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Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time To Spare

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COMPETING NARRATIVES IN CORPORATE BANKRUPTCY: DEBTOR IN CONTROL vs. NO TIME TO SPARE

*David A. Skeel, Jr.**

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INTRODUCTION

“[W]ithout story,” Margaret Atwood writes in a recent account of literature and debt, “there is no debt.” “A story is a string of actions occurring over time,” she explains:

[O]ne damn thing after another, as we glibly say in creative writing classes—and debt happens as a result of actions occurring over time. Therefore, any debt involves a plot line: how you got into debt, what you did, said, and thought while you were in there, and then—depending on whether the ending is to be happy or sad—how you got out of debt, or else how you got further and further into it until you became overwhelmed by it, and sank from view.¹

If debt is a story, so too is bankruptcy, where more than a million Americans go each year to, in the words of an earlier commentator whom we will see again, “atone[] for [their financial] sins.”²

These stories—the “honest but unfortunate debtor” who seeks a fresh start,³ the business that is viable but choking with debt—are obscured in the individual judicial opinions that are legal scholars’ stock in trade. Read a contract or corporate law decision and you often will encounter a complete narrative of the parties’ interactions, sometimes with a clearly delineated

* S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania. I am grateful to Bob Weisberg for helpful comments.

1. MARGARET ATWOOD, *PAYBACK: DEBT AND THE SHADOW SIDE OF WEALTH* 81 (2008).
2. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 233 (1937).
3. This staple of American bankruptcy lore was first given Supreme Court imprimatur in *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

plot. There are “saints” and “sinners” in Delaware corporate law opinions, as a much-cited commentary puts it,⁴ and richly textured narratives of directors’ performances as faithful or unfaithful fiduciaries.⁵ Not so with most bankruptcy opinions. In the course of a big case, bankruptcy judges sometimes produce five or six judicial opinions, each dwelling on a few basic facts as applied to a technical statutory provision. These decisions usually contain only the fragments of a narrative; they are the shards of a larger story.

That larger story is the case as a whole. When a company like Chrysler or United Airlines files for bankruptcy, the participants develop—and often contest—a master narrative that consists of two intertwined stories.⁶ The first concerns the reasons for the company’s financial distress and the second the way forward. In the unusual case where everyone agrees that the business is not viable, the overall narrative indicates that it is time to close the business down and sell its assets for whatever they will bring as scrap. More often, the debtor’s representatives will insist that the business has great promise, but has been throttled by too much debt or an unexpected economic shock. The company, they will argue, is worth preserving—just like the railroads that were restructured in the early days of American corporate reorganization and the many businesses that have been reorganized in the century since.⁷

Creditors or other parties who are unpersuaded or would fare better if the bankruptcy was resolved differently may challenge the debtor’s narrative. The simplest counter-narrative suggests that the business is not viable at all, and cannot realistically be restructured. This challenge is a familiar feature of bankruptcies involving small companies; it is less common with larger companies.

4. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997).

5. A chancery court opinion excoriating Michael Eisner’s dictatorial reign as chief executive officer at Disney is often cited as evidence of the latter. In re Walt Disney Co. Deriv. Litig., 906 A.2d 27 (Del. 2006).

6. The scholarly literature on master narratives and on narrative generally is legion. In a helpful overview, Michael Bamberg notes that “there seem to be two different interpretations of the term ‘master narratives’; one claiming (in a more narrow sense) the existence of master narratives that delineate how narrators position themselves with their story; the other arguing in a much broader sense that speakers are principally subjected to grand récits and metanarratives from which there seems to be no escape.” Michael Bamberg, *Considering Counter Narratives*, in *CONSIDERING COUNTER-NARRATIVES: NARRATING, RESISTING, MAKING SENSE* 351, 359 (Michael Bamberg & Molly Andrews eds., 2004). I use the term in the first, narrower sense in this Essay.

7. The emergence of America’s large-scale reorganization procedure in response to the railroad failures of the nineteenth century is chronicled in DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001).

In support of its claim that the business is worth saving, the company may argue that it simply needs time to renegotiate its obligations with its creditors. Alternatively, it may say that asset values are deteriorating rapidly and it is imperative that the bankruptcy court immediately approve a sale of the company, or some other rapid disposition. These two possibilities correspond to the principal resolution narratives in current Chapter 11 bankruptcy practice, which I will refer to as “Debtor in Control” and “No Time to Spare.”⁸

Chrysler’s bankruptcy vividly illustrates the No Time to Spare narrative. When Chrysler filed for bankruptcy at the insistence of the President and his Auto Taskforce in late April 2009, its lawyers assured the bankruptcy court that the company had been battered by the economic crisis, but could be restructured and preserved if the judge quickly approved the sale of its assets to a new entity that would be managed by Fiat. If the judge thwarted the sale, on the other hand, Chrysler and its subsidiaries would “likely face the immediate, piecemeal liquidation of their assets in a severely depressed market.”⁹ Shortly after Chrysler received the blessing of the bankruptcy court, General Motors filed for bankruptcy in the same district, and invoked the same narrative. The company could be saved, but there was No Time to Spare.¹⁰

Although their lawyers invoked the No Time to Spare narrative, Chrysler and GM were unlikely No Time to Spare cases.¹¹ Both companies—particularly General Motors—were obvious candidates for Debtor in Control treatment. Debtor in Control was the standard resolution narrative for large-scale corporate bankruptcies for the first decade after the enactment of the current bankruptcy laws in 1978. Debtor in Control, with its

8. I have borrowed the “Debtor in Control” label—but have removed the word “full” in order to give it a slightly less pejorative connotation—from a well known article by Lynn LoPucki. Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 99 (1983).

