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Northwestern University Law Review

Printed in U.S.A.
Vol. 98, No. 1

Review Essay

NARRATING BANKRUPTCY / NARRATING RISK

reviewing
NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA
By Edward J. Balleisen. University of North Carolina Press, 2001.

REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE
By Bruce H. Mann. Harvard University Press, 2003.

DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA
By David A. Skeel, Jr. Princeton University Press, 2001.

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I. INTRODUCTION

Contract making stands at the center of Western law in the modern era. The social contract is the font of our legitimate collective authority.[1] The commercial contract releases our economic energies.[2] The marriage contract initiates some of our most intimate relations.[3] No less a liberal luminary than John Stuart Mill described the purpose of government as "enforcing contracts."[4] For Sir Henry Maine, the most distinctive feature of modern political life was the movement "from status to contract."[5] And

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1 *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., 1980); JOHN RAWLS, A THEORY OF JUSTICE (1971).

2 *See generally* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY (1965).

3 *See generally* CAROLE PATEMAN, THE SEXUAL CONTRACT 116–88 (1988); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998).

4 JOHN STUART MILL, THE PRINCIPLES OF POLITICAL ECONOMY WITH SOME APPLICATIONS TO SOCIAL PHILOSOPHY 798 (1848).

5 SIR HENRY MAINE, ANCIENT LAW 182 (1861).

William Graham Sumner announced that "in the United States more than anywhere else, the social structure is based on contract."[6]

Contract breaking, by contrast, haunts the peripheries of our legal traditions. To be sure, the law of contract making has long concerned itself with the consequences of contract breaking. As Holmes famously noted, the law of contracts leaves a promisor "free to break his contract if he chooses."[7] Contract breaking, after all, is what the law of contract breach and contract remedies is all about.[8] But western legal systems in the modern era have also developed elaborate mechanisms for absolution from contract obligations. Indeed, there is a major Western power with a long and exceptionally favorable history of such policies toward contract breaking. This nation has written into its constitution the idea that individuals can contract debts, and yet then be allowed to walk away from them. Moreover, there is in this nation a massive administrative apparatus dedicated to facilitating contract breaking. An entire class of judges convenes to oversee contract breaking. A prominent cadre of the bar earns significant fees by reworking old obligations and helping individuals and firms get a fresh start after failing to live up to their agreements. And an entire industry has grown up around the business of reorganizing firms no longer able to meet their debt payments.

This nation, of course, is the United States. For although contract making seems to have animated much of American history, from the ritual enactment of social contractarian ideas in the Declaration of Independence and the Constitution to a Civil War fought over the exclusion of slaves from contract freedoms, we have a long (if recessive) history of legalized contract breaking. The law of failure, a central part of which we call bankruptcy, lurks beneath each and every contractual agreement we make. It lies at the origins of the modern legal profession.[9] And, as this review will suggest, it has played an important and revealing role in the development of the American law of risk. It is therefore felicitous that three books on the history of American bankruptcy law have recently appeared after a century in which remarkably little work was done in the field.[10] All the more strik-

[6] WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 24 (1883).

[7] OLIVER WENDELL HOLMES, THE COMMON LAW 301 (Little, Brown & Co. 1881).

[8] *See* ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS 923–75 (1952).

[9] *See* Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51 (Gerard W. Gawalt ed., 1984); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920, in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 101–05 (Gerald L. Geison ed., 1983); *see also* 2 ROBERT TAYLOR SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1947 (1946–48); Douglas G. Baird & Robert K. Rasmussen, *Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations*, 87 VA. L. REV. 921, 927–29 (2001).

[10] The classics in the field are now quite old. *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT AND BANKRUPTCY, 1607–1900 (1974); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).

ing that the trio of books should have appeared just as the American economy went into recession and just as significant bankruptcy reforms were debated in Congress. Bruce Mann's *Republic of Debtors*[11] describes the law and culture of debt in the century leading up to the first federal bankruptcy statute in 1800 and its repeal less than three years later. Edward Balleisen's *Navigating Failure*[12] picks up the story with the enactment of a second federal bankruptcy act in 1841, this one repealed after eighteen months. David Skeel's *Debt's Dominion*[13] casts a wide-angle lens across the history of American bankruptcy law, largely focusing on the period since the enactment of federal bankruptcy legislation in 1898.

Among the most striking features of the bankruptcy histories set out in these three books is their confirmation for the law of bankruptcy of something scholars are discovering across a range of fields in American legal and political history. Bankruptcy law appears to represent one more example of the United States's relatively robust and longstanding commitment to social provision for middle-class risks. From disaster relief and tax expenditures to farm subsidies and bankruptcy, the United States has long provided considerable support to those who face the kinds of risks characteristic of middle-class and entrepreneurial life. The striking contrast is the way nineteenth-century American law dealt with risks posed disproportionately to industrial wage earners and the poor. Even as the American law of bankruptcy pioneered in relieving entrepreneurs from some of the risks of business, the American law of torts and American poor laws developed comparatively harsh rules for the occupational risks faced by the working classes.

Even more peculiarly, American lawmakers developed narratives about the inevitability of risk to explain both the extension of relief to debtors in the law of bankruptcy and the denial of compensation in the law of torts. Bankruptcy law offered relief to debtors, explained nineteenth-century bankruptcy commentators, because of the cyclical inevitability of commercial failure. Yet in the same decades, tort jurists consolidated the view that the inevitability of an accident was a reason for the denial of compensation in accident cases. Stories of inevitability developed in both of these areas of what we might call the nineteenth-century American law of risk. But their valences were very different, alleviating debtor risks but declining to alleviate accident victim risks.

Nineteenth-century stories about bankruptcy, and in particular the rise of a demoralized narrative of inevitable market failures, are especially use-

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[11] BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2003).

[12] EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA (2001).

[13] DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001).

ful in understanding patterns of risk regulation in American law because they focus attention on the sources of the American law of risk. For over two decades now, scholars have developed an important field of inquiry known as the cultural theory of risk.[14] The cultural theory holds that risk perception turns on deeply-ingrained cultural orientations toward risk. Orientations such as individualism, egalitarianism, and hierarchicalism, according to the cultural theory, powerfully shape how individuals perceive risks.[15] As cultural outlooks change over time, the cultural theory suggests, so too will social perceptions of risk; thus, for example, in recent years, some observers have begun to detect a renewed social embrace of risk in Western democracies after a century of efforts to spread and ameliorate risks.[16]

Yet if the bankruptcy example is a reliable guide, it appears that the particular ways in which we talk and think about particular risks are the product not just of deeply-ingrained cultural dispositions toward those risks, but also of the ability of interested constituencies to mobilize some of the many different ways of describing those risks that are available in the culture. The history of bankruptcy, in other words, directs us to attend not so much to the culture of risk as to the strategic use of risk talk and to the power of those we might call "narrative entrepreneurs" to shape the way the law describes particular risks.[17] In the making of American bankruptcy law, powerful constituencies of creditors, debtors, and bankruptcy lawyers successfully renarrated commercial failure in ways that emphasized not self-reliance and fault, but interdependence and inevitability. In turn, American bankruptcy law developed exceptionally favorable policies toward the discharge of debtors from their obligations.

II.

The obstacles early American creditors faced in collecting debts make the complaints of twenty-first-century credit card companies seem churlish.

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[14] *See generally* Mary Douglas, *Risk Acceptability According to the Social Sciences*, *in* 11 SOCIAL RESEARCH PERSPECTIVES 91–101 (1985) [hereinafter Douglas, *Risk Acceptability*]; MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE 7–8 (1982).

[15] *See* Douglas, *Risk Acceptability*, *supra* note 14, at 61–64; Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3, 13–15 (1987); Daniel Polisar & Aaron Wildavsky, *From Individual to System Blame: A Cultural Analysis of Historical Change in the Law of Torts*, 1 J. POL'Y HIST. 129 (1989); Aaron Wildavsky & Karl Dake, *Theories of Risk Perception: Who Fears What and Why?*, 119 DAEDALUS 41 (1990).

[16] *E.g.*, EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY (Tom Baker & Jonathan Simons eds., 2002).

[17] On the study of strategic uses of available moves within a culture, see Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice trans.), *in* 16 CAMBRIDGE STUDIES IN SOCIAL ANTHROPOLOGY 3–71 (Jack Goody ed., 1977); DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 8–11 (1987). "Narrative entrepreneurs" is adapted from Cass Sunstein's now wildly popular "norm entrepreneurs." *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

Despite all the talk of the centrality of contract enforcement in the Western political tradition, it was startlingly difficult to collect unpaid debts in eighteenth-century America. The key legal strategy was one of delay. Colonial legal systems made it rewarding and exceedingly easy for debtors to stretch out debt collection proceedings to seemingly interminable lengths. Interest was generally tolled on the filing of the suit. Yet intermittent court sessions meant that in many jurisdictions there were only two times each year when creditors could initiate debt actions. Moreover, multi-layered court systems often meant that a debtor who lost in one court could appeal to a higher court and get a fresh hearing. In some colonies, certain debtors could get as many as three separate trials on the question of whether they owed the debt alleged.[18]

Some creditors would have been lucky to get three trials, for three was often better than none at all. Trials happened only if the debtor could be found and served with the papers that initiated the suit. Stories abound of debtors like New York merchant-poet John Pintard, who evaded service of process by hiding out in Newark, coming out, as he wrote, only to "coursc[] the back lanes at twilights grey."[19] Other debtors simply stayed inside their homes to avoid sheriffs who were barred by law from forcible entry to serve papcrs or make arrests. Debtors like Pennsylvania iron manufacturer Samucl Hazard "kept close," as the practice was known, for as long as two years at a time, leaving their homes only on Sundays when the service of process and the making of arrests were prohibited.[20]

Even where suits could be initiated and debts could be reduced to judgments, creditors still faced often insuperable obstacles collecting on those judgments. Virginia, for example, mandated that judgment creditors wait a year and a day before initiating collection proceedings against a judgment debtor.[21] Colonies typically exempted from seizure by creditors a wide array of necessities, including household items, farm implements, tools of trade, and (most importantly) land, which in Southern plantation colonies was placed beyond the reach of creditors other than mortgagees. Moreover, it was often difficult to collect on even non-exempt property; chronic currency shortages in the colonial economy regularly inhibited auctions at sheriff's sale.[22]

Against this background, the now seemingly atavistic practice of imprisonment for debt ("mediaeval," as one historian has called it[23]) appears

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[18] MANN, *supra* note 11, at 21; *see also* PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 38, 99–100 (rev. ed. 1998).

