Section 363 Sales and Their Blind Faith in the Markets

Jacob DeSelms
Southern Methodist University, Dedman School of Law

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Jacob DeSelms*

ABSTRACT

Airlines tend to go bankrupt. In fact, all the so-called legacy carriers have gone bankrupt at one time or another. What leads these airlines into financial distress varies from case to case. Sometimes they are overrun by costs, and other times they lack sufficient demand. The concern of this paper, though, is not why airlines file bankruptcy—it is assumed that, from time to time, airlines will face financial distress and will require the protection of the U.S. Bankruptcy Code (the Code). Instead, this paper will examine how large firms such as airlines are navigating bankruptcies today.

After providing some overview of the current landscape of large Chapter 11 cases—specifically in the realm of § 363 asset sales and the debates surrounding these sales—this paper will argue that the theories supporting the continued use of these sales are suspect and should be met with skepticism by the courts and by policymakers, and, additionally, that these sales often undermine the policy objectives of the Code in general. Finally, this paper will look at how these debates are shaping future bankruptcy policy and will argue in favor of proposed legislation from Senator Manchin of West Virginia amending § 363 of the Code.

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* JD/MBA Candidate, SMU Dedman School of Law and Cox School of Business, May 2024.
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I. INTRODUCTION

Today, many scholars view Chapter 11 of the U.S. Bankruptcy Code, and its emphasis on reorganizations of distressed firms, as a relic of a bygone era. Motivating their beliefs is the argument that the Code should serve one singular purpose: to maximize the value of the estate for the benefit of the creditors. Any obstruction of this goal, then, would necessarily be something to be discarded. Moreover, in the opinion of several of these scholars, what stands in the way of preserving a distressed firm’s value is the Code itself. These scholars argue that sales of distressed firms—as opposed to reorganizations—preserve the most value. In their eyes, the sale of a firm in the marketplace will almost always deliver the most value possible, so there is little reason to let judges, courts, or even lawyers involve themselves too heavily. Let the procedures of the market, rather than the provisions of the Code, dictate what is best for the corporate debtor; after all, “[f]irms must live or die in the market,” they argue, not the bankruptcy court.

Opposite these advocates of market forces are those who believe that the purposes of the Code go beyond mere value preservation. These folks contend that the Code, and its emphasis on reorganizations, can indeed preserve value;

5. See Baird & Rasmussen, supra note 3, at 674–75.
6. See id. at 675.
8. Id. at 578.
9. See, e.g., Warren, supra note 4, at 777.
further, the realities of the supposedly efficient markets may not be as cold and calculated as many argue.\textsuperscript{10} Both sides of the debate have merit, and both have the data to back up their claims.\textsuperscript{11} A wide chasm has thus emerged between them, and it is unlikely to mend itself anytime soon.\textsuperscript{12} In this splintered area of the law, where the pendulum might swing wildly to one side or the other with little hope of finding common ground, it is imperative for interested parties to keep track of where the policies currently stand and where they might end up.

Part 1 of this paper will further discuss these debates on the purpose of bankruptcy law. Part 2 will examine a specific area of contention within the Code: § 363, which governs the sale of property of the bankruptcy estate. Part 3 will argue in defense of reorganizations as an effective means of administering large Chapter 11 cases. Part 4 will then briefly discuss and argue in favor of proposed amendments to § 363 of the Code.

II. THE GOALS OF CHAPTER 11

As with any discussion of law, it is worth starting with an examination of the policies and goals at the heart of Chapter 11. As Professor Warren points out, there are several reasons for this, particularly in the fractured world of bankruptcy scholarship.\textsuperscript{13} For starters, it is worth examining the objective of a law—be it the entire Bankruptcy Code or merely one section therein—to evaluate whether the means achieve the ends.\textsuperscript{14} In other words, does the law achieve its desired outcome?

An outcome in a bankruptcy case is desirable if it conforms to the policy objective underlying the law; if there is a disconnect between policy objective and outcome, then it is worth reexamining either the policy objective or the implementation of that objective that led to the undesirable result.\textsuperscript{15} One of the two—the objective or its implementation—must change if a desired outcome is to be achieved.

Additionally, it is worth starting with a policy discussion so that a common ground can be established.\textsuperscript{16} Without a common ground to build from, the evaluation of a given law—always a derivative of a policy objective—might look wonderful to one side of the debate and disastrous to the other.\textsuperscript{17} The two sides of the debate could argue for as long as they are able, but they will appear to an outsider as nothing more than two ships passing in the night, each unaware

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Baird, supra note 7, at 597–98 (highlighting some of the strengths of both sides of these debates).
\item See id. at 598.
\item See generally id. (outlining the major disagreements between scholars).
\item See id. at 336, 338.
\item See id. at 339.
\item See id. at 339–40.
\end{enumerate}
\end{footnotesize}
of the other’s guiding principle. Such a debate is a waste of time. As Professor Warren writes, “there is little to gain by loud arguments with no joinder of issue or by refusals to acknowledge substantial commonality.”

As a basic approximation, there are two main camps in the debates over the basic policy objectives of Chapter 11. On one side are the proceduralists—a group “fundamentally concerned with the effect of bankruptcy law on market behavior.” Opposite the proceduralists are the traditionalists, who view bankruptcy law as a means to “serve interests beyond those of maximizing value to creditors or producing the lowest cost for debt.” The debates between these two camps have progressed, morphed, and shifted over the years, and sorting a scholar squarely into one camp or the other “is a dangerous business” because of the complexities and nuances of any given scholar’s beliefs. The basic labels remain relevant and useful, however, as a starting point for discussion.

A. POLICY GOALS ACCORDING TO THE PROCEDURALISTS

The proceduralists generally derive their arguments and beliefs from the law and economics school of thought. They view bankruptcy law both as an integrated part of our market economy and as a system that must recognize itself as being integrated. To that end, proceduralists claim that businesses are aware not only of what the rules of bankruptcy are but of how they are applied—a convincing claim. The effect of a business’s knowledge of bankruptcy law, they claim, is ex ante action by the business taken in anticipation of the probable outcomes of a bankruptcy proceeding. What this means in practice is that corporate finance managers know what to expect from a Chapter 11 case, and they plan and act accordingly long before they require Chapter 11’s protection.