9. Memorandum of Law in Support of Motion of Debtors & Debtors in Possession at 2, *In re* Chrysler LLC, No. 09-09-50002 (Bankr. S.D.N.Y. May 3, 2009), 2009 WL 5131346 [hereinafter Memorandum in Support of Chrysler Sale].

10. “It is imperative that the 363 Transaction be expeditiously approved,” the debtors warned in their motion in support of the sale.

Any delay in the consideration of this Motion will result in continuing and increasing revenue erosion and further loss of market share to other domestic and foreign manufacturers that are not suffering aggravated financial distress. Absent prompt confirmation that the sale has been approved and that the transfer of the assets will be implemented, it is highly probable that GM will have to liquidate.

Debtors’ Motion to Approve the Sale at 5, *In re* Gen. Motors Corp., 409 B.R. 24 (Bankr. S.D.N.Y. 2009) (No. 09-50026), 2009 WL 1529573.

11. Lehman Brothers, by contrast, which we will also consider in this Essay, was a true No Time to Spare case. See *infra* Part II.

sometimes-extended negotiations between the debtor's managers and its creditors, works best with companies whose principal assets are tangible and unlikely to deteriorate rapidly. Railroads, airlines, and manufacturing businesses fit this traditional profile. In recent years, companies increasingly have invoked the No Time to Spare narrative, often because the companies' principal assets are technology and human capital, whose value may quickly disappear. The invocation of the No Time to Spare narrative by the automakers, which are classic bricks-and-mortar companies, could suggest that the old Debtor in Control narrative has been or soon will be fully displaced.¹² If Chrysler and GM were not treated as Debtor in Control cases, perhaps no company will be.

Such a shift in narratives would hardly be the first. In the early twentieth century, the standard resolution narrative fit a pattern I will call Banker Paternalism. When a railroad or other large corporation filed for bankruptcy, the investment banks that had sold the now-bankrupt entity's stock or bonds set up committees to represent each class of shareholders or bondholders in the negotiations with the debtors' managers over the terms of a reorganization. The bankers portrayed themselves as vigilant defenders of the interests of the ordinary investors they represented. Their Progressive and New Deal era critics, on the other hand, were not so sure.

The Essay begins with this earlier era, both to provide context for more recent developments and to illustrate some of the effects of a regnant master narrative for bankruptcy practice and bankruptcy reform. I then will move to the present, and use the Lehman and automaker bankruptcies to explore the relationship between the Debtor in Control and No Time to Spare resolution narratives, and the very different emotional appeal that characterizes each. This will lead to a more general discussion of the significance of resolution narratives—and to my claim that two narratives, and two underlying approaches, may be preferable to a single dominant paradigm.

I. THE BANK PATERNALISM NARRATIVE

Back in the day—the late nineteenth and early twentieth century era when the first corporation reorganization procedure was devised—railroads and then other corporations reorganized through a jerry-built process known

12. The shift in bankruptcy practice reflected in the rise of the No Time to Spare narrative is chronicled in the recent bankruptcy literature. See, e.g., David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917 (2003) [hereinafter Skeel, *Creditors' Ball*]; Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002).

as the equity receivership.¹³ When a railroad threatened to default, a creditor, usually with the full knowledge and approval of the debtor's managers, would ask a court to appoint a receiver to take control of the company's property. Creditors who held bonds secured by mortgages on the railroad's property would initiate a foreclosure proceeding. Rather than ousting the debtor's managers and precipitating a sale of the railroad's property, as would ordinarily be the case with receivership and foreclosure, these procedures simply set the stage for a renegotiation of the railroad's obligations. A manager of the railroad or some other friendly party would serve as receiver, and the foreclosure sale would be postponed indefinitely.¹⁴

Meanwhile, the investment banks that had sold classes of the debtor's stock or bonds would create committees to represent the stock or bondholders in the negotiations, and ask investors to "deposit" their stock or bonds with the committees. The debtor and its investment banks, together with the banks' lawyers, would negotiate the terms of a restructuring. When the parties reached agreement, the bankers would combine all of the committees into a single reorganization committee, and everyone would inform the court that they were ready for the foreclosure sale. The only bidder at the sale would be the reorganization committee itself.¹⁵ Its bid would consist of the old stocks and bonds, plus enough cash for a modest payment to any investors who had refused to go along with the transaction.

This overview is quite sanitized, of course. Sometimes the railroad and its banks were at loggerheads, or the court would refuse to appoint an insider as receiver. Sometimes, an outsider would set up its own committee and try to wrest control of the process away from debtor's principal investment banks. There were corporate raiders in the early twentieth century, just as there are now.¹⁶ But the general process, with or without these and

13. See, e.g., SKEEL, *supra* note 7, at 48-70. Several of the best known contemporaneous accounts of the practice are cited in the discussion below.

14. See, e.g., SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES 8: 33 (1937) (noting that "the receiver or trustee was affiliated with the [debtor], as director, officer, stockholder, etc." in 59% of the cases the SEC examined in 1935, and in many of the other cases "the receiver or trustee had connections with the underwriters of the issuer's securities") [hereinafter SEC REPORT].

15. "Counsel who have acted frequently for reorganization committees have spent a great many anxious hours preparing for the unexpected bidder," Paul Cravath stated in 1916, "but in my own experience he has never appeared." Paul D. Cravath, *The Reorganization of Corporations; Bond-Holders' and Stockholders' Protective Committees; Reorganization Committees; and the Voluntary Recapitalization of Corporations* (Mar. 1 & 8, 1916) in FANCIS LYNDE STETSON ET AL., *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION* 204 (1917).