[19] MANN, *supra* note 11, at 26, 115–21.

[20] *Id.* at 26–28.

[21] *See* A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE 84–85 (1981).

[22] MANN, *supra* note 11, at 30. On the consequences of currency shortages, see Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303 (2001); Bruce H. Mann, *Law, Economy, and Society in Early New England*, 111 YALE L.J. 1869 (2002).

[23] 8 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 233 n.1 (1903); *see also* MANN, *supra* note

less a draconian enforcement mechanism for creditors than an expression of the frustration that many creditors must have felt in trying to collect their due. Imprisoning a debtor rarely improved a creditor's chances of collecting; it was only outside the debtors' prison walls that a debtor would be able to accumulate sufficient assets to pay off his debts. Yet because any of a debtor's creditors could initiate the legal proceedings that would lead to imprisonment, a single disgruntled or vengeful creditor among the lot could often keep a debtor confined indefinitely. And in the 1790s, many of the nation's most prominent men (and it appears at least a few women) found themselves in debtors' prisons. Robert Morris, once the young nation's richest man, signer of the Declaration of Independence, and financier of American efforts in the Revolutionary War, mouldered in debtors' prison for three years beginning in 1798 after engaging in wild land speculations with untrustworthy business partners. James Wilson, delegate to the Constitutional Convention and Associate Justice of the United States Supreme Court, was imprisoned for debt three times, dying in a North Carolina debtors' prison while still a sitting Supreme Court Justice. Morris and Wilson were but two of the most prominent of the host of important merchants and speculators imprisoned in debtors' prisons after spectacularly failed land speculations during the 1790s.[24]

Unlike criminals, debtors paid for the costs of their own upkeep while imprisoned. The result was the reenactment in close quarters of class inequalities. In New York's New Gaol, for example, the first floor was reserved for impecunious laborers who lived in crowded and often filthy conditions. The second and third floors were set aside for skilled artisan and merchant debtors.[25] Elite merchant debtors might arrange to have entire suites set aside for them, like the one in which Morris threw a dinner party for George Washington in Philadelphia.[26] All in all, however, attempts to reproduce ordered boundaries in the community of debtors gave way to what Mann describes as the "licentious chaos" of the debtors' prison. The New Gaol, for example, was said to be "swarming with females of loose character," apparently driven there by brothel owners who used the prisons as a disciplining device over the prostitutes who worked for them.[27]

Much about the practice of debt collection in the eighteenth century remained constant well into the nineteenth century. Despite regular calls for its abolition, imprisonment for debt persisted into the 1830s and 1840s; in some Southern states it was not formally abolished until the early 1870s.[28] Moreover, nineteenth-century debtors continued to have a number

11, at 87–88.

24 MANN, *supra* note 11, at 199–204; COLEMAN, *supra* note 10, at 20.

25 MANN, *supra* note 11, at 87.

26 *Id.* at 101.

27 *Id.* at 91. Mann suggests that at least some prostitutes in debtors' prison had "procured their arrests . . . to serve a captive clientele." *Id.* at 90.

28 COLEMAN, *supra* note 10, at 159–60.

of ways (legal and otherwise) to shield assets from attachment. They fraudulently conveyed assets to friends and relatives in order to escape the clutches of creditors. They concealed assets or transferred them to their wives in the form of separate estates. Or they simply skipped town. Balleisen's *Navigating Failure* describes "tens of thousands of bankrupts" moving west, first for such places as western New York, and then later in the antebellum period for the further reaches of the trans-Appalachian west. By the 1830s, Texas had become the destination of choice for Southern merchants in hard times, so much so that their decision to abscond came to be summed up in the abbreviation "G.T.T.": "Gone to Texas."[29]

In addition, debtors with an intuition that creditors might soon descend had the option of entering into a voluntary assignment of their assets to a third-party trustee for the benefit of their creditors. Technically, such voluntary assignments obligated the trustee to auction the assets and distribute the proceeds to the creditors. Balleisen finds, however, that voluntary assignments often involved considerable amounts of insider dealing. Friends and close associates of a debtor frequently received preferred treatment in the distribution of an estate's proceeds. In many such cases, outsiders and commercial creditors were left to pick through the remains of the estate.[30]

State bankruptcy legislation might have brought a semblance of order to the process of debt collection in the early republic. But bankruptcy statutes at the state level developed in an ad hoc, fitful manner. Some of the colonies of British North America had enacted bankruptcy statutes of sorts in the eighteenth century, but these tended to be temporary statutes enacted in response to particular financial emergencies, with sunset provisions built in.[31] Although the U.S. Supreme Court in 1819 struck down New York's retroactive bankruptcy statute as unconstitutional under the Contracts Clause,[32] the Court also held eight years later (over John Marshall's only dissent on an issue of constitutional law) that states could enact prospective bankruptcy legislation, at least in the absence of countervailing congressional legislation.[33] And yet despite the Court's approval, state bankruptcy legislation remained hit or miss from state to state throughout the nineteenth century, with some states electing not to enact bankruptcy schemes at all.[34]

In the face of these continuing difficulties in the collection of debts, antebellum American moralists reinvigorated a long tradition of ethical exhortation in the field of commercial morals. Commercial practices in early modern England had been accompanied by a powerful discourse on the

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[29] BALLEISEN, *supra* note 12, at 170.

[30] *Id.* at 89–92.

[31] COLEMAN, *supra* note 10, at 6–15.

[32] Sturges v. Crowninshield, 17 U.S. 122 (1819).

[33] Ogden v. Saunders, 25 U.S. 212 (1827); *see* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 498 (1996).

[34] COLEMAN, *supra* note 10, at 269–93.

moral obligations of debtors.[35] On the western side of the Atlantic, early eighteenth-century Puritan ministers had similarly inveighed against the sin of failing to meet obligations. Debtors, suggested an inveterate "creditors' minister" named Samuel Moody, needed to "Work hard; and Pray hard too."[36] Debts, agreed Cotton Mather, were all too often incurred "for the Supply of [debtors'] Carnal Appetites." And if commercial success was a marker in the Puritan tradition of an individual's membership in God's elect, commercial failure was for Mather a sign that the debtor "is then most Evidently called of God into a Low and Mean condition."[37]

Into the early and mid-nineteenth century, legal institutions alone seemed unable to prevent morally questionable conduct by debtors and creditors alike. Men such as the prominent Congregational preacher Henry Ward Beecher espoused a similar ethic of what Balleisen calls "commercial moralism," aiming to inhibit both the "cunning tricks, dealings, concealments, and frauds" of debtors and the unseemly grasping of creditors.[38] Drawing on the tradition of religious rhetoric linking worldly obligations to spiritual debts, commercial moralists like Beecher sought to reassert the moral economy of an earlier era in which close networks of merchants in repeat-play relationships produced strong disincentives to opportunistic behavior.[39] At the same time, the moral economy of the preacher found a secular analogue in the increasingly prominent language of credit, reputation, and character. Insolvency, in the eyes of the secular Moodys and Mathers of the nineteenth century, was "caused by mistakes that originate in personal character."[40]

It is not clear how successful religious and secular commercial moralists were in getting debtors to repay debts.[41] But by the 1830s and 1840s, appeals to commercial morality seemed increasingly futile, even to their makers. Expanding networks of commercial relations, and a revolution in transportation technologies along canals, waterways, and railroads, meant that the informal practices by which eighteenth-century markets had been able to monitor reputation were increasingly inadequate.[42] Melville's satiric novel *The Confidence Man* is suggestive on this point. Melville himself had an intimate knowledge of business failures—his father's as well as his

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[35] JULIAN HOPPIT, RISK AND FAILURE IN ENGLISH BUSINESS, 1700–1800, at 19–20 (1987).

[36] MANN, *supra* note 11, at 36, 39.

[37] *Id.* at 40.

[38] BALLEISEN, *supra* note 12, at 96–97.

[39] *Id.* at 96–98. For a thick description of an early modern network of repeat-play relations among creditors and debtors, see CRAIG MULDREW, THE ECONOMY OF OBLIGATION: THE CULTURE OF CREDIT AND SOCIAL RELATIONS IN EARLY MODERN ENGLAND (1998).

[40] BALLEISEN, *supra* note 12, at 26.

[41] The test of their influence would be how much impact commercial moralists had independent of repeat-play debtors' interests in their market reputations.

