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Built for Business: The Commercial Need for Aggregate Litigation

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Commercial actors long have argued that class actions are bad for business. But for even longer, business groups have supported other types of aggregate litigation that closely resemble class actions, such as expansive federal bankruptcy. While critics have successfully limited national aggregation via class actions, they have not even attempted to criticize aggregation via bankruptcy.

Why have business groups attacked aggregate litigation in some cases and supported it in others? This Article provides an answer by examining aggregation's origins and development, and what emerges, it turns out, is very much the opposite of what aggregation's pro-business critics would have us believe. Aggregate litigation is not bad for business—it was built *for business. Lawmakers throughout history have provided aggregate litigation in response to demands and advocacy by wealthy commercial actors, who always have been aggregation's foremost advocates and beneficiaries. Over time, different aggregate devices have emerged, prospered, and perished based on their benefits to contemporaneous market actors.*

Aggregation critics never have grappled with this long history. When business groups criticize aggregate litigation, they are attacking a foundational tool of their own prosperity. Any assertion that group lawsuits stymie commercial enterprise is woefully incomplete if it does not account for the pervasive commercial need for aggregate litigation.

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Built for Business: The Commercial Need for Aggregate Litigation

JACK ZARIN-ROSENFELD *

INTRODUCTION

Class actions are bad for business, so the story goes. As commercial actors long have argued, class actions force extortionate settlements and over-deter legal profitmaking. But note how the story changes when it comes to other types of big multiparty lawsuits.[1] Business groups have long defended the expansive federal bankruptcy system, even though its core purpose—to provide a single forum for resolving a mass of related claims—is the same as the class action's.[2]

Why have business groups attacked aggregate litigation in some cases and supported it in others? The answer can be found only by examining aggregation's origins and development over time. What emerges is very much the opposite of what business would have us believe about aggregate litigation's downsides. As it turns out, aggregate litigation was *built* for business.

A full accounting of aggregate litigation's history shows, in other words, that markets *need* aggregation to facilitate use and exchange of private property. As the wealthiest market actors have become subject to new market risks, inevitably they have demanded and received new aggregate procedures that protect their own economic interests. Consequently, aggregation's viability and durability always have tracked perceptions about which market actors needed legal protection from market harms.

Throughout history, lawmakers built aggregate litigation in response to demands and advocacy by wealthy commercial actors. Commercial demand for aggregation tracked the early expansion of commerce itself across England and North America, and aggregation in the antebellum

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[1] *See, e.g.*, Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 291 (2008) ("[C]lass actions constitute but one of several methods for bringing about aggregation of claims, *i.e.*, they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum.").

[2] *Cf.* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 183 (2018) (including enforcement of bankruptcy rules and avoidance of class action rules in the same list of corporate conduct that enriches shareholders).

United States was the product of demands from new groups engaged in credit-based speculation. Federal bankruptcy earned its permanent place on the books in the industrial era, as aggregation evolved to accommodate corporations that needed public capital and human labor. And in forging a national culture around consumption and civil rights, the rise of mass markets revealed class actions, long on the periphery, as a powerful vehicle for the vindication of noncommercial interests.

As it turned out, this moment of promise marks the point at which the relatively benign class action began to draw ire from the business community. While corporate debtors pushed federal bankruptcy further than ever in the twentieth century's final decades, the U.S. Chamber of Commerce and like-minded interest groups plowed millions of dollars into a ferocious campaign that dealt several blows from which the class action has yet to recover. Despite their diverging paths in popularity, recently both bankruptcy and class actions have entered an era of transactional aggregation. Today, aggregation remains most available to market-related claims, but in the transactional era, the settlement negotiation itself is treated like just another market deal. The more money a litigant is willing to pay for preclusion, the more likely they will receive it.

This Article's thesis is that commercial actors demand aggregation because markets inherently spawn identical and interdependent lawsuits among large groups of people. Because aggregate litigation is the only practical way to free up assets contested in mass lawsuits for further market exchange, commercial actors always have been aggregation's foremost advocates and beneficiaries. Over time, different aggregate devices have emerged, prospered, and perished based on their benefits to contemporaneous market actors.

Critics of class actions never have grappled with this long history of commercial demand for aggregation. None of the criticisms provides a reason to differentiate commercial and noncommercial claims, yet business groups have deployed these criticisms to target aggregation of noncommercial claims exclusively. That the pattern has continued unabated into the present day, without correction, suggests the inconsistency may be more intentional than sloppy.

Part I of this Article first reviews the formal similarities of bankruptcy and class actions as two types of aggregate litigation. It then presents the stark historical differences in longevity and durability between the universally accepted bankruptcy system and the endlessly controversial class action rules. It concludes with the puzzling failure of aggregation critics, so successful in recent attacks on class actions, to deploy their criticisms against aggregation in bankruptcy.

Part II argues that the differences between bankruptcy and class actions are due to the commercial need for aggregate litigation. It draws connections between different eras of commercial activity and the aggregate litigation that market actors demanded in response. Thus, it first shows that, by the time England had exported its commercial culture to North America in the seventeenth century, demands from creditors and landowners had already obtained a regime of bankruptcy and class actions to aggregate legal claims over the basic buying, selling, and lending of property and money. Next, it recounts aggregate's antebellum-era development in response to the growing collectivization of business ventures, as pervasive credit reliance generated broad acceptance of bankruptcy legislation, and demands from property owners, lenders, and commercial associations generated the first smattering of American class actions. Permanent federal bankruptcy emerged to meet the needs of industrial commerce, which forced courts to build a new method of bankruptcy specifically for the new breed of large corporations, and further required class actions to regulate new conflicts among corporate investors, managers, and workers. And whereas bankruptcy debates were no longer existential, the rise of mass markets forced a modernization of the class action that ushered in a brief golden age of noncommercial aggregation and, eventually, sparked a major backlash from business and conservative groups. That double standard, in which business groups attack aggregation in class actions but not in bankruptcy, defines the landscape to this day.

The concluding Part III examines the ways in which aggregation's commercial history undermines contemporary criticisms. It argues that business groups cannot reconcile any of the criticisms with aggregate litigation's indispensable role in markets, which explains why such groups never criticized the multiple centuries' worth of commercial aggregation prior to the modern class action. Critics of aggregation's departure from the norm of individual trials have never grappled with persistent commercial demand for binding aggregation, while critics of aggregation's susceptibility to collusion never objected on such grounds to commercial aggregation in which acute collusion risk long has pervaded.

I. BANKRUPTCY, CLASS ACTIONS, AND THE DURABILITY OF AGGREGATION

Bankruptcy and class actions are very similar types of aggregate litigation. And yet, whereas the modern class action has been a constant target of fierce opposition since its late twentieth-century birth, controversy over bankruptcy's use and legitimacy fizzled out by the end of the nineteenth century. This Part describes the divergent paths of these similar devices and the criticisms that have withered the class action while ignoring bankruptcy.

Existing aggregate-litigation scholarship has yet to provide a comprehensive answer to this critical question, in part because the field tends to focus on class actions and marginalize bankruptcy.[3] The

[3] For example, the American Law Institute excluded bankruptcy from its *Principles of the Law: Aggregate Litigation*. *See* A.L.I., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 1.02 cmt. a (2009).

"pioneering" bankruptcy scholarship leverages bankruptcy's pedigree to analyze contemporary aggregation, a significant advancement that nonetheless does not seek to explain that pedigree.[4] Historicization of aggregate litigation is in its infancy, and there too the focus has been on the twentieth-century class action, not bankruptcy's longer history.[5] There are many rich standalone bankruptcy and class-action histories, of course, but they predate, and have yet to be integrated with, the comparative insights from the aggregate litigation scholarship.[6]

A. *The Common Form of Bankruptcy and Class Actions*

Bankruptcy and class actions share many features with each other and with other types of aggregate litigation. Every aggregate proceeding involves in essence one centralized adjudication of similar civil claims brought by or against many litigants.[7] The American Law Institute's *Principles of Aggregate Litigation*, for example, defines an "aggregate

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[4] Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1400 (2019) (mentioning Troy McKenzie's "pioneering work" on this bankruptcy topic). *See generally* Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT L. 59 (2012) [hereinafter McKenzie, *Mass Tort Bankruptcy*] (discussing 1940s-era mass tort bankruptcy); *see also* Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past as Prologue?*, 90 WASH. U. L. REV. 839, 842 (2013) [hereinafter McKenzie, *Future of Aggregate Litigation*] (comparing histories of corporate bankruptcy and the modern class action in order "to demonstrate that bankruptcy serves as a rich source of historical guidance for those interested in the future path of aggregate litigation"); Troy A. McKenzie, *Towards a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1019 (2012) [hereinafter McKenzie, *Bankruptcy Model*] (urging that nonclass aggregation follow bankruptcy model for mass torts).

[5] *See, e.g.*, David Freeman Engstrom, *"Not Merely There to Help the Men": Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 STAN. L. REV. 1, 86 (2018) ("Despite decades of heated debate about the class action's proper form and function, historical work on the evolution of mass litigation remains very much in its infancy."). Perhaps the field's most important historical work to date connects the lineage of class actions back to the "private aggregation" of industrial-era tort claims. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1595 n.124 (2004). By documenting the way industrialization and commodification of legal services made these private aggregations "inevitable," this history undermines the normative preference for individual lawsuits that undergirds much of the criticisms of aggregation. *Id.* at 1634.

[6] Standalone histories of American bankruptcy, for example, tend to emphasize the cycle of enactment and repeal that dogged federal bankruptcy legislation during the nineteenth century, analyzing instabilities due to economic, partisan, and ideological conflicts. *See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 11–14 (2004) [hereinafter SKEEL, DEBT'S DOMINION].

[7] *See, e.g.*, RICHARD A. NAGAREDA ET AL., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 1 (Saul Levmore et al. eds., 3d ed. 2020) (defining aggregate litigation as "when claims arise not as isolated events, but instead as part of a larger aggregate—in particular, when wrongdoing on a mass scale gives rise to the potential for large numbers of civil claims that exhibit varying degrees of similarity"); JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND ITS ALTERNATIVES 227 (2d ed. 2018) (examining bankruptcy, administration, and contract as "alternative methods" other than class action); Lahav, *supra* note 4, at 1402 ("[O]ver the last twenty years, the idea that modes of aggregation are separate spheres has eroded so that today MDL, class actions and bankruptcy are understood by most commentators as overlapping and merging methods for resolving large-scale multi-plaintiff disputes.").

proceeding" as one in which "claims or defenses held by many persons" are "combine[d]" for "unified resolution, which may be trial or settlement."[8]

Even among aggregate forms, bankruptcy and class actions are particularly similar. At a basic structural level, both involve a single court that adjudicates multiple claims and defenses all the way to final judgment.[9] Each provides for broad aggregation of claims at the front end and broad claim preclusion at the back end.

Thus, at the front end, the federal Bankruptcy Code enables aggregation of virtually all types of federal and state claims brought against the same bankrupt individual or corporate debtor. The Code's jurisdiction and venue provisions, along with the Code's automatic stay of all pending cases against the debtor, together authorize a single federal court to adjudicate every aspect of a defendant's aggregate liability.[10] Similarly, class actions under Rule 23 of the Federal Rules of Civil Procedure (and state-level counterparts) enable aggregation of claims brought by or against a large number of litigants (the "class"), so long as the claims involve common questions of fact or law and the participating class members and lawyers provide adequate representation to absent class members.[11]

At the back end, bankruptcy and class actions share the unique ability to generate judgments that bind "absentees"—claimants or respondents who did not participate in the litigation.[12] The ability to produce judgments that bind a large group of people not before the court is aggregation's core function.[13] Bankruptcy and class actions provide the only two mechanisms to preclude absentees from pursuing subsequent litigation.[14]

Arguably, absentee preclusion in bankruptcy is *more* expansive, for two reasons. First, absentee claims are easier to aggregate in bankruptcy than they are in class actions.[15] Compared to Rule 23's requirements for judicial

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[8] *See* A.L.I., *supra* note 3.

[9] In contrast to "aggregate lawsuits," "administrative aggregation" refers to a situation in which multiple related lawsuits are consolidated before a single court for *only* pretrial management and rulings, not for ultimate adjudication, and a "private aggregation" refers to a contractual settlement encompassing a mass of claimants or respondents that is consummated outside of court. *See id.* at § 1.02(a)–(c).

[10] *See* McKenzie, *Mass Tort Bankruptcy*, *supra* note 4, at 87 (discussing the Code's provisions on personal and subject-matter jurisdiction, venue, and the automatic stay).

[11] FED. R. CIV. P. 23(a).

[12] DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 114 (2000) ("Only two procedural mechanisms—bankruptcy and class actions—arguably permit attorneys and defendants to broaden the embrace of their proposed settlement to incorporate the claims of individuals who have not previously come forward.").

[13] *See* NAGAREDA ET AL., *supra* note 7, at 5 ("Of course, a class action or any other aggregation device achieves the benefits of judicial economy only because of preclusion.").

[14] *See* TIDMARSH & TRANGSRUD, *supra* note 7, at 128 (arguing that, other than "class actions and bankruptcy," the remaining exceptions to the "same parties" requirement "are of limited utility in preventing the relitigation of related claims across multiple forums").

[15] Both final bankruptcy judgments and class action judgments preclude further litigation of *any* questions that *could* have been raised in the original aggregate proceeding. McKenzie, *Bankruptcy Model*, *supra* note 4, at 1005–07 (summarizing the Code's finality provisions).

approval of proposed class-action settlements, the Code subjects proposed bankruptcy plans to more lenient standards of due process, claim commonality, and claimant cohesion.[16] Second, beyond absent class members, current class action law does not provide any type of mechanism to bind nonparties to a judgment.[17] Bankruptcy law does, via so-called "nondebtor releases"—provisions in the final judgment that preclude absent creditors from successive litigation against both the insolvent debtor and affiliated solvent entities that never endured the bankruptcy process.[18]

In short, bankruptcy and class actions are remarkably similar devices. And yet, their histories and treatment by litigants and commentators could not be more different. Whereas bankruptcy has long earned universal acceptance, the modern class action has lived a life of controversy.

