

V. CASE AND STATUTORY ILLUSTRATIONS

The applications in this chapter examine the phenomenon of cycling as it relates to American bankruptcy law. Cycling over bankruptcy law potentially arises in two different contexts. First, Professor David Skeel has argued that the history of federal bankruptcy law in the United States illustrates the phenomenon of cycling. During the nineteenth century, Skeel argues, Congress cycled over whether the country should have a permanent national bankruptcy law. For much of the nineteenth century, Skeel maintains, there was no stable majority coalition in support of a permanent bankruptcy law. Instead, temporary coalitions formed during periods of national financial crisis, but once the crisis passed, the coalition in support of bankruptcy legislation would also lapse. Every state, however, had its own system of debtor-creditor laws, so that in the absence of a national bankruptcy law, debtor-creditor relations were governed by state laws. In 1898 Congress enacted a new bankruptcy law for the first time, that turned out to be permanent. The Bankruptcy Code that exists today is a direct descendent of the 1898 Bankruptcy Act. We will refer to the history that surrounds this legislation as a “macro” analysis of bankruptcy law.

Second, we look at the phenomenon of potential cycling *within* bankruptcy cases. The process of a successful Chapter 11 reorganization eventually culminates in the proposal of a plan of reorganization by the debtor, a process that is governed by a variety of complex substantive rules and which creditors and other claimants in the case must vote to approve. The Chapter 11 process itself is potentially susceptible to cycling among creditors. We examine several rules that govern the bankruptcy process to explore the question whether they reflect a concern about the potential for cycling in the contexts that give rise to bankruptcy cases and, if so, whether the bankruptcy rules satisfactorily address those concerns. We can conceive of this aspect of cycling as a “micro” analysis of bankruptcy law.

A. “MACRO” CYCLING: CYCLING OVER PROPOSED BANKRUPTCY LEGISLATION IN THE NINETEENTH CENTURY

*The Bust-and-Boom Pattern of Nineteenth-Century Bankruptcy Legislation*¹⁵⁰

The nineteenth-century bankruptcy debates have long been seen as fitting a loose, bust-and-boom pattern. In times of economic crisis, Congress rushed to pass bankruptcy legislation to alleviate widespread financial turmoil. Once the crisis passed, so too did the need for a federal bankruptcy law. Like Penelope and her weaving, Congress quickly undid its handiwork on each occasion only to start all over again when hard times returned. The traditional account is inaccurate in some respects and, as we will see, it does not explain why bankruptcy suddenly became permanent in 1898. But it provides

¹⁵⁰. DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 24–47 (2001) (footnotes omitted).

a convenient framework for describing the first century of bankruptcy debate.

Agitation for bankruptcy legislation rose to a fever pitch at roughly twenty-year intervals throughout the nineteenth century. A depression starting in 1793 led to the first federal bankruptcy law in 1800—an act that Congress repealed three years later. Congress went back to the drawing board in the 1820s, when financial crisis and controversy over the Bank of the United States prompted calls for another bankruptcy law. The debates never came to fruition, however, and it was not until 1841, following the Panic of 1837, that Congress passed its second bankruptcy law. The 1841 act lasted only two years, when defections from the party that had won its passage, the Whigs, led to repeal. The cycle came around once more on the eve of the Civil War, with the Panic of 1857 putting bankruptcy back on the agenda, and setting the stage for the 1867 act. The 1867 act lasted longer than its predecessors, with a movement for repeal leading to an amendment instead in 1874. But by 1878, the nation was once again without a federal bankruptcy law.