[42] CHARLES GRIER SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815–1846 (1972); BALLEISEN, *supra* note 12, at 98.

own—and in his view, commerce among highly mobile traders along the Mississippi River in the 1850s seemed a kind of confidence game, little different from gambling. It was, in short, simply too easy for debtors in over their heads to up and move to Texas.[43]

Far-flung credit networks exacerbated the kinds of collective action problems that plagued debt collection in situations of multiple creditors. The initiation of legal action by a creditor often did sufficient damage to a debtor's credit to make it exceedingly difficult for the debtor to continue business. It therefore became virtually impossible for a debtor-defendant with liabilities exceeding assets to make full payments on those liabilities. Yet common law priority rules meant that the first creditor to sue had a significantly better chance of recovering his loan. The result was an unseemly race to the courthouse door. Indeed, as Balleisen describes, sometimes creditors simply raced straight to the debtor's own door in a frightful free for all, bullying store clerks into turning over assets and stripping stores bare in a matter of days.[44]

III.

It ought to hardly be surprising, then, that American creditors sought legislative recourse in federal bankruptcy statutes. Yet today we may underestimate the political controversies that attached to bankruptcy during the eighteenth and nineteenth centuries. At the opening of the twenty-first century, public controversy about bankruptcy occurs only by proxy, centering only remotely on bankruptcy itself. Should child support and alimony obligations have the same priority in insolvency proceedings as credit card debts?[45] Should abortion protesters be able to escape monetary penalties for illegal protest behavior by declaring bankruptcy?[46] Should debtors be able to retain multimillion dollar homes under state homestead exemptions?[47] Should certain classes of wrongdoers be able to obtain discharges in bankruptcy for damages judgments entered against them?[48] These are the ques-

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43 HERMAN MELVILLE, THE CONFIDENCE MAN (1856).

44 BALLEISEN, *supra* note 12, at 82.

45 Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 32–38 (2002); Elizabeth Warren, *Quiet Attack on Women*, N.Y. TIMES, May 20, 2002, at A19.

46 Philip Shenon, *Anti-Abortion Lawmakers Kill House Bankruptcy Bill*, N.Y. TIMES, Nov. 15, 2002, at A28; Philip Shenon, *Bankruptcy Bill, Caught in Abortion Dispute, Dies in Congress*, N.Y. TIMES, Nov. 16, 2002, at A15.

47 *See* 11 U.S.C. § 522 (2000) (authorizing state law homestead exemptions); TEX. PROB. CODE ANN. § 270 (2003) ("The homestead shall not be liable for the payment of any of the debts of the estate, except for: (1) the purchase money thereof; (2) the taxes due thereon; (3) work and materials used in constructing improvements thereon if thc requirements of Section 50(a)(5), Article XVI, Texas Constitution, are met.").

48 *See, e.g.*, 11 U.S.C. § 523(9) (2000) (barring discharges of debts owed "for death or personal injury eaused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance").

tions in bankruptcy debates today. Such debates, of course, are hotly controversial. In this sense, they are a reliable guide to the story of bankruptcy in America. But in another sense, they are misleading. Controversy by proxy fails to question the legitimacy of bankruptcy. The legitimacy of bankruptcy, however, was precisely at issue in bankruptcy debates during the first one hundred years of the republic.

Early bankruptcy laws in the Anglo-American tradition looked more like a criminal code aimed at policing debtors than like our modern bankruptcy code. Early laws aimed neither to protect debtors from overreaching creditors, nor to provide them with a fresh start. Rather, like virtually all the bankruptcy laws from ancient times, the early English law of bankruptcy was a creditor's remedy, singling out certain "acts of bankruptcy" as grounds for the appointment of a trustee to distribute a debtor-merchant's assets among the creditors. Unpaid or partially repaid creditors retained claims against the debtor, whose unmet obligations were not discharged.[49] To be sure, early modern English creditors could not cut the debtor's body into pieces and collect what Blackstone described as "their proportionable share," as creditors once had been able to do under the Roman Twelve Tables.[50] Nor could they sell a debtor's wife and children into slavery for his failure to repay an obligation, as creditors are said to have been able to do in certain traditional Asian legal systems.[51] But they could take advantage of a bankruptcy regime that included the threat of capital punishment of debtors.

Not until 1705 was discharge for the debtor made a part of the English bankruptcy regime, and even then, discharge was aimed not at allowing debtors a fresh start, but rather at maximizing the recovery of creditors by providing an incentive for debtors to divulge hidden or hard to locate assets. Debtors who cooperated with the orderly distribution of their assets would be permitted to retain five percent of the assets of the bankruptcy estate; those who refused to meet with their creditors, or (worse) hid assets or misrepresented them, could be hanged.[52]

Like the English legislation that preceded it, the Bankruptcy Act enacted by a Federalist-dominated Congress in March 1800 applied only to merchants. Moreover, the Act applied only to those merchants with a minimum one thousand dollars in debt. It authorized the discharge of the debtor with the consent of two-thirds of the creditors appearing, as measured both by number of creditors and by value of the debts. Formally, the Act provided only for involuntary, creditor-initiated bankruptcy proceedings.[53]

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[49] Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1 (1919).

[50] 2 WILLIAM BLACKSTONE, COMMENTARIES 472 (Univ. of Chicago Press 1976); *The Laws of the Twelve Tables*, tbl. III, law X, *in* 1 THE CIVIL LAW 64 (S. P. Scott ed., 1932).

[51] BLACKSTONE, *supra* note 50, at 472–73.

[52] 4 Ann., c. 17 (1705) (Eng.).

[53] Act of Apr. 4, 1800, ch. 19, 2 Stat. 19.

Yet from the beginning, American bankruptcy legislation had a new air about it.[54] Even before the Revolution, petitions to colonial legislatures had begun to emphasize the plight of the honest debtor, caught up in unforeseen accidents or misfortunes not linked to any "Negligence or Inattention" of his own. During the financial downturns of the 1790s, which had put such luminaries as Morris in debtors' prison, critiques of debtors' prisons brought out the same point: "unforeseen accidents" were resulting in the ruin and even indefinite imprisonment of respectable merchants. And in the debates over the 1800 legislation, supporters of the Act argued that there was substantial social value in returning such merchants to active business.[55]

In practice (if not in form), American merchant debtors transformed the Act from an involuntary mechanism to aid creditor collection into an effectively voluntary means to discharge debts. Friendly creditors could be counted on to initiate bankruptcy proceedings on a debtor's behalf. As Mann recounts, a Boston auctioneer named Thomas Clark asked one of his creditors "to make me a Bankrupt," a request that the creditor promptly honored.[56] Some, like New York stockbroker John Pintard, went so far as to engage in elaborate lobbying campaigns with their creditors to get them to initiate bankruptcy proceedings and approve discharges.[57] Indeed, although the Act required the consent of two-thirds of the creditors for a discharge, the Act did not require that creditors be notified of bankruptcy proceedings except by publication in a newspaper.[58] No doubt many creditors failed to learn of discharge petitions that their votes might have prevented. As Mann reports, as many as forty percent of discharges resulted in no payments at all to the creditors. As a practical matter, if not in the language of the statute itself, American bankruptcy had become as much an institution of debtor protection as of creditor protection.[59]

The voluntarist transformation of the Bankruptcy Act did not go uncontested. Within months, critics of the Act began pointing out that the Act effectively granted fresh starts to formerly wealthy merchants but not to the artisans and farmers who were increasingly drawn into commercial relations but were excluded from the Act's coverage. Even worse, the fresh start for the merchant might cancel debts owed to the farmer or artisan mechanic. As one critic put it, under the first Bankruptcy Act, "We saw men rich today, bankrupt tomorrow, and next day in full business and great style,

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[54] For one thing, the Act omitted the capital punishment provision of the English law of bankruptcy.

[55] MANN, *supra* note 11, at 57, 73. There were similar themes in English bankruptcy discourse, though as a matter of law they appear to have been relatively recessive as compared to the United States. For the classic statement, see DANIEL DEFOE, THE COMPLETE ENGLISH TRADESMAN 117–18 (1726); *see also* HOPPIT, *supra* note 35, at 21–23, 162.

[56] MANN, *supra* note 11, at 228–29.

[57] *Id.* at 234–37.

[58] *Id.* at 238.

[59] *Id.* at 252.

while the poor farmer or manufacturer . . . must suffer the penalties of the law in a jail."[60] To be sure, most states had enacted insolvency laws that released debtors with small debt loads from prison after thirty days. Nonetheless, no discharge was available to such debtors under the federal law. And with the Jeffersonian revolution in the election of 1800, federal bankruptcy legislation's days were numbered. Jefferson and Southern plantation owners had resisted the legislation from the start. Federal bankruptcy legislation endorsed an expansion of the federal government's role as against the authority of the states. In particular, it threatened to trump Southern states' limits on the attachment of real property.[61] In December 1803, the newly Democratic-Republican Congress repealed the 1800 Act, less than two years before it was set to expire of its own accord.[62]

The early repeal of the 1800 Act proved to be prophetic of the fitful existence that federal bankruptcy legislation would have over the course of the nineteenth century. Each renewed economic downturn brought a reprise of arguments for bankruptcy legislation. And the de facto voluntary transformation of the ostensibly involuntary Bankruptcy Act of 1800 played itself out in the legislative debates. Legislation considered by Congress in 1821 (in the aftermath of the Panic of 1819) would have allowed farmers to become bankrupts as well as merehants and traders. Moreover, the 1821 legislation (which ultimately failed of enactment) would have allowed debtors to initiate bankruptcy proceedings at their own behest. Bankruptcy would not be merely involuntary at the insistance of one or more creditors, but could be invoked by debtors seeking a fresh start, out from under a crushing debt load.[63]

When Congress finally did enact a second federal Bankruptcy Act in 1841, the Act (like the 1821 bill) authorized both involuntary and voluntary bankruptcies, this time for all persons. Under the 1841 Act, no creditor consent was required for a debtor to receive a discharge. So long as the debtor complied with the statute by turning over all of his property to the bankruptcy trustee, the debtor was entitled to a discharge as a matter of right, regardless of how the debtor had accumulated the debts at issue.[64] And in the thirteen months after the Act became effective in February 1842, some 44,000 individuals entered into bankruptcy proceedings in the United States federal courts. The overwhelming majority of these bankrupts were voluntary. Thirty-three thousand of them received discharges.[65]

The 1841 legislation lasted for an even shorter time than the 1800 Act. By 1843, the financial panic of 1837 that had helped propel the legislation

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60 WARREN, *supra* note 10, at 20.