To understand the ex ante actions firms take in anticipation of a bankruptcy filing, it is useful to think of corporate decisions as falling into one of two basic categories: investment or financing. If the value of a corporation is represented as a pie, investment decisions are the attempts to grow the pie, while financing decisions are preferences for how the pie is sliced. If the pie is worth $100, for example, investment decisions might suggest new strategies to increase the pie’s value to $200, whereas financing decisions would evaluate whether to slice the

18. See id.
19. See Warren, supra note 4, at 776–77 (highlighting two of the main approaches).
21. Id. at 897.
22. See id. at 895.
24. See id.
27. See id. at 578.
30. See id.
pie into $40 portions of debt or $60 portions of debt (with equity making up the balance). The Modigliani-Miller theorem—the source of modern finance theory—says that, in a perfectly efficient market, the size of the pie (the firm’s value) will neither grow nor shrink based on how one slices the pie.\textsuperscript{31} The underlying value of the firm, the theory posits, is affected only by investment decisions, not financing decisions.\textsuperscript{32} Thus, shareholders and finance managers should theoretically be utterly indifferent to financing decisions and should concern themselves only with investment decisions.\textsuperscript{33}

Markets are not perfect, however, and financing decisions do indeed affect the value of a corporation (that is, the size of the pie).\textsuperscript{34} Tax write-offs for interest payments and the cost of bankruptcy are two of the predominant market imperfections that affect a firm’s value.\textsuperscript{35} To maximize firm value, finance managers take these imperfections into account when slicing up their firm’s pie, e.g., more debt may mean larger interest payments leading to less taxable income, but too much debt increases the risk of bankruptcy, which is both expensive and career-threatening.\textsuperscript{36} It is crucially important, then, that corporate finance managers concern themselves with the current state of bankruptcy law—if only to anticipate its costs and calculate them into their ex ante financing decisions (i.e., capital structure decisions).\textsuperscript{37}

This ex ante effect on corporate decisions is proof, in the proceduralists’ eyes, that the bankruptcy regime is integrated into the broader market economy.\textsuperscript{38} Thus, they argue, it is foolish to pretend that bankruptcy law is wholly separate from the broader realm of commercial enterprise and markets.\textsuperscript{39} The result of acknowledging bankruptcy law’s integration into the market economy is the argument that bankruptcy policy should be formulated with this integration in mind.\textsuperscript{40}

Perhaps at the core of the proceduralists’ policy arguments is the “den[ial] that bankruptcy [law] can work any special magic.”\textsuperscript{41} It is a hands-off approach to bankruptcy law to say the least.\textsuperscript{42} Rather than giving financially distressed firms an opportunity to reorganize under the protection of the bankruptcy system, the proceduralists prefer throwing financially distressed firms to the mercy of the market.\textsuperscript{43} “Firms must live or die in the market,” claims Professor

\begin{itemize}
  \item \textsuperscript{31} See id. at 526–27, 545.
  \item \textsuperscript{32} See id. at 526–27.
  \item \textsuperscript{33} See id.
  \item \textsuperscript{34} See id. at 504, 529–30, 540.
  \item \textsuperscript{35} See id. at 529, 540.
  \item \textsuperscript{36} See id. at 529–30, 540; see also Warren, supra note 14, at 371 (noting that management often loses their jobs after bankruptcy filings).
  \item \textsuperscript{37} See BERK & DeMARZO, supra note 29, at 540.
  \item \textsuperscript{38} See Baird, supra note 7, at 576–78.
  \item \textsuperscript{39} See id.
  \item \textsuperscript{40} See id. at 576–80.
  \item \textsuperscript{41} Id. at 577–78.
  \item \textsuperscript{42} See, e.g., id. at 579. The proceduralists argue, for instance, that a bankruptcy judge should act less as a traditional judge and more as a “disinterested arbiter” allowing the market to dictate the process. See id.
  \item \textsuperscript{43} See, e.g., id. at 579–80.
\end{itemize}
Baird, a champion of the proceduralist’s camp, and bankruptcy law should therefore act in accordance.\(^{44}\) Any attempt by a bankruptcy regime to involve itself in the reorganization of a firm “does more harm than good by doing anything more to protect a firm from the forces of the market.”\(^{45}\)

Subscribers to these procedural arguments are diverse and occupy positions throughout the legal world. Writing in 1998, Professor Baird claimed that only academics, including those whose primary scholarship lay outside the realm of bankruptcy law, endorsed this side of the debate, whereas the traditionalists’ ranks included not only scholars but also practitioners and judges.\(^{46}\) But Professors LoPucki and Doherty dispute this claim and point to case law—including opinions from the Supreme Court\(^ {47}\) and the prominent Delaware bankruptcy court\(^ {48}\)—to suggest that there are plenty of legal movers and shakers outside the academy in the proceduralists’ camp as well.

B. POLICY GOALS ACCORDING TO THE TRADITIONALISTS

In contrast to the proceduralists are the scholars, judges, and practitioners who view bankruptcy law as a means to “serve interests beyond those of maximizing value to creditors or producing the lowest cost for debt.”\(^ {49}\) Stated differently, bankruptcy law should, according to the traditionalists, serve interests beyond merely providing a set of procedures for markets to decide the fate of a financially distressed firm.\(^ {50}\)

Professor Warren, a prominent voice in this camp, sees bankruptcy law as a means of “distrib[uting] the consequences [of a debtor’s defaults] among a number of different actors.”\(^ {51}\) This distribution of consequences, according to Warren, will inevitably need to contend with several, often competing, values in answering the question: “How shall the losses be distributed?”\(^ {52}\) A proceduralist’s answer here might advocate for whichever procedures or values maximize the creditor’s collection rights.\(^ {53}\) But in Warren’s view, “no one value dominates.”\(^ {54}\) Warren, of course, recognizes the importance of maximizing the value of the estate, but she views bankruptcy law’s purpose as serving additional interests such as orderly distribution of claims, internalization of the costs of default, and establishment of a privately monitored system.\(^ {55}\)

\(^{44}\) Baird, supra note 7, at 578.
\(^{45}\) Id.
\(^{46}\) See id. at 576.
\(^{48}\) See id. at 13–14 (citing Transcript of Sale Hearing Before Honorable Peter J. Walsh United States Chief Bankruptcy Judge at 172-73, 177, In re Polaroid Corp., No. 01-10864 (Bankr. D. Del. July 3, 2002)).
\(^{49}\) WARREN ET AL., supra note 20, at 897.
\(^{50}\) See, e.g., id.
\(^{51}\) Warren, supra note 4, at 777.
\(^{52}\) See, e.g., id.
\(^{53}\) See id.
\(^{54}\) Id.
\(^{55}\) WARREN ET AL., supra note 20, at 897.
C. SALES VERSUS REORGANIZATIONS: TWO APPROACHES TO VALUE PRESERVATION

An area where the debates between the proceduralists and traditionalists clash most heatedly is in discussions over value. As Professors LoPucki and Doherty point out, firms filing for bankruptcy are given three basic options: (1) reorganize the business; (2) sell the business as a “going-concern,”\(^{56}\) or (3) close the business down and sell the assets piecemeal.\(^{57}\) The last several decades of bankruptcy literature have seen scholars actively debating the strengths and weaknesses of option (1) versus option (2).\(^{58}\) Perhaps unsurprisingly, it is generally the proceduralists advocating for option (2),\(^{59}\) while the traditionalists see the benefits in both option (1) and (2) depending on the circumstances of the particular case.\(^{60}\) The two camps have produced loads of empirical data supporting their claims and attacking their opponent’s,\(^{61}\) but as Professor Baird points out, the two sides are as antithetical as ever in their beliefs.\(^{62}\)