B. *Bankruptcy Durability and Class Action Vulnerability*

Bankruptcy "is the oldest, most enduring, and most far-reaching form of procedural aggregation in use in the United States."[19] The necessity and legitimacy of a national bankruptcy law has not been in serious question for well over a century: by the 1900s, fundamental issues were largely settled in favor of expansive national bankruptcy for all debtors.[20] Federal bankruptcy in the twentieth century continued unabated to expand in scope and use.[21] Repeat litigants, practitioners, and courts today are far more likely to extend bankruptcy's capabilities than to limit them.[22]

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[16] Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 669–72 (2008) (demonstrating bankruptcy's "exceptional[ism]" compared to class action rules on notice and commonality).

[17] Putative class members are not bound to any precertification rulings, including denials of certification. *See* Smith v. Bayer Corp., 564 U.S. 299, 313 (2011). And other actors with close relationships to named litigants, like owners or insurers of a corporate defendant, cannot be bound to the outcome of a class action in which they were not named parties. *See* Taylor v. Sturgell, 553 U.S. 880, 884, 898 (2008); Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996); Martin v. Wilks, 490 U.S. 755, 761 (1989).

[18] *See, e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1158 (2022); Richard L. Epling, *Third-Party Releases in Bankruptcy Cases: Should There Be Statutory Reform?*, 75 BUS. LAW. 1747, 1747–49, 1751 (2020); Gary Svirsky et al., *A Field Guide to Channeling Injunctions and Litigation Trusts*, 260 N.Y. L.J. (2018) (summarizing recent releases of nondebtors).

[19] McKenzie, *Future of Aggregate Litigation*, *supra* note 4, at 842.

[20] *See* John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303, 311–12 (2003) ("[T]oday we may underestimate the political controversies that attached to bankruptcy during the eighteenth and nineteenth centuries. At the opening of the twenty-first century, public controversy about bankruptcy occurs only by proxy."); *accord* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2002) (describing the shape of the pre-1898 and post-1898 bankruptcy landscapes).

[21] *See, e.g.*, MARY ESCHELBACH HANSEN & BRADLEY A. HANSEN, BANKRUPT IN AMERICA: A HISTORY OF DEBTORS, THEIR CREDITORS, AND THE LAW IN THE TWENTIETH CENTURY 2 (2020) ("[T]he bankruptcy rate increased from 1 per 10,000 people annually in the first decades of the twentieth century to about 1 per 300 people at the beginning of the twenty-first.").

[22] *See, e.g.*, David A. Skeel, Jr., *Taking Stock of Chapter 11*, 71 SYRACUSE L. REV. 531, 531–32 (2021) ("The past generation will surely be seen as a golden era in American bankruptcy law. . . .

The class action has followed basically the opposite historical arc. Until the twentieth century's last few decades, class actions occupied a niche corner of American procedure, rarely used and beset by doctrinal confusion.[23] But when the class action rule's 1966 revision allowed new groups to certify large classes of small-dollar and noncommercial claims,[24] the "class wars" that ensued entailed ceaseless controversy that still rages today.[25] In addition to exploding the total number of commercial disputes, mass markets forged opposition from businesses, and conservative groups grew especially fierce and well-financed in the mid-1990s.[26] This spurred a newly Republican Congress to restrict the class action's use in various realms, and the Supreme Court to engage in "increasingly assertive efforts to move the law governing class actions in a conservative direction."[27]

Comparison of bankruptcy's durability and the class action's vulnerability is striking considering their deeply similar forms as aggregate litigation. Contemporary critics have had great success in restricting aggregation via class actions, but they have not even attempted to criticize aggregation via bankruptcy. That double standard is all the more glaring because, as the next Section shows, the leading criticisms of class actions apply in theory to any aggregate litigation.

C. *Criticisms of Aggregate Litigation*

Class actions and other forms of nonclass aggregation are subject to the same general criticisms.[28] Rather than fault devices for failing to deliver on aggregate litigation's benefits—easing the practical burdens of adjudicating existing claims, and generating new claims that require aggregation to advance substantive goals of deterrence or claimant equality—the criticisms

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Although Chapter 11 . . . was vigorously debated in the scholarly literature in the early 1990s, those doubts . . . never troubled bankruptcy professionals in any serious way.").

[23] *See, e.g.*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 43 (2d ed. 2019) (noting the rarity of class actions before 1960); Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES IN L. 1, 2–3 (2018) (noting the same).

[24] Judith Resnik, *"Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1780 (2017) [hereinafter Resnik, *"Vital" State Interests*] ("In the 1960s, new vital state interests—facilitating filings by civil rights and small consumer claimants—came to the fore. Aggregate litigation was then enlisted through revisions of Rule 23 to move due process parameters again.").

[25] *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 52 (2015); HENSLER ET AL., *supra* note 12, at 15; Miller, *supra* note 23, at 13.

[26] *See, e.g.*, J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289–90 (2022) (describing class action as in the "crosshairs" of a "decades-long" campaign "waged by the defense bar, the U.S. Chamber of Commerce, multiple Republican presidential administrations, and various defense-side interest groups"); Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1496, 1525 (2017).

[27] Burbank & Farhang, *supra* note 26, at 1522, 1524.

[28] *See, e.g.*, Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships Among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1028–29 (2017) [hereinafter Resnik, *Reorienting*].

usually object to aggregation in principle.[29] Over the past three decades, lawmakers and activists have leveraged these criticisms in the name of statutes and rules that "prevent the people most in need of aggregate litigation from using it."[30]

Business groups and other critics contend that class actions (1) "extort" defendants by warping the proper process of individual lawsuits,[31] and (2) invite lead plaintiffs and class counsel to "sell out" absent class members.[32] These are the two main attacks on class actions, but they pull in opposite directions. The first, "extortion" criticism, is that aggregation pressures *participating* defendants into settling claims regardless of their merit. The second, "sellout" criticism, is that defendants will bribe claimant *representatives* into settling on terms that undercompensate *absent claimants*. The former concern is coerced defendants, the latter is claimants underpaid by defendants' design.[33]

1. *Extortion and Individual Lawsuits*

Leveraging accounts from prominent jurists and legal commentators, business groups like the U.S. Chamber of Commerce often describe class actions as "extortion."[34] They argue that class certification causes defendants to suffer duress, and therefore defendants should not be responsible for their decisions to settle class actions (the method by which most certified class actions are resolved).[35]

The source of extortion, according to critics, is the risk that one aggregate judgment could wipe out the defendant's assets. That dire prospect, which would not be possible had claims been processed across many individual lawsuits over many years, is on the table with aggregation.[36] To avoid even the chance of catastrophe, defendants are forced into aggregate settlements that are (purportedly) overly generous when compared to the perceived value of individual claims. In other words, critics think

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[29] *See, e.g.*, TIDMARSH & TRANSGRUD, *supra* note 7, at 13–28; Resnik, *"Vital" State Interests*, *supra* note 24, at 1805.

[30] *See* Resnik, *Reorienting*, *supra* note 28, at 1028. Their goal is disaggregation—the purposeful diffusion of claims into individual suits. *Id.* at 1052.

[31] *See infra* Subsection I.C.1.

[32] *See infra* Subsection I.C.2.

[33] *See* TIDMARSH & TRANGSRUD, *supra* note 7, at 23, 25–26 (noting tension between extortion and sellout critiques); COFFEE, *supra* note 25, at 136 (describing extortion and sellout critiques as "polar opposite[s]"); *cf.* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 340 [hereinafter Issacharoff, *Governance and Legitimacy*] (distinguishing "the collective action inquiry" into "the propriety of class certification" from "the governance problem" addressed by "the structure of administration of the class action").

[34] *See* COFFEE, *supra* note 25, at 133 ("At least a minority of the Supreme Court believes that the certification of a class action coerces the defendants into settlement"); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1390 n.140 (2003).

[35] *See* Silver, *supra* note 34, at 1391. An early noteworthy example is Milton Handler's excoriation of class actions as "legalized blackmail." *Id.* at 1363–66.

[36] *See generally In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

defendants are "extorted" when they settle for more aggregate relief than they would have lost had claimants litigated individually.

Given its source, extortion risk is most acute in the context of a large volume of "long-shot" claims, in which risk-averse defendants settle under duress to avoid an aggregate trial, thus "overpay[ing]" relative to the expected results of nonaggregated individual lawsuits.[37] Whether a class includes enough "weak" claims to generate a high variance in outcomes, including a small chance of massive losses, is partly an empirical assertion and partly normative.[38] Claim volume and outcome variance can be predicted or measured case by case, but labeling a claim "weak" or a settlement "too high" treats a world in which everyone uses nonaggregated individual lawsuits as the normative benchmark.[39]

Business groups have rallied opposition by also embracing two related criticisms. First, they have joined legal commentators in condemning class actions for violating the individual due process rights of absent class members.[40] Second, they have echoed conservative allegations that aggregate litigation empowers judges to enforce broad reforms that resemble legislation, even though in this role judges are neither as equipped nor as legitimate as legislators.[41]

All three criticisms—extortion, due process, and the judicial role—venerate bilateral individualized lawsuits. For extortion critics, claim value can be ascertained only by running the claim through many individual trials, and aggregation replaces this "maturing" of "true" claims value with a one-shot, all-or-nothing value imposed by the equivalent of a "central planner."[42] Due process critics identify autonomy to control litigation as an individualized constitutional right waivable only by affirmative consent.[43] And critics worried about the judicial role assert that aggregate lawsuits replace the "substantive law" represented by individual trials of state law claims.[44]

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[37] *See* Silver, *supra* note 34, at 1373.

[38] *Id.* at 1377–80, 1425–28 (analyzing empirical and normative components of prominent "extortion" critics).

[39] *See* COFFEE, *supra* note 25, at 135 (explaining that even the "most plausible theory of extortion" assumes that individual trials are the true measure of claim "value").

[40] *Id.* at 136–37 (reviewing the "rip off" and "no one benefits" critiques); Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. (forthcoming 2023) (manuscript at 3–5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3779991.

[41] *See* TIDMARSH & TRANGSRUD, *supra* note 7, at 28; COFFEE, *supra* note 25, at 149 (reviewing the "undemocratic" critique); David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981–1994*, 86 FORDHAM L. REV. 1785, 1805 (2018) [hereinafter Marcus, *History Part II*] ("To some critics, the class action exemplified . . . the imperial judiciary's modus operandi."); Martin H. Redish, *The Liberal Case Against the Modern Class Action*, 73 VAND. L. REV. 1127, 1138 (2020) ("[T]he courts . . . effectively perform the legal equivalent of . . . changing the DNA of the underlying substantive law.").

[42] *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 220–21 [hereinafter Issacharoff, *Private Claims*] (noting the "central planner" theme).

[43] *See* Resnik, *Reorienting*, *supra* note 28, at 1027.

[44] *See* TIDMARSH & TRANGSRUD, *supra* note 7, at 28; Redish, *supra* note 41, at 1138.

2. *Sellout Risk*

Aggregation requires some degree of centralized control over the prosecution of a mass of legal claims. Whereas individuals can pursue their interests directly by controlling their own individual lawsuits, delegating control runs the risk of disloyal representation. The sellout criticism is built on this principal-agent problem: lawyers (the agents) may find it more profitable to sell out their clients (the principals) by settling claims quickly and regardless of merit.[45]

Sellout critics have targeted class actions especially, harping on the potential for class-action lawyers to sell out absent class members.[46] There have indeed been some egregious examples of defendants' offering settlements that are intentionally generous to class counsel and stingy toward absent claimants.[47] But disloyalty is not guaranteed or even the norm, so the sellout risk provides no reason to oppose class actions or other aggregate forms in principle.[48] As a criticism of aggregation, sellout risk demands *at most* that courts and amici, on a case-by-case basis, push for settlements that sensibly allocate rewards among claimants and counsel.[49]

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In sum, bankruptcy and class actions are highly similar forms of aggregate litigation, both enabling broad front-end joinder of claims and back-end preclusion of absent litigants. Aggregation on a nationwide scale through federal bankruptcy has been a permanent feature of American law for a century. National aggregation via class actions, meanwhile, has been drastically limited by critics who purport to oppose aggregation in principle but never criticize bankruptcy. The next Part traces the roots of this double standard through the long history of commercial demand for aggregate litigation.

II. THE COMMERCIAL HISTORY OF AGGREGATE LITIGATION

Aggregate litigation has served a necessary function in the expansion of American commerce as a vehicle to enforce the laws of market exchange. This Part makes such a case by presenting a history of the connection

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[45] *See, e.g.*, TIDMARSH & TRANSGRUD, *supra* note 7, at 22–23; Almendares, *supra* note 40, at 4–5; Lahav, *supra* note 4, at 1404.

[46] *See, e.g.*, Almendares, *supra* note 40, at 4; Lahav, *supra* note 4, at 1406.

[47] *See* Lahav, *supra* note 4, at 1406 & n.56 (noting an "egregious example" of class counsel settling to obtain a "more lucrative payday for themselves at the expense of the class" (citing Eubank v. Pella Corp., 753 F.3d 718 (7th Cir. 2014))).

[48] *See* COFFEE, *supra* note 25, at 223; Issacharoff, *Governance and Legitimacy*, *supra* note 33, at 339–40 (explaining the difference between general objections to collective resolution and specific objections to particular acts of "any particular agent").

[49] *See* COFFEE, *supra* note 25, at 121–22; Almendares, *supra* note 40, at 53–54; *accord* Lahav, *supra* note 4, at 1407 ("Whether similar agent-principal problems arise in the mass tort bankruptcy context has yet to be studied.").

between changes in market society and expansions in aggregate litigation. Moving chronologically through eras in American market relations, it argues that aggregate litigation is the product of demands from market actors responding to new commercial environments.

A. *Aggregation for Commercial Exchange*

When European colonialists brought the basic institution of private property to seventeenth-century North America, they also imported a culture of "capitalist" commerce.[50] This was a culture obsessed with economic growth from *exchange*—everyday merchants would plan to profit off a constant cycle of trading one thing for another, and financiers would make "forward-looking investment in the generation of gain through trade."[51] Because wealth came from more trades, more sales, and more lending to finance future exchange, English and colonial commerce required a legal framework to facilitate, sustain, and extend market exchange "across territory or space."[52]

Imported along with commercial commerce was the basic framework on which markets rely: legal rules that govern the use and exchange of private property by contract.[53] Markets need such rules to limit and standardize the permissible attributes of property interests, sales and credit contracts, and "asset partitions," legal conventions that separate assets into formally distinct ownership pools.[54] When markets expand to generate more

[50] *See* JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES 3, 44 (2021).

