

University of Pennsylvania Carey Law School

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INSTITUTE FOR LAW AND ECONOMICS

A Joint Research Center of the Law School, the Wharton School,
and the Department of Economics in the School of Arts and Sciences
at the University of Pennsylvania

RESEARCH PAPER NO. 25-16

Debt's Dominion: A New Epilogue

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This Essay, written for the “Who Governs Debt’s Dominion” symposium, looks back on *Debt’s Dominion: A History of Bankruptcy Law in America* as the twenty-fifth anniversary of the book’s publication nears. The Essay begins, in Part I, by briefly describing how *Debt’s Dominion* came about. Part II identifies and seeks to explain a striking decline in optimism about American bankruptcy law since *Debt’s Dominion* was first published. Part III explores a few of the major recent developments in consumer bankruptcy, small business bankruptcy, and large-scale corporate reorganization that I would have analyzed in the book if it were written today. Part IV briefly considers the impact of globalization and concludes the new epilogue.

INTRODUCTION

Looking back on *Debt’s Dominion* after nearly twenty-five years, I am relieved—there’s no other word for it—that the political economy story still rings true.¹ Two of the three forces that supplied the foundation for the narrative—lobbying by creditors and the countervailing influence of pro-debtor populism (the third factor was bankruptcy professionals)—were vivid and obvious from early in the nation’s history. Alexander Hamilton, an early creditor advocate, believed America needed a federal bankruptcy law to fulfill our destiny as a commercial nation. Imagining a more

*S. Samuel Arsht Professor, University of Pennsylvania Carey Law School. I am grateful to Professor Brook Gotberg for conceiving this symposium, to Professor Gotberg and Hannah Biesinger for organizing and hosting the in-person conference, to the participants for their kind words and thoughtful insights, and to Sahara Chen and Dylan Sivin for helpful research assistance. As I said at the conference, the conference was—along with getting my first teaching job and serving on the Puerto Rico oversight board—the highlight of my teaching career.

1. DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001). Since this is an Essay about *Debt’s Dominion*, I will often forgo citations to the book other than with quotations.

agrarian future for America, Thomas Jefferson, a pro-debtor populist, viewed bankruptcy law as a nefarious tool that Northeastern creditors would employ to displace farmers from their land after a drought or other misfortune left them unable to repay money they had borrowed earlier.

Neither Hamilton nor Jefferson was a saint, but they were patrons of the pro-creditor and pro-debtor populist perspectives that clashed visibly throughout the nineteenth century. Both of these forces continue to shape American bankruptcy law today. When Congress enacted its most extensive twenty-first century bankruptcy reforms in 2005,² a century after the end of those early debates and four years after *Debt's Dominion* was published, organized creditors and pro-debtor populism were still in evidence, though each had morphed. The pro-creditor advocates were credit card companies such as Visa and Mastercard, a form of credit that didn't exist in the earlier era.³ And Elizabeth Warren, the face of the populist, pro-debtor opposition, lived in (and was later elected senator of) Massachusetts, a state that had been staunchly pro-creditor in Webster's era.⁴

The third, less obvious influence has been bankruptcy professionals. *Debt's Dominion* tells the story of their efforts to fend off repeal of the federal bankruptcy law in the early twentieth century and, once it was firmly established, to expand bankruptcy's scope thereafter.

If the political economy story had been more elaborate, some of it might have been superseded by now. It's a loose scaffolding, with a great deal of room for working the details out. This is especially true with the early and mid-nineteenth century. Careful recent work by Rafael Pardo, for instance, reveals that insolvency specialists did not simply disappear after short-lived federal bankruptcy laws were repealed in the nineteenth century.⁵ He argues that there was an insolvency bar of sorts even then, due to the backlog of cases that continued after each federal law was

2. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

3. SKEEL, *supra* note 1, at 189–191 (explaining the influence of credit card companies).

4. *Id.* at 200–202 (describing Elizabeth Warren's role in bankruptcy scholarship and politics).

5. Rafael I. Pardo, *Specialization and the Permanence of Federal Bankruptcy Law*, BYU L. REV.

repealed and the existence of somewhat analogous state insolvency laws.⁶ But the framework still accurately characterizes the political forces that shape American bankruptcy law, or so it seems to me.

To bring *Debt's Dominion* up to date as its twenty-fifth anniversary nears, I will begin in Part I with a few remarks about how *Debt's Dominion* came about, then describe in Part II a recent shift in perceptions about bankruptcy law and practice before turning to a few key developments since *Debt's Dominion* was published in Part III. Part IV briefly considers the impact of globalization.

I. ORIGINS

The highly contested early history of American bankruptcy law was what first drew me to bankruptcy. I never realized, until I took a bankruptcy class during law school, how central bankruptcy had been to American history. As I tell my students, if you were compiling a top-ten list of the wrenching social issues of the nineteenth century—issues that divided the populace not just during one period or another, but throughout the entire century—the number one issue would obviously be slavery. But bankruptcy would surely be second or third.

Although I didn't set out to write a history of American bankruptcy law when I began my scholarly career, bankruptcy history was always in the back of my mind. I repeatedly gravitated toward it as I wrote about issues in current bankruptcy law. In retrospect, I felt a little like an explorer who keeps seeing glimpses of a treasure ship but hasn't yet conducted a proper expedition to more fully explore it.

When I first began teaching, I stumbled upon an anomaly that led to the principal focus of my early scholarly articles. The puzzle was this: Why is corporate bankruptcy law treated as if it were entirely unrelated to corporate regulation outside of bankruptcy? I would have thought the drafters of corporate law would want to know how a corporation will be treated if it files for bankruptcy, and vice versa. But everything about the regulatory framework conspires to separate them. Corporate bankruptcy law is a federal statute, while financially healthy corporations are regulated

6. See, e.g., *id.* at 6 (calling this “layered bankruptcy specialization”).

primarily by the states.⁷ The corporate law professors I knew didn't teach bankruptcy, and the bankruptcy professors didn't teach corporate law. Neither spoke the other's language.