61 MANN, *supra* note 11, at 197; WARREN, *supra* note 10, at 16.

62 MANN, *supra* note 11, at 248.

63 WARREN, *supra* note 10, at 27–28.

64 Act of Aug. 19, 1841, ch. 9, 5 Stat. 440.

65 BALLEISEN, *supra* note 12, at 124.

had receded into the past. Businessmen complained of increasingly limited supplies of business credit. And Democrats in the Jeffersonian tradition had opposed the legislation from the start as an undue expansion of federal power. In short, the politics of bankruptcy had shifted yet again. As one Virginia wag put it, "the Whigs had passed the bill to get the votes of 500,000 bankrupt debtors, and now that these debtors did not exist, they were considering the 500,000 creditors."[66] In March 1843, President Tyler signed into law a statute passed by large margins in both houses of Congress repealing the Act.[67] Federal bankruptcy legislation would not be enacted again until 1867, when Southern agricultural interests were unrepresented in the Reconstruction Congress.[68] That legislation would last until 1878.[69] Twenty years more would pass before Congress again enacted bankruptcy legislation in 1898.[70] This time the legislation stuck; we have had federal bankruptcy legislation ever since.

IV.

Historians have recently drawn renewed attention to the ways in which public debt helped to build western nation-states.[71] Private debt, on the other hand, seems to weave an indelible strand through the history of political radicalism.[72] Samuel Adams's revolutionary ardor was triggered by Massachusetts royal officials' attempts to collect debts incurred by Adams's father;[73] indeed, as two leading historians of the Revolutionary period have put it, American colonists' debts to British merchants "were inseparable from the Anglophobia of the Revolution."[74] Shays's Rebellion, an uprising of farmers in western Massachusetts during 1786 and 1787, responded to an oppressive combination of currency scarcity and deflation, on the one hand, and crushing state and private debts, on the other.[75] Early states' rights claims emerged out of state laws designed to frustrate the collection of

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[66] WARREN, *supra* note 10, at 83.

[67] An Act to Repeal the Bankruptcy Act, ch. 82, 5 Stat. 614 (1843).

[68] An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 176, 14 Stat. 517 (1867).

[69] An Act to Repeal the Bankrupt Law, ch. 160, 20 Stat. 99 (1878).

[70] An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 541, 30 Stat. 544 (1898).

[71] *See generally* NIALL FERGUSON, THE CASH NEXUS: MONEY AND POWER IN THE MODERN WORLD, 1700–2000 (2001); JAMES MACDONALD, A FREE NATION DEEP IN DEBT: THE FINANCIAL ROOTS OF DEMOCRACY (2003); Gordon S. Wood, *Debt and Democracy*, N.Y. REV. OF BOOKS, June 12, 2003, at 58–61.

[72] This is true of Anglo-American radicalism more broadly. *See, e.g.*, J.D. Alsop, *Ethics in the Marketplace: Gerrard Winstanley's London Bankruptcy, 1643*, 28 J. BRITISH STUD. 97 (1989).

[73] Priest, *supra* note 22, at 1380.

[74] STANLEY M. ELKINS & ERIC L. MCCITTRICK, THE AGE OF FEDERALISM 92 (1993).

[75] *See* JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 59 (1961).

debts owed to British creditors.[76] Jefferson's radical declaration of human rights—"*that the earth belongs in usufruct to the living*"—sprang (as historian Herbert Sloan has observed) out of his own struggles with debt and from his observation that "no man can, by *natural right*, oblige the lands he occupied, or the persons who succeed him in that occupation, to the paiment of debts contracted by him."[77] Many of the United States's nineteenth-century quasi-socialist utopian communities were led by men who had failed in business ventures.[78] Mormonism—perhaps the United States's most distinctive form of radical Christianity—got its start when Joseph Smith responded to his family's commercial failures by forming the Church of Latter Day Saints.[79] After the Civil War, mounting indebtedness brought on by decreasing agricultural prices motivated the agrarian radicals and Populists who shook up American politics from the 1870s until 1896.[80]

None of these moments in the tradition of Jeffersonian radicalism produced substantial agitation for bankruptcy legislation. The Shaysites did not seek bankruptcy legislation so much as tax and monetary policy reform.[81] Jefferson and the antifederalists actively resisted bankruptcy legislation; James Buchanan and the Jacksonian Democrats who carried on Jefferson's tradition saw in bankruptcy acts a threat to the "pure and uncorrupted" sphere of republican agriculture.[82] (Virginia, where the Jeffersonian tradition was especially strong, did not even enact state bankruptcy legislation during the nineteenth century.[83]) And the Populists did not seek prodebtor bankruptcy legislation so much as federally subsidized loans, federal grain elevators, and inflationary monetary policies.[84] Indeed, when lasting federal bankruptcy legislation was finally enacted in 1898, it was at the behest of creditors' interests (not farmers'), and after Populism had collapsed in William Jennings Bryan's defeat in the presidential election of 1896.[85]

That Jefferson and many of his fellow debt-ridden planters of the South should have been as bitterly opposed to bankruptcy legislation as they were, even to bankruptcy legislation at the state rather than federal level, speaks

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[76] *See* SMITH, *supra* note 33, at 153–56.

[77] HERBERT SLOAN, PRINCIPLE AND INTEREST: THOMAS JEFFERSON AND THE PROBLEM OF DEBT 51 (1995).

[78] BALLEISEN, *supra* note 12, at 20; PAUL E. JOHNSON & SEAN WILENTZ, THE KINGDOM OF MATTHIAS 61–62 (1994).

[79] BALLEISEN, *supra* note 12, at 20, 236 n.22.

[80] LAWRENCE GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA (1976); ROBERT C. MCMATH, JR., AMERICAN POPULISM: A SOCIAL HISTORY 1877–1898 (1993); ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877–1917 (1999).

[81] COLEMAN, *supra* note 10, at 42; MANN, *supra* note 11, at 182; LEONARD L. RICHARDS, SHAYS'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE (2002).

[82] WARREN, *supra* note 10, at 31.

[83] *See* COLEMAN, *supra* note 10, at 160.

[84] ROBERT C. MCMATH, AMERICAN POPULISM: A SOCIAL HISTORY, 1877–1898, at 79, 109 (1993).

[85] SKEEL, *supra* note 13, at 43–44.

volumes about the politics of nineteenth-century bankruptcy laws. Given the relatively pro-debtor structure of nineteenth-century bankruptcy legislation, it seems something of a mystery that political movements organized by debtors should not have seen bankruptcy as an attractive mechanism of reform. To be sure, there were some serious practical impediments. Jeffersonians feared that federal bankruptcy legislation would override local real property exemptions and threaten Southern planters' estates.[86] Later in the nineteenth century, agrarian radicals would include in their coalition any number of white Southern farmers, who likely would have fought hard to prevent their black tenants and sharecroppers from being able to invoke a pro-debtor bankruptcy regime against them.[87]

Yet what seems more significant in explaining the persistence of the powerful anti-bankruptcy strand in nineteenth-century American politics is that bankruptcy legislation highlighted the classic divide in American politics between the Hamiltonian vision of a commercial nation and the Jeffersonian vision of a decentralized agricultural republic. "Is commerce so much the basis of the existence of the United States as to call for a bankrupt law?" asked Jefferson in 1792. "On the contrary, are we not almost agricultural?"[88] Bankruptcy legislation thus became a lightning rod, like the national bank and later the gold standard, in the symbolic politics of national definition.

Those in the Jeffersonian tradition seemed to understand that bankruptcy statutes represented a powerful rationalizing force in American law, bringing in their wake a new kind of order for middle-class commercial life. The new nation's vast geography and decentralized federal governmental structure presented challenges that no western European nation had ever faced. American federalism created a labyrinth of hide-aways for those looking to evade the clumsy reach of the law. "Gone to Texas" was just the debtors' variation of a phenomenon that occupied a central place in areas as diverse as the law of marriage and divorce, on one hand, and the criminal law, on the other.[89] And once a debtor fled to a jurisdiction in which he was unknown, who needed a legally-sanctioned fresh start? Fresh starts were just a state line or a train or steamboat ride away. In the chaotic and unrationalized federal structure of emerging American capitalism, virtually every businessman was potentially a Melvillean confidence man, selling snake oil to people who would never see them again.

By contrast, federal bankruptcy legislation offered the promise of a new economy of order and control, the currency of which was information.

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86 MANN, *supra* note 11, at 197; WARREN, *supra* note 10, at 16.

87 *Cf.* GERALD DAVID JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862–1882, at 145–57 (1989) (describing southern property owners' successful efforts to use state priority rules to maintain control over their tenant sharecroppers).

88 MANN, *supra* note 11, at 197.

89 *See, e.g.*, HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 242–86 (2000).

