the 2005 hard limit to the debtor's period of exclusivity to propose a plan. All of these developments are relevant, to varying degrees.[80] (The 2005 amendments do not look as powerful in Figure 3 as they often were said to be in conversation with bankruptcy professionals: the time in bankruptcy was decreasing before 2005 and there's no downward kink in the curve in 2005; in fact, there's a modest steadying at that time.)

But these new features, although relevant, do not, even if they are excluded, reverse the trend of shortening bankruptcies. In Appendix Figure 1, we chart the duration in bankruptcy for non-§ 363 sales, dividing the sample of large Chapter 11s into prepackaged, prenegotiated, and "free fall" bankruptcies.[81] Even when we remove prepackaged, prenegotiated, and § 363 sale bankruptcies, and thereby leave only free fall bankruptcies, the time in bankruptcy for the free fall filings shortened dramatically. (Moreover, a narrowed valuation dispute range facilitates prepackaged and prenegotiated bankruptcies, because the parties can prepackage and prenegotiate more readily when they can better predict the debtor's value for bankruptcy purposes.) Regardless of how one divides out the bankruptcy types—free fall or overall—the narrowed dispute range is substantial.

D. Why the Dispute Range Should Narrow

These market-oriented developments should, all else being equal, have narrowed the valuation dispute range. If seniors know that the court will never accept a valuation much below market price, then seniors cannot profit by advancing a low valuation. They will incur costs (of their own time, as well as professional fees) and impose costs on others when pursuing a hopeless case. If seniors know that a lowball valuation will lead the juniors to buy the firm (or find someone else to buy it), then the seniors have no reason to offer an excessively low valuation.[82] Conversely,

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80 *E.g.*, Roe, *Three Ages of Bankruptcy*, *supra* note 26, at 206 n.87 (categorizing "prepackaged bankruptcies as faster forms of 1978-Code-inspired deal-making and [ ] the § 363 sale as a new and different decision-making mechanism"); Lubben, *supra* note 10, at 840 ("The credit for [C]hapter 11's cure can be traced to . . . control rights. . . . Most often these control rights are exercised by a [debtor-in-possession] lender."); Altman et al., *supra* note 72, at 54 ("Since 2006, the median time [in default] has decreased by more than half to 11 months, due in parts to limits on extending exclusivity and to a large increase in prepackaged Chapter 11 filings.").

81 Mark J. Roe & Michael Simkovic, Appendix to Bankruptcy's Turn to Market Value, https://perma.cc/54AT-GE97.

82 That is, if seniors are owed $100 and the true value of the firm is $250, seniors would like a false valuation of the firm at $70. An erroneous valuation below $100 would

if the court will ask juniors who propose a too-high valuation to buy the firm, then juniors have little reason to offer the excessively high valuation. And if a marketplace sale of the firm would not bring forward a bid anywhere close to the junior's preferred valuation, juniors have little reason to offer the too-high valuation that the court will reject.

With market thinking entering bankruptcy doctrine and conceptualization, with more § 363 sales, with deeper and better capitalized distressed markets, and with more participants better able to buy and sell bankrupt firm securities and the firms themselves, the valuation process's improvements should be detectable. We check for this.

We first sought a simple, transparent look. We pulled reported firm valuation disputes during the first two decades after the Code came into effect. We calculated the dispute range for each reported Chapter 11 valuation dispute. We calculated that range simply: it's the difference between the values proposed by the two disputants (or, if more than two values were proposed, the highest and lowest values) divided by the average of those values and then multiplied by one hundred.[83]

The need to use the difference between the high valuer and the low valuer is obvious. But the amount of money in dispute is only part of the equation. What counts is the portion of the bankrupt company that's disputed. A million-dollar dispute for a company that the high valuer says is worth $3 million and the low valuer says is worth $1 million is more substantial than a million-dollar dispute in a billion-dollar company. To make the dispute size comparable for different sized companies over time, we scaled it to the underlying size of the company. The average of the high and low disputed values thus became the denominator.

We then compiled a similar table of disputes over the most recent two decades.[84] We used the year of the *LaSalle*

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excessively compensate them. A false valuation at $70 could yield them the entire firm, which is really worth $150 more than the seniors are owed. A good market valuation—or the juniors having the opportunity to buy the firm—would yield the seniors the amount they are owed, but no more than that. To the extent the seniors know such a purchase will moot their $70 assertion, they have less incentive to push forward that false, or at least pessimistic, valuation.

[83] *Cf.* Altman et al., *supra* note 72, at 95 fig.5.1 (using a similar formula to calculate valuation range but with the lower value as the denominator).