These debates on the benefits of sales versus reorganizations do not take place in a vacuum; the arguments are passed down and inherited by policymakers, judges, and practitioners alike, and these groups implement the teachings in different ways.\(^{63}\) One area in which we see these competing views vividly play out is in § 363 of the Code, which governs the sales of assets.\(^{64}\)

III. SECTION 363 SALES: AN AREA OF DEBATE

Section 363 has recently attracted considerable attention in bankruptcy literature because of its growing use by debtors in Chapter 11 cases.\(^{65}\) The scholarly reactions to the growing popularity of § 363, specifically § 363(b), mirror the policy-focused debates discussed above between the proceduralists and the traditionalists.\(^{66}\) Those who subscribe to the proceduralists’ school of thought view the use of § 363(b) as a procedure through which value can be

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56. “[G]oing concern” is defined as “[a] commercial enterprise actively engaging in business with the expectation of indefinite continuance.” Going concern, BLACK’S LAW DICTIONARY 835 (11th ed. 2019). “[G]oing-concern value” is defined as “[t]he value of a commercial enterprise’s assets or of the enterprise itself as an active business with future earning power, as opposed to the liquidation value of the business or its assets.” Going-concern value, BLACK’S LAW DICTIONARY 1865 (11th ed. 2019).

57. See LoPucki & Doherty, supra note 10, at 5.
58. Compare Warren, supra note 4, at 775–77, with Baird & Rasmussen, supra note 3, at 674–75.
59. See, e.g., Baird & Rasmussen, supra note 3, at 699.
60. See, e.g., Baird, supra note 7, at 579.
62. See Baird, supra note 7, at 573–74.
66. See id. at 249, 251–52.
preserved and the efficiency of the markets can be harnessed.67 Those in the traditionalists’ camp, in contrast, view the growing use of § 363(b) as a side-stepping, or even “hijacking,”68 of Chapter 11, which thereby undercuts the policy objectives of the Code.69 This section will examine these debates and why they matter for airlines. However, it is first useful to know what § 363 sales are and why they have become so popular.

A. SECTION 363 SALES IN PRACTICE

Section 363(b) governs the use, sale, or lease of property during a bankruptcy proceeding.70 The provision grants the trustee—the debtor-in-possession in nearly all Chapter 11 cases—the right to “use, sell, or lease” property of the estate outside of the ordinary course of business after notice and a hearing.71 The sales are conducted “free and clear of any interest” in the property,72 and the sales are final.73 Meaning, the assets are sold unencumbered, and the sales cannot be reversed upon appeal.74

Section 363(b) effectively allows a debtor to sell all or substantially all of its assets without the hassle of detailed disclosures or the significant time delays that accompany confirmation of a reorganization plan.75 The use of Section 363(b) has “evolved into an alternative strategy for the debtor to accomplish liquidation.”76

In practice, courts require an “articulated business justification” or a “good business reason” before approving a § 363 sale.77 “So long as a good business reason supporting the sale exists, a judge has considerable discretion in approving that sale.”78 The court in In re Lionel provided five factors for courts to consider: (1) likelihood that a plan will be confirmed in the near future, (2) whether assets were increasing or decreasing in value, (3) whether sale proceeds provided the highest value offered for the assets, (4) whether the value of the asset was proportionate to the estate as a whole, and (5) the effect of the proposed disposition on future plans of reorganization.79 Some courts seem to steer clear of these factors, though, and instead simply defer to a debtor’s business

69. See Rose, supra note 65, at 256–57.
70. 11 U.S.C. § 363(b).
71. Id.
72. Id. § 363(f).
73. Id. § 363(m).
74. Id. § 363(f), (m).
75. See Neyland & St. John, supra note 67, at 48.
76. Rose, supra note 65, at 259.
77. In re Lionel Corp., 722 F.2d 1063, 1070–71 (2d Cir. 1983).
79. See In re Lionel Corp., 722 F.2d at 1071.
For instance, the Judge in In re Global Crossing, in approving a proposed sale of assets outside the debtor’s ordinary course of business, stated:

[A] bankruptcy court has neither the role nor the expertise . . . to substitute its own views as to the optimum business decision for the views of the Debtors’ Board of Directors . . . and their advisors. Similarly, this Court is not called upon to decide on a motion like this one [of] whether assets of the Global Crossing estate should be sold to the competing bidders, or under what terms.81

The court reasoned that, by deferring to the debtor’s business judgement, they could thereby limit “unbridled judicial discretion with § 363 motions.”82

B. THE RISE OF § 363 SALES

Courts have historically resisted “an unbridled use of nonreorganization sales,”83 but the use of these sales has slowly grown in popularity nevertheless.84 Professors LoPucki and Doherty attribute the rise of § 363 sales to a few developments in the 1990s, namely (1) a change in bankruptcy practice and (2) a change in economic ideology.

The change in bankruptcy practice, according to LoPucki and Doherty, resulted from the rise of forum shopping.85 This development gave lawyers and firms—the “case placers”86—the right to choose their bankruptcy venue.87 The large Chapter 11 cases brought with them a windfall of business for the local bar and court.88 This in turn “placed the bankruptcy courts in competition for large public company bankruptcies.”89 The competition for large bankruptcy cases, the professors claim, led courts, in part, to approve asset sales under weaker and weaker levels of scrutiny lest the case placers take their cases to more lenient jurisdictions.90 The result was that case placers had the option to sell the firm or its assets on short notice and without the hassle of the lengthy disclosure statements or uncooperative creditors that so often prolong the reorganization process.91

The change in economic ideology, which coincided with the rise of forum shopping, was marked by the growing influence of the law and economics

82. Rose, supra note 65, at 267 (citing William T. Bodoh et al., The Parameters of the Non-Plan Liquidating Chapter Eleven: Refining the Lionel Standard, 9 EMORY BANKR. DEV. J. 1, 5 (1992)).
83. Id. at 263.
84. See LoPucki & Doherty, supra note 10, at 12.
85. See id. at 4.
86. Id. at 13.
87. See id.
88. See id.
89. Id. at 4.
90. See id. at 12–13.
91. See id. at 13.
school of thought (from which sprang the proceduralists discussed above).\textsuperscript{92} The lawyers, judges, and academics who subscribed to this philosophy collectively exhibited “a growing national faith in the efficiency of markets.”\textsuperscript{93} In fact, Professor Baird—a strong voice in the proceduralist movement—attributes the rise in bankruptcy sales to the growing efficiency of markets, which rendered obsolete the practice of distressed firms raising capital “in bits and pieces.”\textsuperscript{94} Chapter 11, Baird argues, had gone from being a substitute for market sales to serving as the forum where those market sales take place.\textsuperscript{95} According to Baird, it was the efficiency of the markets and their newly acquired ability to source large sums of capital in an efficient manner that ushered in this new era of bankruptcy.\textsuperscript{96}