16. In *The Folklore of Capitalism*, Thurman Arnold chronicles one of these battles, a contest over the remains of the Kreuger-Toll empire built by Ivar Krueger, the Swedish Match King. A high profile group of insurgents, represented by Samuel Untermyer, chal-

other complicating wrinkles, was used to reorganize countless troubled corporations, including nearly every major American railroad. The foundation of the process as it evolved was the Bank Paternalism narrative.

As the banks and their lawyers told the story, the banks stepped to the front when a railroad defaulted in order to protect the scattered investors who owned its stock and bonds. They collected fees for helping restructure a railroad, of course, but they were more concerned to do good than to do well. The banks and lawyers were investors' champions, and by helping to put a struggling railroad back on firmer footing, they were doing a public service as well. Each time it rescued a troubled corporation, J.P. Morgan showed the same public spiritedness that the bank demonstrated by intervening to restore confidence when the American financial system threatened to collapse in 1907.¹⁷

The best-known account of early twentieth century reorganization techniques is suffused with the assumptions of the Bank Paternalism narrative. Paul Cravath, the leading reorganization lawyer of his day, and a namesake of the still prominent law firm now known as Cravath, Swaine & Moore, offered an insider's account of a large reorganization in 1917. "While you have been preparing the receivership papers," he stated, "it may be assumed that your client, the banker, has been engaged in forming a bondholders' protective committee, in which event it becomes part of your task to draw the Bondholders' Protective Agreement appointing the committee, defining its powers and providing for the deposits of bonds thereunder."¹⁸ The primary objective of the agreement, he explained, "is to confer upon the committee the power to take any action it may deem necessary or proper for the protection of the bondholders and the enforcement of

lenged the incumbent bankers. "This particular campaign was bitter," Arnold reports. But the parties reached a truce, with the insurgents being offered a stake in the management. "After the coalition," Arnold concludes, "it was noticeable that the charges and countercharges suddenly ended. Mr. Untermeyer developed the greatest respect for the firm of Sullivan and Cromwell [the incumbents' lawyers], which the firm reciprocated . . ." ARNOLD, *supra* note 2, at 243-44.

17. The narrative was not simply a self-justifying concoction of the banks; it was based at least in part in reality. J.P. Morgan rose to prominence in the nineteenth century by persuading jittery European investors to invest in companies Morgan sponsored, despite the investors' distrust of American markets. *See, e.g.*, RON CHERNOW, *THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE* 29-45 (1990). Alan Morrison and Bill Wilhelm make the same point in more general terms. "[T]he investment banks played an important role in the foundation of the railroads," they write, "and both their reputations and their financial capital were closely tied up with the success of their offerings. They therefore had a vested interest in resolving financial distress when it arose." ALAN D. MORRISON & WILLIAM J. WILHELM, JR., *INVESTMENT BANKING: INSTITUTIONS, POLITICS, AND LAW* 176-77 (2007).

18. Cravath, *supra* note 15, at 162.

their rights.”¹⁹ Because this agreement is the source of the bank’s authority, the “powers conferred . . . cannot well be too broad.”²⁰

For the bankers and lawyers who invoked it, the Bank Paternalism narrative provided a template for a messy and complicated process, and assigned each party a straightforward role. The bankers and lawyers could rely on their experience in earlier cases. “Do not attempt to evolve the agreement out of your own consciousness,” as Cravath put it, “for it would take you days to work out clauses covering half of the contingencies for which provision should be made.”²¹ Speaking later of the agreement used to effect the final reorganization, Cravath extolled its standard provisions as “the result of the experience and prophetic vision of a great many able lawyers.”²² More generally, the bankers and their lawyers could invoke the repeated history of previous cases as a means of persuading a court to sign off on the process in each new case.

The emotional valence of the narrative was of that of reassuring calm. The bankers and lawyers assured the court that everything was under control, and that they had investors’ interests at heart. Robert Swaine, Cravath’s protégé at the Cravath firm, recounted, for instance, “three days of friendly debate” in the chambers of the judge overseeing the reorganization of the St. Louis and San Francisco railroad, during which Swaine patiently persuaded him to approve an innovative alternative to making a cash payment to lower priority creditors, as a recent Supreme Court decision had seemed to require.²³

The same qualities that made the standard narrative so useful—its familiarity, the guidance it provided in case after case—also had a dark side. While many corporate failures neatly fit the Banker Paternalism story, some did not. The story assumed, for instance, that the company would need to be restructured internally through an artificial sale that did not really allow for competing bidders. The bankers and the company’s managers, not some outside group, would decide what was best for the company. In cases where outsiders did emerge and challenge the inside group, the Banker Paternalism narrative could be used to stymie their challenge.²⁴

19. *Id.* at 162-63.

20. *Id.* at 163 (emphasis added).

21. *Id.* at 164.

22. *Id.* at 178.