This seemed odd to me, and for a young law professor, nothing is better than discovering an anomaly that is both obvious and odd. Obvious aberrations are often where rich ore can be found. I wrote articles applying insights about corporate voting to voting in Chapter 11⁸ and exploring the unhappy consequences of cordoning these areas of regulation off from one another.⁹ I later developed a more theoretical account of the relationship that I call an evolutionary theory of corporate law and corporate bankruptcy.¹⁰

As I explored these issues, I poked around in the historical records to see whether corporate law and bankruptcy were always separate domains. It turned out that quite the opposite was true. In the late nineteenth and early twentieth centuries, the Wall Street banks and lawyers that underwrote a big corporation's stock and bonds, and who advised its managers, were often the ones who handled a reorganization if the corporation fell into financial distress.¹¹ Looking back, I think this discovery-- together with my still vivid memories of Alexander Hamilton and Thomas Jefferson-- convinced me that writing a compact but comprehensive history of American bankruptcy law might be a worthwhile endeavor.

A more mundane scholarly impetus also shaped my thinking. I had the good fortune to begin my teaching career in 1990, at a time when scholarly giants roamed the earth. Tom Jackson had

7. The principal exception is federal securities law, which regulates issues such as disclosure by public companies, proxy voting, and insider trading, as well as provides a federal overlay on state corporate law. *See generally*, Securities Act of 1933, 15 U.S.C. § 77; Securities Exchange Act of 1934, 15 U.S.C. § 78.

8. David A. Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461 (1992).

9. David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994).

10. David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325 (1998); John Armour, Brian R. Cheffins & David A. Skeel, Jr., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom*, 55 VAND. L. REV. 1699 (2002).

11. Key earlier works include STUART DAGGETT, *RAILROAD REORGANIZATION* (1908); and Paul D. Cravath, *The Reorganization of Corporations in SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION*, 153 (A. Ballantine et al. eds., 1917). The best new article was Peter Tufano, *Business Failure, Judicial Intervention, and Financial Innovation: Restructuring U.S. Railroads in the Nineteenth Century*, 71 BUS. HIST. REV. 1 (1997).

proposed his classic normative theory of bankruptcy, the creditors' bargain model, less than a decade earlier, and had developed and extended it in co-authored works with Douglas Baird.¹² Elizabeth Warren and two co-authors had recently published groundbreaking empirical work on consumer bankruptcy.¹³ (Happily, all three giants are still going strong, though Jackson and Warren relocated to other neighborhoods—Jackson to a university presidency in the 1990s and Warren to the U.S. Senate in the 2010s).¹⁴ History was a domain in which none of them had planted a flag. For a young scholar, this seemed like an opportunity, so I pursued it.

I have often been asked what my favorite part of *Debt's Dominion* is. This is a little like being asked which of your children you love the most. The correct answer, of course, is that you love them all the same. But as the years pass, I do find myself looking back especially fondly on a few historical moments, such as the multiplicity of perspectives on a potential federal bankruptcy law that emerged in the nineteenth century—with some lawmakers favoring a voluntary bankruptcy option, some favoring only an involuntary bankruptcy option, and others opposing bankruptcy altogether;¹⁵ the remarkable emergence of the world's first large-scale reorganization in the nineteenth century (the most spectacular innovation of the common law in America in my view);¹⁶ the unlikely confluence of factors that produced a permanent bankruptcy law in 1898;¹⁷ and the surprising blessing that William Douglas gave, as a Supreme Court justice, to managers' and

12. See, e.g., THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986); Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganization and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984).

13. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989).

14. See Kathryn Quinn Thomas, *Thomas Jackson: As president, he is the UR's man of action*, ROCHESTER BUS. J., April 27, 2001 (describing Jackson's presidency at the University of Rochester).

15. SKEEL, *supra* note 1, at 28–34. I am grateful to Todd Zywicki for highlighting this discussion in his review of *Debt's Dominion*. Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2018–20 (2003) (describing the instability—or cycling—of these perspectives).

16. SKEEL, *supra* note 1, at 56–63.

17. *Id.* at 40–46. The “permanence thesis” is the feature of *Debt's Dominion* that Pardo focuses on and complicates in his fine article for this symposium. Pardo, *supra* note 5, at 4–6.

bankruptcy lawyers' evasion of bankruptcy reforms he had twisted lawmakers' arms to enact in 1938, when he was chairman of the Securities & Exchange Commission.¹⁸

II. MOOD SHIFT

It probably wasn't accidental that a group of pathbreaking bankruptcy scholars were in their prime when I started writing *Debt's Dominion*. The enactment of the 1978 Bankruptcy Code, which completely overhauled the existing statute, had ushered in a golden era in American bankruptcy law after what seemed, in retrospect, like forty years in the wilderness.¹⁹ After briefly describing this shift, I will contrast it to the current mood, which is far less optimistic.

Prior to 1978, bankruptcy practice was viewed as faintly disreputable. The elite bankruptcy practice of the late nineteenth and early twentieth century had been gutted by sweeping New Deal reforms in 1938.²⁰ The practice that remained was dogged by the perception that "bankruptcy rings" operated in most major cities, treating bankruptcy cases as a source of patronage.²¹ At many law schools, the Bankruptcy class was called Creditors' Rights, or Debtors and Creditors; the casebooks for the class had similar labels.²² I've always suspected that law schools avoided the name Bankruptcy because of the negative connotations it carried.

The 1978 Code changed all of this. Chapter 11, the Code's new reorganization provisions, permitted the managers of a troubled business to continue running the firm in bankruptcy (the managers had been replaced by a trustee in big cases under the old law). As a result, bankruptcy became a much more attractive option for the managers of a big company that fell into financial distress. And

18. SKEEL, *supra* note 1, at 161–168.

19. See *infra* note 23 and accompanying text.

20. This is the subject of chapter 4 of *Debt's Dominion*. SKEEL, *supra* note 1, at 119–127.

21. The "rings" were local bankruptcy lawyers who arranged for the appointment of a friendly trustee who would appoint them as the trustee's counsel in the case, a lucrative role since their fees were paid for from the debtor's assets. *Id.* at 76–77, 133–34.