Those who filed for bankruptcy in federal court provided information about their creditworthiness. And as Balleisen explains, the 1841 federal legislation sparked the rise of credit reporting as a technology of information collection and dissemination. In that same year, abolitionist Lewis Tappan founded the nation's first successful credit reporting agency, the Mercantile Agency. At virtually the same time, Tappan and his brother Arthur were experiencing a financial crisis of their own arising out of a land speculation scheme gone awry. (Arthur would petition for bankruptcy under the new act the next year.) John Bradstreet, of what would become Dun & Bradstreet, one of the leading American credit reporting agencies, got his start with Mercantile. Moreover, as Balleisen tells the story, a remarkable number of the early credit reporting entrepreneurs had brushes with bankruptcy themselves.[90]

In the new business of credit reporting, the information generated by federal bankruptcy laws proved exceedingly useful. Federal bankruptcy dockets and published notices of bankruptcy proceedings, which announced the names, occupations, and addresses of bankrupts, provided the community with a reliable new source of information as to creditworthiness. James Watson Webb of the *Morning Courier and New York Enquirer*, Balleisen writes, "announced an intention to publish the name of every bankrupt in the United States." The Boston *Law Reporter* compiled alphabetical lists of bankrupts in New England, including residence information. This new source of information quickly dried up, of course, when the 1841 legislation was repealed. But although the new rationality and order that credit reporting sought to bring to the nineteenth-century marketplace could not rely on federal bankruptcy legislation for the duration of the nineteenth century, the point remains: bankruptcy law could be a powerful source for market rationalization.[91]

For those in the Jeffersonian tradition, part of the outrage of federal bankruptcy law's rationalizing and commercializing power in the nineteenth century seems to have been that it reconstituted everyone as a merchant.[92] A legal regime designed in its English original for merchants and traders had now been opened up to include even the humble farmer and the modest mechanic, each of whom was (in the eyes of the bankruptcy law) as inextricably interwoven in the market networks of nineteenth-century capitalism as the seventeenth and early eighteenth century merchant had been. Indeed, although agricultural interests would effectively resist federal bankruptcy legislation for all but seventeen years scattered across the nineteenth century, the Bankruptcy Act of 1841 marked the beginning of the end for the

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[90] BALLEISEN, *supra* note 12, at 146–48.

[91] *Id.* at 149–51.

[92] Compare with Adam Smith's claim that "[e]very man . . . lives by Exchanging, or becomes in some measure a merchant, and the society itself grows to be . . . a commercial society." STANLEY, *supra* note 3, at 13.

Jeffersonian agricultural idyl. As Mann points out, agricultural interests had become just that—not so much the soul of the nation, as Jefferson would have had it, but an interest or faction in political life. In debates over bankruptcy, even agrarians such as John Randolph of Virginia began, as early as the first years of the nineteenth century, to restyle agriculture not as a national identity but as a particular group whose interests Congress needed to "take care of" in legislative horse trading.[93]

The venom that Jeffersonian and Jacksonian Democrats reserved for federal bankruptcy legislation responded as much to the extended reach of market economies as to bankruptcy legislation itself. Jefferson himself may have been inextricably mired in debt, but making good on one's obligations remained for Jefferson (as it had been for Moody and Mather before him) a powerful indicator of personal integrity. Bankruptcy legislation represented the encroachment of a web of market relations that seemed to bring with them recurring cycles of business failure, cycles that threatened to undo the honor and personal integrity that Jefferson had prized so highly.

Indeed, as Balleisen's research has marvelously uncovered, the experience of failure led many to seek a new kind of bureaucratized security from risk. From the 1840s onward, men who failed in business seem remarkably often to have found work as insurance agents and executives. When Henry Hazen Hyde failed in his business as a dry goods merchant in Catskill, New York, he received a discharge under the 1841 Act and went on to become the first general agent for the Mutual Life Insurance Company of New York. Less than twenty years later, his son Henry Baldwin Hazen founded the Equitable Life Assurance Agency, which by the end of the century would be the world's largest life insurer, with more than one billion dollars of insurance in force. The nation's first massive financial institutions marketed the promise of security to their customers in the form of insurance policies. And they did so in terms that built on the experience of bankruptcy and failure. Insurance, its marketers announced, would allow the middle-class man to "get peace of mind" for his family's future even in the face of the "business reversals" that had come to seem so common by the middle of the nineteenth century.[94]

The life insurance conncction is an interesting one. Economists have long noted that bankruptcy can be described as a kind of insurance contract between the creditor-insurer and the debtor-insured.[95] Indeed, as David Moss has recently pointed out, the legislators behind the 1841 federal bank-

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[93] MANN, *supra* note 11, at 249.

[94] BALLEISEN, *supra* note 12, at 221–27.

[95] *See* KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK-BEARING 139–40 (1970); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 419–20 (6th ed. 2003); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 83–84 (1986). For a recent account of bankruptcy as entrepreneurial insurance, see WEI FAN & MICHELLE J. WHITE, PERSONAL BANKRUPTCY AND THE LEVEL OF ENTREPRENEURIAL ACTIVITY (Nat'l Bureau of Econ. Research, Working Paper No. 9340, 2002), *available at* http://www.nber.org/papers/w9340.

ruptcy statute expressly addressed the insurance aspect of bankruptcy legislation.[96] Bankruptcy in the nineteenth century thus acted (as it does today) as a compulsory insurance term that promisors purchase (and which promisees extend) in each and every contract they enter into.[97] I promise to pay at some later date, but my promise is always and necessarily haunted by an asterisk. It is always a promise to pay *unless* bankruptcy discharges me from doing so. Bankruptcy, then, is compulsory insurance for certain kinds of contract-breaking.

V.

If bankruptcy legislation is akin to compulsory insurance, it is typically insurance for middle-class risks. As Elizabeth Warren and her colleagues have found, bankrupts tend not to be from the ranks of the poor; nor are they disproportionately from marginal jobs. They are instead "right out of Middle America,"[98] a composite of what Warren has called "the fragile middle class."[99] Indeed, individuals with the class standing to take on substantial debts are precisely those who benefit most from the availability of bankruptcy.

The United States developed a relatively early regime of compulsory insurance for debtors in the field of bankruptcy even as the country came notoriously late to compulsory insurance to protect the poor and the industrial working class. Both bankruptcy and various forms of poor relief have been subject to longstanding traditions of criticism on the ground that they encourage bad behavior sueh as shirking. But in the bankruptcy case, the United States developed a powerful counter-narrative that supported a comparatively pro-debtor system of compulsory insurance. It is worth asking how this came about.

Compulsory insurance systems have long been subject to a critique from incentives. The moral hazard of insurance is that, by softening the blow of bad outcomes, it reduces incentives to take care to avoid the bad outcome insured against.[100] Insurance, especially life insurance, thus historically had an air of unsavory gambling about it. England, for example, found it necessary to prohibit taking out insurance policies on the lives of others. (Insuring another person's life created an unhealthy interest in that

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[96] DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER 125 (2002).

[97] *See* Anthony Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 776 (1983).

[98] ELIZABETH WARREN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 91 (1989).

[99] TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000) (especially ch. 2).

[100] *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 14–15 (1986).

person's premature demise.)[101] Post-Revolution France simply barred life insurance altogether.[102] The great difficulty was that where losses might be within the control of the insured, and thus the result of the insured's own personal and moral failings, insurance was indeed a risky business. And so insurance products proliferated first in such areas as maritime shipping in which owners had little control over the fate of the venture, or where those with considerable influence over it, namely the ship's crew, had an effectively uninsurable interest in the venture's success because of its intimate connection to their own lives.[103]

Bankruptcy seems at first blush to be quite different from insurance such as maritime insurance. As those to whom bankruptcy provides insurance, we often have significant power over our fates in the marketplace. At the very least, it is often impossible to disentangle failures and successes that we owe to our own actions from those as to which we have no meaningful control. Yet in the nineteenth-century law of bankruptcy, American lawmakers redescribed failures in the marketplace not in terms of fault, self-reliance, and control, as Samuel Moody and Cotton Mather would have had it, but in terms of inevitability and lack of control. In the American transformation of bankruptcy from a creditors' collection tool to a debtors' protection device, we see the extension of narratives of structural misfortune to the whim and caprice of the business cycle.

William Blackstone foreshadowed this development, writing in the 1760s that bankruptcy was available to merchants because the "sudden and unavoidable" accidental losses incident to trade made merchants "liable to accidental losses . . . without any fault of their own."[104] "[I]f by accidental calamities" such as "the loss of a ship" or the "failure of brother traders," Blackstone explained, "a merchant or tradesman becomes incapable of discharging his own debts, it is his misfortune and not his fault."[105]

After the panic of 1797, American observers described the fate of elite merchants foundering in debtors' prisons in similarly impersonal terms, attributing their condition not to personal failings so much as to the emerging market dynamic of periodic recession. Business failure for these men was the result of "some unforeseen accidents." Mann describes Philip Daggett of New Haven, Connecticut, who blamed his insolvency on "sundry Epileptic Fits, severe Turns of the Long fever, nervous fever, several Turns of the Billious Cholic and loss of his Eyesight, and . . . Sickness and Death in his

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[101] GEOFFREY W. CLARK, BETTING ON LIVES: THE CULTURE OF LIFE INSURANCE IN ENGLAND, 1695–1775 (1999); VIVIANA ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 71 (1977).

[102] ZELIZER, *supra* note 101, at 38.

[103] *See* CHARLES FERLEY TRENERRY, THE ORIGIN AND EARLY HISTORY OF INSURANCE, INCLUDING THE CONTRACT OF BOTTOMRY 102–03 (1926) (describing the ancient origins of maritime insurance in the form of contracts of bottomry).