C. WHY PROCEDURALISTS SUPPORT § 363 SALES

As discussed previously, a core belief at the heart of the proceduralists’ approach to bankruptcy is a singular concern for value or, more specifically, for the preservation of value.\textsuperscript{97} In line with their faith in the efficiency of the markets, advocates of this approach would rather place their trust in the markets—as opposed to judges—to dictate the value of a company.\textsuperscript{98} In terms of bankruptcy law, this means supporting sales over reorganization.\textsuperscript{99}

The argument in favor of sales over reorganizations is something along the lines of the following: if practitioners or owners of firms want to preserve the value of their distressed firm, their best bet will be avoiding the inefficiencies of reorganization and relying instead on efficient markets to deliver the most value.\textsuperscript{100} Even the Supreme Court weighed in on the wisdom and efficiency of the market in properly valuing companies, writing in support of sales over reorganizations: “[A]ny determination that the price [of a bankrupt company] was top dollar would necessarily be made by a judge in a bankruptcy court, whereas the best way to determine value is exposure to a market.”\textsuperscript{101}

A vivid illustration of this sentiment can be found in the 2001 bankruptcy of Polaroid.\textsuperscript{102} There, managers sought confirmation of a sale that would generate one-third of the company’s book value, but the creditors’ committee objected, arguing that the firm would be more valuable with a reorganization.\textsuperscript{103} The

\textsuperscript{92} See id. at 12.

\textsuperscript{93} Id. at 13.


\textsuperscript{95} See id. at 71–74.

\textsuperscript{96} See id.

\textsuperscript{97} See, e.g., Warren, supra note 4, at 777.

\textsuperscript{98} See LoPucki & Doherty, supra note 10, at 6.

\textsuperscript{99} See Baird & Rasmussen, supra note 3, at 699.

\textsuperscript{100} See id. at 687.

\textsuperscript{101} LoPucki & Doherty, supra note 10, at 13 (citing Bank of Am. Nat’l Trust v. 203 N. LaSalle St. P’ship, 526 U.S. 434, 457 (1999)).

\textsuperscript{102} See id. at 13–14.

\textsuperscript{103} See id.
Delaware bankruptcy Judge refused to even consider the committee’s evidence of value, writing in part:

I have never accepted the proposition that the Court should be guided by valuation when . . . an appropriately shopped sales transaction is the alternative. And even in this case where the disparity is dramatic, to say the least, I think the fundamental proposition, which this Court has fought for a lot of years, is that a transaction appropriately conducted is the better test of value.104

In line with their belief that value should be preserved at all costs, another feature of § 363 sales that proceduralists champion is the speed and efficiency these sales provide.105 Rather than a drawn-out plan formulation and confirmation period, a § 363 sale allows debtors to dispose of the need for creditor approval of a plan and avoid a drawn-out reorganization.106 Proceduralists see this efficiency as another source of value preservation.107 Some other advantages the firms get in return for choosing a § 363 sale are (a) the chance to unload depreciating assets from their balance sheets, (b) a quick source of liquidity, and (c) more control over their bankruptcy process.108

D. WHY TRADITIONALISTS FAVOR REORGANIZATIONS

Section 363(b) is an area of the Code where proceduralists see a perfectly legal opportunity to avoid some of the more time consuming and cost-intensive aspects of the Code, whereas the traditionalists, in stark contrast, see a legal loophole that is “fraught with potential for abuse.”109 The traditionalists argue that, though perfectly legal, the sales undermine what the Code and what the Framers of the Code had in mind for this provision.110 Again, the traditionalists are absolutely in favor of promoting the efficiency and preservation of value, but, in their eyes, the Framers thought the Code should also promote preservation of jobs, rehabilitation of businesses, resolution of distributive decisions, and more.111

Traditionalists also point out that § 363 sales threaten creditor protections.112 Here we see another argument that § 363 sales are undercutting the policy

104. Id.
105. See Alla Raykin, Comment, Section 363 Sales: Mooting Due Process?, 29 EMORY BANKR. DEV. J. 91, 94 (2012).
106. See id.
107. See id. at 94–95.
108. See id. at 94–96. By avoiding the disclosure statements or by attempting to sell all or substantially all of their assets through a § 363 sale, debtors can, for instance, avoid potentially hostile creditor committees seeking to implement their own plan—a privilege known as the debtor’s right to plan exclusivity. See id.
110. See id. at 251–52.
111. See id. at 254.
112. See generally Raykin, supra note 105.
objectives of the Code.\textsuperscript{113} The argument being that the very reason that § 363 sales are so attractive—their speed and finality—is the same reason why creditor protections are threatened.\textsuperscript{114} An explanation of the procedures of a § 363 sale helps explain the point.

In a § 363 sale, “[c]ourts generally take a supervisory role” whereby they “defer[] to market principles and the debtor’s business judgment.”\textsuperscript{115} Courts first approve the sale and bidding procedures and then, after the bidding process is completed, the court approves the purchaser.\textsuperscript{116} In both stages of the process, the court defers to debtor’s management’s business judgment.\textsuperscript{117} If management proclaims that a certain offer is the best the market can afford, then the judge, not wanting to interfere with the wisdom and efficiency of the market, normally accepts management’s claim at face value.\textsuperscript{118} The threat to creditor protection happens here, when the urgency and the abbreviated nature of a § 363 sale, coupled with the deference given to debtor’s management, prevents creditors from mounting a fully informed defense.\textsuperscript{119} Under traditional reorganizations, as will be discussed below, creditor protections are much more deeply ingrained into the system.\textsuperscript{120}

Despite their criticisms of § 363 sales, traditionalists are quick to point out that the use of § 363 sales for assets are commonplace and perfectly acceptable.\textsuperscript{121} They argue instead that it is the use of § 363 to sell entire businesses that is suspect.\textsuperscript{122}