[84] We used search terms like those used in Kenneth Ayotte & Edward R. Morrison, *Valuation Disputes in Corporate Bankruptcy*, 166 U. PA. L. REV. 1819, 1831 (2018) (listing "'Chapter 11,' 'valuation,' . . . 'discounted cash flow,' 'comparables,' 'multiples,' and vari-

market-infused opinion as our demarcation line between market skepticism and market acceptance (even though the acceptance of market value and market transactions was a process stretching over a decade or more). The range of dispute narrowed significantly, by about one-third. Appendix Table 5 lists each of the fifty-seven cases and their dispute ranges.[85]

We identified plan-confirmation valuation disputes using Westlaw searches, the method Professors Ken Ayotte and Ed Morrison used in a recent prominent study of valuation in bankruptcy.[86] A dispute was included only if the case was a Chapter 11 business bankruptcy, the dispute was over the going-concern value for plan confirmation, we could determine a high and low proposed valuation, and the high value was greater than $10 million in inflation-adjusted 2022 dollars.

The average valuation spread fell from 78% in disputes from 1980 to 1999 to 50% in disputes from 2000 to 2022. (If one drops the middle transition decade and compares only the first fifteen years with the last fifteen, the drop is sharper, with the dispute range halving.) Although the sample size is small, this test of means is statistically significant ($p < 0.01$). Figure 4 illustrates; Table 2 in Part III tabulates.

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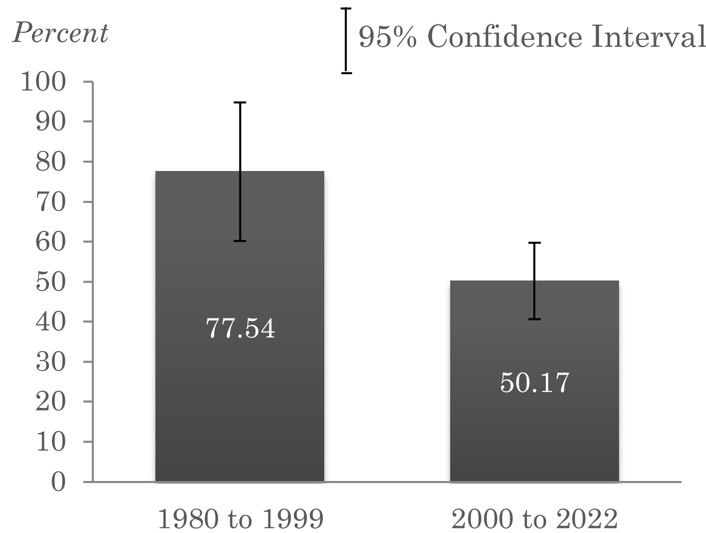
ants of these terms" as search criteria), and Bernard Trujillo, *Patterns in a Complex System: An Empirical Study of Valuation in Business Bankruptcy Cases*, 53 UCLA L. REV. 357, 367 n.34 (2005) (listing Westlaw keycites "'51K3563 51K3564 51K3565 & DA(AFT 1978 & BEF 1999)' in the library 'fbkr-bct'" as search criteria).

85 *See* Appendix, *supra* note 81.

86 Ayotte & Morrison, *supra* note 84, at 1831.

FIGURE 4: NARROWING BANKRUPTCY VALUATION DISPUTE SIZE OVER TIME, 1980–2022[87]



The two shaded vertical bars show the average dispute range in reported § 1129(b) valuation contests. The range is calculated by subtracting the lowest valuation offered from the highest, then dividing that difference by their average. The difference was statistically significant at $p < .01$. A table of the decisions is in the Appendix. *See* Appendix, *supra* note 81. The vertical line in each average in this figure shows the 95% confidence interval.

The observed narrowing is substantial. Still, the data is suggestive but not dispositive because there are fewer than sixty full-scale, reported valuation disputes,[88] while there are hundreds of large-firm bankruptcies.

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[87] Source: Westlaw searches; authors' analysis of the court decisions.

[88] The total sample size is fifty-seven, which is not large. The later bankruptcies with valuation disputes involved larger firms than those in the earlier period. The size differential could affect the propensity toward valuation litigation; high fixed costs of litigation may lead larger firms to generate more valuation litigation than smaller firms. But if more valuation information is available for larger firms, and if more is at stake in the disruption of a large firm's operations, perhaps the parties to a larger bankruptcy can settle more quickly. In the analysis below we find that the time trend toward narrower disputes persists even after we control for firm size.

Figure 4 includes only those firms for which the valuation dispute was litigated and a judicial opinion issued. Some disputes settle at an earlier stage and others are obviated through a sale. If more easily valued firms are more likely to be sold or to have restructuring disputes settled, and if sales became more available in later years, this could make us less likely to find evidence of the dispute range narrowing in the remaining litigated cases, biasing the result *against* our working hypothesis. On the other hand, if firms that are harder for courts to value are sold more often, this would narrow the litigated dispute range over time. Litigated valuation disputes narrowed in the later years.