[104] 2 BLACKSTONE, *supra* note 50, at 472–73.

[105] *Id.* at 474.

Famely and other misfortunes."[106] Consider also Azariah Smith of Farmington, who described his indigence as having bcen caused not "by Negligence or Inattention to his Business but by Meer Casualty Misfortune and uncommon Disappointments in his said Traffick and with Mankind," this notwithstanding his own admission that his troubles were "More Especially" attributable to his marriage to a woman deeply in debt.[107] In the words of Federalist politician James Bayard in the 1790s, bankruptcy legislation was required because even "the most honest and prudent man may, *by accident and misfortunes* incident to commerce, be deprived of the means of making good his engagements."[108]

By the middle of the nineteenth century, many had come to describe recurring recessions and business failure in the same terms once reserved for maritime disasters, with "metaphors of floods, typhoons, tide and hurricanes."[109] Failure, Senator William Stewart of Nevada explained in 1867, was all too often a result "which no human foresight could have guarded against."[110] The law of bankruptcy, lawmakers such as Stewart argued, should therefore allow debtors a fresh start. To be sure, there were many who continued to see defects of personal character at the root of most cases of insolvency. But, as Balleisen describes it, the 1841 Act "stood for the proposition that business failure often resulted from circumstances beyond the control of individual proprietors, and that, as a result, most ruined business owners should not remain perpetually beholden to their creditors in law."[111]

In the 1841 Act, to put it in Mann's terms, moral failure had been transformed into market failure, not just for merchants and traders but for all citizens. The moral hazard narratives of Moody and Mather, and even Buchanan and Beecher, had given way to market hazard narratives that burst out of the merchant-class boundaries suggested by Blackstone and set by the 1800 American act and its English predecessors. Middle-class failures in fields as diverse as agriculture, trades, and skilled artisanry had come to be seen either as structural products of recessions outside the control of the proprietor, or as the worthwhile byproducts of entrepreneurial risk taking. Either way, bankruptcy legislation would provide the debtor with an orderly means to a fresh start, free from the burden of prior debts. And when Congress in 1898 finally enacted what would be lasting bankruptcy legislation, the debtor protections pioneered in the 1841 Act would be picked up and extended, this time in an Act that (although originally lobbied for by creditors' interests rather than debtors') allowed for home-

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106 MANN, *supra* note 11, at 72.

107 *Id.* at 73.

108 *Id.* at 208 (emphasis added).

109 SKEEL, *supra* note 13, at 25.

110 WARREN, *supra* note 10, at 105.

111 BALLEISEN, *supra* note 12, at 133.

stead exemptions and reduced the number of grounds on which creditors could force debtors into involuntary bankruptcy proceedings.[112]

Seen in this light, the law of bankruptcy fits in nicely with recent scholarly descriptions of the development of social provision policy in the United States. Theda Skocpol's work on Civil War pensions, for example, shows us a nation state that from the 1870s onward was engaged in a "precocious" welfare state program of old age pensions for veterans and their survivors.[113] Michele Landis Dauber has begun to dig still deeper into the American past to discover a robust system of disaster relief by which the federal government allocated resources to local communities struck not just by metaphorical floods, typhoons, and hurricanes, but by the real thing.[114] Jacob Hacker and Christopher Howard have drawn attention to the uses of tax expenditures as the American way of welfare.[115] And Ariela Dubler has powerfully described the old law of dower as a mechanism of compulsory middle-class social provision (though a deeply flawed one).[116] In all of these ways, the nineteenth-century federal government was deeply involved in insuring the security of many of its citizens against a wide array of misfortunes.

From an insurance perspective, bankruptcy is among the most interesting of these nineteenth-century legal regimes of provision for risk. Neither disaster relief nor war pensions, for example, could boast the kind of long history of moral exhortation about self-reliance and fault that attached to bankruptcy. Moreover, neither disaster relief nor veterans' pensions seemed quite as susceptible to moral hazards as bankruptcy was. To be sure, ostensibly natural disasters (as historian Ted Steinberg argues) often result from human risk-taking. Homes built in the Mississippi River flood plain, for example, all too often come with homeowners' insurance subsidized by the federal government.[117] By the same token, young women seemed to many observers to marry aging Civil War veterans with a fre-

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[112] An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 541, 30 Stat. 544 (1898).

[113] THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 65–151 (1992).

[114] Michele Landis, *Fate, Responsibility and "Natural" Disaster Relief: Narrating the American Welfare State*, 33 LAW & SOC'Y REV. 257 (1999); Michele Landis, *"Let Me Next Time Be 'Tried By Fire'": Disaster Relief and the Origins of the American Welfare State 1789–1874*, 92 NW. U. L. REV. 967 (1998).

[115] JACOB HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES (2002) (describing the ways in which social welfare policy in the United States is delegated to private actors through tax credits and other policy devices); CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE (1997) (describing social welfare policy in the United States as organized not around tax-and-spend social programs on the Western European model, but rather around tax expenditures).

[116] Ariela R. Dubler, *In the Shadow of Marriage*, 112 YALE L.J. 1641 (2003).

[117] TED STEINBERG, ACTS OF GOD: THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA (2003).

quency that would have been remarkable absent the pensions to which they thereby became entitled.[118] Nonetheless, as a general matter, natural disaster and veteran status provided relatively easy-to-administer criteria for eligibility in social provision programs.

In sum, neither disaster relief nor veterans' pensions seemed to produce (at least at first blush and not on a widespread scale) the kinds of perverse incentives for personal carelessness that inevitably attached to an insurance arrangement designed to give an open-ended class of citizens the opportunity to discharge debts and obtain a fresh start. Whether a business failure was really the product of economic downturn or of desirable entrepreneurial risk-taking, rather than some personal failing of the proprietor, was inevitably an exceedingly difficult question. Not every firm collapsed in an economic downturn. And many failed gambles had been foolish propositions to begin with. Bankruptcy, in other words, was one of the areas in which the register shift from moral hazard to market hazard ought to have been most difficult. And yet over the course of the nineteenth century, if only fitfully at first, the shift was made.

The contrast with other kinds of risk policies that were developing in the nineteenth century economy is especially revealing here. For if middle-class business risks were renarrated in terms that exonerated proprietors and thus made insurance for those risks desirable (or at least feasible) as a matter of public policy, it was in precisely this same historical moment that Americans constructed narratives for new nineteenth-century working-class risks around a language of fault and self-reliance. And where bankruptcy legislation created middle-class insurance at the federal and state levels for much of the nineteenth century, the kinds of risks incident to the lives of the poor and the industrial working class went largely unattended.

Indeed, many of the leading figures of mid-nineteenth-century law, politics, and culture exhibited a kind of systematic blindness to working-class risks.[119] Lincoln's great 1859 speech to the Wisconsin Agricultural Society, an encomium to the virtues of free labor over slavery, blithely explained that if some "singular misfortune" blocked the ascent of a wage laborer to the status of independent proprietor, the laborer could hardly blame the legal system. Indeed, failure in this regard was more likely the result of "a dependent nature which prefers it," or the laborer's own "improvidence" or "folly."[120] A little over a decade earlier, Ralph Waldo Emerson had written of a "deep remedial force" that he described as a kind of natural law of

[118] OTTO E. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 8 (1922); SKOCPOL, *supra* note 113, at 143–47.

[119] The following two paragraphs draw on JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 14–15 (2004).

[120] Abraham Lincoln, Address Before the Wisconsin State Agricultural Society, Milwaukee, Wisconsin (Sep. 30, 1859), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 471, 479 (Roy P. Basler ed., 1953).

compensation. There was no need for the political system to take up the problem of risks, suggested Emerson, because every misfortune was inevitably and inescapably balanced by a countervailing good fortune. The universe, Emerson wrote, sought always to restore a kind of Aristotelian mean; no human law could possibly intervene to the contrary.[121]

In law, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court drew on Lincolnian ideas of misfortune and Emersonian ideas about compensation to set in place an American law of industrial risks. In 1842, as the nation's law for the first time formally allowed debtors to initiate voluntary bankruptcy proceedings and to obtain discharges regardless of creditor consent, Shaw ruled that a railroad employee named Nicholas Farwell could not recover damages from the railroad for an injury arising out of the negligence of one of his fellow employees. No matter that a third party or passenger would likely have been able to recover for the same injury. In Shaw's view, the injured worker was in as good a position as his employer had been (indeed, most likely a better one) to monitor the work of his fellow workers. It followed that to allow Farwell to recover compensatory damages would have been to create a moral hazard in the workplace, softening the blow of employee carelessness for those best able to prevent it.[122] And thus was born the fellow servant rule. In the years and decades that followed, courts in Massachusetts and elsewhere in the United States developed a whole panoply of doctrines that made it exceedingly difficult for industrial workers to go to law for insurance against the risks of their work. Employees were said to assume the ordinary risks inherent in the workplace. And where an employee's own negligence (no matter how slight) contributed to his injury, he was barred from recovering damages, even from a negligent employer.[123]

The contributory fault doctrine connected the law of work risks to a much broader array of nineteenth-century legal rules that limited the law's risk-spreading capacity. People entering onto someone else's land were owed only a limited duty of care, and sometimes no duty of care at all.[124] Charitable institutions such as hospitals were immune from suit, as were family members and municipal, state, and federal governments.[125] Product manufacturers had only limited duties to consumers who had purchased the product from an intermediary rather than directly from the manufacturer itself.[126]

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[121] RALPH WALDO EMERSON, *Compensation, in* ESSAYS (1841), *reprinted in* THE ESSENTIAL WRITINGS OF RALPH WALDO EMERSON 154, 156, 158, 165, 170–71 (Brooks Atkinson ed., 2000).