[51] *Id.* at 3–4 (explaining how preindustrial economic growth "depended on and created greater transactional liquidity—as in, a greater scope for sales and more trade in goods").

[52] *Id.* at 190.

[53] *See* CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA 156 (2021) ("At the foundation of the market economy in colonial America were formal legal institutions and a body of laws that protected property interests when individuals used their property for exchange in the market or as collateral for credit."); KATHARINA PISTOR, THE CODE OF CAPITAL 47 (2019) ("Market economies revolve around contracts and property rights."). In form, property interests are immutable and not individuated—property is governed by certain basic rules of possession and use that cannot be alerted by any particular owner or contract. *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 778–79 (2001) (explaining the need for immutable rules to govern resources that implicate "coordination among a large and indefinite number of persons"). Immutable, standardized rules also limit the scope of permissible market exchange (e.g., drugs, human organs), attributes of payment and credit instruments (e.g., cash, bonds, credit cards) such as fungibility (whether the payee can use the instrument in future transactions without regard for defects in prior transactions) and finality (whether the payor has a window to cancel payment after the instrument was delivered), the types of assets and obligations permitted in credit contracts, and the relative priority of creditors' claims to repayment from a common debtor. *See* ROBERT E. SCOTT & GEORGE G. TRIANTIS, FOUNDATIONS OF COMMERCIAL LAW 180–82, 267–69 (2010); MANN, *supra* note 20, at 14–15, 47–48 (discussing priority and preference).

[54] *See* PISTOR, *supra* note 53, at 47 ("Capital . . . relies on more than just enforceable contracts and clear property rights that are enforceable against the world; it also depends on . . . asset-shielding devices that lock in past gains and protect asset pools."). "Affirmative" asset partitions create legal "personhood"

exchange, so too do they generate more lawsuits that are identical or interdependent because they address the same immutable and standardized legal rules.[55]

This dynamic explains why aggregate litigation was first built to accommodate conflicts over the exchange of private property and credit. As explored in this Section, starting in the sixteenth century, bankruptcy was used to facilitate credit exchange by imposing finality on commercial debts, first to the exclusive benefit of participating creditors, eventually to the benefit of debtors as well. Traders and lawmakers in the American colonies largely agreed on the basic need for bankruptcy, but local market conditions precluded the type of national consensus already realized in England. The earliest class actions, meanwhile, started to emerge in England as a vehicle to adjudicate standardized claims in real property and monetary funds.

Antebellum-era aggregation was built for conflicts over credit contracts and asset partitions, the key legal tools in unlocking antebellum-era economic growth.[56] Bankruptcy statutes at the state and federal levels grew out of demands from commercial lenders and entrepreneurial borrowers desperate for protection against the financial risks of credit speculation. At the same time, the first American class actions began to pop up in the early nineteenth century as a means for creditors to collect from common debtors or business associates to manage common funds.

for a new entity—meaning the entity can own, contract, sue, and be sued independently from its owner—and establish priority between claims to the new entity's assets and claims to nonentity assets. "Defensive" asset partitions, rather than merely prioritizing claims, cut them off altogether. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393–94 (2000); John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2183–84 (2016); Merrill & Smith, *supra* note 53, at 789. Limited liability for corporate shareholders is a typical defensive partition because it prohibits a corporation's creditors from pursuing the personal assets of the corporation's owners. *See* PISTOR, *supra* note 53, at 60. Whereas a partnership entails only an affirmative partition because creditors can eventually reach partners' personal assets (after extinguishing the partnership's assets), a corporation consists of both affirmative and defensive partitions. *See* G. Marcus Cole, *Limiting Liability Through Bankruptcy*, 70 U. CIN. L. REV. 1245, 1257 n.54 (2002).

[55] SCOTT & TRIANTIS, *supra* note 53, at 182. For example, credit instruments generate such lawsuits because they are meant to proliferate financial obligations that are identical in structure and fungible. *See* MANN, *supra* note 20, at 12–13.

[56] *See* PISTOR, *supra* note 53, at 57 ("New coding strategies that partition assets and shield entities have frequently spurred the expansion of credit, thereby boosting the returns for their owners."); Edward J. Balleisen, *Bankruptcy and the Entrepreneurial Ethos in Antebellum American Law*, 8 AUSTL. J. LEGAL HIST. 61, 77 (2004) [hereinafter Balleisen, *Entrepreneurial Ethos*] (describing antebellum-era credit reliance); *see also* Tony A. Freyer, *Debt Failure and the Development of American Capitalism: Bruce Mann's Pro-Debtor Republic*, L. & SOC. INQUIRY 739, 754–57 (2005) (reviewing MANN, *supra* note 20). Starting in the 1840s, as Northern lenders tried to commercialize land and Southern farmers tried to expand slave-based agriculture into the western frontier states, use of commercial partitions like sole proprietorships and partnerships multiplied. *See* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RSRV. L. REV. 319, 369 (2013); *accord* LEVY, *supra* note 50, at 152.

1. *English and Colonial Bankruptcy*

i. English Origins

Two innovations formed the basic parameters of English bankruptcy law in place at the time of American Independence. Initiated mid-sixteenth century, the first innovation was the provision of a collective forum for creditors to litigate claims against the same debtor on an aggregate basis. The second came at the start of the eighteenth century with the enactment of the first discharge law, which offered debtors the chance to preclude all future attempts by creditors to collect on existing debts.

a. Creditor Aggregation

Lawmakers in sixteenth-century England created bankruptcy to regulate the only conduct at the time resembling market exchange—trade between merchants.[57] Most merchants and traders by that time had no choice but to rely on multilateral credit relations.[58] Once trade in the mid-1500s expanded in population, geography, and commodity types, merchants had no way to guarantee full performance at the promised time.[59] More than anyone else in society, merchants, traders, and financiers could end up in ruin because of bad luck and the unpredictable nature of commerce.[60]

Gradually a consensus emerged among commercial creditors that trade would not be sustainable without court-imposed settlements of multiple

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[57] *See* Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153, 157 (2004) ("[A]s England's colonial expansion grew throughout the sixteenth century, a modern system of mercantile credit, the Law Merchant, and a primitive system of courts were adopted, leading to the passage of England's first non-criminal bankruptcy statute in 1571."); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7 & nn.14–16 (1995) [hereinafter Tabb, *History of the Bankruptcy Laws*] (explaining that, "[a]s commerce expanded, the need for a collective procedure to collect debts became evident").

[58] Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229, 1238 (2010). ("[A]ll merchants and traders who depended on credit existed in this state of financial instability, [and] the insolvency of one person who owed significant debts could lead to the failure of many others.").

[59] *Id.* at 1237–38 & nn.30–31 (explaining the reliance of merchants and traders on credit and the extent to which the "primitive state of communication, travel, and production" in the sixteenth century made it impossible to get "complete assurance" of timely performance) (citing Julian Hoppit, *The Use and Abuse of Credit in Eighteenth-Century England*, *in* BUSINESS LIFE AND PUBLIC POLICY: ESSAYS IN HONOUR OF D.C. COLEMAN 64, 65–67 (Neil McKendrick & R.B. Outhwaite eds., 1986); V. MARKHAM LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND 2 (1995)).

[60] *See* Kadens, *supra* note 58, at 1244 & n.69 (noting that "paradigmatic examples of misfortunes that could render a man insolvent without culpability" included fires, shipwrecks, and insolvency of other debtors); Cole, *supra* note 54, at 1249 (noting that merchants and traders "were deemed worthy of [bankruptcy] protection because of the unpredictable fortunes of commerce and markets"); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 9 ("In commerce, however, credit became recognized as a necessary evil. And once credit is used, things can go wrong. Defaults happen, and in the instance of multiple defaults, a collective remedy such as bankruptcy is needed. Bankruptcy was limited to traders because it was believed that they had 'peculiar facilities for delaying and defrauding creditors.'").

debts owed by the same merchant.[61] Expanding trade threw more upstanding merchants into insolvency armed with plenty of legal and practical means to escape creditor collection, and the growing volume and complexity of multilateral credit contracts exacerbated competition among creditors of the same merchants.[62] The insolvent merchant was an inevitable risk, and demand for special insolvency laws stemmed from the need to spread that risk across all commercial lenders.[63]

Enacted in 1543, the first bankruptcy law was exclusively a remedy for creditors.[64] It centralized the collection process by requiring petitioning creditors to solicit participation by the debtor's other creditors, staying all other collection actions against the debtor, and providing for final distributions to participating creditors on a ratable basis.[65] The law applied only to *merchant* debtors because they were thought uniquely susceptible to insolvency and likely to abscond from their creditors.[66] And the new law forced bankrupt debtors to make virtually all of their property interests available to creditors, including interests in tangible real property and intangible legal rights to sue.[67]

Unlike bankruptcy laws enacted in the eighteenth century and thereafter, the 1543 law did not discharge any debts.[68] In effect, the first bankruptcy

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[61] Vanessa Finch & David Milman, *The Roots of Corporate Insolvency Law*, in CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES 10 (3d ed. 2017) ("The idea that creditors might act collectively was recognized in 1542 with the enactment of the first English Bankruptcy Act which dealt with absconding debtors and empowered any aggrieved party to procure seizure of the debtor's property, its sale and distribution to creditors 'according to the quantity of their debts.'").

[62] *See* Kadens, *supra* note 58, at 1236; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 328 (1991) [hereinafter Tabb, *Bankruptcy Discharge*].

[63] *See* MANN, *supra* note 20, at 46 ("Bankrupt debtors were presumptively dishonest and fraudulent."); Kadens *supra* note 58, at 1242; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 8; PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA 270 (1974) (noting that the English system of bankruptcy relief "put all creditors on an equitable footing" and ensured "one creditor could not satisfy his claim at the expense of other lenders," such that "losses were spread equitably, and one bankruptcy was less likely to trigger other failures").

[64] An Act Against Such Persons As Do Make Bankrupt, 34 & 35 Hen. 8, c. 4; *see, e.g.*, Kadens, *supra* note 58, at 1236 ("Bankruptcy began in England as a collection device in which all power rested with the creditors. For a century or more, the law's sole concern was that creditors should be repaid, while the interests of the debtor were ignored."). Following the meticulous reconstruction by Emily Kadens, the years used herein refer to the year of statutory enactment. *See id.* at 1236–37.

[65] *See, e.g.*, MANN, *supra* note 20, at 46 (explaining that the 1543 statute "authorized the imprisonment of debtors who absconded or shut themselves in their houses, the seizure of their property, and its distribution among creditors"); Kadens, *supra* note 58, at 1239; Lubben, *supra* note 56, at 328.

[66] *See, e.g.*, Kadens, *supra* note 58, at 1242 ("Only those who bought and sold for a living were subject to bankruptcy.").

[67] *See id.* at 1241.

[68] *See*, *e.g.*, MANN, *supra* note 20, at 46 (noting that the 1543 law is "regarded by historians as the first bankruptcy law for its procedure, despite its lack of discharge"); Kadens, *supra* note 58, at 1241 ("[A]rguably the defining characteristic of most bankruptcy systems, the creditors [under the 1543 law] would join together in a single bankruptcy proceeding, which would gather all the assets and then divide them ratably according to the amount of the creditors' respective debts."); Tabb, *Bankruptcy Discharge*, *supra* note 62, at 329–30.

law precluded absent mercantile creditors from relitigating the bankruptcy liquidation in a follow-on suit *against participating creditors*, and it precluded any suits to reimprison the debtor for failing to pay off prebankruptcy debts.[69] But the law did not preclude follow-on collection suits *against the debtor*—any creditor who missed the first bankruptcy was still free to sue to imprison the debtor or to collect on any and all debts (including prebankruptcy debts).[70] Mercantilist creditors conceded that sustainable trade required a compromise with their fellow creditors, but they were not ready to concede the same significance to debtors.

b. Debtor Discharge

Without any allowance for the possibility of clearing past debts, the pre-1700 regime gave debtors no reason to cooperate with the bankruptcy process.[71] As credit-backed commerce expanded during the seventeenth century, Parliament added new provisions to maximize creditor recoveries, usually threats of criminal sanctions meant to induce debtor cooperation.[72] These threats sometimes resulted in a primitive form of voluntary settlement called "compositions," the utility of which was limited because they could not bind absent creditors (unlike full-blown bankruptcy proceedings).[73]

The major shift occurred in 1706 when Parliament introduced two new provisions regarding bankrupt merchants—the death penalty and the discharge.[74] Reflecting the power of commercial creditors, failure by bankrupt merchants to surrender all their assets was practically the only commercial fraud crime punishable by death.[75] Under the discharge provision, in exchange for the debtor's honest accounting and distribution of current assets, participating creditors could consent to relinquish all claims against the debtor based on prebankruptcy liabilities, including claims of absent creditors.[76]

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[69] *See* Tabb, *Bankruptcy Discharge*, *supra* note 62, at 330–32.

[70] *See* Kadens, *supra* note 58, at 1242 ("Thereafter [the bankruptcy case], the creditors could pursue all other legal avenues, including keeping the bankrupt in debtors' prison, until the debts were completely paid.").

[71] *See id.* at 1243–44, 1265; Tabb, *Bankruptcy Discharge*, *supra* note 62, at 330.

[72] *See* Kadens, *supra* note 58, at 1247 ("[S]eventeenth-century bankruptcy statutes focused . . . on forcing all bankrupts, through the threat of corporal punishment and imprisonment, to turn over their assets to the benefit of their creditors."); Lubben, *supra* note 56, at 334 ("This was an era of increasing commerce and increasing financial fragility. Credit markets were thin and obligors were highly interconnected. One default could lead to a chain of systemic failure. Thus, Parliament increasingly sought to ensure debtors' compliance with their obligations through the use of sticks rather than carrots.").

[73] *See* Kadens, *supra* note 58, at 1244–45.

[74] *Id.* at 1265.

[75] *Id.* at 1263–64 ("[I]n imposing capital punishment in the 1705 draft and the eventual 1706 law, Parliament treated bankruptcy as a special case, and the fraudulent bankrupt as a particularly incorrigible character.").