E. The Narrowed Bid-Ask Spread Prebankruptcy

Another impact of the narrowing dispute ranges due to the rise of market valuation could be expected as a prebankruptcy consequence. More predictable valuation means creditors and stockholders know when valuing a distressed firm that a bankruptcy court will not entertain wild valuation proposals. That expectation of a narrowed dispute range could affect the bid-ask spread for the distressed firm's securities. Since the extra-high (and extra-low) valuations are taken off the table, the valuation process should be somewhat easier for traders to predict. A common measure of market efficiency is the bid-ask spread. Brokers quote one price when selling a stock and another for buying the stock; they earn profit on the difference. When the value of the stock is easier to ascertain and therefore less volatile, the spread between the bid and the ask price narrows.

Hence, a declining bid-ask spread over time for distressed equity supports the idea of an efficacious rise of market valuation in bankruptcy. By contrast, a time-invariant bid-ask spread would refute the hypothesis of improved valuation of distressed firms. In fact, the spread narrowed.

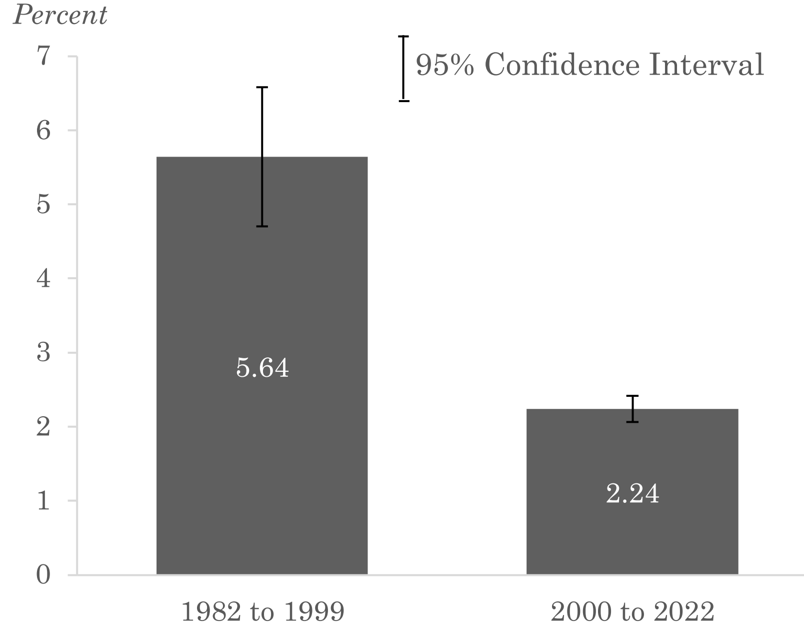
To be sure here, bid-ask spreads were narrowing in the overall stock market;[89] distressed firms participated in that narrowing. And bid-ask narrowing does not in itself "prove" that dispute ranges were narrowing. Narrowing could come from multiple market improvements, each consistent with this Essay's thesis, but in different ways: (1) the narrowing bid-ask spread could anticipate the narrowed dispute range—the paper's core thesis—or (2) it could reflect a better prebankruptcy market in which distressed debt traders better predict bankruptcy outcomes, even if the dispute range never narrowed, or (3) the equity market's capacity to assess value improved across the board for distressed and nondistressed firms.

Figure 5 shows the narrowing of the bid-ask price since 1999, suggesting that the market pricing for distressed firms and their securities improved on at least one of these dimensions.

Improvements in bankruptcy could either encourage more firms to file bankruptcy or enable more firms to restructure outside of bankruptcy based on more accurate predictions of bankruptcy's likely outcome.

[89] *See* Appendix, *supra* note 81, at fig.4.

FIGURE 5: NARROWING BID-ASK SPREAD IN DISTRESSED FIRM EQUITY, 1982–2022[90]



This figure pulls all large public firm bankruptcies for which prebankruptcy bid-ask equity spreads are available from CRSP. Bid-ask spreads fell by about 90% from the earliest years of data in the 1980s and 1990s to the latest years in the 2020s, consistent with the rise in efficacious market valuation. The bars near the top represent the 95% confidence interval.

III. VALUATION ON THE GROUND: IS THE DISPUTE RANGE NARROWING?

The simple comparison in Figure 4 of the dispute range in the first twenty years under the Code with the range of the second twenty—with the Supreme Court's market-oriented *LaSalle* decision dividing the two periods—shows the dispute range narrowed in the recent period. Table 2 presents the same information in Figure 4. As in Figure 4, Table 2 divides the sample into pre- and post-*LaSalle* periods. The differences are statistically significant at the $p < 0.01$ level.

[90] Source: Center for Research in Securities Prices (CRSP); FLA.-UCLA-LOPUCKI BANKR. RSCH. DATABASE, *supra* note 79.

