

Debt's Dominion: A History of Bankruptcy Law in America. *By David A. Skeel Jr.* Princeton: Princeton University Press, 2001. 272 pp. Tables, notes, index. Cloth, \$35.00. ISBN 0-691-08810-1.

Reviewed by Tony A. Freyer

More than any other commercial nation, observed Alexis de Tocqueville, America condoned bankruptcy. David A. Skeel's important book suggests the transnational contrast in order to highlight the past and present distinctiveness of American bankruptcy policy. He begins by noting that, under current U.S. law, consumer debtors can receive a discharge from obligations owed their creditors; debtors in other nations either possess no such right or it is severely restricted by compelling continued repayment over a number of years. Corporate bankruptcy is also distinctive. Virtually all other nations require the managers of failed corporations to be replaced by a disinterested overseer who sells off the assets, usually at unprofitable prices. U.S. bankruptcy law, however, keeps the failed corporation running with the same managers in control until the parties negotiate a reorganization plan intended to return the firm to normal operation. American bankruptcy process also relies principally upon courts—which in turn promotes the role of lawyers and other legal professionals—whereas outside the United States the process is primarily administrative, with accountants having greater influence. Skeel's insightful historical analysis explains the unique evolution of the American bankruptcy regime.

Skeel's short section covering the antebellum period is limited. Citing Peter Coleman's study *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900* (1974), he notes that during this era the states dominated bankruptcy policy. Indeed, prior to the Civil War, Congress passed only short-lived national laws in 1800 and 1841. Overall, state and federal legislation enabled debtors as well as creditors to initiate bankruptcy proceedings, which—unlike those in Britain—applied to merchants, artisans, and agricultural enterprises. Moreover, both state and federal law left administration and enforcement primarily to the discretion of judges, whose construction generally favored bankrupt debtors. Skeel cites in passing Edward J. Balleisen's important study of the federal Bankruptcy Act of 1841, *Navigating Failure:*

Bankruptcy and Commercial Society in Antebellum America (2001); he does not, however, incorporate Belleisen's findings showing that the pro-debtor policy reinforced personal credit networks—which often included women—among the nation's predominately independent small proprietors. Skeel's failure to consider the social impact of antebellum bankruptcy policy leads to a misunderstanding of the complex local and intersectional debtor–creditor politics that prevented the implementation of lasting federal legislation before 1860.

Congress enacted another temporary measure in 1867. Over the next two decades, however, locally rooted debtor–creditor relations were transformed, culminating in the federal Bankruptcy Act of 1898. Since then, the same general political, professional, and ideological interests have shaped America's distinctive bankruptcy regime. Accordingly, Congress passed the law of 1898 as a result of a national lobbying campaign that mobilized Chambers of Commerce and other interstate business groups led by lawyer Jay Torrey and supported by congressional Republicans. Democrats responded with a pro-debtor populist ideology. The opposition nonetheless recognized that, in the new late-nineteenth-century market economy, only a national bankruptcy system could protect failed debtors. Thus, Democrats voted for the law because it maintained judicial, rather than administrative, enforcement and preserved long-standing state exemptions, such as the debtor's homestead and tools of trade. The Bankruptcy Act also did not apply to corporations. Wall Street lawyers joined J. P. Morgan and other New York financiers, however, to pioneer the federal judiciary's control of the railroad equity receivership, which left failed corporations in the hands of the same managers who had brought ruin upon the company.

The Great Depression brought the next significant changes in bankruptcy policy. During Republican Herbert Hoover's administration, William Donovan, the Justice Department's former Antitrust Division head, and Solicitor General Thomas Thacher published reports revealing that widespread conflicts of interest plagued bankruptcy proceedings in New York and other large cities. As a result, in 1933 and 1934, Congress amended the 1898 law, broadening the right of small businesses, farmers, and other individuals to discharge their debts and codifying the corporate reorganization structure the federal courts had evolved under the equity receivership. The amendments

represented a compromise reached among interstate creditors, debtors, and lawyers possessing bankruptcy expertise. The lobbying campaign nonetheless accentuated the division between bankruptcy lawyers of low prestige who represented individuals and those of high status whose clients included big corporations. Seeking enhanced professional legitimacy, reform advocates from both groups formed the National Bankruptcy Conference (NBC). Joining the Commercial Law League and the Commercial Law Section of the American Bar Association, the NBC became the nation's leading champion of bankruptcy reform. Bankruptcy bar professionals, the Securities Exchange Commission, William O. Douglas, and congressional debtor-creditor interests struck a more far-reaching compromise in the Chandler Act of 1938. Named after Tennessee congressman Walter Chandler, the law altered only incrementally the already existing pro-debtor discharge provisions and state exemptions.

According to Skeel, however, the Chandler Act's impact on corporate reorganization was "revolutionary" (p. 74). Since the 1890s, an alliance between Wall Street financiers and elite lawyers had won from federal courts bankruptcy policies that had saved managerial capitalism from itself. Douglas had briefly practiced law with one of the top bankruptcy law firms, an experience that left him with an enduring antipathy toward those institutions. As an SEC commissioner and chairman, Douglas translated his negative experience into Chapter X of the Chandler Act. In the name of anonymous small investors, Chapter X instituted extensive SEC oversight of failing large corporations seeking relief through bankruptcy proceedings. Ironically, although the new system ended the role of the Wall Street lawyer-financier alliance, it actually increased the importance of less prestigious attorneys who handled small and medium-sized corporate reorganizations under Chapter XI.

Since the 1960s, mounting consumer credit debt fostered further changes in bankruptcy policy. A short review can only suggest how illuminating is Skeel's examination of this period. The clash within Congress between national consumer creditors and debtors espousing a pro-consumer ideology, the activism of the NBC and other bankruptcy legal professionals, and judicial discretion continued to shape the course of policymaking. The Bankruptcy Code of 1978 largely maintained the most important state exemptions, including Florida and Texas provisions that enabled wealthy persons to

maintain possession of large homes. The code also limited somewhat the consumer debtor's right to gain a full discharge under Chapter VII, while it provided incentives for debtors to develop manageable repayment plans according to Chapter XIII, a process Alabama pioneered. Indeed, local diversity characterized the administration of the code's provisions governing consumer debt. Regarding corporate debtors, the code emasculated Chapter X, substituting judicial primacy for wide-ranging SEC oversight. Precipitating the SEC's diminished role were several leading Supreme Court decisions—some of which Justice Douglas wrote—construing Chapter XI so broadly that eventually even large corporations found refuge within its reach. As a result, the same managers retained control throughout the entire reorganization process.

During the 1990s the Republicans' Contract with America and their subsequent takeover of Congress promoted additional code revisions benefiting especially credit-card companies. There was no mention, however, of the fact that the revisions failed to close the code's loopholes, which continued to permit abuse by both small debtors and large corporations. By 2001 pro-debtor Democrats allied with bankruptcy-law professionals blocked the revisions, though Skeel predicts eventual passage.

The book is marred by factual errors. The date of the Interstate Commerce Act's passage is given as 1885 rather than 1887. Thurman Arnold's first name is spelled "Thurmond." Long-time Alabama Democratic congressman William C. Oates is identified as a Republican. In the same paragraph, Chandler is listed as a senator and a congressman. Nevertheless, at least for the period since the 1890s, this is the most comprehensive history of American bankruptcy policymaking yet written. It deserves the close attention of specialists and general readers alike.

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