[76] *See, e.g.*, MANN, *supra* note 20, at 46–47 ("For the first time, honest commercial debtors would be shielded from imprisonment, freed from liability for their debts, and returned to the market to compete

Like its sixteenth-century predecessors, the discharge law grew out of the need to limit merchant insolvency as a means of sustaining commerce.[77] It too was conceived as an incidental tool meant only to maximize creditor recoveries.[78] But the discharge's more profound effect, the use of aggregate litigation as an affirmative tool of debt relief, was immediately felt: from 1705 to 1706, the number of new bankruptcy cases grew from roughly 150 to 550, then settled into an annual pace in the low hundreds.[79]

This was the basic legal framework in place when colonists transported English bankruptcy to North America. Bankruptcy was a tool for creditors, and its purpose was to force merchants into repaying their debts as quickly as possible.[80]

ii. Colonial Consensus

Bankruptcy laws in the colonies, albeit temporary and varied, reflected an emerging consensus on the basic need to regulate insolvency. At some point before American Independence, every colony, in one way or another, provided for a collective liquidation proceeding that precluded all creditors from relitigating against other creditors.[81] Most colonies also prohibited reimprisonment of cooperating debtors, and nine colonies enacted (temporary) laws that allowed discharge of debt claims.[82]

As early as the seventeenth century, insolvency risk spread throughout the colonies.[83] Credit was required whenever payment for goods and services could not be made on the spot, so debt contracts spread across all

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again."). Upon obtaining a discharge, a debtor could use that fact as an affirmative defense to subsequent suits by creditors to collect discharged debts, and in turn, those creditors could attempt to prove infirmities in the earlier bankruptcy case. Tabb, *Bankruptcy Discharge*, *supra* note 62, at 342–43.

77 *See, e.g.*, Cole, *supra* note 54, at 1260 (attributing limitation to view that merchants were "the only economic actors in society whose personal financial circumstances needed to be shielded from the volatilities of commerce and commercial speculation").

78 Discharge supporters argued that mercantile creditors needed more debtor cooperation to continue lending confidently. *See* Kadens, *supra* note 58, at 1232–34; Witt, *supra* note 20, at 312.

79 Kadens, *supra* note 58, at 1268–69, 1269 n.215 (citing JULIAN HOPPIT, RISK AND FAILURE IN ENGLISH BUSINESS 1700–1800, at 188 (1987)).

80 Lubben, *supra* note 56, at 337 ("This statute would remain in place . . . [for] the remainder of the colonies' attachment to the home country."); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 12.

81 *See* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 526 (1996) ("[Colonial and Founding-era bankruptcy laws] differed in several respects. . . . Nevertheless, all of these acts had substantial similarities. They all provided for a collective proceeding between creditors and an insolvent debtor."); *accord* COLEMAN, *supra* note 63, at 38, 103–04, 159–61.

82 *See* Cole, *supra* note 54, at 1265 & nn.95–97. The few colonies that never enacted a direct discharge experimented with other debt-collection restrictions that affected (and required notice to) all of a debtor's creditors. *See, e.g.*, COLEMAN, *supra* note 63, at 196 (discussing Virginia law requiring "reasonable notice" to creditors of a debtor seeking prison release).

83 MANN, *supra* note 20, at 3–5 ("Common to all was the uncertainty that faced both debtors and creditors when indebtedness became insolvency. . . . [I]nsolvency . . . pervaded all reaches of American society. Everyone stood somewhere on the continuum of indebtedness that ran from prosperity to insolvency, whether in their own right or by their dependence on a husband, a father, a master, or an owner. That had always been the case in early America.").

geographies, demographics, and occupations.[84] Credit relations were multilateral and interdependent, often forcing colonial market actors to borrow in some instances and lend in others.[85] That deepening interdependence made it virtually impossible to avoid or control all insolvency risks.[86]

Hence, although no colony in the seventeenth century went as far as English bankruptcy law in allowing a binding aggregate distribution to existing creditors, two colonies started to experiment.[87] In the 1630s, Maryland enacted a law requiring insolvent debtors to assign assets to creditors on a proportionate basis, but the law did not discharge or even alter any unpaid debts.[88] Rhode Island passed a similar law in 1678.[89] Both the Maryland and Rhode Island laws were temporary and quickly repealed.[90]

As it did in Europe, credit-based speculation drove colonial economic growth in the eighteenth century.[91] The creditors who financed this explosive growth soon found themselves, like English creditors 150 years earlier, in a destructive race to assert priority or obtain preferential early payments from colonial debtors, who had little incentive to cooperate and a plethora of options for evading collection.[92] Creditors had no choice but to demand "statutory mechanisms for stopping the race and apportioning losses" among themselves.[93]

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[84] *Id.* at 3 ("Debt cut across regional, class, and occupational lines. Whether one was an Atlantic merchant or a rural shopkeeper, a tidewater planter or a backwoods farmer, debt was an integral part of daily life."). Small-time colonial farmers, for example, produced and sold products like tobacco that took months to plant, grow, and ship, so there was no way to consummate transactions instantaneously. *Id.* at 131–33.

[85] *Id.* at 19 ("Relations between creditors and their debtors were not purely bilateral affairs. Creditors were themselves debtors, and debtors often had many creditors. Each debt was a strand in a web of indebtedness that bound debtors and creditors, creditors and other creditors, debtors and other debtors to one another in complex interrelations.").

[86] *Id.* at 132 (describing colonial "state of mutual dependence possible only in a highly leveraged economy, where the fortunes of borrowers and lenders were so thoroughly intertwined that they often seemed more like partners"); Freyer, *supra* note 56, at 743 ("Adapting their traditional reliance on credit to unstable market conditions, Americans became increasingly vulnerable to failure. Thus, the availability of credit offered incentives to incur obligations that were more than ever subject to natural calamities, bad luck, local and international political contingencies, or human moral weakness.").

[87] MANN, *supra* note 20, at 47.

[88] *Id.*; COLEMAN, *supra* note 63, at 163.

[89] MANN, *supra* note 20, at 47.

[90] *Id.*

[91] *See* PRIEST, *supra* note 53, at 165 ("The colonial creation of functioning legal institutions that protected property titles, that made interests in property transparent, and that allowed individuals to pledge their property as collateral for debts, set the stage for the rapid economic advance of the United States."); MANN, *supra* note 20, at 127–29, 133 (describing the surge of colonial speculation and farming debt).

[92] *See* PRIEST, *supra* note 53, at 43 ("Word that one creditor was bringing a debt action against a debtor would, of course, be highly relevant to all of that debtor's other creditors. In times of general economic recession or uncertainty, litigation volume skyrocketed as creditors scrambled for a place in line."); MANN, *supra* note 20, at 26–27, 48–49; Witt, *supra* note 20, at 306–08.

[93] MANN, *supra* note 20, at 49.

Pushed by local creditors, a few colonies started to enact true bankruptcy laws in the first decades of the eighteenth century.[94] Even though colonial reliance on English creditors meant lawmakers were wary of aggressive debt relief, Massachusetts and New Hampshire enacted brief experiments with bankruptcy discharges to induce cooperation from commercial debtors with property.[95] Other colonies sometimes released indigent debtors from prison but never debtors who owed large debts.[96]

The Seven Years' War and its aftermath led to "the first concerted effort" by colonies to enact bankruptcy laws.[97] War spread insolvency throughout the colonies, from prominent urban merchants to smalltime rural traders, and cemented public consensus that commercial debtors required special protections.[98] Lawmakers in Massachusetts, New York, Rhode Island, and Connecticut responded with new bankruptcy laws, each providing broader debtor relief than England did at the time.[99]

After the Revolutionary War, credit-based speculation and insolvency continued to pervade Founding-era America, and as the flush speculation of wartime gave way to post-Independence recession, demand for bankruptcy protection reached a fervor.[100] Because American debtors usually owed multiple creditors and were often creditors themselves, states continued to enact bankruptcy laws that were across the board more forgiving of debtors than was English law.[101] And when national bankruptcy was first considered during the Constitutional Convention of 1787, there was no notable

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[94] *Id.* at 47–48 (attributing "growing geographic complexity of credit" as a reason for the emerging colonial view that "an insolvent debtor's financial and material remains as rightfully belonging to all of the debtor's creditors rather than to the creditor who was quickest to seize them").

[95] *Id.* at 52–53 (noting that Massachusetts and New Hampshire laws "confirmed that the model for American experiments with bankruptcy legislation until well into the nineteenth century would be English"); COLEMAN, *supra* note 63, at 271–72 (attributing relative infrequency of colonial discharge laws to "dependen[ce] upon the transatlantic flow of capital" and the resulting lack of will "to repudiate British debts").

[96] *See* MANN, *supra* note 20, at 51–52 (on laws in Virginia, Pennsylvania, Maryland, and New York); Lubben, *supra* note 56, at 338.

[97] MANN, *supra* note 20, at 55.

[98] *See id.* at 77 (arguing that a "flurry of statutes and petitions" following the Seven Years' War "suggest[ed] a new willingness to create a law of failure that was something other than mere debt collection process"). For the first time, published pamphlets called for the discharge of commercial debtors. *See id.* at 55–59.

[99] Merchant debtors could initiate their own bankruptcies under Massachusetts's new law (whereas English debtors could not file their own bankruptcy petition), and nonmerchant debtors were discharge-eligible under the laws enacted in New York, Rhode Island, and Connecticut (whereas English bankruptcy was still reserved for traders only). *See id.* at 59–67, 77.

[100] *See* Freyer, *supra* note 56, at 452–54, 749–50.

[101] *See* MANN, *supra* note 20, at 186–87; COLEMAN, *supra* note 63, at 272; Freyer, *supra* note 56, at 743–46; *accord* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 458 (2006) ("American colonies had neither discrete classes of 'merchants' and 'traders,' nor a discrete landed class. During the colonial period, all forms of wealth were subjected to commercial risks.").

opposition to including a clause that gave Congress the power to enact national bankruptcy laws.[102]

2. *Building an American Class Action*

i. English Representative Suits

English courts first permitted the "representative suit," the class action's predecessor, for the convenience of individual landowners who sought to enforce rents and other property rules against commoners in a single action.[103] The first ever class action to bind absentees was probably *Brown v. Vermuden* in 1676, in which the court authorized a single reverend to enforce a tax on a group of miners working church land.[104]

As *Vermuden* suggests, the representative suit was a direct result of expanding market relations starting in the late seventeenth century, which facilitated larger networks of association and generated more multiparty lawsuits in which individual participation by every litigant was practically impossible.[105]

During the eighteenth century, representative suits were used increasingly to translate "status-based" customs governing land into "legal" rules ready-made for market exchange.[106] Courts enabled property owners and traders to litigate these rules in accordance with their standardized and

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102 *See* MANN, *supra* note 20, at 185–86 (explaining how delegates "clearly recognized the problems inherent in applying state insolvency and bankruptcy rules to debtors and creditors who lived in different states"); Lubben, *supra* note 56, at 341 & n.112 (2013) (explaining that dominant Hamiltonian and Jeffersonian constitutional views did not need to be "reconciled" with respect to bankruptcy, "since both lead to support for inclusion of the Clause"); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 13 ("The subject of bankruptcy received only passing attention from the framers at the Constitutional Convention of 1787. A bankruptcy law was apparently believed to be a necessary subject of federal legislation because of the problems that varying and discriminatory state laws caused for nonresident creditors and interstate commerce in general.").

103 *See* Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 GA. ST. U. L. REV. 627, 630–31 (2008) (explaining that the first class actions involved "a single plaintiff" and "numerous defendants," the former usually a manor lord or parson, the latter usually a collection of "social underdogs" occupying the land); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 870–71 (1977) [hereinafter Yeazell, *Social Context*] (describing the "peculiar" fact that the first class actions were against defendant classes and "involve[d] disputes arising out of manor or parish communities").

104 Valdes, *supra* note 103, at 631 & nn.15–17 (citing Yeazell, *Social Context*, *supra* note 103, at 870) (summarizing Brown v. Vermuden (1676) 22 Eng. Rep. 796, 1 Ch. Cas. 272).

105 *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 165–95 (1987) [hereinafter YEAZELL, MEDIEVAL GROUP LITIGATION] (analyzing how new arrangements of capital concentrated in growing cities generated more unincorporated groups, formed for financial and commercial goals, and were closer to voluntary associations than pure "status" groups); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 254–55 (1990) (reviewing YEAZELL, MEDIEVAL GROUP LITIGATION, *supra*) (describing the ways the fading "status-based regime" and "emerging liberal regime" both "generated representative suits" among old feudal and new mercantile groups).

106 YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 105, at 153–54 (explaining the use of the representative suit in turning custom into "a system of codes and decisional law in a society held together by the market"); Bone, *supra* note 105, at 254 (same).

categorical format—representative suits were perfect for legal relations that were designed to disregard individuality.[107] For example, in the seminal case *Mayor of York v. Pilkington* (1737), the court justified preclusion of absentees by analogy to an in rem proceeding, echoing bankruptcy's forced adjudication of all claims to the same property in one proceeding.[108]

By the nineteenth century, though formal legal doctrine "stood unsettled," in practice the handful of representative suits that bound absentees always involved the use and exchange of property.[109] They fell roughly into two categories: general rights cases, and creditors' bills. General rights cases involved disputes about land-based rents, taxes, and customs, or disputes over membership in commercial associations like partnerships and investment accounts.[110] Creditor bills were used to adjudicate multiple claims to a fixed estate—that is, they resembled bankruptcy cases.[111] The big difference was that bankruptcy precluded all claims by absent creditors against participating creditors, while representative suits did not preclude individualized claims with respect to fund distributions, which meant representative suits were ineffective at liquidating solvent business ventures.[112]

ii. Class Actions in Antebellum America

Class actions were mostly absent from the legal landscape in the nineteenth-century United States.[113] The Supreme Court promulgated the first federal rule for class suits in 1842.[114] The rule governed equity suits where parties were "very numerous," and it contained an explicit proviso

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[107] *See* Bone, *supra* note 105, at 239–40, 240 n.57 (explaining how the shape of the liberal property right required individual proceedings that were "effective against the world-at-large or an indefinite class," suggesting courts expanded equity jurisdiction "because establishing ownership good against the world facilitated efficient market transactions in property" and reduced litigation burdens on property owners).

[108] 25 Eng. Rep. 946, 947–48, 1 Akt. 282, 295–97; s*ee* Bone, *supra* note 105, at 240 & n.56 (explaining how *Pilkington*'s "core idea" of the in rem proceeding "supported a general theory . . . that was able to accommodate the individualistic rights of a liberal legal order").

[109] Geoffrey C. Hazard Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, U. PA. L. REV. 1849, 1877–78 (1998).