TABLE 2: NARROWING BANKRUPTCY VALUATION DISPUTE SIZE, 1980–1999 VS. 2000–2022

	Years	**N**	**Mean**	**Standard Error**	**Standard Deviation**
Valuation Dispute Range	1980–1999	21	77.54	8.65	39.63
	2000–2022	36	50.17	4.67	28.04
	Difference		27.37**	9.83	

** $p < 0.01$.

This table summarizes the results for the range of valuation disputes, comparing the later twenty-year period (2000–2022) to the Code's earlier twenty-year period (1980–1999). A test of means yields a t-value of 2.78, a standard error of 9.83, a mean difference of 27.37, and a significant p-value of 0.009 under the most conservative set of assumptions (a two-tailed t-test assuming unequal variances). The p-value is significant (< 0.01) under all specifications.

While the Supreme Court's *LaSalle* decision is an important marker, changes were occurring before and after the decision. For example, § 363 sales were already growing in frequency by the 1990s. Hence, a continuous measure could be probative.

The trend toward narrower valuation disputes does not depend on Table 2's division of the sample into two periods, around *LaSalle*. The valuation dispute range continuously declined over the four decades. The simple regression analysis in Table 4, column (1) suggests a statistically significant decline in the valuation dispute range averaging 1.1 percentage points per year over the forty-year sample period.

Could other factors explain the narrowing dispute range? Changes in the characteristics of debtor firms could affect the results, including the size of the debtor firm, the firm's industry, and whether the debtor was publicly traded or privately held. Changes in basic investment markets could make valuation harder or easier: a more volatile equity market in the bankrupt firm's industry prior to the judicial valuation opinion could indicate that the market had more trouble valuing the firm; if that changed over time, that change could explain the narrowing dispute range. Credit market conditions measured by the prime rate at the time the debtor filed for bankruptcy could affect the severity of a valuation dispute. We tested for the impact of these features; the results are reported in Table 4, column (2).

We then added controls for characteristics of the bankruptcy court resolving the dispute, including the level of experience of the bankruptcy judge hearing the valuation dispute and the judicial forum. The results are reported in Table 4, column (3). First, basic descriptive statistics are presented in Table 3 below. Further details are in Appendix Table 6.[91]

TABLE 3: BASIC DESCRIPTIVE STATISTICS[92]

Variable	Mean	Standard Deviation	Min	Max
Valuation Dispute Spread	60.25	35.06	4.99	179.82
Valuation Average (2022 USD Billions)	2.54	5.5	0.01	26.39
Equity Volatility	16.13	9.48	5.24	49.54
Judicial Experience	10.39	8.18	0.47	34.1
Prime Rate at Filing	6.61	3.33	3.25	16.5

Many of the firms in our sample are privately held and filed bankruptcy prior to the 2003 introduction of electronic dockets on PACER. Information about these firms' capital structure (e.g., leverage, percent secured debt) is therefore not readily available.

Table 4 reports in columns (2) and (3) the results of these regressions. Valuation percentage spread is our dependent variable. With or without the controls, and in multiple combinations of the controls, the valuation dispute narrows over time, and the results remain statistically significant across the differing specifications.

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91 *See* Appendix, *supra* note 81.

92 Source: Westlaw was the source for whether there was a disputed valuation with a reported valuation decision. Supplemental data sources for this analysis included the LoPucki Bankruptcy Research Database; docket searches on Bloomberg and PACER; the SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) database; and the Board of Governors of the Federal Reserve System Release H.15 Selected Interest Rates.

TABLE 4: REGRESSION: DISPUTE RANGE NARROWED OVER TIME, 1980–2022[93]

	(1) No controls	(2) Controls	(3) Court
Year	-1.11* (0.450)	-2.34** (0.732)	-2.28** (0.707)
Valuation (USD billions)		-1.60** (0.470)	-1.89** (0.580)
Equity Volatility		27.56* (11.42)	38.19** (12.82)
Judicial Experience			-8.17+ (4.584)
Prime Rate	No	Yes	Yes
Publicly Traded	No	Yes	Yes
Industry	No	Yes	Yes
Court	No	No	Yes
R^2	0.11	0.33	0.39
N	57	57	57

+ $p < 0.10$, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. Robust standard errors in parentheses. The dependent variable is the valuation percentage spread. Main results are robust to clustering standard errors at the year level, using classical standard errors, or using log, linear, or square root versions of independent and dependent variables. Equity Volatility is calculated using equal-weighted daily returns within Fama-French thirty-industry classifications in the trailing three months prior to the published judicial opinion and then taking the log of this value. Judicial Experience is the square root of the number of years between when the judge overseeing the valuation dispute was appointed to the bench and the date of the judicial opinion. Prime rate is the prime interest rate at filing. Main results are robust to using the prime rate at the time of the judicial opinion or at confirmation or a combination. Industry control indicators use Fama-French five-industry classification. Court controls use dummies for the Southern District of New York and Delaware bankruptcy courts. The Fama-French industry information came from Professor Kenneth French's series of equal-weighted daily returns by industry, available on his website. *See Current Research Returns*, TUCK SCH. OF BUS. AT DARTMOUTH (last updated June 2024), https://perma.cc/C2BY-8JG4.