23. ROBERT T. SWAINE, I THE CRAVATH FIRM AND ITS SUCCESSOR 172 (1946).

24. Summarizing their studies of the challenges mounted by outsiders in *Paramount Publix*, *Krueger & Toll*, *Celotex* and several other cases, for instance, the SEC investigators concluded that:

Generally, opposition is not organized until the insiders are well on the way to complete control of the reorganization. For this reason, as well as the strategic position, prestige, and resources of the insiders, it is the highly exceptional case in

In the 1910s, and then with increasing intensity in the 1930s, critics attacked the Bank Paternalism narrative, subjecting it to sometimes hilarious ridicule. The most famous early attack, in Louis Brandeis's popular book *Other People's Money*, was earnest and alarmed.²⁵ A small coterie of banks—the Money Trust, he called them—dominated American finance, cutting off competition to the detriment of everyone else. The banks' control of the receivership process was, Brandeis argued, a key component of their monopoly. "We must break the Money Trust," he concluded, "or the Money Trust will break us."²⁶ Two decades later, Jerome Frank remarked, in an aside about the maneuverings of the best-known reorganization lawyers, that "the word 'prestige' is derived, so the philologists tell us, from the same root as 'prestdigitator.'"²⁷

Several New Deal critics assessed Bank Paternalism in explicitly rhetorical terms. In a review of *The Investor Pays*, a muckraking book by Max Lowenthal about the controversial reorganization of the St. Paul Railroad, Roger Foster contrasted "the fictitious drama staged by the bankers and their lawyers for courts and public" with the "real" story.²⁸ "In the fictitious story," he writes:

[T]he directors employ expert engineers to make a survey, learn from them that the road can not earn existing charges . . . and vote to have the road consent to a receivership which one of its creditors happened to be seeking. . . . Certain bond and stockholders organize protective committees. The committees induce the bankers to prepare a plan and agree to it when it is prepared, and ask the bankers as reorganization managers to carry it out.²⁹

"The real story," which "bears little resemblance to the bankers' story," was more ominous.³⁰ "Hanauer of [the investment bank] Kuhn, Loeb and their lawyer, Swaine, precipitated the receivership, decided on their plan and

which the independents can hope to win substantial support—let alone enough support to enable them to put through a program of their own.

SEC REPORT, *supra* note 14, at 24.

25. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT* (1913). The book originated as a widely read series of articles in *Harper's* magazine. *Id.* at v.

26. *Id.* at 201.

27. Jerome N. Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 VA. L. REV. 541, 542-43 (1933). In the second part of this article, Frank offered up something of an apology to Robert Swaine, the principal butt of Frank's joke. "The writer trusts that his attempted facetiousness (in the first installment of this paper) when referring to Mr. Swaine," Frank wrote, "will not indicate any lack of respect for Mr. Swaine's brilliance . . . in this field. On the other hand, the writer does venture to disagree flatly with several of Mr. Swaine's positions on the subject." *Id.* at 698, 709 n.97.

28. Roger S. Foster, Book Review, 43 YALE L.J. 352, 353 (1933) (reviewing MAX LOWENTHAL, *THE INVESTOR PAYS* (1933)).

29. *Id.*

30. *Id.*

jammed it through without giving either security holder or public authority any real voice in the matter.”³¹ Foster acknowledged that “[t]he lawyer with some experience in reorganization practice . . . will be indignant at Lowenthal for making his cherished, familiar, necessary fictions take on a sinister cast. He will see nothing reprehensible in what was done by Hanauer and Swaine, the principal villains of the book.”³² But Foster sides squarely with Lowenthal, praising “[t]his devastating explosion of the myth that security holders agree on a plan, this unsurpassed exposition of just how one of the great private banking houses can arrange a reorganization.”³³

A massive Securities and Exchange Commission study initially overseen by William Douglas offered a parallel critique, but with a slightly different emphasis. “The formation of a protective committee has long been regarded a prerogative of the inside group,” the reporters wrote at the end of the first volume.³⁴ “Bankers responsible for the original distribution of securities in default commonly profess a ‘moral obligation to protect the security holders’ in these situations. As a complement to their own activity in forming protective committees in response to moral obligations,” the reporters continue, perhaps with a wisp of sarcasm, “outside interference with their control is deemed to be poaching on their own preserves.”³⁵ While agreeing wholeheartedly about the existence of a moral obligation, the reporters questioned bankers’ commitment to it. “The trouble has been,” they conclude, that bankers’ and managers’ “claims to a dominant voice in reorganization . . . have been exerted too frequently on behalf of their own interests.”³⁶

Just how important was the Bank Paternalism narrative to the banks’ influence in these cases? According to a standard critique of narrative or law-and-literature analysis, not very. A narrative skeptic would point out that the bankers relied on established techniques to gain control in these cases, e.g., making use of an already compiled list of investors formed from selling the company’s securities, and asking the investors to deposit their securities with the bank’s committee. The narrative skeptic would conclude that the real-world techniques fully explain the reorganization.³⁷ The Bank Paternalism narrative is simply a label used to describe a process that could be fully explained without it.

31. *Id.*

32. *Id.* at 355.

33. *Id.*

34. SEC REPORT, *supra* note 14, at 1:874.

35. *Id.*

36. *Id.*

37. For the importance of having the investors’ list, see, e.g., ARNOLD, *supra* note 2, at 244 (“[N]ot being in possession of the lists of security-holders, and not having the financial prestige of the conservative group, [the insurgents in the Kreuger-Toll case] were able to get hold of only one fourth as many bonds as were deposited with the conservative party.”).

The New Dealers' response to the Bank Paternalism narrative suggests, to the contrary, that they took the narrative very seriously. Efforts to debunk Bank Paternalism were a key feature of the case for reform. To expose the bankers' supposed moral commitment to investors as a sham, the reformers devised and repeatedly invoked a counter-narrative that portrayed the bankers and their lawyers as seizing control in an undemocratic fashion and feathering their own nests at the expense of investors. One version of the counter-narrative analogized the bankers to machine politics. "In reorganizations," Roger Foster wrote in 1935:

[T]he banker has managed the financial body politic much as machine organizations have managed municipal politics. . . . Like Tammany, the wise bankers have adapted their government to the more permanent tendencies of human nature, rather than those moral abstractions that sometimes get written into law. They have managed to dispense patronage and warp the application of principles with a view to appeasing aggressive, articulate and influential constituents. The timid souls, the guileless and confiding masses, have been forgotten men.³⁸