22. The first edition of the casebook for which I am now a co-author was called *Cases and Materials on Debtor-Creditor Law*. See William F. Young Jr., *Book Review: Cases and Materials on Debtor-Creditor Law*, 60 CORN. L. REV. 689 (reviewing WILLIAM D WARREN & WILLIAM E. HOGAN, *CASES AND MATERIALS ON DEBTOR CREDITOR LAW* (1974)). The book is now called *Bankruptcy*. DANIEL J. BUSSEL, DAVID A. SKEEL, JR., & MICHELLE M. HARNER, *BANKRUPTCY* (12th ed. 2025).

where big companies go, big law firms are sure to follow. By the mid-1980s, nearly every big New York law firm raced to build a bankruptcy practice.²³ A gold rush was on. The whiff of disrepute had disappeared.

Much like bankruptcy practice, the scholarly literature had atrophied prior to 1978, with only a handful of scholars, such as Vern Countryman and Frank Kennedy, furnishing occasional sparks of light.²⁴ After the enactment of the 1978 Code, a vibrant scholarly literature reemerged. This was the context in which the foundational modern bankruptcy scholars such as Thomas Jackson, Douglas Baird, and Elizabeth Warren made their contributions.

I began writing *Debt's Dominion* during the second wave of contemporary bankruptcy scholarship in the 1990s. The hot academic debate of that era was triggered – ironically enough given the transformational effect of Chapter 11 and the 1978 Code – by an article purporting to show that Chapter 11 was a failure.²⁵ A new generation of law-and-economics scholars, including me, piled on, advocating often fanciful alternatives to Chapter 11,²⁶ while bankruptcy progressives defended Chapter 11.²⁷ The intensity of the debate, and the participation of top legal scholars, was further evidence of the new-found relevance of bankruptcy law. We all joined in because Chapter 11 was important. This, too, together with the focus of the first wave of bankruptcy scholarship having been elsewhere, made the 1990s seem like an opportune time to write a compact history of American bankruptcy law.

23. See, e.g., Sherry R. Sontag, *Amid Bust, a Boom*, NAT'L L.J., Apr. 2, 1990, at 29 ("Ten years ago, before large corporate clients began to use the 1978 Bankruptcy Code as a way out of short-term financial problems, most large firms ignored the field altogether. Now they are scrambling to bolster and promote their insolvency practices.").

24. For Countryman's role (and references to Kennedy as well), see David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075 (2000).

25. Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992).

26. See, e.g., Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993) (devising an approach Adler dubbed "chameleon equity"); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992); David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994) (calling for state regulation of bankruptcy).

27. Lynn M. LoPucki, *Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig*, 91 MICH. L. REV. 79 (1992); Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437 (1992).

Debt's Dominion was a story, in a sense, about the rise of federal bankruptcy law, its decline, and its recent rebirth. Although I tried not to make this too obvious, I loved that the book had the same narrative arc as a rock star documentary. It was as though I was writing about a journey through the wilderness that had arrived at the promised land.

Twenty-five years on, the promised land feels a little more congested. It is increasingly run by insiders who collect tribute. One of Chapter 11's innovations was a financing provision that made it easier than ever before for a debtor to borrow funds for its operations in bankruptcy, but the market for financing has proven stubbornly resistant to competition.²⁸ The debtor's existing lenders have a nearly insurmountable first-mover advantage and enjoy monopoly profits.²⁹ The course of many Chapter 11 cases is dictated by this lending agreement, together with contracts—known as restructuring support agreements, or RSAs—entered into by the lenders, the debtor's managers, and a group of favored creditors.³⁰ The RSA dictates the terms of a restructuring, and promises fees to its participants that are not offered to creditors who are not parties to the agreement.³¹

American bankruptcy law is still the most important insolvency framework in the world, and bankruptcy practice remains a mainstay of the most prestigious law firms. Any rumors of the demise of Chapter 11 are quite premature. But the level of

28. The financing provision is 11 U.S.C. § 364. For evidence that the market for financing (known as debtor-in-possession or DIP financing) is not competitive, see B. Espen Eckbo, Kai Li & Wei Wang, *Loans to Chapter 11 Firms: Contract Design, Repayment Risk, and Pricing*, 66 J.L. & ECON. 465, 467 (2023) (finding that the rate charged by DIP lenders "is almost five times the average spread on matched investment-grade loans and almost double the average spread on matched leveraged loans issued by highly risky (nonbankrupt) firms"); Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REGUL. 651, 685 (2020) (explaining that DIP loans are priced similarly to much riskier junk bonds).

29. Eckbo et al, *supra* note 28, at 467; Tung, *supra* note 28, at 685.

30. See, e.g., Kenneth Ayotte & Jared A. Ellias, *Bankruptcy Process for Sale*, 39 YALE J. ON REGUL. 1 (2022).

31. RSAs (and their post-petition siblings, plan support agreements) are analyzed at length in David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020) (hereinafter, Skeel, *Distorted Choice*).

discontent has risen.³² The mood has shifted. The ambient attitude is less optimistic than twenty-five years ago.

III. UPDATING THE STORY

If I were writing *Debt's Dominion* today, it wouldn't need to be a great deal longer than the original version. The only major bankruptcy reforms of the past twenty-five years were already underway when I wrote *Debt's Dominion*, and I covered them in the book.³³ The amendments to bankruptcy law since then have been relatively minor, not nearly as transformative as the 1978 Code. But there have been significant non-legislative developments with consumer bankruptcy, small business reorganization, and large-scale corporate reorganization that I would not have wanted to omit. I explore these developments in this Part. I begin, in Part III.A, by briefly discussing a group of young bankruptcy scholars who have directed attention to the discriminatory effects of ostensibly neutral consumer bankruptcy law. In Part III.B, I describe a set of surprisingly effective new reorganization provisions Congress has enacted for small businesses. Part III.C focuses on several key features of many large-scale reorganization cases that have recently been called into question.