We consider the control variables listed above because firms that are larger or public or in certain industries might be easier to value if there is more information available about them, more resources available with which to conduct valuation analyses, or

[93] The dispute range in reported decisions comes from Westlaw searches and then manual coding after examining the decisions. Additional data comes from the LoPucki BRD.

more potential buyers. Perhaps the narrowing dispute range came from changing industries from which the bankrupts were drawn. Similarly, during periods of financial market volatility within an industry, it may be harder to agree on an estimate of value. Perhaps volatility was higher in the first decades under the Bankruptcy Code than afterward. Credit conditions might also affect the ease of valuation or the amount of time and resources that the parties are willing to expend on valuation disputes; those conditions vary over time and could explain the narrowed valuation range. Moreover, judges who are more experienced, see more business bankruptcy cases, have access to more capable clerks and better resources, or who are in circuits that have embraced market valuation may find it easier to assess proposed valuations. Such judicial capabilities may encourage disputing parties and their experts to converge in their estimates to preserve credibility. Judges might well have (and we believe in fact have) become better at valuing over time, and institutional changes might have brought more valuation disputes before those judges.

Again, column (1) simply correlates our time trend (year of the bankruptcy filing) with the dispute range, without any control variables. In this specification, the valuation spread—the dispute range—declines by around 1.1 percentage points per year.

Introducing controls for debtor characteristics, market conditions, and judicial characteristics *strengthens* the time trend. It also suggests that valuation dispute ranges tend to be narrower when it is easier for the market to value the debtor firm and when judges are more experienced. With the controls in columns (2) and (3), the valuation percentage spread declines on average by 2.3 percentage points per year.

Column (3) retains the controls for debtor characteristics and market conditions that appear in column (2) and adds controls for judicial experience and dummy variables for the New York and Delaware courts.[94] (Large corporate bankruptcies shifted toward

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[94] Cases in the Second and Third Circuits may have a narrower valuation dispute spread. If so, this could be due to these circuits embracing market valuation early, or to high levels of judicial expertise not otherwise captured by our experience variable. *See* Michael Simkovic, *The Evolution of Valuation in Bankruptcy*, 91 AM. BANKR. L.J. 299, 305 (2017) ("The first judicial use of market prices as a substitute for . . . expert opinion . . . [was] affirmed by the Third Circuit in 2007."); Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119, 120 (2018); Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 428, 436–62 (2006); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1386, 1392 (2000).

these two courts and their circuits during the past four decades, as summarized in Appendix Figure 3.[95] The experience level of judges hearing valuation disputes also increased.)

After we added these controls, the narrowing dispute time trend persisted at a 2.3 percentage point annual decline. The results with controls thus reinforce the univariate analysis detailed in Table 2 and depicted in Figure 4.

In addition, we find evidence consistent with intuitions about what drives the ease of valuation and incentives to engage in valuation disputes: the valuation spread is narrower for larger, more valuable firms and for debtors in industries suffering from lower equity volatility. In column (3), an additional billion dollars of debtor value predicts a 1.9% narrower valuation spread. Meanwhile, a 1% rise in equity volatility in the debtor's industry predicts a valuation spread that widens by 0.38 percentage points. Thus, firms that are easier for markets to value also exhibit a narrower valuation dispute spread. This is consistent with a shift toward market-based valuation contributing to narrower spreads. And, as expected, a more experienced judge also predicts a narrower valuation spread.

Overall, Table 4 indicates that the dispute range narrowed by 1.1 to 2.3 percentage points per year during the forty-three-year sample period. While omitted variables could help explain these results, adding controls has thus far only *strengthened* the time trend toward narrower valuation disputes. The basic results of narrowed valuation disputes over time are robust to plausible alternate specifications.[96]

These results give the data ample opportunity to reject the hypothesis that the valuation dispute range has narrowed over the decades. The data do not reject that hypothesis.

* * *

Additional evidence supports our hypothesis that bankruptcy is faster when there are fewer or less intense valuation disputes.

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95 *See* Appendix, *supra* note 81. In the latter part of these four decades, the Southern District of Texas, at least until very recently, has garnered more big cases. Samuel M. Andre, *The Southern District of Texas: The Next Big Venue in Commercial Bankruptcy?*, FREDRIKSON (Oct. 10, 2018), http://perma.cc/6WDV-N53J. Adding it as a control does not change results.

96 In an untabulated analysis, we replaced our dependent variable (the valuation percentage spread) with its log. Results are similar, generally with greater significance and higher R-squared. The linear, untransformed valuation percentage spread has less skew than its log transformation.