All told, then, Congress passed three federal bankruptcy laws prior to 1898: the Bankruptcy Acts of 1800, 1841, and 1867. Together, the acts lasted a total of sixteen years. The absence of a federal bankruptcy law did not leave a complete vacuum in debtor-creditor relations, of course. Most states had insolvency laws on the books. Some of them, like Massachusetts's, predated the Revolution. In times of financial panic, states also responded by passing stay laws imposing moratoria on creditor collection. Proponents of federal bankruptcy legislation emphasized both the wide variation in these laws and their serious constitutional limitations, such as the inability of state law to bind out-of-state debtors.¹⁵¹

Skeel explains that today bankruptcy is seen primarily as a device for allowing debtors to discharge debt. Originally, however, one major purpose of federal bankruptcy law in America was to promote a more effective collection of debts, especially interstate collection. The inclusion of the Bankruptcy Clause as an enumerated power of the U.S. Constitution, for instance, was in large part designed to permit Congress to override debtor-friendly laws similar to those enacted by the states under the Articles of Confederation, most notably to protect farmers.¹⁵² Not surprisingly, therefore, substantive views on the propriety of various proposed bankruptcy policies tended to divide based upon geographical region. Skeel writes:

Because southerners feared that northern creditors would use bankruptcy law as a collection device to displace southern farmers from their homesteads, the strongest opposition to federal bankruptcy came from the South. Many western lawmakers opposed bankruptcy

151. *Id.* at 24–25 (footnotes omitted).

152. See Todd J. Zywicki, *Bankruptcy*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 31 (David R. Henderson ed., 2d ed. 2008), available at <http://www.econlib.org/library/Enc/Bankruptcy.html>.

legislation for similar reasons. Lawmakers from the commercial northeastern states, by contrast, were much more likely to view federal bankruptcy legislation as essential to the promotion of commercial enterprise.

In addition to geography, lawmakers' views on bankruptcy also tended to divide along party lines. The Federalists (later Whigs, and then Republicans) promoted bankruptcy as essential to the nation's commercial development. Jeffersonian Republicans (later Democratic Republicans, and then Democrats), on the other hand, sought a more agrarian destiny and insisted that bankruptcy legislation would encourage destructive speculation by traders. Northeastern Federalists were the leading cheerleaders for federal bankruptcy legislation, and southern and western Jeffersonians were the staunchest opponents.¹⁵³

Skeel argues that the bankruptcy debates of nineteenth-century America illustrate a phenomenon of legislative cycling:

I have suggested thus far that the nineteenth-century debates pitted opponents of bankruptcy against bankruptcy advocates. In actuality, the debates were much more subtle. Rather than two positions, lawmakers divided into at least three camps, and sometimes more—and these camps crossed party lines. By considering the competing views in slightly more detail, and by analogizing these views to a voting irregularity that political scientists call *cycling*, we can begin to see how deeply unstable bankruptcy was for over a hundred years.

... Daniel Webster, like the famous Supreme Court justice Joseph Story, argued for an expansive and permanent federal bankruptcy framework. John Calhoun embodied the opposing view that federal bankruptcy legislation would be a serious mistake. Not coincidentally, Webster was a Whig from a commercial state, Massachusetts, whereas Calhoun was a states' rights advocate from the agrarian South.

Senator Henry Clay of Kentucky, a Whig and member along with Webster and Calhoun of the "Great Triumvirate" of famous senators, represented a third, and similarly influential, view of bankruptcy. Clay was willing to support bankruptcy legislation, but only if the law was limited to voluntary bankruptcy. Clay shared the fear of many bankruptcy opponents that northern creditors would use bankruptcy to displace southern farmers from their homesteads, but he believed voluntary bankruptcy would minimize this risk while enabling financially strapped debtors to obtain relief.

Still other lawmakers adopted variations of these views. Democrat Thomas Hart Benton, another prominent senator ..., was a vocal opponent of bankruptcy. Here, as elsewhere, he frequently found himself allied with John Calhoun. But Benton also insisted that, if Congress did pass a bankruptcy law, it needed to include

153. SKEEL, *supra* note 150, at 26.

corporations as well as individuals. Bankruptcy, in his view, might be one way to [rein] in the excesses of the nation's growing corporate sector.¹⁵⁴

Skeel describes the story as involving legislative cycling:

A vexing problem when lawmakers (or decision makers of any kind, for that matter) hold a multiplicity of views on a single subject is that their voting may lead to irrational or unstable outcomes. At its extreme, the competing views can lead to the phenomenon of cycling. In a pathbreaking book, the economist Kenneth Arrow demonstrated that no voting institution based on democratic principles can guarantee that voting irregularities of this sort will not arise. If everyone has an equal vote, and every option is available, the voting process may lead to chronically unstable results.