A. Consumer Bankruptcy

The biggest legislative changes—and the most reviled—of the past twenty-five years are the consumer bankruptcy amendments enacted in 2005. Although the legislation came four years after *Debt's Dominion*, its final shape was in place before *Debt's Dominion* was published. *Debt's Dominion* predicted that the new strictures—such as the new means test and credit counseling prerequisites to filing for bankruptcy in Chapter 7—would simply raise the cost of bankruptcy and discourage some consumer debtors from filing.³⁴ No great prescience was required here—others made the same

32. See, e.g., David Skeel, *Bankruptcy's Identity Crisis*, 171 U. PA. L. REV. 2097 (2023). See also Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 Va. L. Rev. 1261 (2023) (focusing on mass tort bankruptcies).

33. The seventh chapter of the book focuses on the proposed consumer bankruptcy reforms that became the centerpiece of the 2005 amendments. SKEEL, *supra* note 1 at 187–211.

34. See, e.g., *id.* at 205 (“Although the means test would not reach a large number of debtors, it would appreciably raise the cost of the bankruptcy process.”).

prediction³⁵—and the reforms did have the predicted effect. Bankruptcy filings, which were well over a million a year in the early 2000s, have dropped to roughly 500,000 a year today.³⁶

The most notable subsequent development in consumer bankruptcy is a new literature exploring the discriminatory effects of facially neutral consumer bankruptcy rules. When I and others were asked to write about race and financial distress in the early 2000s, the topic was novel in the literature.³⁷ Since then, racial disparities in bankruptcy have been given more sustained attention. A particular focus has been the treatment of criminal fines and fees. After Michael Brown, an unarmed Black man, was killed in Ferguson, Missouri, a governmental report documented the town's heavy reliance on revenues from fines and fees, including fines for failing to appear at court hearings.³⁸ The fact that defendants can be jailed if they don't pay the fees, which are disproportionately owed by Blacks and other minorities, prompted comparisons to the debtor's prisons of the nineteenth century.³⁹ Several bankruptcy scholars have pointed out that these criminal fines and fees cannot be discharged in bankruptcy, which means that bankruptcy provides less relief for many Blacks and other minorities than for other Americans.⁴⁰ Other scholars have empirically documented the higher filing rates and differential

35. See, e.g., Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407 (2002).

36. For bankruptcy filing numbers, see, e.g., U.S. Courts, *Bankruptcy Filings Rise 11.5 Percent Over Previous Year* (July 31, 2025), available at <https://www.uscourts.gov/data-news/judiciary-news/2025/07/31/bankruptcy-filings-rise-115-percent-over-previous-year> (on file with the BYU Law Review) (reporting 542,529 bankruptcy filings in the past year).

37. See, e.g., Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777 (2004); David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1695 (2004).

38. U.S. Dept. of Justice Civil Rights Division, *Investigation of the Ferguson Police Department* (March 4, 2015) https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (on file with the BYU Law Review).

39. See, e.g., Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1 (2016).

40. Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917 (2017); Nicole Langston, *Discharge Discrimination*, 111 CA. L. REV. 1031 (2023). Mechele Dickerson has also written extensively about related issues. See, e.g., A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004).

treatment of Blacks and other minorities in bankruptcy.⁴¹ The complete history of race and American bankruptcy law has yet to be written, but scholars are increasingly filling in key pieces—including key pieces from the nineteenth century.⁴² This work adds a previously unexplored dimension to the history of bankruptcy law in this country.⁴³

B. A New Era for Small Business Reorganization

When *Debt's Dominion* was first published, the big unsettled legal issue in corporate reorganization was the new value exception to the absolute priority rule. For businesses that have filed for Chapter 11, the absolute priority rule ordinarily bars the shareholders from retaining any ownership interest if (1) there exists a class of creditors that will not be paid in full and (2) this class of creditors objects to the proposed reorganization plan.⁴⁴ For decades, dating back to the 1939 U.S. Supreme Court decision that first defined the absolute priority rule, courts had suggested that shareholders were not bound by this stricture if they provided new value—“money or in money’s worth.”⁴⁵ Shareholders who provided new value were, in effect, purchasing stock in the reorganized company; they weren’t receiving the stock on account of their prior equity interest. In 1988, the Supreme Court ruled, in a case involving a family farm, that a promise to keep working for the business did not qualify as “money or money’s worth.”⁴⁶ But the Court didn’t provide any further guidance, and some, including the solicitor general’s office, argued for a narrow interpretation of

⁴¹ See Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 579 (2022); PAMELA FOOHEY, ROBERT M. LAWLESS & DEBORAH THORNE, *Debt's Grip: Risk and Consumer Bankruptcy* 107-131 (2025) (describing the treatment of Blacks in bankruptcy).

⁴² See Rafael I. Pardo, *Financial Freedom Suits: Bankruptcy, Race, and Citizenship in Antebellum America*, 62 ARIZ. L. REV. 125 (2020); Rafael I. Pardo, *Bankrupted Slaves*, 71 VAND. L. REV. 1071 (2018).

⁴³ Much as these other scholars are exploring the racial dimension of bankruptcy, Alvin Velazquez has recently written about features of bankruptcy—including exceptions to the discharge—that may impede labor mobilization. Alvin Velazquez, *Bankrupting Labor Power*, 78 STAN. L. REV. (forthcoming 2026).

⁴⁴ 11 U.S.C. § 1129(b) (2018).

⁴⁵ Case v. L.A. Lumber Prods., 308 U.S. 106, 122 (1939).