In *The Folklore of Capitalism*, Thurmond Arnold developed a similar metaphor in more elaborate detail. A corporate reorganization, he wrote:

[I]s a combination of a municipal election, a historical pageant, an antvice crusade, a graduate school seminar, a judicial proceeding, and a series of horse trades, all rolled into one—thoroughly buttered with learning and frosted with distinguished names. Here the union of law and economics is celebrated by one of the wildest ideological orgies in intellectual history. Men work all night preparing endless documents in answer to other endless documents At the same time practical politicians utilize every resource of patronage, demagoguery, and coercion beneath the solemn smoke screen.³⁹

As the New Dealers' attentions suggest, the Bank Paternalism narrative was hardly an inconsequential gloss. Just as the narrative's significance should not be understated, however, it also should not be exaggerated. Challenges to the prevailing narrative figured prominently, but the reformers also debated Robert Swaine and other defenders of current reorganization practice in more lawyerly terms and used empirical evidence to buttress the case for reform.⁴⁰

The influence of the Bank Paternalism narrative is perhaps best seen in stylized, historical terms. The reorganization techniques came first in the nineteenth century—the cobbling together of the equity receivership device from traditional receivership and foreclosure law.⁴¹ The Bank Paternalism narrative was then used both to justify the revolutionary new practice and to

38. Roger S. Foster, *Conflicting Ideals for Reorganization*, 44 YALE L.J. 923, 923-24 (1935).

39. ARNOLD, *supra* note 2, at 230.

40. The most detailed empirical evidence was compiled in the multi-volume SEC report described earlier. *See supra* note 14.

41. *See, e.g.*, SKEEL, *supra* note 7, at 48-70.

persuade courts to give their imprimatur to additional innovations that were devised to deal with new problems. The narrative helped banks and their lawyers to explain why a judge should approve a sham foreclosure sale, and should limit the remedies of dissenting investors. The banks and their lawyers could be trusted, the narrative suggested, because they were bound by a moral obligation to protect their investors. The narrative thus emerged from the new reorganization technique, but also reinforced and extended it.

The narrative had equally profound implications for the New Dealers who sought to “democratize” corporate reorganization: Banker Paternalism, and especially their alternative narrative, defined the potential paths of reform. Because bankers and their lawyers were self-appointed and only pretended to protect the investors they represented, reform should either empower investors directly or provide them with a different champion.⁴² The reforms that emerged sought to combine these objectives.⁴³ They prohibited any banker or lawyer that had represented a company prior to bankruptcy from participating in the reorganization, thus deposing investors’ previous champions. The investors’ new champions would be an independent trustee, who would take over the business in bankruptcy, and the SEC, which would police the reorganization process and offer its assessment of any proposed reorganization plan.⁴⁴ Once the trustee developed a proposed reorganization plan and the SEC had offered its assessment, the shareholders and creditors would vote whether to approve the plan.

The battle over corporate reorganization in the 1930s centered on competing versions of the same master narrative. While the complexity of large-scale corporation bankruptcy and the need for coordination—in contrast, say, to an ordinary trial—causes it to gravitate toward a single narrative,⁴⁵ one can easily imagine multiple narratives, each of which defines a

42. These two strategies imply very different conceptions of investor democracy, of course. The second approach reflects that high view of elite expertise held by many of the New Dealers.

43. In the book review discussed earlier, Roger Foster focused more intensely on the former objective, calling for more meaningful bondholder voice in the choice of their representative: “Let machinery be provided for bondholder election of representatives by plurality or majority vote,” he argued, “with [the] requirement that candidates disclose, or free themselves from, inconsistent interests To dislodge the bankers, the reformer will be forced to change his democratic slogan and call in Democracy at large.” Foster, *supra* note 28, at 357.

44. See, e.g., SKEEL, *supra* note 7, at 119-23 (describing the proposed reforms, which were enacted as part of the Chandler Act of 1938).

45. Although the narrative structure of trials takes a wide variety of forms, even here the narratives tend to draw on a limited number of templates. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 118 (2000) (“A lawyer’s work is full of narrative labor designed to cook up ‘winning’ stories according to hornbook recipes—how to unmask the false hero and disclose the true villain of the tale told by one’s opponent, how to

different kind of case. Current reorganization practice reflects one variation on this theme.

II. DUELING METAPHORS AND THE PANIC OF 2008

Bank Paternalism was undermined by the counter-narratives of the Progressive and New Deal era, then displaced altogether by the legislative reforms enacted in 1938.⁴⁶ Although the central features of the old equity receiverships have not disappeared, the master narratives of current reorganization practice are quite different. The tension between the two principal narratives was thrown into high relief by the watershed bankruptcies of the 2008 Panic—Lehman, Chrysler, and General Motors.

The first narrative dates back to the 1980s, shortly after the last complete overhaul of the bankruptcy laws in 1978. According to this narrative, bankruptcy is designed to preserve “going concern value” when a large company stumbles. To achieve this objective, bankruptcy prevents creditors from making grabs for the company’s assets, and it gives the debtor’s managers an opportunity to negotiate with its creditors over the terms of a reorganization plan.

This narrative, which I call Debtor in Control, was associated with references to bankruptcy as “relief from creditors” and as a “breathing spell” for the debtor.⁴⁷ The Debtor in Control narrative suggested that the company and its team of professionals should be given plenty of time to determine what went wrong and work with its creditors to develop a plan for a healthier future. The narrative included an appeal to patience and for sympathy for the distressed company.