[110] *Id.* at 1861–66; *see* Bone, *supra* note 105, at 237 & n.48, 249–51 (arguing that the "growth of market capitalism and the rise of the liberal state in eighteenth century England" created new disputes over general rights).

[111] *See* Hazard et al., *supra* note 109, at 1861, 1866, 1869–70. Courts forced litigant creditors to file the bill on behalf of *all* creditors subject to "common victimization" by the same debtor and enjoined all other creditor suits outside of the creditors' bill. *Id.* at 1868, 1872.

[112] *See id.* at 1870 n.92; *cf.* Bone, *supra* note 105, at 254 n.101 (suggesting courts sought to ensure "that all members had an opportunity to advocate their distinct membership rights").

[113] *See, e.g.*, Miller, *supra* note 23, at 2 (2018) ("Relatively few actions resembling what today we would call class actions appear to have been instituted under these provisions.").

[114] *See* TIDMARSH & TRANSGRUD, *supra* note 7, at 140–41 (noting that first class action rule "applied only to cases seeking equitable relief," meaning "there were no class actions for damages").

that judgments from such suits did *not* have any preclusive effects on absent parties.[115]

Like in England, the initial class suits were used to aggregate claims involving the market exchange of property interests.[116] As Americans exchanged more types of property, so arose more disputes over property interests shared by hundreds of individuals who were all technically necessary parties.[117] Early American class suits were used mostly by groups linked by financial or commercial ties (joint stock companies, unincorporated business investors, worker associations, and privateer crews) and always resolved disputes over real or personal property, debtor estates, and agreements governed by categorical, class-wide legal rules.[118]

From the outset, American courts struggled to grasp a coherent legal logic governing the preclusive effect of class actions on absentees.[119] Led by Justice Joseph Story's 1840 equity treatise, which "virtually created the American law of class suits," courts largely followed English precedent.[120] In practice, therefore, the preclusive effect of early American class suits turned on the presence of property.[121]

State courts began experimenting with absentee preclusion in creditors' bill cases. In the 1829 case *Hallett v. Hallett*, a New York court issued a binding decree and justified it by analogy to an in rem proceeding—one of, if not the "first suggestion" of that analogy in American case law.[122] The upshot: sometimes class suits, just like bankruptcy, had to bind absentees based on an imposed norm of creditor equality, for the sake of finality over property.[123] New York courts in the 1830s ran with *Hallett*'s use of the in

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[115] Hazard et al., *supra* note 109, at 1901.

[116] *Id.* at 1882 ("[T]he substance of the social conflicts that these representative suits were trying to address . . . included disputes over inheritance (the legatees' bills), between debtor and creditor and among creditors unsatisfied in their just debts (the creditors' bills), the governance of private business and eleemosynary associations (the 'association' cases), and the legitimacy of measures taken by local government (the tithe and manorial cases).").

[117] YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 105, at 165 (noting the shift "from a rural, customary, agricultural world" to an "individualistic, entrepreneurial-capitalistic" world).

[118] Hazard et al., *supra* note 109, at 1885–86 (1998) ("The state court cases decided in the first half of the nineteenth century reflect essentially the pattern described above [in federal cases]. Again, the salient problem was joinder of parties, particularly as it arose in creditor and legatee bills."); *accord* Bone, *supra* note 105, at 222.

[119] *See* Hazard et al., *supra* note 109, at 1881–82 (discussing JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS (2d ed. 1840), and summarizing Story's "tentative" and "puzzling" analysis of the binding effect of representative suits).

[120] *Id.* at 1878.

[121] Bone, *supra* note 105, at 280 n.158 ("The presence of property in litigation made an important difference in general to the res judicata effect of a judgment on nonparties.").

[122] Hazard et al., *supra* note 109, at 1887 (discussing Hallett v. Hallett, 2 Paige Ch. 15 (N.Y. Ch. 1829)).

[123] *See id.* at 1889 ("Since the proceeding concerned the fund, distribution of the fund as such would be a conclusive adjudication of all of the absent claimants' rights of recovery. *Hallett*, therefore, marks the appearance of an entirely new conceptual basis for preclusion in at least some kinds of class

rem concept and intimated further that creditors' bill decrees would bind absent creditors as to the assets distributed.[124]

Finally, in 1854, the United States Supreme Court expanded on *Hallett*'s justification for binding class suits.[125] The Supreme Court in *Smith v. Swormstedt* made its "first unequivocal statement" that class suits could bind absentees that were "fairly represented," but the statement was technically dicta because preclusion was not formally at issue in the case.[126] The facts and reasoning of *Smith* did not provide much forward guidance either, as the conflict could fairly be characterized as a suit by some members of a voluntary association against other members, a suit by members *on behalf* of an association, and a suit over a limited fund.[127]

3. *Bankruptcy in the Antebellum Period*

For much of the nineteenth century, federal bankruptcy cycled through periods of enactment and repeal because it was subject to consistent opposition and inconsistent support, patterns derived from the material contexts of different local markets. Compared to the steadfast opposition, support for federal bankruptcy always grew in the wake of recessions,[128] but recessions and recoveries were cyclical.[129] Once enacted, federal bankruptcy was enforced to facilitate voluntary and friendly filings, which led to mass discharge of debt.[130] Without debt to discharge, prior beneficiaries of the

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suits."); *accord id.* at 1891–92 (analogizing fund-based class suits to "modern bankruptcy doctrine of illegal preferences").

[124] *See id.* at 1888 (discussing Wilder v. Keeler, 3 Paige Ch. 164 (N.Y. Ch. 1832); Brooks v. Gibbons, 4 Paige Ch. 374 (N.Y. Ch. 1834); Innes v. Lansing, 7 Paige Ch. 583 (N.Y. Ch. 1839)).

[125] *See id.* at 1897–901 (discussing Smith v. Swormstedt, 57 U.S. (16 How.) 288, 298 (1854)).

[126] *Id.* at 1899–900. Of the "few federal cases dealing with any aspect of representative suits" in this period, none addressed preclusion. "These developments are consistent with the formulation . . . of class suit doctrine as it was received from English law. That is, there was still no 'rule' of res judicata in class suits." *Id.* at 1885.

[127] *Id.* at 1900 (contending that the class in *Smith* "could be defined according to any one of the categories by which class suit doctrine had been formulated").

[128] HANSEN & HANSEN, *supra* note 21, at 162 n.10 (discussing the history of bankruptcy acts passed following recessions); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 14 (discussing the Bankruptcy Act of 1800).

[129] *See, e.g.*, HANSEN & HANSEN, *supra* note 21, at 7 (summarizing Charles Warren's influential boom-bust interpretation (citing CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 9 (1935)); SKEEL, DEBT'S DOMINION, *supra* note 6, at 24–25 (2001) (describing and refining bust-and-boom legislation); *accord* Lubben, *supra* note 56, at 323 (linking Warren's and Skeel's interpretations).

[130] Witt, *supra* note 20, at 314 (2003) (summarizing bankruptcy's "fitful existence" during the nineteenth century as a cycle of enactment in response to financial crises, followed by "voluntary transformation[s]" that made them more debtor friendly, followed by quick repeal within a few years); Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 331 (1994) ("Many businessmen had supported previous bankruptcy measures, but often as insolvents who intended to discharge their personal debts. Such measures therefore proved highly transitory, their constituencies waning when the failures resulting from particular economic dislocations had been addressed.").

federal bankruptcy system became more cognizant of its costs and, consequently, less likely to come to its defense.[131]

The other problem was that supporters of federal bankruptcy disagreed among themselves on the particulars.[132] Resisting the usual partisan divide, congressional debates always entailed more than two competing views—the issue could not be simplified to "for or against federal bankruptcy."[133] Supporters of federal bankruptcy thus faced enormous challenges in assembling a coalition behind a *specific* bill with *specific* details, whereas opponents with contradictory agendas could easily find common purpose.[134]

The cycle emerged during the saga of the first federal bankruptcy law, enacted in 1800 and repealed three years later. During an extended period of state-level bankruptcy and fierce congressional debates over proposed federal bills, all agreed on the basic need for bankruptcy and its import in determining the future character of American markets. The cycle continued into the 1840s, when Congress enacted an expansive federal bankruptcy law that, though short-lived like its predecessors, set the baseline for all subsequent efforts.

i. The First Federal Bankruptcy Law

Financial panics during the 1790s, resulting in "widespread ruin and the imprisonment of thousands of debtors," revived demand for federal bankruptcy.[135] In their lobbying of Congress, commercial creditors and wealthy debtors who suddenly found themselves in default echoed the rationale for England's bankruptcy regime—enhanced creditor control over

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[131] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 27–28 (noting that administrative costs made the "first three bankruptcy acts . . . each deeply unpopular" with both opponents and supporters).

[132] *See id*. at 30 ("[T]he multiplicity of views contributed to Congress's inability to reach a stable outcome on federal bankruptcy legislation throughout the nineteenth century."); EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 257 n.7 (2001) [hereinafter BALLEISEN, NAVIGATING FAILURE] (listing multiple sources of "Congressional inaction," including "deep disputes among proponents of a national bankruptcy system on matters of detail").

[133] SKEEL, DEBT'S DOMINION, *supra* note 6, at 24 ("[L]egislators faced a series of options on the bankruptcy issue. Rather than just favoring or opposing bankruptcy, lawmakers divided into at least three separate camps and sometimes more."); *id.* at 46 ("Lawmakers' views divided loosely along geographical and party lines . . . . Even within these groups, however, lawmakers held divergent views."); *id.* at 248 n.20 ("Although many issues do align along this conservative-to-liberal spectrum, the bankruptcy debates clearly were more complicated."). For example, a pro-debtor legislator would, on the one hand, support a federal law that allowed debtors to file for voluntary bankruptcy and prohibited creditors from filing involuntary bankruptcies, or a law that did not give creditors the power to vote against a proposed discharge, and would, on the other hand, oppose a federal law that allowed only involuntary bankruptcies and conditioned discharge on creditor approval. *See id*. at 30–31.

[134] *See* Witt, *supra* note 20, at 330 (summarizing Skeel's argument that "any particular legislative outcome" was "unstable" in the nineteenth century because of the "range of differing preferences for [federal bankruptcy] legislation").

[135] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 14.

uncooperative debtors, and the chance at fresh starts for honest debtors.[136] Undeniably the lifeblood of American commerce, merchants and their financiers had little difficulty convincing lawmakers to accommodate their distinctive need for credit and vulnerability to insolvency.[137] Even opponents of federal bankruptcy supported activist bankruptcy laws enacted at the state level, all of which offered relatively better protection for the preferences and property of local debtors compared to federal proposals.[138]

As a first attempt at national bankruptcy, American style, the Bankruptcy Act of 1800[139] better resembled England's mercantilist regime than the debtor-relief laws already enacted by states and colonies.[140] Specifically, the 1800 Act allowed only creditors to start bankruptcy cases, applied only to merchants with over $1,000 in debt, and conditioned the discharge of debts upon the consent of two-thirds of creditors.[141] The Act's exclusive eligibility to rich merchant debtors meant, in effect, that debts owed *to* farmers or artisans could be discharged without their participation, while debts owed *by* farmers or artisans could not be discharged at all.[142]

Yet in practice, litigants and courts quickly moved beyond the 1800 Act's formal strictures, transforming it into a pro-debtor regime more in line with state-level bankruptcy.[143] Courts interpreted the law to allow bankruptcy protection for not only merchants, but also professionals, artisans, and other users of local credit networks.[144] Bankruptcies initiated by debtor-aligned creditors became the norm, and many debtors secured preferences to close creditors like family and long-term business associates.[145] Due process for creditors was satisfied by generic publication notice, and many creditors likely never knew of discharges that their votes might have stopped.[146]

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136 *See* MANN, *supra* note 20, at 252 ("Proponents of the Act had justified it on two grounds—as a means of empowering creditors to stop the evasions of fraudulent debtors, and as a shield to protect honest debtors from vindicative creditors.").

137 Witt, *supra* note 20, at 312–13; Tabb, *Bankruptcy Discharge*, *supra* note 62, at 335–36.

138 *See* Freyer, *supra* note 56, at 750–51 (explaining that agrarian creditors and debtors opposed federal proposals specifically because they included land in the equitable distribution among all creditors, while state bankruptcy laws usually allowed the debtor to keep land or to give local creditors priority over faraway commercial creditors); *accord* Priest, *supra* note 101, at 453–55.

139 Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

140 Lubben, *supra* note 56, at 344–45 & n.139 (explaining that the 1800 Act "closely tracked the English practice that had developed throughout the eighteenth century" and "ignored the ways in which American insolvency law had already drifted away from English practice in the decades before the American Revolution").

141 *See* Witt, *supra* note 20, at 312–13; Tabb, *Bankruptcy Discharge*, *supra* note 62, at 335–38.

142 *See* MANN, *supra* note 20, at 226–28; Witt, *supra* note 20, at 313 (explaining how the 1800 Act "effectively granted fresh starts to formerly wealthy merchants but not to the artisans and farmers who were increasingly drawn into commercial relations but were excluded from the Act's coverage").

143 *See generally* MANN, *supra* note 20, at 219–53.

144 Freyer, *supra* note 56, at 749.

145 *Id.* at 752–53.

146 MANN, *supra* note 20, at 238–39.

Despite the 1800 Act's pro-debtor transformation, lawmakers from agrarian states continued to oppose federal bankruptcy and quickly repealed the Act after taking power in 1803.[147] But repeal did not result from rejection of bankruptcy aggregation. To the contrary, some critics faulted the 1800 Act for not being effective *enough* in facilitating creditor collection and control over dishonest debtors, while the Act's most vocal opponents in Congress expressly supported state bankruptcy laws.[148]

ii. States to the Rescue

The post-repeal period saw multiple opposing factions that nonetheless all agreed on the need for bankruptcy.[149] Following the 1800 Act's repeal, most states enacted bankruptcy laws permitting the discharge of in-state debts.[150] Newer western states populated by debt-financed entrepreneurs were aggressive in enacting debtor discharge laws, as were northeastern states populated by merchants and financial creditors.[151] Southern states were not, because resident landowners were primarily creditors of small local debtors and thus had more to lose than gain through debtor relief.[152] The rare opposition to state-level discharge laws came from commercial creditors, who wanted a national discharge instead.[153] Not one state regressed to a pre-bankruptcy regime of mandatory individualized debt collection.[154]

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[147] *See* Freyer, *supra* note 56, at 744–45 (noting that agrarian opposition was "ironic" because the 1800 Act was enforced in "similar ways" to state bankruptcy laws).