⁴⁶ Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 204 (1988).

the new value exception.⁴⁷ Eleven years later, the Supreme Court tried again in the *203 North LaSalle Street* case.⁴⁸ The Court once again rejected a proposed new value plan, and it was once again somewhat coy about the exception. The court didn't definitively rule on the question whether the new value exception still exists; but if it does, the court said, the new value exchange needs to be subject to a market test, such as an auction that gives other bidders an opportunity to bid for the new equity.⁴⁹

The new value issue is most pressing for small businesses, since they are invariably owner-run. There isn't much point in reorganizing if the owner-manager cannot retain her ownership interest. I predicted that "we can expect continued fights over whether new value arrangements have been structured to exclude outside interests."⁵⁰ The flood of cases I expected never materialized, but Congress later enacted a new set of provisions known as Subchapter V shortly before the COVID-19 pandemic.⁵¹ For the small businesses that qualify, these provisions provide the benefits of the new value exception without requiring the owners of the business to contribute new value.⁵² Although the new Subchapter V provisions have given rise to a slew of interpretative

47. The new value exception was the subject of a little paper I wrote in law school that published after I graduated and which served as my job talk, despite having already been published. See generally David Skeel, *The Uncertain State of an Unstated Rule: Bankruptcy's Contribution Rule Doctrine After Ahlers*, 63 AMER. BANKR. L.J. 221 (1989). Another recent law school graduate named Bob Rasmussen was one of the authors of the solicitor general's brief in *Ahlers* questioning the scope of the new value exception. Brief for the United States as Amicus Curiae Supporting Petitioners, *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (No. 86-958) (illustrating the narrowness of the exception by noting that it did not apply on the facts of *Los Angeles Lumber*), https://www.justice.gov/osg/media/204981/dl?inline=&utm_source=chatgpt.com (on file with the BYU Law Review) (last visited Oct. 13, 2025).

48. See generally *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999).

49. *Id.* at 458.

50. SKEEL, *DEBT'S DOMINION*, *supra* note 1, at 234.

51. 11 U.S.C. §§ 1181-1194 (2018) (enacting the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019)). Subchapter V, which commenced on February 19, 2020, was based on the recommendations of the ABI Commission to Study the Reform of Chapter 11. American Bankruptcy Institute, 23 AM. BANKR. INST. L. REV. 1, 297-326 (2015). See Daniel J. Bussel & Austin J. Damiani, *Chapter 11 at the School of Subchapter V: Part I*, 44 BANKR. L. LTR. 1, 1 (June 2024).

52. Compare 11 U.S.C. § 1129(b)(2)(B) (2011) (enacting the absolute priority rule), with *id.* § 1191(c) (confirming the Subchapter V plan that permits shareholders to retain their equity so long as "disposable income" test is met).

questions,⁵³ they have been remarkably helpful.⁵⁴ Many small businesses that probably couldn't have reorganized previously have emerged from Chapter 11 as reorganized companies.

C. Large-Scale Corporation Reorganization

The story in corporate reorganization for the past twenty-five years has been a tale of dramatic shifts in reorganization practice, but not in the law itself.⁵⁵ This is partly, but not entirely, consistent with *Debt's Dominion's* predictions. "Absent catastrophic change in the U.S. markets," I concluded, "bankruptcy will retain its current characteristics: control by managers and the debtor's attorneys, and a flexible approach to absolute priority. Bankruptcy lawyers have an enormous stake in this framework . . . and there is no obvious, cohesive constituency for harsher reorganization rules."⁵⁶

The one note that sounds off-key now is the reference to "control by managers." The debtor's managers do still formally have control—including the exclusive right to propose a reorganization plan—but they are less likely to have practical control than in the early years of the 1978 code. By the time *Debt's Dominion* was published, debtor-in-possession financiers had begun using their DIP financing agreements to limit a debtor's managers' degrees of freedom in bankruptcy.⁵⁷ This trend has continued, and in more recent years has been combined with restructuring support agreements that are negotiated prior to bankruptcy. The DIP and RSA often include milestones that impose strict deadlines and

53. A major issue has been the question of whether entities that use Subchapter V are subject to the non-dischargeability provisions in section 523, despite the fact that section 523 applies to individuals. The first two circuits to rule on this question have held that Subchapter V plans are subject to section 523. In re Cleary Packaging LLC, 36 F.4th 509, 513 (4th Cir. 2022); In re GFS Indus. L.L.C., 99 F.4th 223, 226, 228 (5th Cir. 2024).

54. See, e.g., Paul W. Bonapfel & Adriano Iqbal, *Subchapter V Update*, Mar. 2023, at 1 (quoting Hon. Michelle Harner, Emily Lamasa, and Kimberly Goodwin, *Subchapter V Cases By The Numbers*, 40-Oct AM. BANKR. INST. J. 12, 59 (2021)) ("[S]ubchapter V appears to be working as intended. . . . [Small] businesses also are . . . confirming reorganization plans at a relatively high rate. . . .").

55. The importance of norms of practice in the historical evolution of corporate reorganization is the central theme of Douglas Baird's excellent recent book. See generally DOUGLAS G. BAIRD, *THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS* (2022).

56. SKEEL, *supra* note 1, at 227.

57. See, e.g., Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 783–85 (2002); David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 919 (2003).

dictate the outcome of the Chapter 11 case.⁵⁸ These developments have taken control out of the hands of the debtor's managers.

If I were trying to resuscitate my prediction of managerial control, I might point to an even more recent development, the large number of bankruptcies of companies sponsored by private equity funds. Private equity funds pioneered the use of clever strategies for evading their loan agreements so that they can keep borrowing and postpone a potential bankruptcy.⁵⁹ (These strategies are now known as "liability management" exercises.)⁶⁰ And private equity funds often have more say over the bankruptcies of their sponsored companies than the managers of a typical debtor in Chapter 11.⁶¹ But it would be a stretch to compare these cases to the bankruptcies of the 1980s.

Congress hasn't been absent altogether. Lawmakers have passed a few significant bankruptcy amendments, but they have reinforced trends that were already well underway. In 2005, Congress capped managers' exclusivity period at eighteen months.⁶² This would have been big news if it were passed in the 1980s, when Chapter 11 cases sometimes dragged on for years. But DIP financing agreements and other contracts had already shortened the typical case. A provision that now gives retailer debtors only 210 days to decide which store leases they intend to retain and which they will abandon has imposed additional time pressure on retailer bankruptcies.⁶³

In addition to editing my reference to managerial control, I would briefly discuss three current controversies in large-scale reorganization cases if I were writing *Debt's Dominion* today: venue shopping, non-pro rata payouts to favored creditors, and the Supreme Court ruling in *Purdue Pharma* that nonconsensual non-debtor releases are not permitted in most cases.

58. See, e.g., Ayotte & Ellias, *supra* note 30, at 3–4.

59. The best early analysis of this development is Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1, 6 (2023) (noting that the "transactions 'extend runway' for the distressed company").