The views of nineteenth-century lawmakers on bankruptcy legislation provide a convenient illustration of the voting problems I have just described. Although the views will be described in stylized form, the overall pattern is not simply hypothetical. The senators I will use for purposes of illustration held views very close to the positions I will attribute to them, and Congress's ever-shifting stances on bankruptcy law in the nineteenth century may well have reflected the kinds of uncertainties we are about to explore.

Assume that three senators, Benton, Webster and Clay, must choose among three options: not passing any bankruptcy law (No Bankruptcy); passing a complete bankruptcy law [that permitted both voluntary and involuntary bankruptcy] (Complete Bankruptcy); or passing a law that permits only voluntary bankruptcy (Voluntary Only). As the careful reader will note, I have omitted a fourth option: providing for involuntary but not voluntary bankruptcy. As it turns out, the 1800 act adopted precisely this approach. Both for simplicity and because involuntary-only disappeared as a viable option by the middle of the nineteenth century, however, I will banish it from our discussion.

Of the three options we are considering, Benton would prefer not to pass any bankruptcy law (No Bankruptcy). If a bankruptcy law must pass, his next choice would be a complete bankruptcy law that included involuntary bankruptcy and brought corporations within its sweep (Complete Bankruptcy). His least favorite alternative is Voluntary Only.

As a fervent nationalist, Daniel Webster strongly favors an expansive bankruptcy law that provides for both voluntary and involuntary bankruptcy (Complete Bankruptcy). So strongly does he believe in the importance of bankruptcy to the health of the national economy that he would accept Voluntary Only bankruptcy as a second choice. His least favorite option is No Bankruptcy.

154. *Id.* at 28.

Henry Clay sees voluntary bankruptcy as an opportunity to alleviate the dire financial straits of many of his constituents. But he strongly opposes involuntary bankruptcy, fearing that many debtors who might otherwise recover from their financial distress would be hauled into bankruptcy court by their creditors. Clay's first choice is thus Voluntary Only, his second choice No Bankruptcy, and his last choice Complete Bankruptcy.

Table 3.A.1. Cycling Among Bankruptcy Options in the Nineteenth Century

<i>Senator</i>	<i>First Choice</i>	<i>Second Choice</i>	<i>Third Choice</i>
Benton	No Bankruptcy	Complete Bankruptcy	Voluntary only
Webster	Complete Bankruptcy	Voluntary Only	No Bankruptcy
Clay	Voluntary Only	No Bankruptcy	Complete Bankruptcy

The senators' views are illustrated in [Table 3.A.1]. The problem here is that the senators hold unstable preferences. To see this, consider what would happen if they held a series of [pairwise] votes on [any two of] the three options and each voted in accordance with his [sincerely held] preferences. In a vote between No Bankruptcy and Complete Bankruptcy, the winner would be No Bankruptcy, since both Benton and Clay prefer No Bankruptcy over Complete Bankruptcy. If the Senators then pitted the winner, No Bankruptcy, against Voluntary Only, Voluntary Only would emerge victorious on the strength of votes from Webster and Clay. At this point, Voluntary Only appears to be the winner. But if the senators held a vote between Voluntary Only and Complete Bankruptcy in order to complete the comparisons, both Benton and Webster would vote for Complete Bankruptcy. The senators prefer Complete Bankruptcy over Voluntary Only, but they like Complete Bankruptcy less than another option (No Bankruptcy) that Voluntary Only defeats.

If we were to study the alternatives a bit more closely, we would quickly see that Benton, Webster, and Clay could never choose a stable winner among the three alternatives. . . . For each option that two of the senators favor, there is always a choice that two of the senators like better. If the senators continued to vote and voted in accordance with their preferences, the votes would [disclose a] cycle.