Intuitively, disputed valuations should lead Chapter 11 proceedings to drag on longer. And indeed, disputed valuations on average last longer than similar bankruptcies. Table 5 demonstrates this. In Table 5, we identify the subset of the reported dispute cases that were also in the LoPucki Bankruptcy Research Database—twenty-six of the fifty-seven reported valuation disputes. These are all relatively large firms that were publicly traded prior to filing. We compared these to similar cases in that dataset with no reported valuation dispute. Cases with a valuation dispute took between 57% and 73% longer than similar cases without a dispute, depending on the controls used. This translates into bankruptcies with a valuation conflict taking six to nine months longer.[97]

[97] In Table 5, we use a log specification, which analyzes the decline in case duration in percent terms and compresses extreme observations. This is helpful because of the pronounced decline in average case duration over the years and because of a skew in the distribution of case duration. Results from a linear model, shown in Appendix Table 3, are qualitatively similar. *See* Appendix, *supra* note 81.

TABLE 5: REGRESSION: BANKRUPTCY TAKES LONGER WHEN THERE IS A VALUATION DISPUTE, 1980–2022[98]

	(1) Base	**(2) Court**	**(3) Attorneys**
Valuation Conflict	0.55** (0.196)	0.55** (0.207)	0.46** (0.146)
Year Filed	-0.04*** (0.007)	-0.04*** (0.007)	-0.03*** (0.007)
Leverage (log)	-0.26** (0.097)	-0.27** (0.098)	-0.12 (0.086)
Prime Rate at Filing (log)	0.51** (0.172)	0.52** (0.171)	0.41* (0.163)
Prime Rate at Disposition (log)	-0.72*** (0.183)	-0.71*** (0.179)	-0.49** (0.174)
Unionized Employees (log)	0.02+ (0.014)	0.03+ (0.014)	0.02+ (0.012)
Judicial Experience		-0.01** (0.005)	-0.02*** (0.005)
Industry	Yes	Yes	Yes
Assets (log)	Yes	Yes	Yes
Ebit (billions)	Yes	Yes	Yes
Employees	Yes	Yes	Yes
Court	No	Yes	Yes
Debtor Attorney	No	No	Yes
Creditor Committee Attorney	No	No	Yes
R^2	0.279	0.300	0.574
N	711	711	711

+ $p < 0.10$, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. Robust standard errors in parentheses. Here we compare the length of the proceeding in cases with a reported valuation dispute and cases without a reported valuation dispute. The dependent variable is the log of case duration in years. Industry control indicators use Fama-French thirty-industry classification, as described in the note after Table 4. Court controls consist of dummies for the Southern District of New York and Delaware bankruptcy courts. Debtor Attorney variables include dummies for firms that represented a debtor in at least five cases in the dataset and a dummy for missing data. Creditor Committee Attorney variables include dummies for firms that represented creditors' committees in at least five cases in the dataset, and a dummy for either missing data or cases where no creditors' committee was appointed. Appendix Table 2 repeats the analysis in Table 4 with added detail. *See* Appendix, *supra* note 81.

[98] Source: LoPucki Bankruptcy Research Database.

Table 5 shows what is becoming familiar in this Essay: a decline in case duration over time. The table also shows a negative relationship between judicial experience and case duration, a negative relationship between leverage and case duration, a positive relationship between interest rates at filing and case duration, a negative relationship between interest rates at confirmation and case duration, and a marginally significant positive relationship between the number of unionized employees and case duration. In other words, reorganization is quicker when the debtor is more highly levered (and when juniors are therefore more likely out of the money), when the cost of capital for an in-bankruptcy loan to finance the bankruptcy is higher, when the judge is more experienced, when exit financing is cheaper, and when there are few or no unionized employees.[99] These findings are consistent with prior research[100] as well as intuition. That consistency with prior results and intuition buttresses the persuasiveness of the decline in dispute distance as significant in bankruptcy's four-decade development.

Lastly, we add that for the fifty-seven bankruptcies with a reported valuation dispute, those that had a wider valuation took longer to resolve. The result, displayed in Appendix Table 4,[101] is not statistically significant, but it points in the same direction as the results in Table 5.

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While the data fits well with the interpretation that the move to market valuation propelled much of bankruptcy's success, we do not claim that the data results are definitive. We consider our

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[99] Debtors seeking to reduce their labor costs by rejecting collective bargaining agreements must first negotiate with the union in good faith and demonstrate that costs imposed on unionized workers are necessary for an effective reorganization. 11 U.S.C. § 1113. This negotiation and mandatory judicial review slow the process.