⁶⁰ Liability management exercises are discussed in notes 74–81 and accompanying text, *infra*.

61. See, e.g., *id.* (describing sponsors' success in obtaining "a broad release from liability for prepetition conduct of the sponsor and its affiliates and representatives").

62. 11 U.S.C. § 1121(d)(2)(A) (2018).

63. *Id.* § 365(d)(4).

1. Venue Shopping

The first controversy, venue shopping, is old but evergreen; it figured prominently in *Debt's Dominion*. *Debt's Dominion* commented on the then-recent emergence of Delaware as the favored filing location for large Chapter 11 debtors, after a decade in which those laurels went to the Southern District of New York.⁶⁴ The ease with which companies can pick their filing location had provoked controversy.⁶⁵ In 1997, a bankruptcy commission with Elizabeth Warren serving as reporter had recommended tightening the rules to remove companies' right to file in their domicile.⁶⁶ This proposed reform could have sharply diminished the number of cases in Delaware, since domicile was the principal basis for Delaware filings. "From a political perspective," I wrote, "Delaware venue is somewhat precarious," since Delaware benefits from these filings at the expense of the many other districts where bankruptcy debtors have their headquarters or principal assets. The chief barrier to reform, it appeared, was then-Senator Joe Biden: "Biden is an influential senator and a long-standing member of the Judiciary Committee, and he has made clear that he will resist any effort to eliminate domicile-based venue."⁶⁷ After Joe Biden left the Senate to serve as Vice President to Barack Obama and later as President, that obstacle disappeared. In the new political environment, two awkward recent developments seemed to invite reform. The first was the growing ease with which debtors could pick not only their district but their judge.⁶⁸ A company that filed in White Plains, New York, knew which judge they would get, even though the Southern District of New York (which includes White Plains) has numerous bankruptcy judges; debtors who filed in Houston or Richmond were assured of getting one of two judges,

64. SKEEL, *supra* note 1, at 229–32.

65. Under the venue provision, 28 U.S.C. § 1408, a debtor can file in the location of its domicile, principal place of business, principal assets, or where an affiliate has filed for bankruptcy. By quickly creating a new entity ("affiliate") in the desired district and putting the affiliate into bankruptcy, a debtor can file anywhere it wishes.

66. Final Report of the National Bankruptcy Review Commission 765 (1997) (recommending removal of domicile as a basis for venue).

67. SKEEL, *supra* note 1, at 232.

68. See Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. ILL. L. REV. 351, 354 ("In 2020, 55% of large, public company bankruptcy filings were heard before just three of the nation's 375 bankruptcy judges.").

each primed to handle big cases.⁶⁹ Debtors' ability to pick their judge, even in multi-judge districts, struck many observers as offensive. Although New York and Richmond closed the loopholes that made this possible,⁷⁰ Houston didn't. The second awkward development, also involving Houston, was a major ethical scandal. One of the two Houston judges had been living for some years with a bankruptcy lawyer and former clerk who represented parties in a large number of the Houston bankruptcies.⁷¹ This might easily have catalyzed Congress to take a close look at the venue provisions.

But nothing happened in Washington. Congress had venue reform legislation at its disposal—it's been introduced numerous times⁷²—but scarcely a rumble was heard, even after the Houston scandal broke. The opposition to forum shopping seems to be too diffuse to generate a serious movement for reform, enabling Delaware, the district that depends on the stream of cases most, to fend it off, even in the post-Biden era.⁷³

If there is a major external shock, such as the Depression in the 1930s, venue reform surely will anchor any populist bankruptcy reform package. But until then, forum shopping seems less precarious than I once thought.

2. *Disproportionate Payouts to Favored Creditors*

Two of the most pressing current controversies involve contracts or transactions that give some creditors a disproportionate payout as compared to other, similarly situated creditors. The first is the use of liability management exercises (LMEs), which occur outside of bankruptcy and are intended to postpone the need for bankruptcy.⁷⁴ LMEs take three forms, which

69. See, e.g., *id.* at 372–73 (Southern District of Texas), 377 (Richmond).

70. See, e.g., Jordan Singer, *Two federal bankruptcy courts move to combat forum shopping*, THE INTERDEPENDENT THIRD BRANCH, Jan. 10, 2022 (quoting Mayer Brown blog post).

71. See, e.g., Alexander Gladstone, *U.S. Judge Seizes Control of Bankruptcy Scandal Cases From Houston Court*, WALL ST. J., Apr. 10, 2025.

72. See, e.g., Bankruptcy Venue Reform Act, H.R. 1017, 118th Cong. (2023).

73. This is an illustration of Mancur Olson's classic insight that a concentrated interest group can often secure benefits for itself even if more diffuse groups have more at stake overall. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

74. See, e.g., Buccola, *supra* note 55, at 25 (observing that "sponsors are biased against resolving distress in Chapter 11—they want portfolio companies to use and extend their runway.").

have become known as “uptiers,” “dropdowns,” and “double-dips.” In an “uptier,” the debtor (usually owned by a private equity fund) arranges with a subset of its senior lenders to borrow new funds, secured by a lien with priority over the existing loan and to the detriment of the lenders that are excluded from the new loan.⁷⁵ In a “dropdown,” the debtor transfers assets to a subsidiary that is not precluded by the debtor’s senior loan agreement from engaging in new borrowing, and enters into a new loan secured by the transferred collateral.⁷⁶ In a “double-dip” transaction, the third and newest innovation, a loan is structured in a fashion that gives the lender two different claims: one against existing collateral and guarantors, and the other in the form of an intercompany claim.⁷⁷ Each is a clever way for a debtor that may have otherwise exhausted its ability to borrow to arrange new financing. Uptiers have generated the most controversy, and they are the LME of particular interest here.⁷⁸

An especially egregious uptier deployed by Serta, a mattress manufacturer, recently gave rise to an important Fifth Circuit ruling. Serta arranged with a narrow majority of its existing lenders to borrow an additional \$200 million and to exchange \$1.2 billion of their debt for an \$875 million loan. The new \$200 million and \$875 million loans were both given priority over the earlier loan, subordinating the lenders that were not invited to participate in the new loans.⁷⁹ The favored lenders insisted the transaction was an “open market purchase,” thus squeezing through a loophole in the original loan agreement.⁸⁰ The transaction was struck down by a federal court of appeals, which pointed out the obvious: that a sweetheart deal with a subset of the debtor’s lenders is not an open-market purchase.⁸¹ The *Serta* ruling suggests that the handwringing about LMEs may not amount to much. If courts police dubious

75. See, e.g., Skeel, *supra* note 32, at 2109 (describing uptiers).

76. *Id.* at 2109–10 (describing dropdowns).