This kind of voting irregularity can arise in either of two ways. If a group of existing voters hold inconsistent views, cycling can occur at the time of a particular vote, as in the illustration we have just considered. But cycling can also take place intertemporally. Even if a clear majority of legislators held Benton's views today, next year's

majority might hold the views I have attributed to Webster; and two years down the road might be a Clay year.

I should emphasize—as several readers of this book emphasized to me—that true cycling only occurs under the restrictive conditions defined in Arrow's Theorem. If lawmakers agreed that one option belongs on the left, one in the center, and one on the right, for instance, their preferences would not be cyclical even if they sharply disagreed about the best choice. In view of this, let me emphasize that the principal point of this section is simply that the multiplicity of views contributed to Congress's inability to reach a stable outcome on federal bankruptcy legislation throughout the nineteenth century. Whether lawmakers' inconstancy reflected true cycling, or merely a garden-variety case of shifting legislative outcomes, the point remains the same.

Moreover, it is quite possible that the bankruptcy debates did indeed reflect true legislative cycling. If legislators hold consistent preferences, they will ordinarily gravitate toward a stable outcome even if there are sharply divergent views on what the outcome should be. Yet no such outcome emerged in the bankruptcy debates until late in the century. One is hard-pressed to think of another legislative issue on which Congress flip-flopped so continuously and for so long. (The closest analogue may be the debates whether to base the currency on gold alone, or to include silver as well; but these debates involved fewer shifts and moved more quickly to a relatively stable outcome.)

Rather than receding, the instability of the bankruptcy debates actually got worse as the century wore on. Ironically, as lawmakers came to see the Bankruptcy Clause as an expansive source of authority, and as this was vindicated by the Supreme Court, Congress's broad powers tended to complicate rather than to simplify it. Although the debates prior to the 1800 act were extremely controversial, most lawmakers viewed themselves as having only two options. They could pass a bill that provided for involuntary bankruptcy, or not pass any bill at all. Because it put more options at lawmakers' disposal—most importantly, the possibility of a Voluntary Only bill—the expanding view of Congress's powers exacerbated the existing instabilities.

From the 1830s on, lawmakers' views were repeatedly splintered among the options we have considered—Complete Bankruptcy, Voluntary Only, and No Bankruptcy—along with variations on these themes. In the twentieth century, Congress has developed institutional structures that can assure stability even in the face of inconsistent preferences. One of these, delegation of gatekeeping authority to a committee, dates back to the early nineteenth century. Because the relevant oversight committee determines whether existing legislation is reconsidered, committees have the power to prevent a new Con-

gress from promptly reversing the enactments of its predecessor. In theory the Judiciary Committee, which has overseen bankruptcy issues since 1821, could have served this purpose. But committees played a less prominent role in the nineteenth century, in part because both Congress and congressional committees operated on a part-time basis. Neither the Judiciary Committee nor any stable block of lawmakers in Congress was in a position to act as agenda setter and provide the kind of stable outcome we see in other contexts where lawmakers hold inconsistent preferences.

Even a brief overview of the debates that led to the 1841 and 1867 acts gives a flavor of the instability that came from the multiplicity of views. The 1841 act was the brainchild of the Whig party, which had made bankruptcy law a crucial plank in the platform that brought them the presidency and control of the Senate the year before. In the face of strong opposition, the Whigs secured the necessary votes for enactment through a controversial log-rolling campaign that obtained votes for bankruptcy in return for votes on a land distribution bill. (Logrolling is another possible solution to cyclical preferences. Rather than voting their true preferences, lawmakers permit one bill to pass in return for a favorable vote on other legislation.)

Even before the bill took effect, a vote to repeal passed the House when a small group of southern Whigs reversed their earlier support for the legislation, and a similar proposal fell only one vote short in the Senate. The defection of several more Whigs, this time from the Midwest, brought the coalition tumbling down. Less than two years after it went into effect, President Tyler (who had assumed the presidency after President Harrison died) signed the repeal legislation and the 1841 act was gone. Just as the initial vote papered over a variety of strident dissenting views, the repeal illustrated just how quickly a majority coalition can collapse when lawmakers' underlying preferences are unstable.