[122] Farwell v. Boston & Worcester R.R. Corp., 45 Mass. (4 Met.) 49 (1842).

[123] For a summary, see 1 & 2 CHARLES BAGOT LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT (1904).

[124] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 393–99 (5th ed. 1984).

[125] *E.g.*, McDonald v. Mass. Gen. Hosp., 120 Mass. 432 (1876).

[126] *Cf.* Thomas v. Winchester, 6 N.Y. 397 (1852).

Paradoxically, if the idea that business failures were inevitable accidents underlay the development of voluntary discharge in bankruptcy, that same idea of inevitable accident formed the basis of tort law's denial of damages to accident victims in cases of inevitable injury. Inevitable injury, by which tort lawyers meant injury that could not be attributed to anyone's negligence, was *damnum absque injuria*: harm without a remedy.[127] In the market failure narrative of the law of bankruptcy, inevitability was used to describe whole classes of business risks. In the moral failure narratives of tort, by contrast, inevitable accidents were exactly the cases in which, as Holmes famously explained, there was no reason to "set in motion" the "cumbrous and expensive machinery" of the state.[128]

The law of torts represented only one of the ways in which the kinds of risks faced by the poor and the working classes continued to be described in moral hazard rather than market hazard terms. Across the century, local governments sharply reduced their provision of so-called "outdoor relief" (relief without confinement to an almshouse or workhouse) for the poor.[129] Unemployment relief foundered on claims that the unemployed were "shirkers" and "itinerant freeloaders."[130] And during precisely the post-Civil War years in which Congress enacted the third federal bankruptcy scheme of the century, state governments in the North and especially in the South enacted harsh new vagrancy laws aimed at policing the character flaws of the poor by compelling them to reenter the ostensibly free labor workforce.[131]

Despite the refusal of so many American lawmakers to renarrate the risks of the industrial and wage labor economy as they had been willing to renarrate the risks of business failure, the moral hazards at issue in bankruptcy were if anything greater than those at issue in industrial work. Surely the incentives to preserve one's bodily integrity and one's life were generally greater (regardless of any insurance policy) than the incentives to avoid failed financial gambles. Yet nineteenth-century American law began to describe these two kinds of risks in very different ways, seeing moral hazard in the former and market hazard in the latter. Where the inevitability

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[127] *See* WITT, *supra* note 119, at 44–51; John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First Party Insurance Movement*, 114 HARV. L. REV. 690 (2001). For the historical background of the inevitable accident category in the early modern English common law, see Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575 (1994).

[128] HOLMES, *supra* note 7, at 96.

[129] MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 41–43 (1997).

[130] ALEXANDER KEYSSAR, OUT OF WORK: THE FIRST CENTURY OF UNEMPLOYMENT IN MASSACHUSETTS 132 (1986); *see also* JOHN A. GARRATY, UNEMPLOYMENT IN HISTORY: ECONOMIC THOUGHT AND PUBLIC POLICY 117–19 (1978).

[131] AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 108–16 (1998); Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1273–83 (1992).

of accidents was ostensibly a rationale for denying recovery to personal injury claimants, business failures were (in the words of one anonymous late eighteenth century commentator) like "[s]o many unforeseen Accidents" for which it would be "cruel . . . to make no Allowance" in a law of bankruptcy.[132] Yet as U.S. Supreme Court Justice Joseph Story (friend and associate of Lemuel Shaw and drafter of the 1841 federal bankruptcy legislation) described it, the bankruptcy system promised to "grow popular" and become "one of the most lasting benefits ever conferred upon our country."[133] In recurring spates of business failures, even Emerson seemed to see an exception to his universal law of compensation; in situations of mass bankruptcy, Emerson described society "checkmated," reduced to a condition as "bankrupt of principles and hope, as of property."[134]

VI.

What is one to make of American law's disparate narratives of middle-class risk and industrial wage-earner misfortune? Were Shaw, Story, and their peers simply out to protect their own, insuring their own security through middle-class risk policies? Are we presented simply with a story of stark class biases at work in our law?[135] Surely it would not be the only time such biases appeared in legal institutions.

Yet there is something else going on here, and it is something that holds lessons for the ways in which the American legal system and American politics have often worked. Two factors warrant special attention.

First, despite the United States's exceptionally debtor-friendly bankruptcy laws, bankruptcy in the U.S. has always been as much about coordinating the interests of creditors as it has been about providing fresh starts to debtors. As the difficulty collecting debts in the colonial and early republican periods suggests, free-for-alls over a debtor's assets and the race for the courthouse door rarely worked in the creditors' collective self-interest. Bankruptcy law can thus be thought of as a kind of "creditors' bargain," as bankruptcy scholar Thomas Jackson has famously called it—a mechanism that maximized creditors' recovery of their interests by means of a legal clearinghouse in which creditors' interests could be advanced in an orderly fashion.[136]

Creditors, in other words, had their own interests in effective bankruptcy schemes. And often the creation of protections for debtors has

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[132] MANN, *supra* note 11, at 57.

[133] R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 331 (1985).

[134] SKEEL, *supra* note 13, at 25 (quoting Emerson).

[135] *Cf.* Wythe Holt, *Labor Conspiracy Cases in the United States, 1805-1842: Bias and Legitimation in Common Law Adjudication*, 22 OSGOODE HALL L.J. 591 (1984).

[136] Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

proven useful in advancing these creditor interests. It is no coincidence, for example, that discharge (freeing debtors of past obligations regardless whether they had been paid in full) first appears in Anglo-American bankruptcy in 1705 amendments to the generally draconian English law of bankruptcy.[137] Providing debtors with incentives to cooperate and to disclose otherwise hidden assets was thought likely to increase creditors' total recovery. As a result, unlike other kinds of insurance, the insurance policy that bankruptcy law effectively extends to debtors is one that is often mutually beneficial to debtors and creditors. While the question of how to allocate the risks of the industrial wage earner and the poor generally pitted wage earners against employers, or the poor against the public fisc, the question of how to deal with bankruptcy risks often aligned the interests of the respective parties.[138]

Second, social provision systems in the United States have emerged in a federal system that has often made it easier to migrate across jurisdictional boundaries than to enforce obligations across those boundaries. American bankruptcy law could therefore hardly have afforded to experiment with the harsher regimes common in other nations' legal systems. Debtors could too easily evade creditors by fleeing the state and going to Texas, if not further. Moreover, thanks to the Bankruptcy Clause of the U.S. Constitution, bankruptcy legislation enjoys special constitutional status, freed of the federalism constraints that have preoccupied policymakers in other areas.[139] Federal bankruptcy legislation has thus been able to create carrots (voluntary discharges, relatively generous homestead exemptions, and the like) that induce debtors to go through the orderly distribution of their assets. By contrast, in the kinds of workingmen's insurance systems that came under discussion after the Civil War, federalism issues often cut the other way. Where state-level workingmen's insurance seemed likely to raise employers' costs, in-state employers held over state legislatures the possibility of reenacting the out-of-state migrations of generations of debtors before them.[140]

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[137] An Act to Prevent Frauds Frequently Committed by Bankrupts, 4 & 5 Ann., e. 17 (1705) (Eng.), *reprinted in* 8 STATUTES OF THE REALM 461, 463 (1821).

[138] Employment risks might have aligned the interests of employers and employees around allocating risks to the best cost avoider among them, but difficulties such as asymmetrical information and flawed risk assessment limited the possibilities of this kind of alignment. Certainly employees and employers have often experienced their interests as nonaligned in this regard. *See, e.g.*, DOROTHY NELKIN & MICHAEL S. BROWN, WORKERS AT RISK: VOICES FROM THE WORKPLACE (1984).

[139] U.S. CONST art. I, § 8, cl. 4.

[140] It is not clear that the fact of federalism in and of itself inhibited the development of workingmen's insuranee systems. In Canada's federal system, for example, federalism seems to have encouraged the growth of such insurance systems as national health insurance. *See* Jacob S. Hackcr, *The Historical Logic of National Health Insurance: Structure and Sequence in the Development of British, Canadian, and U.S. Medical Policy*, 12 STUD. AM. POL. DEV. 57, 71–74 (1998).

Why, then, were bankruptcy hazards described in different terms than industrial and wage earning hazards? The work of Balleisen, Mann, and Skeel suggests that much of the answer lies in the existence of powerful constituencies on both sides (creditor and debtor), who had interests in telling the story that way, and because institutional structures facilitated one kind of story in the bankruptcy setting but not in the work risk setting. Stories about risk in the history of American bankruptcy law reflected the institutional settings, political interests, and storytelling power of the stakeholders.[141] In particular, narrative entrepreneurs from eighteenth-century Blackstone to nineteenth-century commentators like Azariah Smith, William Steward, and James Bayard, successfully reshaped the trajectory and valence of the stories that Americans told about commercial risks and insolvency. Narratives of moral hazard, on one hand, and structural misfortune, on the other, were not simply valid representations of the relative incentives at issue in different insurance market settings. Rather, they reflected the success of storytellers from Blackstone to Bayard in reshaping the ways in which Americans talked about business failure.

Did the success of narrative entrepreneurs in American bankruptcy law signal some deep shift in the American culture of risk, as the cultural theory of risk would suggest?[142] Perhaps. But the on-again, off-again character of federal bankruptcy law in the nineteenth century suggests a fractured culture of risk in a period of flux.[143] Moreover, the comparison to tort law suggests that American culture contained an array of competing ways to describe risk. The success of the lawmakers who renarrated American bankruptcy stories in terms of market hazards rather than moral hazards lies in their ability not so much to shift the culture as to strategically invoke one among a number of available ways of talking about risk. Their success (and, in turn, the failures of the Moodys and the Mathers, the Beechers and the Buchanans) can be attributed to a powerful convergence of interested parties around market hazard narratives of risk. Debtors and creditors alike had much to gain from the market hazard narrative. And so descriptions of American failure perceptibly shifted from moral failings to market cycles.