[148] *See* MANN, *supra* note 20, at 249–52 (noting that the Act's "most vocal opponents . . . expressed a strong preference for state insolvency laws" and shared "not a common set of verifiable reasons, but rather . . . little more than anxiety that debtors were using bankruptcy to escape obligations they could have repaid").

[149] *See* Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 13–15.

[150] *Id.* at 13, 15 (noting that "many states stepped into the void" and "continued to regulate relations between debtors and creditors, bankruptcy, and insolvency during the lengthy era of federal inaction after the 1803 repeal"); *see, e.g.*, Lubben, *supra* note 56, at 346 (reviewing "the serious, longer-term efforts at addressing bankruptcy at the state level" and the "vibrant insolvency system" that arose in the states post-repeal). In addition to not discharging out-of-state debts, states also could not *retroactively* discharge debts that preexisted enactment of the bankruptcy statute. *See* COLEMAN, *supra* note 63, at 160.

[151] *See* PISTOR, *supra* note 53, at 41 (2019) (noting western states were more likely to enact these laws); *see* Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 16–19, 23 (summarizing how northern states pushed for debtor discharge laws).

[152] *See* PISTOR, *supra* note 53, at 41 (discussing how southern states were unlikely to adopt debtor discharge laws).

[153] *See* Witt, *supra* note 20, at 308–09, 317 (discussing opposition to state discharge laws).

[154] Rather than relegate creditors to individual lawsuits, state legislatures differed only on the permissible scope of collective suits, including, most importantly, which types of debtor property were available for repayment. *See* PRIEST, *supra* note 53, at 149 (exploring how state legislatures navigated between "subjecting all forms of property to commercial risk" and "exempting various types of personal property from the claims of creditors"); BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 12 (summarizing patterns of state bankruptcy laws following antebellum financial panics). The necessity and scarcity of credit limited the extent that state legislatures could restrict creditor suits. *See* PRIEST, *supra* note 53, at 150 (suggesting that colonial and antebellum laws "offered few protections from commercial risks" because of the "lack of internal capital sources" and "the desire for credit").

State-level bankruptcy laws formed the basis for renewed calls during the 1820s to enact a federal bankruptcy system that allowed voluntary filing by a broader set of debtors than was provided for in the 1800 Act.[155] Opponents of the proposed federal bills, rather than attack bankruptcy in principle, cited the purported efficacy of state bankruptcy laws in addressing insolvency.[156] Of the various factions that banded together to defeat several proposed federal bills during the 1820s, not one did so in terms that criticized state-level, creditor-initiated bankruptcy.[157]

Meanwhile, restrictions on state bankruptcy rebounded to the benefit of federal bankruptcy, not to the detriment of bankruptcy laws generally. Hence, in ruling that states could not discharge out-of-state debts or debts that preexisted the discharge's enactment, the Supreme Court confirmed that Congress could accomplish both under the Bankruptcy Clause should it choose to reenact federal bankruptcy.[158] A few states pulled back in response to the Court, but others forged ahead in trying to construct workable insolvency laws, unwilling to wait for Congress to act.[159]

iii. Bankruptcy for All

Demand for federal bankruptcy followed the rapid spread of credit dependency throughout the antebellum economy.[160] The same contracts that fueled coordinated profits in manufacturing and farming laid the groundwork for coordinated losses, exposing Americans to new sources of financial ruin.[161] Insolvency could hit from overall shifts in the economy, sector-specific competition, or discrete failures somewhere in the vast network of credit contracts.[162] The dynamic created a natural constituency

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155 *See* John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEVS. J. 361, 361–62, 361 n.4 (1988) (explaining that preexisting state bankruptcy laws inspired 1841 Act provisions).

156 *See* Tabb, *Bankruptcy Discharge*, *supra* note 62, at 348–49 (saying some opponents viewed state insolvency laws as not "wholly power-less"); BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 257 n.7 ("[P]eriodic debtor relief provided by state legislatures during the 1820s and 1830s . . . lessened pressure on Congress to exercise the bankruptcy power . . . .").

157 McCoid, *supra* note 155, at 387–88; *cf.* Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 16 (discussing disapproval of a federal bankruptcy bill).

158 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193–97 (1819); McCoid, *supra* note 155, at 378–79; *see also* SKEEL, DEBT'S DOMINION, *supra* note 6, at 27 (noting how the Supreme Court favored a broader interpretation of the Bankruptcy Clause).

159 *See* Lubben, *supra* note 56, at 359 (discussing how some states passed "debtor-relief measures").

160 *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 32–35, 38–39, 41, 43, 45, 47–48, 103–04 (summarizing the prevalence of "antebellum bankruptcies"); COLEMAN, *supra* note 63, at 290 ("The commercialization of most aspects of [post-Revolution] life . . . brought an ever larger number of Americans into the institutionalizing world of buying and selling, lending and borrowing.").

161 BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 32 ("Economic hardships anywhere along the chain of credit could quickly migrate up and down the chain, tracing the very same paths that in other times spread economic growth.").

162 Witt, *supra* note 20, at 322 ("Middle-class failures in fields as diverse as agriculture, trades, and skilled artisanry had come to be seen either as structural products of recessions outside the control of the proprietor, or as the worthwhile byproduct of entrepreneurial risk[-]taking."); *see also* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 32–49.

for expansive debt relief, both to give fresh starts to already-broke borrowers, and to assure future market actors that neither lending nor borrowing would risk total destitution.[163]

Public proponents of federal bankruptcy in the 1830s understood this dynamic and, therefore, emphasized universal benefits to all market actors.[164] Most influential were the "thousands of politically active businessmen" who went directly to Congress to demand relief for their own debts.[165] Joining them were commercial creditors who wanted a nationwide process to put debtors into involuntary bankruptcy, and grudgingly accepted the discharge as a prudent check on the oversupply of risky credit.[166]

Even opponents of federal bankruptcy agreed that some bankruptcy process was necessary to spread the growing risks of insolvency.[167] Agrarians and Jacksonians above all sought to protect plantation owners, the local purveyors of credit to small farmers, shopkeepers, and artisans.[168] They opposed federal bankruptcy, in other words, solely to protect their own localized version of bankruptcy.[169]

Financial panics in 1837 and 1839 caused mass insolvency that shot bankruptcy to the top of the political agenda,[170] and Congress responded by enacting the Bankruptcy Act of 1841.[171] Most significantly, the 1841 Act

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163 *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 15–18; Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMPAR. L. REV. 1, 9 (2005); Freyer, *supra* note 56, at 755–58; *accord* COLEMAN, *supra* note 63, at 283 ("[B]oth the supporters and the opponents of bankruptcy laws used similar technical arguments to justify their positions. Fraud, recklessness, and immorality, for example, were as much blamed on the existence as on the absence of discharge legislation.").

164 A well-crafted federal bankruptcy law, they argued, would "improve the certainty surrounding commercial transactions and significantly reduce their cost." BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 103.

165 Balleisen, *Entrepreneurial Ethos*, *supra* note 56, at 65, 79–81 (explaining how the 1841 Act "owed its passage primarily to the intense lobbying of tens of thousands of failed businessmen who desired freedom from their debts" and that such "demands meshed well with the widespread predisposition in the nineteenth-century United States to encourage widely dispersed commercial ventures").

166 *Id.* at 68 ("When creditors placed too much confidence in their ability to collect debts through the courts, these bankruptcy reformers argued, creditors far too readily extended loans or sold on credit.").

167 *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 18–19, 26–27 ("One link between antebellum bankruptcy and capitalist innovation lay with financial opportunities created by the process of insolvency itself."); Sauer, *supra* note 130, at 295–96 ("Bankruptcy measures provide a means to marshal and distribute an insolvent debtor's assets among his creditors while discharging the debtor from any remaining obligations.").

168 Freyer, *supra* note 56, at 757–58.

169 *See* Balleisen, *Entrepreneurial Ethos*, *supra* note 56, at 73 (summarizing Jacksonian concern for "vested rights of creditors" and preference for state supervision of debtor-creditor laws); *see also* MANN, *supra* note 20, at 197 (describing Jefferson's objection to a federal bankruptcy bill in 1792 because "the failure to exclude agrarian debtors who engaged in some trading would 'render almost all the landholders South of [Pennsylvania] liable to be declared bankrupts'"); Freyer, *supra* note 56, at 749 ("[T]he federal law benefited not only merchants, but also professionals, artisans, women, and others engaged in local credit networks maintained through negotiable commercial contracts.").

170 *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 5, 102, 104–05 (describing the panics of 1837 and 1839).

171 Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

provided that "[a]ll persons whatsoever" could file their own bankruptcy petitions voluntarily and receive a nationwide discharge of any and all debts.[172] Congress also empowered partnerships to file voluntary petitions and reinstated the prospect of involuntary bankruptcy specifically for merchant and finance debtors.[173]

Debt relief was available to any insolvent debtor who conformed with the Act's requirements.[174] Upon turning over all property and publishing notice to creditors, debtors were entitled to a discharge as a matter of law.[175] Discharge did not require affirmative creditor consent—a debtor who complied with the Act could receive a discharge even if every creditor opposed it.[176]

Even though the 1841 Act's drafters and supporters balanced the need for discharge against other priorities—like the provision that barred debtors from making transfers "for the purpose" of preferring some creditors over others—litigants and courts quickly defanged the ban on preferences and most other potential chokepoints on discharge.[177] Local creditors and debtors found various avenues to secure preferences, an echo of the 1800 Act's pro-debtor transformation.[178] Federal judges, suddenly buried in lawsuits that were filed through a popular piece of new legislation, were concerned above all with discharging debt obligations, not paying them out in perfect priority.[179]

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[172] *Id.*, 5 Stat. at 441; *see* Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 17 ("While the 1800 Act was nothing more than a reprise of the old English bankruptcy model, the 1841 Act, because of its establishment of voluntary bankruptcy, was a watershed event in bankruptcy history."). Voluntary bankruptcy followed logically from the Act's basic premise that financial risk was both desirable and unavoidable for every market actor. *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 132–33 (explaining how Congress embraced voluntary bankruptcy proceedings and set a powerful precedent).

[173] *See* Lubben, *supra* note 56, at 370 ("Partnerships filed for bankruptcy under the 1841 Act."); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 16–18 ("Involuntary bankruptcy was permitted against merchants.").

[174] BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 105 ("All debtors, no matter how small or how large the total value of their indebtedness, could gain financial absolution unless they violated a specific statutory prohibition.").

[175] Witt, *supra* note 20, at 314 & n.65; Tabb, *Bankruptcy Discharge*, *supra* note 62, at 352–53.

[176] BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 105. A creditor majority (in number and value) could block discharge only by filing a written dissent setting forth the debtor's violations of statutory requirements. *See id.* at 116; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 17.

[177] David A. Skeel, Jr., *The Empty Idea of "Equality of Creditors*,*"* 166 U. PA. L. REV. 699, 706–07, 706 n.30; *see* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 102–03 (explaining how creditors found ways to "compel preferential payments"); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 18 ("Control was in the hands of the courts and the assignees.").

[178] BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 103 ("Diligent creditors continued to find ways to compel preferential payments, while many embarrassed debtors continued to place a high priority on shielding relatives and close business associates from the consequences of failure."); Freyer, *supra* note 56, at 756 (comparing pro-debtor enforcement of the 1800 and 1841 Acts).

[179] *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 110–15 (discussing how and why judges prioritized discharge).

The 1841 Act lasted only thirteen months before Congress repealed it,[180] yet the churn during its lifespan was enormous. Hundreds of involuntary bankruptcy filings and tens of thousands of voluntary filings resulted in fresh starts for almost 40,000 insolvent debtors across the country.[181] These discharges offered reliable finality, as disgruntled creditors were largely unsuccessful in relitigating their claims post-bankruptcy.[182]

Considering this mass relief of debts, the 1841 Act was a victim of its own success, and its repeal did not signal a repudiation of bankruptcy. Because the Act had so thoroughly transformed insolvent debtors into reinvigorated traders, demand for voluntary bankruptcy waned at the same time demand for cheaper commercial credit surged, and scrapping the nationwide, voluntary, all-access discharge was the one obvious way to encourage lending.[183] Still, petitions supporting the Act—mainly from urban merchants and chambers of commerce—outnumbered repeal petitions, and repeal debates in Congress focused more on presidential politics than bankruptcy merits.[184]

However brief, the 1841 Act's flirtation with a nationwide system of voluntary bankruptcy left lasting "reverberations."[185] By providing the equivalent of national insurance for business failure writ large, Congress had acknowledged the necessity of business debt and the importance of business debtors.[186] Of the tens of thousands of Americans given a fresh start, many dove right back into credit-fueled commercial speculation in commodities, manufacturing, and real estate, while others gave up the hopes of business ownership completely and settled into a new class of credit-dependent professionals and salaried workers.[187] In effect, national bankruptcy helped create a true "capitalist" class—a group of people who owned both (1) personal property for consumption, and (2) commercial property for investment in separate legal vehicles built for profit.[188]

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[180] Balleisen, *Entrepreneurial Ethos*, *supra* note 56, at 66 (noting that the Act went into effect in February 1842 and Congress repealed it in March 1843).

[181] *Id.* at 66, 71 & n.22.

[182] BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 128–30.

[183] *See* Balleisen, *Entrepreneurial Ethos*, *supra* note 56, at 72–74; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 18.

[184] *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 122–23, 264 n.58.

[185] *Id.* at 132. Most directly, voluntary bankruptcy was included in all subsequent federal bankruptcy laws. Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 18.

[186] *See* Witt, *supra* note 20, at 319, 322.

[187] *See* BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 173–81 (discussing various strategies of discharge recipients to access credit for "future entrepreneurial activity"); Freyer, *supra* note 56, at 756–58 (summarizing transformation of former proprietors into middle-class earners and consumers); Balleisen, *Entrepreneurial Ethos*, *supra* note 56, at 78 (noting that "substantial numbers of failed proprietors" remained in wage-earning jobs long after discharge of debt).

[188] *See* Balleisen, *Entrepreneurial Ethos*, *supra* note 56, at 76–77 (explaining the link between the 1841 Act discharge, the "entrepreneurial ethos," and a newly consolidated "business culture predicated on . . . 'creative destruction'"). On the distinction between personal and investment property, see CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS 107–08 (2005).