The debates on the 1867 bankruptcy act, which dated back to the early 1860s, were complicated by the onset of the Civil War. When the war finally ended, the Republicans held large majorities in the House and Senate, which strengthened the support for a bankruptcy bill that included involuntary as well as voluntary bankruptcy. Northern lawmakers were particularly concerned that creditors would find it impossible to collect from southern debtors in the southern state courts. Yet a sizable group of lawmakers continued either to resist any bankruptcy legislation, or to insist that only voluntary bankruptcy be included. . . . Although it lasted longer than either of its predecessors, the 1867 act was deeply unstable from the moment it was enacted. In both 1868 and 1872, lawmakers amended the law to soften its effects on debtors, and a move to repeal it led to further concessions to debtors in 1874. By 1878, the act had few defenders, and it was repealed by large majorities of both parties in both houses.

The 1898 act would bring these instabilities to an end, but each of the competing views remained very much in evidence throughout the deliberations that preceded it. . . . [I]n debates that began in 1881 and spanned almost two decades, the Senate voted for . . . Complete Bankruptcy in 1884, as did the House in 1890 and 1896, and Complete Bankruptcy finally prevailed in 1898 in the form of the 1898 act. Proponents of Voluntary Only bankruptcy . . . also had their moments, as the House passed a Voluntary Only bill in 1894, and the Senate passed a somewhat similar bill before agreeing to Complete Bankruptcy in 1898. Throughout this time, opponents of bankruptcy managed (sometimes on the merits, sometimes because Congress ran out of time to act) to preserve the No Bankruptcy status quo.¹⁵⁵

In 1898 Congress finally enacted a bankruptcy law that, with several major overhauls, has remained a permanent piece of legislation. Thus, the 1898 legislation brought an end to the century of legislative turmoil that had frustrated the enactment of a permanent bankruptcy law in the nineteenth century. As Skeel explains:

Most of us have childhood memories of a game called musical chairs. In musical chairs, children walk around a circle of chairs as long as the music continues to play. When the music stops, they scramble to sit in the chairs. There are enough chairs for all but one child. With each round of music, the child who fails to grab a seat is eliminated, until finally, when only two children and one seat remain, one child emerges at the winner.

By now, the similarity between musical chairs and the nineteenth-century bankruptcy debates should be obvious. The principal difference was that, rather than one game of musical chairs, the debates became an endless series of such games. The winning alternative one year might give rise to a new approach the next. When the music stopped in 1898, there was no obvious reason to believe the circling was over—that Complete Bankruptcy had won out for good. But it had.¹⁵⁶

Skeel then asks, “Why, after a century of legislative turmoil, did Congress finally enact a permanent bankruptcy law in 1898?”¹⁵⁷

Skeel identifies several factors that help to explain the stability of the 1898 legislation in contrast with its predecessors. First, the later half of the nineteenth century saw a dramatic growth in the number of commercial trade groups throughout the United States. These groups both benefited from and encouraged the continuing development of interstate commerce. This included an increasing recognition of the value of an integrated set of commercial laws, including bankruptcy laws. In particular, Skeel notes that “Merchants who engaged in interstate commerce complained bitterly and repeatedly that debtors played favorites when they

155. *Id.* at 28–33.

156. *Id.* at 35.

157. *Id.*

ran into financial trouble. The favorites [took the form of selective payments to] family members and local creditors, not [to] out-of-state merchants.”¹⁵⁸ Merchants engaged in interstate commerce and the trade associations they comprised strongly urged Congress to enact a national bankruptcy law to ease these problems of interstate debt-collection and to thereby spur further commercial development. While these commercial interests played a major role in the ultimate success of the 1898 bankruptcy law, the final compromise that the act embodied reflects a balance of commercial interests with those of local agrarian communities and other groups that provided a countervailing set of pro-debtor interests. The stability of the eventual 1898 compromise legislation was enhanced by the long term Republican control of the Presidency, including the elections of President McKinley in 1898 and of Theodore Roosevelt in 1902 and 1906, and Republican control of Congress until 1910.