\begin{enumerate}
\item IV. IN FAVOR OF REORGANIZATIONS
\item In the first decade of the 2000s, “[m]ore than twenty percent of [C]hapter 11 cases [were] disposed of through § 363 sales.”\textsuperscript{123} Scholars such as Professor Baird point to such statistics and proclaim that the writing is on the wall for Chapter 11.\textsuperscript{124} Baird’s reasons are driven by his trust in the wisdom of the market to retrieve the greatest possible value for a distressed firm and by his belief that the U.S. Bankruptcy Code should serve no other purpose than value maximization.\textsuperscript{125} If one views the policy objectives of the Code in this manner, whereby value maximization is \textit{the} end-all-be-all, then his arguments are quite convincing—firms would not be utilizing asset sales in place of reorganization
\item \textsuperscript{113} See e.g., id. at 93.
\item \textsuperscript{114} See generally id.
\item \textsuperscript{115} Id. at 98.
\item \textsuperscript{116} See id. at 98–99.
\item \textsuperscript{117} See id. at 99.
\item \textsuperscript{118} See id.
\item \textsuperscript{119} See id. at 97.
\item \textsuperscript{120} See discussion infra Section IV.B.
\item \textsuperscript{121} See Rose, supra note 65, at 259.
\item \textsuperscript{122} See id.
\item \textsuperscript{123} Raykin, supra note 105, at 92.
\item \textsuperscript{124} See generally Douglas G. Baird & Robert K. Rasmussen, \textit{The End of Bankruptcy}, 55 STAN. L. REV. 751, 751–52 (2002) (arguing that “[c]orporate reorganizations have all but disappeared.”).
\item \textsuperscript{125} See, e.g., Baird & Rasmussen, supra note 3, at 685.
attempts if there were not real benefits involved. If one believes that the Code should serve policy objectives beyond mere value maximization, however, then Baird and others’ arguments seem to derive from a reality where the tail is wagging the dog, i.e., from a reality where the behavior of debtors dictates the rules of the road rather than the rules dictating the debtors’ behavior. However, even if one accepts Baird’s arguments on the true purpose of Chapter 11, some recent scholarship has questioned his reliance on the high volume of debtors who opt for § 363 sales as evidence of its superiority.126

A. “SHOW ME THE INCENTIVES AND I WILL SHOW YOU THE OUTCOME”127

As Baird and company argue, debtors opt for asset sales over reorganization because sales offer the best preservation of value.128 Arguing in defense of traditional reorganizations, however, Professors LoPucki and Doherty suggest that there are other, more sinister reasons so many debtors are opting for sales.129

The criticism that LoPucki and Doherty bring to light in their defense of reorganizations is that perverse incentives are what drive many large Chapter 11s today.130 They claim that, often, debtors are acting not according to considerations such as value preservation, but rather according to their own self interests.131 What others call agency costs (the fact that the “players” in these bankruptcy dramas are looking out for their own interests rather than the debtors’) LoPucki and Doherty “consider corruption a clearer description.”132 The accusation leveled here is extraordinary, but the authors cite some worrisome data in support of their claim that the decision makers in a reorganization have only their own interests in mind. For starters, in nearly half of the sale cases they studied, the CEOs took home large severance payments, and in four additional cases, the CEO was hired on to work for the buyer after the sale.133 These findings suggest a potentially captured management looking out for their own interests over the firm’s.

Another worrying incentive affecting attempts to reorganize is what is known as a Key Employee Retention Plan (KERP).134 KERPs are, on their face, a way for ownership of a firm to keep management in place during the downfall of the

127. This quote is often attributed to Charlie Munger, the famed investor and long-time business partner of Warren Buffett. It is unclear if he said this exact quote, but the point is to emphasize how incentives dictate business outcomes. He stated elsewhere in a speech he gave: “Never, ever, think about something else when you should be thinking about the power of incentives.” Charlie Munger, The Psychology of Human Misjudgment, FS.BLOG (2005), https://fsmisc.s3.ca-central-1.amazonaws.com/great-talks/The+Psychology+of+Human+Misjudgment.pdf [https://perma.cc/E2WT-92E8].
128. See, e.g., Baird & Rasmussen, supra note 3, at 687 (“The claim of The End of Bankruptcy was both that financially distressed businesses typically have little or no going-concern value and that, even when they do, sales provide the simplest and often the best way of preserving it.”).
129. See generally, LoPucki & Doherty, supra note 10.
130. See id. at 4.
131. See id.
132. Id. at 32 (emphasis added).
133. See id. at 32–33.
134. See Meier & Servaes, supra note 61, at 4249.
company. And while the managers who led the firm into financial distress in the first place are likely still the best choice to run the firm while in bankruptcy, the perverseness of KERP*s stems, in part, from the fact that they “often reward executives for the speed with which the bankruptcy is resolved.” With large sums of personal gain at stake and with the backing and encouragement from the largest creditors, it is easy to imagine how management might opt for the speedier § 363 sale over a drawn-out reorganization.

Additionally, LoPucki and Doherty discuss how the investment bankers facilitating these transactions are also potentially compromised by incentives. They argue that the bankers “have little reason to maximize the sale prices,” stemming from the fact that markets for distressed companies are incredibly thin. On one end of the transaction, the average numbers of bidders in these sales is a meager 1.6 per sale, whereas the other side of the bargain is a soon-to-be-defunct firm. LoPucki and Doherty argue that, despite the bankers facilitating these bargains being paid on a commission basis, they have little incentive to maximize the purchase price with so few bidders and a seller who they have “little reason to curry favor with.” After all, the only side who can hire the bankers for subsequent deals are the bidders.

Scholars argue that these incentives are problematic because they risk interfering with and discouraging good faith attempts to reorganize the distressed firm. Debtors attempting to reorganize must meet certain requirements before a plan of reorganization can be confirmed, and the integrity of those requirements is called into question when a debtor is incentivized to avoid a reorganization. Seeing a bankruptcy reorganization through to its end requires not only detailed disclosures on behalf of the debtor, but also a hearing on the proposed plan whereby a judge must confirm that their

135. See id.
136. See Meier & Servaes, supra note 61, at 4249.
137. See LoPucki & Doherty, supra note 10, at 34–35.
138. Id. at 35.
139. See id. This low number of bidders creates another critical problem for sellers hoping to reap the most value from their sales. Efficient markets require a robust market of buyers and sellers, which leads to true price discovery. With only 1.6 buyers per transaction, who will drive the price up? The buyers set the price in such a market, and they have zero reason to pay full value unless it is absolutely necessary.
140. Id.
141. See Rose, supra note 65, at 272.
143. Id. at 272–73.
Section 363 Sales and Their Blind Faith

A reorganization plan was made in good faith.\textsuperscript{148} By utilizing § 363 to avoid the reorganization process, debtors risk undermining the objectives of the Code.\textsuperscript{149} Without the detailed information that might otherwise come to light through disclosure statements or hearings where an opposing party has the chance to object, sales under §363(b) are “vulnerable to sweetheart deals or unfair dealing.”\textsuperscript{150} Whereas scholars such as LoPucki and Doherty chalk these sweetheart deals up to corruption, others see only strategic behavior.\textsuperscript{151} The behaviors being incentivized, albeit potentially perverse, are only logical so long as they suit the debtor’s or creditor’s interests and so long as courts continue to allow them.\textsuperscript{152} Thus, the argument returns to the purposes and objectives of the Code: should the Code and the courts continue to allow these incentives under the banner of value preservation, or should the Code and the courts take a more skeptical stance toward them and their potential to undermine the reorganization process?\textsuperscript{153}