77. See, e.g., *Double-Dip Explained Simple*, PARI PASSU NEWSLETTER (Aug. 16, 2024), <https://restructuringnewsletter.com/p/pp-double-dip-explained-simple>.

78. It is not yet clear how controversial double-dips will be come. They are made possible by an old Supreme Court case that seems to allow double claims. *Ivanhoe Building & Loan Ass’n v. Orr*, 295 U.S. 243 (1935).

79. *In re Serta Simmons Bedding, LLC*, No. 23-20181, at 11 (5th Cir. Dec. 31, 2024, revised Feb. 14, 2025).

80. *Id.* at 33–38.

81. *Id.* at 38.

LMEs, the prospect that a troubled company may try to arrange an LME will simply endure as a recognized feature of distressed debt practice.

In addition to LMEs, the second form of seemingly disproportionate payout comes from the fees given to the signatories of RSAs (and plan support agreements, or PSAs, as the agreements are known when the parties negotiate them after the bankruptcy filing).⁸² The creditors who negotiate the terms of a future reorganization plan with the debtor and memorialize it in an RSA are often compensated for their professional fees and given one or more of a variety of other kinds of fees, including “support” fees.⁸³ Alternatively, or additionally, they may agree to “backstop” financing for the debtor when it exits from bankruptcy, an arrangement that is often quite lucrative for the favored creditors.⁸⁴ Critics condemn the payments as giving the favored creditors a greater recovery than creditors who are left out, violating the rule that creditors in the same class must be treated equally.⁸⁵ Defenders insist that these payments are separate from creditors’ recoveries on their claims and compensate the favored creditors for negotiating the terms of the restructuring or agreeing to backstop the restructuring.⁸⁶

Although indefensibly generous fees have in fact been permitted in some cases,⁸⁷ Congress is even less likely to intercede here in the near term than with venue-shopping. Elite bankruptcy professionals represent the parties who are most likely to benefit from these practices, so the professionals have little incentive to advocate for change. And RSA fees are far less salient to the public than venue-shopping. If an external shock—an economic

82. The issues discussed in this paragraph are explored in detail in Skeel, *Distorted Choice*, *supra* note 31, at 379–81.

83. See, e.g., *id.* at 408–09 (describing “waiver and support” and professionals’ fees in PREPA RSA).

84. A recent empirical analysis by Vincent Buccola, Adi Marcovich, and Matthew McBrady finds that backstopping fees tend to be generous and low-risk for the recipients. Vincent S.J. Buccola, Adi Marcovich Gross & Matthew R. McBrady, *The Backstop Party*, COASE-SANDOR INST. FOR L. & ECON. RSCH. PAPER NO. 25-13, Mar. 2025, at 8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5188727 (on file with the BYU Law Review).

85. 11 U.S.C. § 1123(a)(4).

86. I offered a framework for distinguishing appropriate and inappropriate fees in Skeel, *Distorted Choice*, *supra* note 31, at 395–405.

87. *Id.* at 416–21 (discussing backstopping fees in the *Peabody Energy* case).

depression or artificial-intelligence-induced catastrophe—unleashed a surge of populist outrage, Congress might adopt a strict equal treatment rule, banning most or all of these fees.⁸⁸ Absent such a shock, the use of RSA and PSA fees is likely to continue.

3. *No Longer the Social Solution of Last Resort?*

In *Debt's Dominion* I noted that the Bankruptcy Code's expanded definition of "claim", which bankruptcy professionals lobbied for, "has played a crucial role in . . . bankruptcies filed by Johns Manville, A.H. Robins, Dow Corning, and other firms after they were sued by thousands of actual and potential tort victims."⁸⁹ In the Johns Manville case, the debtor's lawyers created a "channeling injunction" that required even future victims to seek their recovery from a "trust" created to compensate victims rather than from the reorganized company. Uncertain whether directing future victims to the trust would violate the victims' due process rights, "bankruptcy professionals and the managers of Manville itself persuaded Congress to give its explicit imprimatur to the Manville solution" in cases involving asbestos liability.⁹⁰ The Manville channeling injunction became the strategy of choice in mass tort cases. Starting with A.H. Robbins, mass tort debtors often erased the liability not just of the debtor itself, but of third parties such as directors, officers, and shareholders.⁹¹ Although bankruptcy law does not explicitly authorize these non-debtor releases-- except in asbestos cases (thanks to the Manville provision--), courts relied on the traditional view that bankruptcy courts are courts of equity with more discretion than other courts to fashion appropriate solutions to financial distress.

An important new literature questions the view that bankruptcy judges should be permitted to bend the bankruptcy

88. Janger and Levitin have argued for this approach. Edward J. Janger & Adam J. Levitin, *The Proceduralist Inversion – A Response to Skeel*, YALE L.J.F. 335, 346 (2020).

89. SKEEL, *DEBT'S DOMINION*, *supra* note 1, at 217.

90. *Id.* at 220. The Manville provision is 11 U.S.C. § 524(g).