Within a decade, a backlash developed, with increasingly vocal criticism of the new order.⁴⁸ Two cases in particular became fodder for critics. In the bankruptcy of Eastern Airlines, the bankruptcy judge permitted the company to hold its creditors at bay for several years, despite their pleas that the company was imploding.⁴⁹ Eastern never did propose a plan acceptable to its creditors, and the company collapsed. In LTV, the company

discomfit the opponent’s witnesses, how to delve a yard below the opponent’s precedents and blow them at the moon.”).

46. See, e.g., SKEEL, *supra* note 7, at 119-23.

47. See, e.g., H. Rep. No 95-595, 1978 U.S.C.C.A.N. 6296 (describing the automatic stay, which prohibits creditors from continuing their efforts to collect what they are owed, as giving the debtor a “breathing spell”).

48. The scholarly debate centered on an article by Michael Bradley and Michael Rosenzweig, which characterized Chapter 11 as disastrously inefficient. Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992).

49. For a debate about Eastern and Chapter 11 generally, see James J. White, Comment, *Harvey’s Silence*, 69 AM. BANKR. L.J. 467 (1995); Harvey R. Miller, *Harvey’s Outburst: A Rejoinder to Professor White’s Comment*, 69 AM. BANKR. L.J. 481 (1995).

and its lawyers persuaded the bankruptcy judge to extend LTV's control for a period that eventually ran to nearly seven years.⁵⁰

The lawyers who handled the largest cases—such as Harvey Miller at Weil, Gotshal—continued to employ and defend the Debtor in Control narrative. Starting in the late 1980s, Miller criticized the increasing constraints on a debtor's control over the reorganization as a result of creditors' opposition to extending the debtor's exclusive right to propose a reorganization plan, the influence of creditors who bought their claims in anticipation of bankruptcy, and other factors. "The erosion of debtors' rights in chapter 11 under the guise of creating a level playing field," he and a co-author warned in 1988, "may discourage debtors from seeking protection under the provisions of the Code"⁵¹

A new narrative began to emerge in the 1990s in connection with many of the same practices that Miller and other proponents of Debtor in Control had condemned. In these cases, the debtor and a lender that had agreed to finance the debtor's bankruptcy appeared before the bankruptcy judge at the very beginning of the case and insisted that the company would collapse unless the judge immediately approved the proposed loan.⁵² More recently, they have increasingly insisted that the court approve both the loan and an immediate sale of the company's most important assets. Like the Debtor in Control narrative, the new narrative—No Time to Spare, I will call it—has its own characteristic metaphors. With No Time to Spare, lawyers speak of "melting ice cubes."⁵³ The judge must sign off on everything right away, because the company's assets are a melting ice cube and will (to speed up the metaphor) evaporate unless the court springs immediately into action. No Time to Spare is designed to induce an atmosphere of urgency, even panic, that makes second guessing unthinkable.

The Lehman, Chrysler, and General Motors bankruptcies have subjected the Debtor in Control and No Time to Spare narratives to great pressure and posed new questions about the relationship between the two.

50. See, e.g., Edward I. Altman, *Evaluating The Chapter 11 Bankruptcy-Reorganization Process*, 1993 COLUM. BUS. L. REV. 1, 4.

51. Harvey R. Miller & Jacqueline Marcus, *The Crumbling Debtor Leverage in Chapter 11 Cases—An Implementation or Perversion of the Bankruptcy Reform Act of 1978?*, C371 A.L.I.-A.B.A. 105, 161 (1988). See also Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2012-14 (2002) (arguing that creditor pressure forces companies to confirm reorganization plans that have a short term focus).

52. For an early illustration of this argument, see David A. Skeel, Jr., *The Story of Saybrook: Defining the Limits of Debtor-in-Possession Financing*, in BANKRUPTCY LAW STORIES 177, 189-90 (Robert K. Rasmussen ed., 2007) (describing the contention in *Saybrook* case that the business would collapse unless the debtor in possession loan was approved).

53. See, e.g., *In re Summit Global Logistics, Inc.*, No. 08-11566, 2008 Bankr. LEXIS 896, at *31 (Bankr. D.N.J. Mar. 26, 2008).

When Lehman Brothers filed for bankruptcy on September 15, 2008—the event widely identified as triggering chaos in the financial markets—its managers asked the bankruptcy court to immediately approve both interim financing by and a sale to Barclays Capital.⁵⁴ Although the request for first day approval of financing is a common feature of No Time to Spare cases, the terms of the proposed sale of its assets were highly unusual. Bankruptcy judges have usually insisted on bidding rules that allow several weeks, and often more, for the debtor to advertise the sale, look for other bidders, and perhaps negotiate a higher price. Lehman’s lawyers claimed that its investment banking operations would disintegrate so quickly—it was so rapidly melting an ice cube—that the court should dispense with even these limited protections. “I don’t want to use the melting ice cube,” Lehman’s lawyer argued at the hearing to approve the proposed sale.⁵⁵ “It’s already half melted, Your Honor. The steps [that have] happened [in the past two days] make it imperative that this sale be approved.”⁵⁶

The No Time to Spare narrative had never been pushed to this extreme, calling for immediate approval of both the financing and the sale of such a large company. Further complicating the proposed sale was the fact that the bankruptcy court did not have authority over the Lehman’s investment banking business at the time Lehman asked the judge to approve a sale, because the parent corporation had filed for bankruptcy but the investment banking subsidiary had not.⁵⁷ Although the bankruptcy judge acknowledged the extraordinary nature of the case, and warned the hordes who attended the sale hearing not to treat his ruling as precedent, he approved the sale just four days after the case was filed.⁵⁸

The Chrysler and General Motors bankruptcies stretched the No Time to Spare narrative in a very different way. Unlike with Lehman, which clearly fit the No Time to Spare profile, Chrysler and General Motors looked like Debtor in Control cases. The auto companies’ most significant assets—their plants and assembly lines—are fixed and tangible. Like the airlines, many of which have filed for bankruptcy in the past two decades, they were obvious candidates for a traditional reorganization process. Indeed, most bankruptcy lawyers scoffed when the Obama administration began hinting that the restructurings could be carried out within a few

54. For a more detailed discussion of the Lehman sale, and a critique of the conventional wisdom about the significance of its default, see Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. CORP. L. 469, 489-91 (2010).