B. SECTION 363 SALES AND THEIR POTENTIAL TO UNDERMINE THE CODE’S OBJECTIVES

To give one example of how sales under § 363(b) might potentially undercut the policy goals of the Code, it is useful to examine the roles that creditors play in a bankruptcy case. In Chapter 11 bankruptcies, creditors are given several powerful tools—both to protect their interests and to serve as a check on the debtor’s immense powers.\textsuperscript{154} Three examples of creditor-friendly tools being (1) the debtor’s disclosure statements, (2) creditor approval of the plan, and (3) the good faith standards required of the debtor.\textsuperscript{155}

Section 1125 of the Code demands that, prior to voting on plan confirmation, the debtor provide the creditors with a summary of the plan for reorganization and a written disclosure statement containing “adequate information” (as determined by the court after notice and a hearing).\textsuperscript{156} As scholars point out, these disclosure requirements were meant to provide creditors with sufficient information to make informed decisions about the case.\textsuperscript{157} In other words, the requirements provide creditors with the information necessary to check the debtor’s actions and, if need be, argue for alternative courses of action as they see fit. As one might imagine, a debtor attempting to navigate a bankruptcy

\textsuperscript{149} See Rose, supra note 65, at 272.
\textsuperscript{150} Id.
\textsuperscript{151} See, e.g., Warren, supra note 14, at 348.
\textsuperscript{152} See id.
\textsuperscript{153} See generally Rose, supra note 65, at 272.
\textsuperscript{154} See id. at 254–57. Some of the debtor’s most important tools include the power to maintain control of the firm; the exclusive right of the debtor to file a plan of reorganization during the first 120 days of a bankruptcy case; the power to assume or reject pre-petition executory contracts; and more. See id.
\textsuperscript{155} See id. at 256–57.
\textsuperscript{156} 11 U.S.C. § 1125(b).
\textsuperscript{157} See Rose, supra note 65, at 257.
proceeding might wish to avoid these time consuming and intricately detailed disclosure statements that shed an intimate light on the debtor’s operations.\footnote{158} And in many cases, § 363(b) of the Code allows the debtors to avoid these disclosures altogether.\footnote{159}

In avoidance of disclosures and of plan approval, proceduralists see efficiency, expediency, and, therefore, preservation of value.\footnote{160} Traditionalists, in contrast, see an undercutting of the Code’s objectives.\footnote{161} In the traditionalists’ eyes, preservation of value is great, but so too is a fully informed creditor who can properly and effectively check a debtor’s powers when needed.\footnote{162} A creditor kept in the dark on some of the most important information in the entirety of the case is a useless check on the debtor’s powers.\footnote{163} If debtors wish to benefit from the immense protections and powers granted by the Code, they must also be willing to abide by sections of the Code that aren’t entirely to their advantage.\footnote{164} In short, they should not be allowed to have their cake and eat it too.

C. THE UNFORESEEN CONSEQUENCES OF § 363 SALES AND THEIR POTENTIAL TO DESTROY VALUE RATHER THAN PRESERVE IT

Beyond issues with perverse incentives, there is a growing set of empirical studies undercutting the proceduralists’ argument that sales, rather than reorganizations, necessarily preserve the most value.\footnote{165} Professors LoPucki and Doherty, for instance, relying on empirical data, contend that sales yield “less than half as much value as reorganization.”\footnote{166} The reason, they claim: “insufficient market liquidity . . . compounded by managers’ personal incentives to sell their companies for inadequate prices.”\footnote{167} If correct, these findings would cast real doubt on the proceduralists’ claims that the markets and the markets alone are the most reliable source of value.

Fire Sales

What the professors call “insufficient market liquidity” leads directly to the phenomena of fire sales.\footnote{168} Fire sales can be characterized as forced sales of assets at less than market value,\footnote{169} and they are often cited when criticizing the supposed efficiency of § 363 sales.\footnote{170} The critique is that, in choosing to speedily

\begin{footnotesize}
\begin{itemize}
\item \footnote{158}{See Warren, supra note 14, at 375–76.}
\item \footnote{159}{See Rose, supra note 65, at 259.}
\item \footnote{160}{See, e.g., Raykin, supra note 105, at 95.}
\item \footnote{161}{See Rose, supra note 65, at 259.}
\item \footnote{162}{See id.}
\item \footnote{163}{See id.}
\item \footnote{164}{See id. at 256–57.}
\item \footnote{165}{See, e.g., LoPucki & Doherty, supra note 10, at 3.}
\item \footnote{166}{Id. at 4.}
\item \footnote{167}{Id.}
\item \footnote{168}{See generally id.}
\item \footnote{169}{See, e.g., Meier & Servaes, supra note 61, at 4229.}
\item \footnote{170}{See LoPucki & Doherty, supra note 10, at 35.}
\end{itemize}
\end{footnotesize}
sell their assets in a § 363 sale, firms end up inefficiently disposing of their assets for prices way below their true market value.  

Finance scholars point to a range of factors that might explain why firms end up selling their assets for depressed prices. For instance, distressed firms might be trying to sell their assets to buyers in an industry troubled by the same financial hardships affecting the seller. Others suggest that buyers in distressed asset sales are often times lower value users than the sellers, which also leads to depressed prices. Additionally, the more specialized a firm’s assets are, the greater the fire sale discount that results. This phenomenon, known as “asset specificity,” is crucially important in the context of the airline industry because some of an airline’s greatest assets—its planes—are useful only to their industry.

Airlines face an inflated risk of fire sales, in part, because of the industry-specific assets (e.g., airplanes) they hold on their balance sheets. This heightened risk stems from the fact that the would-be bidders in a distressed sale of an airplane, for example, would either be (a) another airliner potentially suffering from the same economic headwinds that caused the seller’s financial distress or (b) a financial institution such as a bank who would be a lower value user of the assets.

The discounts garnered in these fire sales are not small either. Pulvino shows, for instance, that financial institutions pay only seventy cents on the dollar for aircraft during market recessions—a shocking loss of value when the price tag for a commercial aircraft can run upwards of one hundred million dollars. Thus, financially distressed airlines are at risk of unloading arguably their most precious asset in deeply-discounted fire sales—further evidence of the unforeseen consequences of asset sales.

To get a more in-depth idea of why, under distressed conditions, an asset would sell for depressed prices, it is worth quickly examining how the buyers or sellers value the assets in the first place.

**Asset Valuations**

Regardless of the identity of the potential buyer, the bidding and valuation process for an asset such as an aircraft—a cash generating asset—would look

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171. See generally id.


173. See Meier & Servaes, supra note 61, at 4230.


175. See Hotchkiss et al., supra note 172, at 247.

176. See id. at 274.

177. See Pulvino, supra note 174, at 940.

178. See id.

179. See id. at 941.


181. See Pulvino, supra note 174, at 953.
relatively the same. In short, “[t]he value of an asset that produces cash is the present value of the cash flows it generates over its life.” The process involves a bidder asking themselves three basic questions: (1) how certain are the future cash flows?; (2) when will those cash flows emerge?; and (3) what is the rate of return on a risk-free investment such as long-term U.S. bonds? “If you can answer these three questions, you will know the maximum value of the [asset]—and the maximum number of [dollars] you now possess that should be offered for it.”