B. *Aggregation for Industrial Exchange*

Industrialization of the American economy ushered in a boom-bust cycle of credit speculation that dwarfed antebellum swings.[189] Factory equipment and wage labor grew increasingly valuable, and the federal government subsidized vast amounts of "private" development, including the transcontinental railroad, which catalyzed a new class of corporate owners and investors.[190] The size and complexity of asset partitions surged, none more used than the limited-liability corporation, which quickly replaced partnerships as the business organization of choice.[191]

The industrial-era rise of two new classes—capital investors and waged workers—generated new varieties of standardized lawsuits. As abolition and industrial demand for workers forced lawmakers and courts to build out a body of labor law, the industrial workplace increasingly pitted owners and workers against each other in disputes over common terms like "hours, working conditions, and wages."[192] Further, because industrial operations required massive amounts of funding up front, business owners increasingly had to raise capital from the anonymous public, which required a new legal framework to define relations between the corporate entity, managers, and shareholders.[193] As a result, both booms in corporate mergers and busts spreading corporate failure generated lawsuits against corporate managers that implicated thousands of dispersed investors.[194]

Lastly, the economic boom in the decade prior to the Great Depression offered the first glimpses of mass consumerism. Mechanized production of

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[189] LEVY, *supra* note 50, at 190–91 (dubbing industrial growth and "oscillations of the credit cycle" as the "twin dynamics" defining this era).

[190] *See id.* at 189–92. Industrial investment unlocked exponential growth by multiplying the productivity of human labor and enabling manufacture of "intermediate" goods (like steel) that were used to build more complex parts. *See id.* at 190, 327.

[191] *See* Lubben, *supra* note 56, at 369 ("The key change that developed in the decade before the Civil War was the increasing use of corporations in place of sole proprietorships and partnerships."); David A. Skeel, Jr. *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1358 (1998) [hereinafter Skeel, *Corporate Bankruptcy*] ("The late nineteenth century saw the emergence of the great trusts and a much more market-based (and quite controversial) corporate law as technology supported large-scale enterprise."). By mid-century, states had embraced general incorporation statutes that facilitated creation of "dramatically more firms" of all different sorts. Cole, *supra* note 54, at 1266. As state legislators realized the political gains to be had from corporate supporters, "state-chartered firms[] acted more and more like private businesses, rather than simply arms of the state." SKEEL, DEBT'S DOMINION, *supra* note 6, at 49.

[192] LEVY, *supra* note 50, at 192. Employers and workers were generally free to customize their agreements but enforcing the ban on slavery *required* mandatory rules for maximum hours and employment duration. That and other standardized rules (e.g., minimum wage and age laws) proliferated around the country to facilitate labor negotiations among increasingly large groups of workers and firms. *See* GEOFFREY KAY & JAMES MOTT, POLITICAL ORDER AND THE LAW OF LABOUR 101–02, 114–15 (1982).

[193] *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH 15–16 (2012); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 25–26 (2001).

[194] *See* COFFEE, *supra* note 25, at 33–34.

standardized goods, national mail ordering, corporate advertising, and store installment credit all proliferated in the 1920s.[195] Automobiles were the most significant new good, fitting both industrial demand for transportation and consumer demand for personal use.[196]

1. *Bankruptcy in the Era of Mass Production*

The bankruptcy system during the industrial era expanded to accommodate new debtors whose postbankruptcy earnings provided (potentially) more value to creditors than did the debtor's current assets. Individuals who fell into insolvency had more opportunities than ever to get a wage-paying job and pay creditors back over time. Similarly, the rise of big corporations required a new method of bankruptcy, corporate reorganization, and further gave rise to the possibility of nondebtor releases.

i. Individual and Business Liquidation

Financial panics before and after the Civil War reenergized supporters of federal bankruptcy. Following the 1841 Act's repeal, states again enacted their own bankruptcy laws, exempting debtor property and providing temporary stays of debt collection, which "blunted" demand for federal relief.[197] But the Supreme Court and lower courts struck down state laws that tried to alter either existing debt claims retroactively or the claims of out-of-state creditors.[198] Hence, when massive financial distress rippled throughout the country with no regard for state borders, the need for federal bankruptcy was again put on full display.[199]

Northern creditors were, as always, the stalwart lobbyists for a new federal bankruptcy law.[200] They were joined once again by other commercial actors in need of at least temporary federal debt relief following wartime destruction.[201] Southern plantation owners were just as desperate for financial rescue during Reconstruction, but they could not support similar

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[195] LEVY, *supra* note 50, at 489.

[196] *Id.* at 327–28.

[197] BALLEISEN, NAVIGATING FAILURE, *supra* note 132, at 264 n.61; *see also* Lubben, *supra* note 56, at 372 (discussing state bankruptcy laws after the Civil War); Tabb, *Bankruptcy Discharge*, *supra* note 62, at 353 ("[S]tate stay and insolvency laws proliferated as an attempt was made to solve debt problems more on a local basis.").

[198] Sauer, *supra* note 130, at 312 n.123.

[199] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 19 ("After the Panic of 1857 and the financial cataclysm caused by the American Civil War, overwhelming pressure for another federal bankruptcy law led to the enactment of the Bankruptcy Act of 1867. The inability of state laws to discharge preexisting debts or debts of nonresident creditors contributed to the need for a federal law.").

[200] *Id.* at 19 ("Northern creditors pushed hard for the bankruptcy bill, viewing such a law as essential to their ability to collect anything from southern debtors.").

[201] *See* ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR 6 (2004) ("Advancing the law as a measure of benefit to the commercial classes in all sections of the country, adherents with differing political agendas represented the Bankruptcy Act as relatively politically neutral.").

relief for "their black tenants and sharecroppers."[202] When the Reconstruction Congress finally restored federal bankruptcy, Southern representation was minimal.[203]

The Bankruptcy Act of 1867 reintroduced a comprehensive system of voluntary and involuntary bankruptcy for all debtors.[204] Any individual or legal entity could file a voluntary petition for liquidation, including corporations (although corporate debtors could not discharge debts formally).[205] Compared to the previous federal bankruptcy law, Congress gave creditors more control under the 1867 Act, conditioning discharges on both majority creditor consent and required minimum payouts, as well as the traditional prerequisites of debtor cooperation and creditor notice (both publication and individual to proven creditors).[206]

Above all, Congress intended that the 1867 Act benefit "white men of the merchant class."[207] Lawmakers succeeded to that extent, but casting the net as wide as any propertied debtor preserved the southern class and race structure as it existed before the Civil War.[208] Many Southern creditors used the Act to force local merchants and farmers into involuntary bankruptcy, and Southern debtors filed voluntary bankruptcy cases at a higher rate than existed nationwide.[209]

Debtors were granted discharges far less frequently than they were under the 1841 Act, but true to form, federal bankruptcy under the 1867 Act still transformed into a more debtor-friendly system.[210] Like their predecessors, federal debtors were often able to buy a discharge, either through voluntary bankruptcy or collusive involuntary bankruptcy forced by friendly creditors.[211] Various amendments to the Act over the next seven years defanged the creditor consent requirement and added a new tool for small business debtors to force a small gang of holdouts into accepting a repayment plan that most other creditors approved.[212]

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[202] Witt, *supra* note 20, at 317.

[203] *Id.* at 315 (attributing enactment to the fact that "Southern agricultural interests were unrepresented in the Reconstruction Congress").

[204] Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 19 ("Now 'any person' was subject to the threat of involuntary bankruptcy. The list of 'acts of bankruptcy' that would support an involuntary petition was greatly extended as well.").

[205] *See* Lubben, *supra* note 56, at 389 (noting the 1867 Act's general corporations provision); Tabb, *Bankruptcy Discharge*, *supra* note 62, at 358.

[206] Tabb, *Bankruptcy Discharge*, *supra* note 62, at 359–60.

[207] THOMPSON, *supra* note 201, at 7.

[208] *Id.* at 6 ("Because the primary beneficiaries of bankruptcy relief were white, male merchants, professionals, and planters, the Act stabilized and entrenched southern society's postwar class and race structure . . . .").

[209] *Id.* at 3, 7.

[210] Tabb, *Bankruptcy Discharge*, *supra* note 62, at 358–61.

[211] *Id.* at 359–60.

[212] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 21 ("The composition agreement . . . allowed the debtor to propose payment of a certain percentage of his debts over time in full discharge of

Just as self-interest "drove southerners' warm reception" of the Act, the push for repeal came only after its "intense use" by Southern residents.[213] Southern Democrats urged repeal when they took back control of Congress in the mid-1870s, by which time federal bankruptcy's high administrative costs plainly outweighed its paltry benefits.[214] Eventually, even disappointed creditors joined the calls for repeal, which finally occurred in 1878.[215]

ii. Corporate Reorganization

Corporate bankruptcy in the antebellum era always meant liquidation, a total shutdown.[216] Decades before Congress included corporate debtors in the 1867 Act, state lawmakers and courts started to allow local corporate debtors to file for liquidation.[217] National corporations were practically nonexistent, so there was no real demand for corporate bankruptcy at the federal level.[218] Whenever Congress considered bankruptcy legislation, it focused on fresh starts for individuals and liquidations for small businesses.[219]

Liquidation made little sense, however, for the new wave of large industrial corporations.[220] Breaking down operations into piecemeal assets for separate sale made little sense if the discrete parts were already integrated into a single process worth more than the sum of its parts.[221] Owners and managers of big, financially distressed corporations "simply ignored" the liquidation provisions of federal bankruptcy laws.[222]

Railroads were the archetypal industrial firm needing a different solution to insolvency. Competing intensely since the 1840s to lay down thousands of miles of rail tracks, and forced to rely on "byzantine" funding networks to

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those debts . . . while also keeping his property. If the proposed composition was accepted by a majority in number and three-fourths in value of the creditors, it was binding on all creditors named in the composition."); *see also* SKEEL, DEBT'S DOMINION, *supra* note 6, at 54 (on compositions for "small, mom-and-pop businesses"); Lubben, *supra* note 56, at 377 (noting that Congress was close to repeal in 1873 but chose instead to add composition and other provisions as part of reforms in 1874).

[213] THOMPSON, *supra* note 201, at 4*; see also* Lubben, *supra* note 56, at 378 ("[O]nce Southern debtors had overcome the economic problems inherent in being on the losing side of the war, the South resumed its traditional animosity to federal bankruptcy legislation and the statute was repealed.").

[214] THOMPSON, *supra* note 201, at 4–5 ("[T]he Act's repeal practically coincided with the political redemption of the South. . . . [W]hen Congress considered the repeal of the 1867 Bankruptcy Act during the late 1870s, southern statesmen were among the law's vocal detractors.").

[215] *See* Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 19 ("Northern creditors who had hoped to use the bankruptcy law to facilitate collection from southern debtors were disappointed. Indeed, most of the pressure for repeal came from creditors.").

[216] Skeel, *Corporate Bankruptcy*, *supra* note 191, at 1353 ("Well into the nineteenth century, financial distress meant displacement of the firm's managers and piecemeal liquidation.").

[217] Keeping with the state-level bias for local lenders, corporate liquidation in the states was accomplished by assignments to specific creditors. *See* Lubben, *supra* note 56, at 371–72.

[218] *Id.* at 370. States began issuing corporate charters to specific businesses in the early nineteenth century, "primarily . . . in banking, transportation infrastructure, or water provision." Cole, *supra* note 54, at 1265–66.

[219] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 48.

[220] Mark J. Roe, *Three Ages of Bankruptcy*, 7 HARV. BUS. L. REV. 187, 193 (2017).

[221] *Id.* at 193–94.

[222] SKEEL, DEBT'S DOMINION, *supra* note 6, at 48.

meet enormous up-front costs, railroad corporations were acutely vulnerable to insolvency.[223] Yet, it was widely agreed that liquidating railroads would present a physical and accounting "nightmare," all for the paltry reward of relatively useless scraps of machinery.[224] More terrifying still was the prospect of a dismantled railroad system: railroads had taken on the quality of a "public utility" that had transformed market society for producers, distributors, and consumers throughout the country.[225] Even the highest-priority bondholders, who would be first in line for repayment in a liquidation, preferred reorganization when it came to railroads.[226]

Because of this alignment of interests, corporate reorganization "grew up spontaneously" in the courts.[227] To bypass legislative solutions and go right to the courts was the choice of railroad managers and the Wall Street investment banks that underwrote the corporation's financing.[228] State and federal judges, well aware of popular consensus, were more than receptive.[229]

Gradually what emerged was a novel procedure ready-made for nationwide corporate bankruptcy: the equity receivership.[230] The equity receivership forced the corporate debtor's shareholders, managers, and creditors to negotiate and propose a readjusted capital structure that would give the firm a chance to survive.[231] Judges ensured creditors had their priority respected and received a minimum payout, but otherwise deferred to the parties' agreed terms.[232] The last step of the process was a foreclosure

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[223] *See id.* at 50–52, 57–58; Miller & Waisman, *supra* note 57, at 161.

[224] SKEEL, DEBT'S DOMINION, *supra* note 6, at 62 (quoting Albro Martin, *Railroads and the Equity Receivership: An Essay on Institutional Change*, 34 J. ECON. HIST. 685, 699 (1974)); *see* McKenzie, *Future of Aggregate Litigation*, *supra* note 4, at 849–50 (explaining liquidation's various pitfalls for holders of the "multiple tiers of equity and debt" that financed railroad expansion).

[225] Roe, *supra* note 220, at 194; *see also* SKEEL, DEBT'S DOMINION, *supra* note 6, at 49–50 (describing railroads' "transformative effect" on intensity, geography, and complexity of interstate commerce).

[226] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 61–63; Miller & Waisman, *supra* note 57, at 165.

[227] Cole, *supra* note 54, at 1267–68.

[228] By seeking novel relief one discrete lawsuit at a time, corporate investors, managers, and bankers avoided a national debate on the wisdom of federalized debt relief for big business. *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 55, 63.

[229] *See id.* at 61 (explaining that federal judges were not "lone rangers" but rather reflected "the views of a remarkably broad consensus in favor of reorganizing the railroads"); Miller & Waisman, *supra* note 57, at 163 ("Creditors and courts embraced the concept that the debtor's knowledge, expertise, and familiarity with its business were inherently valuable in large, complex, corporate restructurings.").