This is why the 1898 Bankruptcy Act was inspired by creditors' interests rather than by debtors' protections. In the aggregate, even ostensibly debtor-protective provisions such as discharge and voluntary bankruptcy filings could work to increase creditor recoveries by promoting the orderly distribution of a debtor's remaining assets. And once the bankruptcy regime was in place for a sufficiently sustained period, new constituencies,

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[141] On the development of moral hazard ideas in several other contexts, see Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

[142] On the cultural theory of risk, see *supra* notes 14–17 and accompanying text.

[143] On ways in which the American law of bankruptcy has long been characterized by oscillation between competing views of commercial risks, see Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986).

chiefly the bankruptcy bar, quickly grew up around bankruptcy, developing powerful vested interests in its continuation. Indeed, as Skeel suggests, by the end of the nineteenth century, the new narrative of market hazards was able to call into being political constituencies for bankruptcy that have fixed in place federal bankruptcy systems ever since.

In Skeel's account, federal bankruptcy legislation during the nineteenth century was subject to what Kenneth Arrow described in his Impossibility Theorem as the problem of cycling in democratic regimes.[144] Where lawmakers and citizens have a range of differing preferences for legislation, any particular legislative outcome is likely to be highly unstable, contingent on the particular structure of the legislative agenda.

Say, for example, as Skeel does, that legislators rank differently their preferences among no bankruptcy legislation (*NB*); legislation authorizing debtor-initiated bankruptcies (*VB*); and legislation authorizing creditor-initiated as well as debtor-initiated bankruptcy proceedings (*IB*). Suppose further that Thomas Hart Benton, Democratic Senator of Missouri, preferred *NB* over *IB*, and *IB* over *VB*; that high-nationalist Whig Daniel Webster preferred *IB* over *VB*, and *VB* over *NB*; and that Kentucky Whig Henry Clay most liked *VB*, but preferred *NB* over *IB*. Under such circumstances, the result of any congressional vote on bankruptcy policy will turn on the structure of the legislative choice on the table. If Benton, Webster, and Clay were asked to choose between *NB* and *IB*, Benton and Clay would vote for *NB* and there would be no bankruptcy statute enacted at all. If the legislative agenda were subsequently restructured such that Benton, Webster, and Clay were asked to choose between *VB* and *NB*, Webster and Clay would vote for *VB* and there would be voluntary bankruptcy. But if the agenda were restructured once again to pose a choice between *VB* and *IB*, Benton and Webster would vote for *IB* and there would be an involuntary bankruptcy statute—at least until the question of repeal was put on the floor, at which point we would come full circle, with Benton and Clay voting to repeal. As in Arrow's Impossibility Theorem, infinite iteration of the cycle would preclude the stable adoption of any of the three available bankruptcy policies.[145]

In Skeel's account, what stopped the iterative cycling of nineteenth-century bankruptcy law was the emergence of the bankruptcy bar as a powerful constituency, able to shape the agenda in the bankruptcy field.[146] The progenitor of the modern bankruptcy bar was Robert Fields, a Boston law-

[144] *See* SKEEL, *supra* note 13, at 28–30; KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2–3 (1951). David Coleman made an earlier, less formal suggestion that legislative cycling explains the oscillation of federal bankruptcy legislation in the nineteenth century. *See* COLEMAN, *supra* note 10, at 21–22. Many thanks to Ed Balleisen for pointing this out to me.

[145] SKEEL, *supra* note 13, at 28–34. Ed Morrison's game-theoretic savvy has made my presentation of this point far clearer than it otherwise would have been.

[146] *Id.* at 46–47.

yer whose *Practical Treatise upon the Bankrupt Law of the United States* (published within weeks of the enactment of the 1800 Act, and one day before it went into effect) provided debtors and their advocates with what Mann describes as a "step-by-step guide to the bankruptcy process."[147] By the time of the 1841 Act, there had been relatively little further specialization in the field; bankrupts under the 1841 legislation were represented by a wide variety of generalist commercial lawyers.[148] Over the next century, however, the personal bankruptcy bar weathered any number of scandals, and survived its occasionally deserved reputation as vultures preying on the failures of others, to become a powerful interest in the shaping of the nation's bankruptcy laws. Indeed, once a sustained period of Republican control in the White House and the Congress allowed the 1898 legislation to stay in place for a decade and a half, the bankruptcy bar became, in Skeel's words, "the single most important influence on the development of bankruptcy law."[149]

The bankruptcy bar's influence is most readily apparent in the historic reliance of the American law of personal bankruptcy on voluntary institutions in the private sector rather than on public bureaucracies. Where other western nations at the end of the nineteenth century and in the opening of the twentieth built bankruptcy schemes around a state-run bureaucracy of gatekeepers who controlled access to the benefits and burdens of bankruptcy status, the United States's bankruptcy scheme has hewed to a lawyer-driven model of bankruptcy in which the system's central institutional apparatus exists in the form of the private bankruptcy bar. It is the bankruptcy bar, rather than, say, a civil service of bankruptcy bureaucrats, that has repeat-play expertise in the field. Again and again in the course of U.S. bankruptcy law, the private bankruptcy bar has been able to shape reform by pointing to its experience and to the considerable start-up costs of shifting to greater public administration.[150]

To be sure, the bankruptcy system's reliance on private actors has its costs, too, in the form of the relatively high administrative costs generated by the adversarial system and in the form of recurring scandals that have often revealed a too-cozy world of bankruptcy insiders, able effectively to monopolize the lucrativc occupations of bankruptcy trustee and receiverships. Yet it is precisely the entrenched position of the bankruptcy bar that allowed the personal bankruptcy bar to survive unscathed through the centralizing tendencies of the New Deal. The New Deal might have reworked personal bankruptcy, making it, as Skeel notes, of a piece with the social

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147 MANN, *supra* note 11, at 224.

148 BALLEISEN, *supra* note 12, at 140–41.

149 SKEEL, *supra* note 13, at 47.

150 The chief exception to this pattern was the corporate reorganization bar's failure to block William O. Douglas's thoroughgoing transformation of corporate bankruptcy law in 1938, a transformation that sharply limited the role of the bar in corporate bankruptcies. *Id.* at 123–27.

welfare safety net created by the New Deal.[151] But as we have seen, bankruptcy has always been subject to a political dynamic distinct from the kinds of insurance programs and safety nets characteristic of the welfare state. Bankruptcy is a safety net not so much for wage workers, but for the entrepreneurial middle classes. And like so many of the middle-class safety nets that populate American politics, from disaster relief and veterans' pensions to personal injury law and federally subsidized but employer-provided health insurance, bankruptcy has developed along a separate track, largely because of the constitutional settings in which it has operated and because of the powerful constituencies it has been able to attract: constituencies that rarely find substantial rewards in programs for the poor and the industrial working classes.

VII. CONCLUSION

Among the most extraordinary stories uncovered in these books is the one told by Mann of a "shadow republic" created in the New York Gaol. From deep in the papers of William Duer, the "Prince of Speculators"[152] in the eighteenth-century New York financial district, Mann has recovered the tale of a remarkable constitutional system of government adopted by imprisoned debtors. Duer himself was imprisoned in the Gaol for most of the period from 1792 until shortly before his death in 1799. In Duer's papers, Mann finds the records of an internal private government constituted of a supreme court and elected judges (apparently with life tenure), an elected attorney general, one clerk, two wardens, and four stewards, the latter two offices charged with the basic policing and inspection tasks of the debtors' proto-state. The shadow republic, in other words, effectively reproduced the basic features of the young republic outside the Gaol's walls, complete with procedural requirements, parliamentary procedures, and a system of sanctions that involved banishment from the halls of the Gaol to the stairwells.[153]

In certain respects, debtors' prison governments, like bankruptcy itself, threatened to invert the social structure of the communities outside their walls. Critics of bankruptcy feared that legislation like that enacted in 1841 would instigate a "Jubilee of the Bankrupts"[154]—debtors would rush pell-mell into the federal courthouses to be released from their obligations. And the spectacle of debtors recreating the forms of constitutional governance in the often licentious, Bacchanalian setting of the late eighteenth-century debtors' prisons seemed to turn ordered government on its head.[155]

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[151] *Id.* at 100; Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1401–04 (1985).

[152] COLEMAN, *supra* note 10, at 20.

[153] *See* MANN, *supra* note 11, at 147-65.

[154] BALLEISEN, *supra* note 12, at 119.

[155] MANN, *supra* note 11, at 90–91.

Yet what is perhaps most striking about the shadow republic of the debtors is the extent to which it reproduced rather than defied the conventions of the society around it. Out of the very act of contract breaking, debtors recreated a new social contract as microcosm for the social contract in the outside world. Merchants and skilled artisans, for example, were typically separated out from mere laborers in debtors' prisons. In New York, the former occupied the upper two halls of the Gaol while the laborers occupied the lower hall. The leadership of the New York debtors' government closely tracked the prestige and wealth of its membership. And in this sense, the tale of the little republic of the contract breakers points to a critical feature of the American law of risk. The law of risk is often a product of the stories we tell about the risks the law seeks to regulate. In turn, the success of certain stories over others often tells us as much about the power of the storytellers as about either their cultural outlook or the validity of their story.