[100] *See, e.g.*, Gilson et al., *supra* note 16 ("M&A in bankruptcy is . . . more likely when the costs of financing a reorganization are greater than financing costs to a potential acquirer. Consistent with a senior creditor liquidation bias, the greater use of secured debt leads to more sales in bankruptcy."). *See generally* Sandeep Dahiya, Kose John, Manju Puri & Gabriel Ramirez, *Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence*, 69 J. FIN. ECON. 259 (2003) (noting that obtaining debtor-in-possession financing is associated with faster bankruptcies); Gary M. Roberts, *Bankruptcy and the Union's Bargain: Equitable Treatment of Collective Bargaining Agreements*, 39 STAN. L. REV. 1015 (1987) (explaining that negotiations with unions can delay bankruptcy resolution); Ben Iverson, Joshua Madsen, Wei Wang & Qiping Xu, *Financial Costs of Judicial Inexperience: Evidence from Corporate Bankruptcies*, 58 J. FIN. & QUANTITATIVE ANALYSIS 1111 (2023) (finding that bankruptcy cases overseen by inexperienced judges take longer).

[101] *See* Appendix, *supra* note 81.

results suggestive. It is observational data, with a limited sample size, with little opportunity to test causality.

Moreover, it is possible that the shortening mechanism was not market value directly but that a valuation consensus and common information bundle arose over the decades. Restructuring professionals came to believe in market value, and all of them had a Bloomberg terminal. Bankruptcy players then eventually converged on similar valuation judgments for the firm to be restructured. This is still the market at work, albeit through a mechanism different from judicial harnessing of the market. The mechanism resembles what economists call convergence on a Schelling point—a focal point of shared assumptions that allows easy coordination.[102]

Still, the basics are there. Although the core sample is small ($n = 57$), both univariate and multivariate regression analyses suggest that the narrowing of the spread is statistically significant ($p < 0.01$). We pulled what data is available to bear on the hypothesis that the move to market valuation made Chapter 11 much better than it had been. The results for the controls are consistent with prior work and intuition, and they do not degrade the significance of our focus, which is in fact strengthened statistically. The data could have falsified that thesis. But the thesis was not falsified.[103]

The data showed the dispute range narrowing significantly over time as more market-based reorganization techniques came to be used and as courts switched to find market value more indicative of the value for reorganization purposes than a judicially found, fictional reorganization value that has no ties to market prices and market transactions. Moreover, the jurisdictions that were the most aggressive and earliest in adopting market valuation—the Second and Third Circuits, especially the Southern District of New York and the District of Delaware—were generally faced with narrower, more limited valuation disputes. And the size of valuation disputes corresponds to the ease with which markets could value the debtor firm's securities or the firm could be sold.

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[102] The classic example: Two students are offered a reward if they meet tomorrow in New York City. They are not told where or when and they cannot communicate. Professor Thomas Schelling's Yale students regularly chose to meet at noon under Grand Central Station's big clock—a salient focal point on their usual entry path to New York City. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 55–56 (1960).

[103] *Cf.* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 66–67 (2d ed. 2002).

Thus, the overall results of the analysis are consistent with this Essay's narrative: judges rejected market valuation in the earlier years and adopted it in the later years; few whole-firm, § 363 sales were done in the early years while many more were done in the later years; rights offerings of stock, which can anchor valuation (even if insiders get a benefit from backstop fees or other favorable treatment), were absent in the early years and present in the later years; market institutions, like distressed debt trading, were present in the early years but thinner than they became in the later years.

All in all, the case is strong for bankruptcy having become more market-oriented over time, for that to have induced the range of valuation disputes to narrow because of that turn to a more focused market valuation, and for these features to have been central in accelerating and thereby improving bankruptcy.

IV. POLICY IMPLICATIONS AROUND THE WORLD

Many policymakers around the world see Chapter 11 as a success—a bankruptcy system worth emulating.[104] The United States, it's said, "possesses the top [bankruptcy] model[,] enshrined in Chapter 11."[105] It is seen as a success overall despite its ongoing difficulties and distortions (such as increasing financial creditor litigation, new fraudulent transfer issues, and mass tort controversies). Consider this summary of the European Union's central modern restructuring reform directive[106]:

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[104] *See, e.g.*, Frederico Mollet, *Will Corporate Debt Choke the Post-COVID-19 Recovery?*, EUR. POL'Y CTR. (Jan. 25, 2021), https://perma.cc/5G4Z-C8P8 ("Europe has long struggled with slow and inefficient insolvency regimes which aggravate debt overhangs by liquidating insolvent but viable businesses. In contrast, the US's Chapter 11 bankruptcy system has allowed viable businesses to swiftly restructure."); Emilie Ghio, Gert-Jan Boon, David Ehmke, Jennifer Gant, Line Langkjaer & Eugenio Vaccari, *Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic*, 30 INT'L INSOLVENCY REV. 427, 439 (2021) (noting the 2021 introduction in the Netherlands of "a new, mainly out-of-court restructuring procedure" that is "[b]uilt on the basis of the Anglo-American tradition of schemes of arrangement and [ ] Chapter 11 . . ."); *cf.* Horst Eidenmüller, *Comparative Corporate Insolvency Law, Second Edition* 6 (Eur. Corp. Governance Inst., Working Paper No. 738/2023, 2023) (available on SSRN); Bo Becker, *The EU's Insolvency Reform: Right Direction, Not Enough, and Important Issues Left Unaddressed*, CTR. FOR ECON. POL'Y RSCH. (June 27, 2019), https://perma.cc/PH29-H4AT ("European insolvency systems today . . . deliver much less than the Chapter 11 system in the US.").