55. See Transcript of Hearing at 244, *In re Lehman Bros. Holdings, Inc.*, 416 B.R. 392 (Bankr. S.D.N.Y. 2008) (No. 08-13555).

56. *Id.*

57. A creditor objected at the hearing that the sale should not be free and clear of the liabilities of subsidiaries that were not actually in bankruptcy, but the judge overruled the objection. *Id.* at 247-48.

58. *Id.* at 247-48, 251-52.

weeks. But the Chrysler and General Motors were characterized as No Time to Spare cases instead.

The Chrysler bankruptcy was filed first, as a test run for the much larger General Motors filing a month later.⁵⁹ Invoking the No Time to Spare narrative, Chrysler and its lawyers insisted that the company's assets needed to be sold immediately. The sale, "*if consummated without delay*," would preserve jobs, value, and the company, they wrote in their motion supporting the proposed sale.⁶⁰ If the sale were "*not . . . allowed to proceed, on the other hand*,"

[Chrysler and its subsidiaries would] likely face the immediate, piecemeal liquidation of their assets in a severely depressed market—affording the Debtors and their stakeholders little hope of realizing any significant value. Moreover, thousands of Chrysler employees, and hundreds of thousands of others who work for Chrysler's suppliers and dealers, will lose their jobs in a terrible economic upheaval. Accordingly, the Debtors are seeking the Court's approval to proceed expeditiously with the [sale].⁶¹

The professed emergency was almost certainly illusory.⁶² The ostensible buyer of the assets, Fiat, was not actually paying any cash for Chrysler's assets. The purchase price—\$2 billion—would come entirely from the U.S. and Canadian governments. Fiat's contribution was to manage the new company that was set up to acquire the assets—known informally as New Chrysler—and to give New Chrysler access to its technology. There was no reason to believe that Fiat, or the U.S. Treasury, would back out of the transaction if it were put on a more leisurely time line. The "sale" was unusual in another respect as well. It looked a lot more like a reorganization than a sale. In addition to paying the \$2 billion, which would go to Chrysler's senior lenders (and amounted to 29% of what they were owed), New Chrysler agreed to give Chrysler retirees a \$4.6 billion promissory note and 55% of New Chrysler's stock in return for their \$10 billion unsecured claim; and it agreed to assume \$5.3 billion in trade debt.

Despite these problematic features, the bankruptcy judge approved the sale. Unlike the judge in *Lehman*, he did so without acknowledging the awkwardness of the fit between the No Time to Spare narrative and the details of the Chrysler transaction. The Second Circuit was similarly unequivocal in its affirmation of the bankruptcy court decision. In a key line, the court held that even "an automobile manufacturing business can be within

59. During negotiations with the government, a Chrysler consultant complained to Chrysler's chief executive that the company was simply a "guinea pig." See, e.g., George F. Will, *More Judicial Activism, Please*, WASH. POST, June 14, 2009, at A15 (quoting and describing the exchange).

60. Memorandum in Support of Chrysler Sale, *supra* note 9, at 2.

61. *Id.*

62. The Chrysler sale and the questions raised in this paragraph are explored in more detail in Mark J. Roe & David Skeel, Essay, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. (forthcoming 2010).

the ambit of the ‘melting ice cube’ theory.”⁶³ In its own bankruptcy filing, General Motors mimicked Chrysler’s use of the No Time to Spare narrative, and extended it still further. General Motors lacked even the pretense of a third party buyer in its “sale.” The government once again put up all the funding, and the new company paid its senior lenders and restructured the claims of its employees and other creditors. Relying heavily on the *Chrysler* opinion, the bankruptcy judge approved the ostensible sale.⁶⁴

The Chrysler and General Motors bankruptcies vividly illustrate the most obvious downside of a master narrative. While the narrative can streamline a very complex process, giving the participants well-defined roles, it also can be used strategically in cases in which the facts do not fit the narrative. Invoking the No Time to Spare narrative helped the automakers persuade two bankruptcy judges to approve transactions that were very difficult to reconcile with ordinary bankruptcy rules. The narrative was not the whole story, of course. There is substantial reason to doubt whether the courts would have approved the transactions in either case had the U.S. government not thrown its financial and political weight behind the sales. But No Time to Spare provided the narrative framework for the transactions, and for the claim that there was nothing especially unusual about them.

The auto bankruptcies were not the first to misuse the No Time to Spare narrative. In recent years, No Time to Spare has often and increasingly been invoked in cases where the lender also wishes to buy the company’s assets—a strategy that bankruptcy lawyers call “loan-to-own.”⁶⁵ In many of these cases, the emergency is artificial, created by the lender’s refusal to lend unless the debtor agrees to a prompt sale of its assets. Some might better fit the Debtor in Control paradigm, or at the least, a more leisurely campaign to sell the debtor’s assets.