In the sale of an aircraft, competitor airlines could immediately generate revenues with the purchased planes, but those revenues might be reduced by lower demand, for instance, if the industry as a whole is in a market downturn; thus, although it is likely the asset will generate cash in the future, there is some uncertainty in the amounts of cash a bidder could generate. And because assets are only as valuable as their future revenues, the uncertainty of future revenues would lead to a low valuation.

Banks would value the asset in the same manner, asking themselves: “how much revenue could we generate with this asset?” Unlike airlines, though, banks do not have the option to buy the planes and immediately repurpose them to generate an immediate return on their investment. Instead, they would need to find a lessee or another buyer before they could generate a return (which, again, may be difficult if the entire industry is financially distressed and other firms are not in the market for aircraft). Thus, cash generation for banks takes more time and is less certain than, say, for a competitor of the airline selling the plane. A lower valuation will result.

Thus, regardless of who purchases the asset—be it a bank, a different airline, or even a shipping carrier—if a seller’s financial distress is associated with a broader downturn in the market, any would-be buyer will be neither willing nor able to pay the full value of the plane. And because the seller is looking to sell quickly, they would be in no place to demand the asset’s full value—beggars cannot be choosers.

183. Id. at 7.
184. See id. at 8.
185. Id. (quoting Warren E. Buffett, *Chairman’s Letter to the Shareholders*, BERKSHIRE HATHAWAY 1, 12 (2000)).
188. See id.
190. See Mauboussin & Callahan, *supra* note 182, at 7.
191. See id.
D. SOME EVIDENCE OF VALUE CREATION IN FIRE SALES

Despite the damning evidence presented by LoPucki and Doherty, financial scholars Jean-Marie Meier and Henri Servaes, in their article The Bright Side of Fire Sales, argue that there is indeed some value in distressed sales despite the criticisms surrounding fire sales.192 Their analysis highlights the often-ignored side of fire sales—the buyers—and measures the returns that buyers generate through asset purchases in the fire sale.193 How they define returns is important: rather than measuring the “alpha” of an investments, which measures the “excess returns earned [by actively managed] investment[s],”194 they instead measure the “abnormal return,” which is “merely a summary of how the actual returns differ from the predicted yield.”195 Put differently, alpha measures asset performance relative to an industry benchmark while abnormal return measures asset performance relative to predictions or expectations.196

What Meier and Servaes found, in sum, was that the story so often told regarding fire sales and their destruction of value paints only half a picture—and an overly-negative one at that. They conclude that “from a welfare perspective, the costs associated with fire sales of corporate assets are much lower than previously thought based on an analysis of seller costs only”197 because, in part, “buyer abnormal returns are significantly higher when the transaction is a fire sale compared to a regular acquisition.”198 Just how much lower than previously thought? They found that buyer returns on asset purchases were 2.09% higher, on average, during fire sale transactions compared to regular transactions.199

Even more shocking, though, was that buyer returns from acquisitions of entire companies were 4.76% during fire sales compared to 0.81% in regular acquisitions.200 The source of these excess returns, they argue, is the seller’s reduced bargaining power in times of financial distress.201

These findings support Baird and others’ argument that there is indeed value in selling a distressed business as opposed to attempting a reorganization.202 And if the purpose of bankruptcy, as they see it, is to maximize the value of the

193. See id. at 4230–31.
196. An illustration: a hedge fund generates 10% return in a year. If the market as a whole generated 8%, the hedge fund’s alpha would be 2%. If analysts had predicted that the hedge fund would only generate 9% returns in the year, their abnormal return would be 1%.
197. Meier & Servaes, supra note 61, at 4231.
198. Id. at 4242.
199. See id. at 4236.
200. Id.
201. See id. at 4242.
202. See generally Baird, supra note 94, at 77.
debtor’s assets at all costs, then these findings certainly bolster their argument that sales are superior to reorganizations.\footnote{See Baird, supra note 7, at 577–78.} But for firms facing financial distress and imminent failure, the argument that though your firm may perish, the greater good of value creation will be served, seems like a hard pill to swallow.

E. More Evidence of Value Destruction Under § 363 Sales

Professors Neyland and St. John, however, take aim at the argument that sales early in the bankruptcy process necessarily preserve the most value.\footnote{See Neyland & St. John, supra note 67, at 48, 51.} Their analysis shows that there is often greater value preservation potential in the delay of a sale as opposed to haste to unload assets.\footnote{See id. at 51.} They show this through a real option analysis using “basic financial . . . theory to describe the claims of shareholders and creditors as a set of long call and short put options.”\footnote{Id. at 49 ("A call option is a financial instrument which gives the holder the right but not the obligation to buy an underlying security at a pre-specified price (known as the ‘strike’ price). Conversely, a put option gives the holder the right but not the obligation to sell an underlying security at a pre-specified ‘strike’ price.").} The results of their analysis show, using numerical data from the case of In re Lionel Corp., that delay of the sale of Lionel Corp.’s assets could have resulted in gains that “far outweighed shareholders’ gains from preserved asset value”—the justification for the early sale.\footnote{Id. at 87.}

Though Neyland and St. John deduced their findings from a limited set of assumptions,\footnote{See id. at 72.} they show that delaying a sale, even of depreciating assets, might preserve value more effectively than a rushed § 363 sale.\footnote{See id. at 87.} Even if the limited assumptions of Neyland and St. John’s analysis are not applicable in every case, their findings do show that value preservation is not always as clear cut as some might argue.

F. Our Markets: Some Are Efficient, Others Are Not

These ambiguities in the data highlight a key criticism of the proceduralists’ approach to bankruptcy policy more generally. Namely, a critique of the way so many scholars from this camp begin their analyses of policy: in a hypothetical world free of market imperfections.\footnote{See Warren, supra note 14, at 379–81.} Professor Baird himself candidly wrote, “[t]he proceduralist begins with the cold realities of a market economy: Success is rewarded and failure is brutally punished.”\footnote{Baird, supra note 7, at 580.} At the heart of this belief is an unwavering conviction in the efficiency of our markets.\footnote{See Warren, supra note 14, at 380.} It is the invisible hand of the market, in other words, that decides which firms should die off and which
firms should live on.\textsuperscript{213} Too many laws on the books or too much judicial discretion, the argument goes, will only serve to cloud the market’s judgment—a recipe for value destruction.\textsuperscript{214}

Here, I am in agreement with Professor Warren, who writes in opposition, “[i]t is interesting to imagine what kind of market would produce enough failure to stimulate an interest in a bankruptcy system but would be so perfect that a hypothetical bankruptcy system could operate without concern for market imperfections.”\textsuperscript{215} To think only in terms of the “cold realities”\textsuperscript{216} of the market is to entirely ignore the human elements involved in a bankruptcy sale, which of course are far from cold, rational, or pure.\textsuperscript{217} The incentives and fire sales discussed above\textsuperscript{218} undermine these cold realities every step of the way.