[105] Tibor Tajti, *Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States*, 6 CHINA-EU L.J. 1, 1 (2018).

[106] Council Directive 2019/1023, 2019 O.J. (L 172) 18.

> [T]he European Commission . . . reviewed the [EU's] restructuring . . . framework and proposed significant changes . . . . The central theme of all the proposed reforms relates to the adaptation (and adoption) of various provisions of Chapter 11 of the United States . . . . Chapter 11 has been held out as a success and as a model for the reform of restructuring laws worldwide.[107]

While we agree that Chapter 11 is overall a success, we nevertheless urge caution before emulating it. Policymakers around the world who emulate Chapter 11[108] could find themselves buying into the Chapter 11 of 1980–1999 and not acquiring the modern, successful Chapter 11. The early 1980s Chapter 11, as pictured in the left of Figure 3, was a long-duration Chapter 11, needing on average three years to restructure a large firm. Modern Chapter 11s take three months.

The problem for policymakers seeking to emulate Chapter 11 is that the statute barely changed, while bankruptcy's duration shortened and its efficacy improved. It was the surrounding market institutions (distressed debt investors, distressed debt trading, and high-quality information systems for distressed firms) and U.S. bankruptcy judges' willingness to utilize them that changed. In the 1980s, U.S. bankruptcy judges rejected the market and market valuation; in the 2000s they generally equated

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[107] Gerard McCormack & Wai Yee Wan, *Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges*, 19 J. CORP. L. STUD. 69, 70 (2019); *see also* Baird et al., *supra* note 8 ("[M]ost of the individual domestic regimes have, like the Directive itself, taken significant inspiration from US Chapter 11, but none have exactly replicated it.").

[108] *See* Masaki Fujita & Sayuri Tago, *General Overview of and Recent Developments in Japanese Rescue-Type Insolvency Proceedings*, 15 INSOLVENCY & RESTRUCTURING INT'L 39, 39 (2021) (noting that Japan "adopt[s] the debtor-in-possession [ ] model [from Chapter 11] in principle"); Peng Xu, Bankruptcy Resolution in Japan: Civil Rehabilitation vs. Corporate Reorganization 22 (2004) (Rsch. Inst. of Econ., Trade & Indus. Discussion Paper Series 04-E-010) (available at https://perma.cc/DJ3M-B8S9) ("The recent bankruptcy reform in Japan is highly influenced by the U.S. Bankruptcy Code, in particular, Chapter 11."); Oscar Couwenberg & Stephen J. Lubben, *Good Old Chapter 11 in a Pre-Insolvency World: The Growth of Global Reorganization Options*, 46 N.C. J. INT'L L. 353, 368 (2021) ("The Dutch Scheme engrafts several key [C]hapter 11 provisions onto its framework."); Michael Kim, *When Nonuse is Useful: Bankruptcy Law in Post-Communist Central and Eastern Europe*, 65 FORDHAM L. REV. 1043, 1060 n.162 (1996) ("Hungarian bankruptcy law consists of . . . a reorganization section based on Chapter 11."); Mikovhe Maphiri, *The Suitability of South Africa's Business Rescue Procedure in the Reorganization of Small-to-Medium-Sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 101, 123–24 (2018) ("[T]he provisions of the . . . United States Bankruptcy Code are considered as part of South Africa's recognition of international law.").

market value with bankruptcy value. For policymakers around the world to be confident that they are buying into the Chapter 11 of the past two decades and not that of its first two decades, it is not enough to adapt the Chapter 11 statute to their jurisdiction. They will need to assess their own market institutions and their judiciary's views of markets.[109]

CONCLUSION

Bankruptcy in the 1980s was largely viewed as unsuccessful, and the inability to value the firm accurately and quickly was a major reason for this failure.

U.S. bankruptcy today is not seen as the same failure that it was in the 1980s, but rather as a success. Bankruptcy has made progress in narrowing the valuation range by using § 363 sales and market values. These improvements and the rise of market value in bankruptcy are major reasons why bankruptcy works well today and worked poorly earlier.

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[109] U.S. bankruptcy judges typically are drawn mid-career from bankruptcy lawyers and commercial litigators. Judges with this background should be readier to accept market-based solutions to bankruptcy problems than would career civil servants. Many nations draw their judges from the latter. *See* Becker, *supra* note 104 ("[M]anaging [complex bankruptcies] is challenging, and a system of specialised courts may be needed. . . . Perhaps a new system of European bankruptcy courts, at least for corporate cases, would be appropriate.").