What then is the status of the Debtor in Control narrative? Future interpreters may identify Chrysler and GM as the final stage in a transition from Debtor in Control to No Time to Spare as bankruptcy’s central narrative. As No Time to Spare ascended, on this view, its predecessor necessarily receded into the background, eventually to disappear. Chrysler and GM were the final exclamation points. Both were classic Debtor in Control cases. The successful use of the No Time to Spare narrative could signal the

63. *In re Chrysler LLC*, 576 F.3d 108, 114 (2d Cir. 2009). The Second Circuit opinion was subsequently vacated by the Supreme Court, but the Court left the bankruptcy court decision undisturbed. *Ind. State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015 (2009).

64. *In re Gen. Motors Corp.*, 407 B.R. 463, 497 (Bankr. S.D.N.Y. 2009) (describing *Chrysler* as “directly on point and conclusive here”).

65. For discussion of the dangers of loan-to-own financing, see, for example, Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 464-67 (2006).

final ascendancy of this narrative in every large reorganization case, no matter how poor the fit.

This would be unfortunate. Even if No Time to Spare now provides the standard narrative structure for large corporate bankruptcy cases, the availability of at least one alternative narrative could provide a necessary check. If Debtor in Control disappears, every major case will be forced into the No Time to Spare mold. Objectors' only meaningful recourse will be to challenge the narrative on its own terms, asking the court to proceed a little less quickly than the debtor and its lenders wish. With an alternative narrative, by contrast, they can attempt to show the inapplicability of No Time to Spare in cases for which it is a poor fit. There no doubt are limits to the benefits of competing narratives. As much as too many choices can undermine the virtues of choice,⁶⁶ a multiplicity of narratives could dilute the chief benefit of a master narrative—the clear roles it assigns to the parties and the simple template it provides for the bankruptcy process. But the coexistence of several possible narratives could assure a closer correspondence between the narrative and the underlying facts in any given case. It will be harder to characterize an airline or large industrial firm as No Time to Spare, for instance, if the Debtor in Control narrative is available as an alternative.

Bankruptcy's master narratives have always been closely intertwined with the underlying legal structures, which suggests that bankruptcy judges and bankruptcy law will determine the future of the current, competing narratives. Bankruptcy judges stand as the gatekeepers in the current process since they must approve urgent requests for financing or a sale.⁶⁷ They theoretically could curb misuses of the No Time to Spare narrative. But their oversight is complicated by the difficulty of second-guessing the dire warnings of both a debtor and its lenders that the company will immediately collapse if the transaction is not approved. There often is no way to know for sure if the threat is real, and little time to decide. By removing one of the principal bases for policing questionable No Time to Spare transactions, the *Chrysler* and *General Motors* decisions have made the task still more difficult for bankruptcy judges in that circuit.⁶⁸

If the bankruptcy bench is less than ideally positioned to police the two master narratives, a different word of caution is in order for legislative reform.⁶⁹ Congress is not subject to the same urgencies as a bankruptcy

66. See, e.g., BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* (2004).

67. Both the financing provision, 11 U.S.C. § 364 (2006), and the sale provision, 11 U.S.C. § 363(b) (2006), provide only for notice and a hearing as a prerequisite for approval.

68. See generally *Roe & Skeel*, *supra* note 62.

69. Mark Roe and I have suggested a reform that might distinguish between the two kinds of cases. *Id.* (proposing a rough rule of thumb that would require use of the Chapter 11

judge with a particular request before her, and it can act in advance. But lawmakers also are removed from the narrative world of bankruptcy. There sometimes is a lag between the emergence of a new narrative in bankruptcy practice and its appearance in Congress. The last substantial bankruptcy reforms, which were enacted in 2005, provide a telling example.

When it enacted the reforms, Congress seemed to assume Debtor in Control was still the norm in large-scale bankruptcy cases, and that large cases continued to drag on for far too long, as critics had contended in the 1980s. In reality, the No Time to Spare narrative was already in its ascendancy, and changes in bankruptcy practice had all but eliminated the complaints of delay.⁷⁰ But the 2005 reforms took the earlier era as their reference point. One change in particular—a restriction on the period during which only the debtor can propose a reorganization plan—addressed an issue that no longer existed in most cases, and did so in a way that made little sense even for those cases that still fit the Debtor in Control pattern.⁷¹

CONCLUSION

“Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative,” Robert Cover wrote in an article often seen as the touchstone for narrative analysis of law.⁷² It is, he continued, “a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.”⁷³ When a large business flounders, the present crisis often stands in contrast to the possibility of a more prosperous future. To narrate this contrast, the managers and other stakeholders of large American businesses have relied on master narratives, three of which have been explored in this Essay: the Bank Paternalism narrative of the early twentieth century, and more recently, the Debtor in Control and No Time to Spare narratives.

The limited number of master narratives at any given time is perhaps best explained by the complexity of a large-scale corporate reorganization, and the signal benefits of having a simple template and assigned roles for

process if, among other things, more than half of the stock or debt of the new entity is continued from the old company).

70. See, e.g., Skeel, *Creditors' Ball*, *supra* note 12, at 921 (noting that increased creditor control has led to faster cases and more asset sales).

71. The provision, which amended 11 U.S.C. § 1121, places an absolute limit of eighteen months on the debtor's “exclusivity” period. Excessive delay is rarely a concern in current reorganization cases, and in cases that do require significant time, the fixed limit on the debtor's exclusivity period may create turmoil as the deadline nears. Creditors may delay, for instance, knowing that the debtor will soon lose control of the case.

72. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

73. *Id.*

the key participants. But these benefits also have serious costs. The most obvious is the danger that the narrative will be used to persuade courts to approve transactions for which the paradigm is a poor fit. The presence of multiple possible narratives may serve as a partial corrective, decreasing the likelihood that cases will be forced in procrustean fashion into a template for which they are ill suited.