91. See, e.g., Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 961 (2022) ("Those who succeeded in discharging their liability exposure in the Robins bankruptcy case included a long list of alleged joint tortfeasors: Robins's insurer (Aetna), members of the Robins family, and other officers, directors, employees, and attorneys for Robins.").

rules to achieve equitable objectives. In the leading article, Professor Jonathan Seymour rejects bankruptcy exceptionalism both as resting on flawed historical foundations and as normatively undesirable.⁹² Seymour sharply criticized the proposed reorganization plan in the Purdue Pharma opioid bankruptcy, which would have released the Sackler family, who were the principal shareholders of Purdue Pharma, from litigation by opioid victims in return for payments of roughly \$4.5 billion.⁹³ The case was appealed to the Supreme Court, which vindicated the anti-exceptionalists. In his majority opinion, Justice Gorsuch ruled that the Sackler releases were not authorized by the Bankruptcy Code and were therefore not permissible.⁹⁴

Despite the *Purdue Pharma* ruling and the powerful theoretical arguments the anti-exceptionalists have marshalled, the anti-exceptionalists are destined to lose on the ground, i.e., in actual bankruptcy cases. Ninety years ago, a prominent scholar compared Supreme Court rulings that strike down commonly used bankruptcy strategies to “thunderbolts from Almighty Jove,” and pointed out that after the shock of the ruling passes, bankruptcy lawyers devise a way around it.⁹⁵ “There is a blinding flash, perhaps some spectacular damage to a restricted area,” he wrote.⁹⁶ “Temporarily there is terror and repentance. But soon calm is [restored] and with it confidence that, granted a proper observance of prescribed rituals . . . there is likely to be very little interference with the actual plans of those who walk the earth below.”⁹⁷ This is still true today.⁹⁸ Starting from the premise that a non-debtor release is valid for victims who consent to the release, debtors’

92. Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 2011 (2022). For earlier discussions of bankruptcy exceptionalism, see generally Ralph Brubaker, *Abrogation of State Sovereign Immunity Through Congress’s Bankruptcy Power: Considering the Framers’ Intent with Respect to the Attributes of Sovereignty, Uniformity, and Bankruptcy Exceptionalism*, 23 No. 3 Bankr. L. Letter 1 (Mar. 2003); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605 (2008). For a defense of bankruptcy exceptionalism, responding to Seymour, see Jared I. Mayer, *For Bankruptcy Exceptionalism*, U. CHI. L. REV. ONLINE, June 27, 2023, at 1, 8.

93. See, e.g., Seymour, *supra* note 92, at 1974–78.

94. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 216–21 (2024).

95. Roger S. Foster, *Conflicting Ideals for Reorganization*, 44 YALE L.J. 923, 927 (1935).

96. *Id.*

97. *Id.* at 927–28.

98. See, e.g., April Wimberg & Jacob Margolies, *The New Dance in Bankruptcy: Trotting Around Purdue*, AM. BANKR. INST. J. 30, 30 (2025).

lawyers have already used opt-in releases, and in a few cases opt-out releases that deem victims to consent unless they opt-out.⁹⁹ The bankruptcy bar has too much at stake in mass tort cases, and non-debtor releases are too central a feature of these cases to abandon the practice.¹⁰⁰

IV. THE THIRD ERA CONTINUES

Debt's Dominion divides the history of American bankruptcy law into three eras: the period from the nation's founding until the New Deal, from 1938 to 1978, and from 1978 to the present. Despite the recent changes and controversies, American bankruptcy law remains firmly within the third era.

My original epilogue noted the rising tide of globalization and concluded that other countries were borrowing from American law but not displacing it. This is still true. Some say that the United Kingdom's insolvency laws are now an enticing alternative to Chapter 11.¹⁰¹ Similarly, Singapore has hired retired American bankruptcy judges for its new bankruptcy system.¹⁰² But neither seems likely to poach many debtors. And if either attracted a few, U.S. bankruptcy professionals would respond, much as the Delaware legislature responded after Elon Musk moved Tesla's incorporation to Texas.¹⁰³

99. For a defense of opt-out consents, see Marshall S. Huebner & Kate Somers, *Opting Into Opting Out: Due Process and Opt-Out Releases*, AM. BANKR. INST. J., Aug. 2024, at 26.

100. The recent drama over so-called Texas Two-Step mass tort bankruptcies appears to be on its way to becoming a side-show. In a Texas Two-Step, a company uses Texas's divisional merger statute to put the assets of the company (or a subsidiary) in one entity and the liabilities (the lawsuits) in another. The entity with the liabilities then files for bankruptcy. Johnson & Johnson's failed efforts to deploy this strategy with its Baby Powder liability—which were rejected three times—may chill other companies' enthusiasm for trying it. See *In re Red River Talc LLC*, 670 B.R. 251, 307 (Bankr. S.D. Texas 2025) (dismissing the third filing).

101. See, e.g., Adam Gallagher, Toby Smyth & Madlyn Gleich Primoff, *Is the New U.K. Restructuring Plan a Viable Alternative to Chapter 11?*, AM. BANKR. INST. J., Sep. 24, 2020, at 24 (concluding that new U.K. provisions don't quite match Chapter 11).

102. See, e.g., James Nani, *Singapore Vies to Be Insolvency Hub With Sontchi Joining Bench*, BLOOMBERG LAW (Jan. 24, 2022, at 17:00 MT), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XENHRL0000000?bna_news_filter=bankruptcy-law#jcite (on file with the BYU Law Review).

103. See Christina M. Sautter, *Delaware's SB21 Continues 150 Years of Corporate Power and Regulatory Capture*, PROMARKET (June 23, 2023), <https://www.promarket.org/2025/06/23/delawares-sb21-continues-150-years-of->

If radical change were to come, it would likely arise from within the United States as a populist backlash to some currently unseen development that prompted sweeping reform. There is very little evidence that such a wave is forming, despite the tumult of the current moment.¹⁰⁴ The third era of American bankruptcy law marches on. Twenty-five years later, American bankruptcy law is still debt's dominion.

[corporate-power-and-regulatory-capture/](#) (on file with the BYU Law Review) (describing new Delaware legislation as response to Tesla's departure and other recent developments).

104. A wave seemed to be forming during the pandemic, *see* David Skeel, *The Populist Backlash in Chapter 11*, BROOKINGS: ECONOMIC STUDIES (Jan. 12, 2022), <https://www.brookings.edu/articles/the-populist-backlash-in-chapter-11/> (on file with the BYU Law Review), but the whelming wave has dissipated.