According to Skeel, the most important factor bringing about the permanence of the 1898 act was the growth of a specialized bankruptcy bar to administer the new system, a development that was triggered by the massive railroad reorganizations of the late-nineteenth and early-twentieth centuries. In short, bankruptcy lawyers had the incentive, organization, and political influence to retain a permanent bankruptcy law that earlier coalitions of interest groups had difficulty procuring in the first place. The bankruptcy bar exerted continuing influence by affecting a lawyer-centered litigation system that stands in stark contrast with the more typical administrative bankruptcy systems that characterize most western legal systems. This influence, Skeel notes, is reinforced by the historical accident that jurisdiction over bankruptcy law is in the Judiciary Committee of Congress, rather than such other committees as Banking or Financial Services. Lawyers are repeat players before the Judiciary Committee, thus possessing potentially greater influence there than would likely be the case on other subject-driven committees. On the Financial Services Committee, for example, banking interests are likely to exert comparatively greater influence than the organized bar. Finally, during the course of the twentieth century, bankruptcy law came to be seen as a highly technical, largely non-ideological area of law. This understanding of bankruptcy reinforced the influence of bankruptcy lawyers on the legislative process by allowing them to couch their recommendations in terms of nonpartisan technical advice. In reality, as Skeel notes, bankruptcy lawyers have an incentive to increase the scope of bankruptcy law along with the expense and complexity of bankruptcy procedures, as has been consistent with historical developments throughout the twentieth century.

To a certain extent, the observations about bankruptcy legislation are generalizable. Saul Levmore has argued more generally, for example, that the presence of legislative cycles might increase the influence of interest groups on the legislative process, and in fact, might help promote the formation of interest groups.¹⁵⁹ Levmore explains:

158. *Id.* at 36.

159. Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J. LEGAL STUD. 259 (1999).

Interest groups act where there are cycling majorities or other aggregation anomalies and, therefore, where there are excellent opportunities to influence agenda setters or to bargain for the formation of winning coalitions. Instability attracts political activity.¹⁶⁰

The presence of underlying preferences that are susceptible of cycling, Levmore explains, suggests that legislative outcomes are often determined by “procedures and institutions,” such as the presence of those with agenda-setting power or the structure of voting rules, “rather than coherent or stable majority preferences.” Where this is the case, he argues, “Political activity is a relatively attractive investment.”¹⁶¹ Levmore provides two explanations:

First, participation and subsequent investment may be most profitable when victory does not require overcoming a clear or stable majority winner. . . . As contributors and political entrepreneurs evaluate investments, it is likely to turn out that many of the best available projects are those in which costs are low because procedures, rather than underlying preferences, need to be influenced. This approach stresses a rational, or expected-value, calculation by contributors and groups.

A second approach makes room for quasi-rational actors who choose strategies that might plausibly advance their ends efficiently, but in settings where there is insufficient pressure to root out imperfect strategies. . . . [I]mperfectly informed interest groups might invest where the probability of victory (rather than its expected value) is high—and . . . where there is no stable winner the chance of bargaining for victory or influencing the agenda setter is greatest.

If the focus is, instead, on the imperfect and expensive information citizens have about their political agents, then interest groups can be understood as sensibly investing in influencing politicians where these politicians can be influenced without upsetting their less-organized constituents. The idea is that interest groups might invest where their successes would not arouse suspicion by dispersed majorities or by other forces that might be motivated to diminish the power of interest groups in the longer run by changing various rules or political institutions. It seems likely that an interest group would have more trouble gaining for its members something that a majority of the citizenry (or legislature) unambiguously opposes than it would have extracting a law or subsidy that did not appeal to any absolute majority of the relevant voters but that was not opposed by a clear majority. The suggested link between cycling and rent seeking can therefore be seen in agency terms. It is more difficult to monitor an agent when the baseline for what to expect of the agent, or institution of which the agent is a part, is unclear. If an organized group seeks to capture an agent who controls the agenda of a legislative assembly,

160. *Id.* at 259.