V. HOW THESE DEBATES ARE SHAPING POLICY

Currently before the Senate Committee on the Judiciary is a bill, introduced by Senator Manchin of West Virginia, “[t]o provide protections for pensions in bankruptcy proceedings, and for other purposes.”\textsuperscript{219} Some of these “other purposes” are relevant to our discussion, including proposed changes to § 363. The changes would subject subsections (b)(1) and (c)(1) to the language of subsection (q), which the bill introduces in full.\textsuperscript{220} The changes would read:

\begin{enumerate}
\item[(B)(1)] Subject to subsection (q), the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.
\item[(Q)(1)] Subject to paragraphs (2) and (3), the trustee may not sell property of the estate under subsection (b) or (c) unless the trustee is able to demonstrate that-
\item[(E)] with respect to each class of claims or interests-
\end{enumerate}

\begin{footnotes}
\item[213] For an explanation of Adam Smith’s Invisible Hand Theory, see Christina Majaski, What is the Invisible Hand in Economics?, \textsc{Investopedia} (Mar. 21, 2023), https://www.investopedia.com/terms/i/invisiblehand.asp#:~:text=The%20invisible%20hand%20is%20a%20metaphor%20for%20how%2C%20in%20a%20market%20economy%20people%20act%2C%20about%20their%20own%20well%20being%20[https://perma.cc/6QJT-YWKF].
\item[214] \textit{See}, e.g., Baird, \textit{supra} note 94, at 71–72.
\item[215] \textit{See} Warren, \textit{supra} note 14, at 382.
\item[216] Baird, \textit{supra} note 7, at 580.
\item[217] \textit{See}, e.g., discussion \textit{infra} Section IV.A.
\item[218] \textit{See} id.
\item[219] \textit{See} S. 5097, 117th Cong. (2022).
\item[220] \textit{See} id. at § 5.
\end{footnotes}
(ii) such class is not impaired by the sale.

(3) The trustee may not sell substantially all of the property of the estate under subsection (b) or (c) during the 60-day period beginning on the date of the filing of the petition unless the court determines that:

(A) there is a high likelihood that the value of the property of the estate will decrease significantly during that period; and

(B) the requirements under paragraph (1) have been satisfied with respect to each sale that would contribute to substantially all of the property of the estate being sold.\(^{221}\)

Further, the following would be added to the end of Section 363(b):

(3) In approving a sale under this subsection, the court shall consider the extent to which a bidder has offered to maintain existing jobs, preserve terms and conditions of employment, and assume or match pension and retiree health benefit obligations in determining whether an offer constitutes the highest or best offer for such property.\(^{222}\)

The proposals here, if implemented, would serve to constrain the use of § 363 sales in their most suspect form—sales of entire businesses.\(^{223}\) By ensuring that debtors wait at least 60 days to sell all or substantially all of their property, the provision curtails attempts at side-stepping the reorganization process.\(^{224}\) Under this provision, a debtor will have to conform with all of the requirements of a full reorganization process—more disclosures will be made, more information will come to light, and more will be understood about the proper way forward, in the court’s eyes, for the debtor.\(^{225}\)

Additionally, the amendments make clear that courts should consider more than mere value preservation in their assessment of a debtor’s proposed sale.\(^{226}\) Critics will argue that subsection (q)(3) is a one-way ticket to value destruction because of its required assessment of concerns such as jobs and pensions. A small consolation for these critics, though, is that the provision asks judges only to consider such issues.\(^{227}\) A judge who believes firmly in the wisdom of the market, it seems, could still decide a sale is proper and warranted.

Senator Manchin’s bill is a great example of how the abstract debates discussed above are being put into practice today. And while the bill addresses more than § 363 sales, the amendments proposed to § 363 would help prevent many of the pitfalls of § 363 sales discussed in this paper.

\(^{221}\) Id. (emphasis added); 11 U.S.C. § 363(b)(1).
\(^{222}\) See S. 5097, 117th Cong. (2022).
\(^{223}\) See, e.g., Rose, supra note 65, at 283.
\(^{224}\) See id. at 270.
\(^{225}\) See id. at 284.
\(^{226}\) See S. 5097, 117th Cong. § 5 (2022).
\(^{227}\) See id.
VI. CONCLUSION

Airline management teams are acting today in anticipation of tomorrow.\textsuperscript{228} Their expectations of customer demand, borrowing rates, and the health of the economy are all planned for well in advance.\textsuperscript{229} So, too, are their anticipations of the future of bankruptcy law.\textsuperscript{230} Professor Baird and other proceduralists are correct here in their argument that bankruptcy law should recognize itself as being integrated with the broader market economy\textsuperscript{231}—because it is.\textsuperscript{232}

Thus, it is essential that corporate managers be given an idea of where corporate bankruptcy law is today, and where it might go in the future. This paper has attempted to provide those insights, while also highlighting some of the central debates shaping the future of bankruptcy legislation.

Professor Baird’s belief that little can be said or done to bridge the gap between the proceduralists and the traditionalists seems perfectly reasonable.\textsuperscript{233} Both sides present compelling yet largely distinct arguments.\textsuperscript{234} However, the proceduralists’ near total reliance on the wisdom of the market begins to seem unreasonable in the face of LoPucki, Doherty, and so many others’ claims of perverse incentives and unforeseen consequences of sales. While the market is a critical source for accurate valuations, these highlighted issues cast doubt on the proceduralists’ heavy deference to the market.

Additionally, Warren and others present convincing arguments that the purpose of the Code is to achieve more than mere value maximization.\textsuperscript{235} Any attempts to undermine the objectives of this duly enacted piece of legislation should thus be met with criticism and skepticism. Bankruptcy scholars have rightfully called the potential abuses of § 363 into question,\textsuperscript{236} and Senator Manchin’s proposed amendments to § 363 would alleviate many common abuses.\textsuperscript{237}

\textsuperscript{228} See discussion infra Section II.A.
\textsuperscript{229} See id.
\textsuperscript{230} See id.
\textsuperscript{231} See Baird, supra note 7, at 576–77.
\textsuperscript{232} See discussion infra Section II.A.
\textsuperscript{233} See Baird, supra note 7, at 573–74.
\textsuperscript{234} See id. at 574.
\textsuperscript{235} See generally Warren, supra note 14.
\textsuperscript{236} See, e.g., Rose, supra note 65, at 249–50.
\textsuperscript{237} See, e.g., S. 5097, 117th Cong. § 5(q) (2022).