161. *Id.* at 261.

for example, it might succeed most easily when there is no stable, majoritarian winner because the principals do not know what to expect of an uncorrupted assembly. Without this sort of baseline expectation it will be difficult to know when the assembly has been influenced in a manner contrary to its legal obligations or principals' preferences.¹⁶²

Thus, Levmore concludes that in general:

[A]n interest group will invest more where procedure determines outcome, but it may invest either less or yet more depending on whether it also expects to be opposed by a competing organized group. Where there is no Condorcet winner and there is a competing organization, the probability of victory drops (compared to the case where there is no organized competition) but the likelihood of a loss increases if one does nothing. My secondary conjecture is that one should find increased investment where there is no Condorcet winner, regardless of expected opposition.¹⁶³

In addition to Levmore's observations, Todd Zywicki argues that Skeel's historical discussion of the crucial role played by bankruptcy lawyers in ensuring the permanence of the American bankruptcy law in 1898 explains another link between legislative cycling and interest group activity.¹⁶⁴ Most of the primary actors in the legislative process, such as creditors, debtors (such as farmers), and corporate management, were willing to offer *conditional* support for a permanent bankruptcy system. Specifically, their support was conditioned on the superiority of the proposed regime to a continuation of the No Bankruptcy regime, meaning the continued reliance on state law over related matters of debt collection and debtor relief. As has been seen, during the nineteenth century, it was often the case that various groups preferred no bankruptcy system to the particular systems that were imposed during various economic crises.

Bankruptcy lawyers, in contrast, had an overriding preference for the maintenance of a bankruptcy system *as an end in itself*. Bankruptcy lawyers earn their living from bankruptcy filings; thus they have a direct stake in the continued existence of a bankruptcy system. The details of the particular system and the way it treated individual interest groups was (and is) of secondary importance to the mere existence of stable regulatory infrastructure for bankruptcy law that depends in large part for its administration on a developed bankruptcy bar. As a result, the bankruptcy bar served as a sort of residual claimant for the continued existence of the bankruptcy system itself, ensuring that even if legislative cycling or shifting preferences occurred, it did so *within* the accepted framework of the continued existence of some bankruptcy regime rather than taking the form of ongoing proposals to create, or displace, the bankruptcy system in

¹⁶². *Id.* at 261–63 (footnote omitted).

¹⁶³. *Id.* at 272–73 (footnote omitted).

¹⁶⁴. See TODD J. ZYWICKI, *BANKRUPTCY AND PERSONAL RESPONSIBILITY: BANKRUPTCY LAW AND POLICY IN THE TWENTY-FIRST CENTURY* (forthcoming 2010).

wholesale fashion. Bankruptcy lawyers also prefer a system that produces a greater number of bankruptcy filings and more expensive and complex bankruptcy procedures, goals that became more prominent during subsequent rounds of bankruptcy reforms during the twentieth century.

In 2005, Congress passed a comprehensive bankruptcy reform law that tempered some of the highly pro-debtor elements of the 1978 Code. Todd Zywicki has argued that the balance struck in this legislation can be explained by Skeel's basic model of an interaction between creditors, bankruptcy lawyers, and ideology.¹⁶⁵ In 2005, Zywicki argues, these same forces were present but the balance was struck differently. Most importantly, the Republican takeover of Congress in 1994 shifted the ideological center of gravity in Congress away from the debtor-friendly orientation of the past to a new focus on personal financial responsibility. Zywicki observes that the Republican Party is also generally tied less closely to lawyers than Democrats, and its electoral victory therefore weakened the interest group influence of lawyers over Congress. Finally, a dramatic growth in bankruptcy filings during the 1980s and 1990s, from about 250,000 annual consumer filings at the beginning of that period to about 1.5 million per year at the end, despite a period of steady prosperity and low unemployment, strengthened creditors' claims that the bankruptcy system was overly vulnerable to fraud and abuse. The interaction of these various factors produced a different winning coalition than in the past, pushing the bankruptcy laws in a more conservative direction.

DISCUSSION QUESTIONS

1. Skeel notes that during the nineteenth century the Supreme Court consistently adopted broader readings of the Bankruptcy Clause of Article I, Section 8 of the Constitution ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States"), thereby providing Congress broad latitude in crafting federal bankruptcy law. Skeel suggests that by increasing the *range* of options open to Congress, the expansive interpretation the Supreme Court gave to the Constitution's Bankruptcy Clause during the nineteenth century exacerbated the problem of instability and promoted cycling. Assuming that the Supreme Court could anticipate at the time of making a decision that one interpretation would be more likely to result in cycling than another, should it take this into account in its decision? Does social choice justify a normative conclusion that a judge should prefer a narrow interpretation that reduces the likelihood of cycling over a broader one that encourages cycling? In answering this question, note that a narrower interpretation of the Bankruptcy Clause promotes stability but does so by restricting the range of options available to Congress. Does social choice theory provide a normative basis for choosing between ensuring stability versus adhering to range?

2. Although Congress has exclusive power under Article I, Section 8, of the Constitution to enact laws on the subject of bankruptcies, this power is

¹⁶⁵ Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016 (2003) (reviewing SKEEL, *supra* note 150).

layered over a preexisting foundation of state debtor-creditor law. This preexisting legal framework means that Congress's failure to enact a federal bankruptcy law creates a default rule of deferring to such state laws. Doing so may not result in an optimal bankruptcy regime, but it does create a functional status quo outcome meaning that the result need not be catastrophic. "No Bankruptcy" is therefore both a theoretical and practical option, although perhaps subject to certain substantive biases that render this system suboptimal (such as a tendency to prefer in-state interests over out-of-state interests). In this sense, the presence of a workable default rule made it less essential for Congress to act except in times of crisis. This combination of factors might have the unintended consequence of promoting cycling. Absent this workable *status quo*, would Congress have felt a greater urgency to reach agreement on bankruptcy law and to prevent cycling? Why or why not?

3. Skeel notes that given the presence of legislative cycling, one option available to legislators to break the cycle would be the adoption of some institutional rule or actor with the authority to limit *range* through agenda-setting power. If so, what practical alternatives can you identify for where to vest such power? Consider the following possibilities. First, some congressional committee (such as the Judiciary Committee) could use its agenda-setting power to prevent status quo-altering legislation from reaching the floor of Congress. Second, a well organized interest group (such as the bankruptcy bar) could use its external influence to restrict the range of practical outcomes available to Congress by effectively excluding the preferences of less organized groups from practical consideration. Third, the Supreme Court could through constitutional interpretation limit the range of options available for Congress to consider. Fourth, the Constitution could preempt any state authority with respect to debtor-creditor law, thereby eliminating "No Bankruptcy" as a theoretical or practical alternative. Finally, the legislature could permit log-rolling and thereby relax the requirement of sincere voting or "independence of irrelevant alternatives." Are these the only options? If not, what other options might have been available to nineteenth century lawmakers to create a stable bankruptcy law? What criteria might you use to select among these or other alternatives?

B. "MICRO" CYCLING: CYCLING INSIDE BANKRUPTCY

Consider whether the problem of cycling that characterized nineteenth century federal legislation is further endemic to the problem of bankruptcy itself. To illustrate, consider a stylized debtor-creditor arrangement in which the debtor owes \$1.5 million but holds assets valued at \$500,000, resulting from a combination of questionable business decisions and a failing economy. To simplify, assume three creditors, each owed \$500,000. Each creditor wants to gain a maximum payoff even if this requires depleting the entire assets of the debtor's firm, while the debtor seeks to remain an ongoing concern. Assume that the three entities seek to resolve their financial relationships with a regime of majority decision-making over the debtor's assets. For any stable solution with majority