[230] *See* Miller & Waisman, *supra* note 57, at 163 ("The law of receiverships provided no precedent for conveying ownership of a business to creditors in satisfaction of debt obligations, or for binding disapproving creditors to a reorganization plan.").

[231] *See, e.g.*, SKEEL, DEBT'S DOMINION, *supra* note 6, at 58 ("The goal of the negotiations was to rework the railroad's capital structure."). Critical to commencing this effort was the filing of a creditors' bill against the railroad, which stopped all individual suits against the railroad and thus "provided a breathing space for the parties to try to work out a plan of reorganization." *Id.*

[232] *See, e.g.*, Roe, *supra* note 220, at 195 (describing equity receivership as a "recapitalization" in which "the parties came up with the terms and the judiciary loosely checked the terms for conformity with priority rules"). The court's main functions were approving the payment of ongoing expenses that kept the railroad running during the reorganization and ensuring a minimum recovery for creditors. *See*

that "sold" the railroad's assets to a newly created corporation, a move that, while not a formal discharge of claims against the old corporation, had the same effect in that the old corporation was left an empty shell.[233]

With little controversy, the routine reorganization of railroads cohered during Reconstruction.[234] And soon thereafter the equity receivership was used to reorganize other large industrial corporations.[235] Much like the evolution of individual bankruptcy, corporate reorganization also morphed from an involuntary remedy for creditors into a voluntary proceeding controlled by the debtor's inside circle to the detriment of creditors as a whole.[236] These three features—voluntary filing, insider control, and "secondary focus" creditor protection—characterized the typical corporate reorganization by the turn of the century.[237]

iii. The Bankruptcy Act of 1898

Support for federal bankruptcy again followed in the wake of expanding transportation, communication, and credit networks, which were the key infrastructure behind the nationwide growth of commercial operations and capital markets.[238] Virtually every American's income depended on credit by the 1890s, which resulted, finally, in a sustainable base of support for bankruptcy's promise of nationwide insurance against market losses.[239] State lawmakers were proactive in reenacting bankruptcy laws after the 1867 Act's repeal, but growth in interstate businesses led to nationwide financial panics that put on full display the impotence of this state-by-state patchwork, reinforcing the case for a federal regime.[240]

SKEEL, DEBT'S DOMINION, *supra* note 6, at 59–60; William W. Bratton & David A. Skeel, Jr., *Bankruptcy's New and Old Frontiers*, 166 U. PA. L. REV. 1571, 1575 n.11 (2018).

[233] *See, e.g.*, Lubben, *supra* note 56, at 383 ("When the creditors had agreed on a new capitalization of the railroad, and the rate at which old securities would be exchanged for new, the railroad was sold at foreclosure to a new legal entity . . . , as unpaid creditors were left behind with claims against an assetless corporate shell."); Skeel, *Corporate Bankruptcy*, *supra* note 191, at 1356 ("In effect, managers and their advisers took creditors' state law debt collection remedies and turned them inside out to fit the needs of troubled railroads.").

[234] Lubben, *supra* note 56, at 379.

[235] *See* Miller & Waisman, *supra* note 57, at 162.

[236] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 64–65; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 22 (describing how federal receiverships "came to be dominated by insiders, and [were] subject to much abuse.").

[237] Bradley Hansen, *The People's Welfare and the Origins of Corporate Reorganization: The Wabash Receivership Reconsidered*, 74 BUS. HIST. REV. 377, 385–86 (2000); *accord* SKEEL, DEBT'S DOMINION, *supra* note 6, at 64; Miller & Waisman, *supra* note 57, at 163–64, 164 n.60.

[238] Sauer, *supra* note 130, at 334–35.

[239] *See id.* at 330–33 (describing the process by which "increasingly capital intensive" commerce and manufacturing in the 1890s generated an "ongoing constituency" for a permanent federal bankruptcy); Witt, *supra* note 20, at 320 n.97.

[240] *See* Lubben, *supra* note 56, at 379, 383–84; Miller & Waisman, *supra* note 57, at 160; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 21, 23; Sauer, *supra* note 130, at 334–35.

Business groups were far and away the most active and important advocates for a new federal bankruptcy law.[241] Merchants and commercial financiers, organizing into the first generation of trade associations and chambers of commerce all across the United States, launched the largest and wealthiest effort to date in favor of national bankruptcy, inundating Congress with "missives" and legislative proposals for fifteen years.[242] In addition, newly formed industrial businesses and corporate law firms both provided pivotal support for permanent federal bankruptcy.[243]

Working together, commercial trade groups, large corporations, and corporate law firms formed a powerful coalition that outorganized and outspent the remaining opponents of federal bankruptcy.[244] Opposition still stemmed from the needs of for-profit farmers in agricultural regions, but agrarian markets were significantly less pervasive in American life, resulting in a dearth of organized groups representing rural interests.[245] Southern and western lawmakers representing farmers no longer had the votes to mount full-on opposition to federal bankruptcy, and instead had to focus on making the inevitable federal regime more beneficial to their constituents.[246]

After numerous failed attempts throughout the decade, Congress finally enacted the Bankruptcy Act of 1898.[247] Professional creditors successfully preserved their power to force debtors into involuntary bankruptcy, to control the bankruptcy proceedings, and to block the

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[241] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 46 ("The single most important development at the end of the century was the formation of local chambers of commerce, boards of trade, and other merchant organizations across the country. These organizations provided a nationwide base of support for bankruptcy law and eventually persuaded Congress to enact the 1898 Act."); Sauer, *supra* note 130, at 331–32 (noting that campaigns by trade associations and chambers of commerce played a "central role in the passage of the 1898 Act").

[242] "The emergence of these trade groups was dramatic evidence of the increasingly commercial nature of the nation, and these organizations would be the driving force behind the 1898 Act." SKEEL, DEBT'S DOMINION, *supra* note 6, at 36–37, 249 n.34 (discussing Bradley Hansen, *Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law*, 72 BUS. HIST. REV. 86, 87, 98–104 (1998)).

[243] Corporations expanding in geography and complexity were forced into "bureaucratic and actuarial" methods of business that valued above all the "predictability" that a permanent federal bankruptcy law offered. Sauer, *supra* note 130, at 332. Metropolitan corporate law firms and the American Bar Association welcomed the business generated by making federal courts permanently available as forums for bankruptcy litigation. *Id.* at 332–33.

[244] *Id.* at 331–33.

[245] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 38–39 (describing the struggles faced by the agrarian movement to have their interests represented in legislative proposals); Sauer, *supra* note 130, at 328–29 (describing opposition from agricultural regions).

[246] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 39 (describing the efforts of lawmakers representing farmers to promote farmers' views); *see* Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 23 (describing opposition from southern and western lawmakers to a national bankruptcy bill and their efforts to push alternative bills calling for involuntary bankruptcy).

[247] Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978); HANSEN & HANSEN, *supra* note 21, at 8.

discharge of debts.[248] But their growing need to rehabilitate and push debtors back into the market forced creditor groups to compromise in various ways.[249] The 1898 Act thus exempted agricultural debtors from the threat of involuntary bankruptcy, and more than any prior federal regime, it regulated overly aggressive creditors and protected financially distressed debtors who acted in good faith.[250]

With involuntary bankruptcy assured for most debtors, proponents of voluntary bankruptcy faced little resistance installing a generous system of relief for willing debtors. Consequently, the 1898 Act allowed voluntary filing by "any person who owe[d] debts," abolishing prior requirements for minimum debts or proof of insolvency.[251] The new law further abolished the requirement that cooperative debtors obtain creditor consent to discharge most debts.[252] And like the previous federal bankruptcy law, the 1898 Act empowered debtors and creditor majorities to negotiate and force binding repayment plans on dissenting and absent creditors.[253]

Congress also expanded the overall scope of federal bankruptcy through provisions defining bankruptcy jurisdiction and the types of "claims" allowed therein.[254] But expensive and clunky federal administration under the previous two bankruptcy laws meant any new federal system would have to be significantly more adversarial and litigant-driven.[255] Hence, the Act installed a bankruptcy process largely controlled by creditors, not public officials.[256]

iv. Permanent Federal Bankruptcy

Federal bankruptcy was stuck in a cycle of enactment and repeal for much of the nineteenth century, yet it was more entrenched than ever by century's end. Within years of the 1898 Act's passage, over 16,000 federal

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[248] SKEEL, DEBT'S DOMINION, *supra* note 6, at 41–42; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 25–26. Partnership and small corporate debtors were also subject to involuntary liquidation, and partnerships could file voluntarily as well. *Id.* at 26. Congress prohibited involuntary filings against banks, railroads, and insurance companies out of an awareness that such firms required reorganization. Lubben, *supra* note 56, at 374.

[249] SKEEL, DEBT'S DOMINION, *supra* note 6, at 39–41.

[250] *See id.* at 42–43 (describing efforts to reconcile debtors' and creditors' interests); Freyer, *supra* note 56, at 758–59 (discussing the protections afforded to debtors engaged in farming and agriculture).

[251] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 26 & n.171.

[252] SKEEL, DEBT'S DOMINION, *supra* note 6, at 46; Lubben, *supra* note 56, at 387; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 24 ("The 1898 Act . . . severely limited the number of grounds for denial of discharge. Furthermore, very few debts were excepted from the discharge.").

[253] Lubben, *supra* note 56, at 386; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 26.

[254] SKEEL, DEBT'S DOMINION, *supra* note 6, at 94, 147–48.

[255] *See id.* at 40–41 ("Given [cost] concerns, and the sorry legacy of the earlier bankruptcy bills, it was clear from the outset that the creditors' only hope was to propose a bill that pared back the administrative structure to an absolute minimum.").

[256] *Id.* at 41; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 25.

bankruptcy cases were being filed per year.[257] Southern congressmen who led several failed attempts to repeal the 1898 Act were always advocates for even more pro-debtor bankruptcy laws.[258] By the 1920s, the bipartisan consensus was in favor of legislation to expand the scope of bankruptcy's jurisdictional and substantive reach.[259]

Commodification of bankruptcy lawyering was a central cause of bankruptcy's twentieth-century permanence. The 1898 Act's minimalist administrative structure drove demand for private legal services related to bankruptcy, resulting in a newly specialized personal bankruptcy bar that formed a powerful constituency for preserving federal bankruptcy.[260] Likewise, corporate reorganizations over the next half-century evolved into a system of insider dealing controlled and protected by a cadre of Wall Street banks and law firms.[261]

More broadly, the timing of national bankruptcy's emergence and permanence demonstrates its fundamental importance to markets. Increased use of limited liability to entice corporate investors undermined ideological opposition to a nationwide bankruptcy discharge, which served as a time-based limitation on liabilities incurred before bankruptcy.[262] Opposition to federal regulation, which remained trenchant in resisting safety nets for the working class and poor, was no longer deployed against the federal aggregation provided by national bankruptcy.[263]

2. *Class Actions in the Era of Mass Production*

In the second half of the nineteenth century, the American class action remained "peripheral," as the Supreme Court's approval of absentee preclusion in *Smith* simply coexisted in direct contradiction with the equity rules' prohibition on absentee preclusion.[264] No federal cases addressed class-action preclusion until the 1880s, which left state courts to innovate out of necessity. In addition to property use and exchange that produced the few binding antebellum-era class actions, industrial-era class actions expanded to accommodate conflicts involving capital investors and waged labor.[265]

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[257] Lubben, *supra* note 56, at 390 ("Within five years, more than 14,000 voluntary cases and 2,500 involuntary cases were being filed under the Act each year.").

[258] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 27.

[259] SKEEL, DEBT'S DOMINION, *supra* note 6, at 73, 94 & 256 n.38.

[260] HANSEN & HANSEN, *supra* note 21, at 30–54; *see* SKEEL, DEBT'S DOMINION, *supra* note 6, at 43, 46–47.

[261] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 66–68; Roe, *supra* note 220, at 195.

[262] *See* Plank, *supra* note 81, at 525; Cole, *supra* note 54, at 1265 (noting that "early Americans viewed bankruptcy law" as "provid[ing] limited liability for businessmen, and their creditors, who could find it nowhere else at the time").

[263] Witt, *supra* note 20, at 326, 328–29.

[264] YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 105, at 222; Hazard et al., *supra* note 109, at 1901–02.

[265] *See* Hazard et al., *supra* note 109, at 1905 (noting that "cases in this period dealing directly with res judicata became entangled" in conflicts between labor unions and employers).

First, industrial-era class actions adjudicated shared attributes of status assigned by law, which in practice meant conflicts over property use and exchange, management of property trust funds, and membership in business associations.[266] To make sure real property titles were marketable, for example, state courts constructed a new doctrine of "virtual representation" that precluded unborn future inheritors from relitigating determinations about property trusts.[267] Roughly twenty state cases in this period used a concept like adequacy of representation to decide whether absentees were bound to adjudication of shared property interests.[268]

Second, industrial-era class actions adjudicated attributes assigned by joint or identical contractual agreement. Generally, absent class members were bound to judgments that changed class-wide attributes of group membership but not to judgments that ordered discrete relief for individuals.[269] In creditors' bills or similar disputes over limited funds, courts would bind absentees on issues like fund ownership or total size but not to individual determinations like specific payouts.[270] Likewise, federal courts, in starting to face class actions between corporations and labor unions, bound absent union members to injunctions barring strike activity and common-fund determinations.[271] Similar class suits grew out of industrial-era corporate expansion and resulting conflicts among the

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[266] *See id.* at 1910 (grouping state cases during this period into "intergenerational property transfers, taxpayer suits, creditors' bills, and bills of peace"); *accord* Bone, *supra* note 105, at 275–78 & nn.150–55.

[267] *See* Hazard et al., *supra* note 109, at 1910 ("Practical utility required some conceptual device for binding the absentees. Otherwise, a trustee or living beneficiary would have great difficulty selling property or investing in development of the property from the trust corpus because title would not be marketable if the absent remaindermen were not bound . . . ."); Bone, *supra* note 105, at 276–77 & nn.153–54 (attributing doctrine's expansion to "significant benefits" of using "classwide relief . . . [for] facilitating the alienation of property").

[268] *See* Hazard et al., *supra* note 109, at 1911–12 & nn.284–87.

[269] *See* Bone, *supra* note 105, at 278–81 & nn.155–56, 158 (noting the following cases that discuss how impersonal remedies could bind absent, individual class members: *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854); *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 F. 598 (N.D. Ohio 1898); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915); *Harmon v. Auditor of Public Accounts*, 13 N.E. 161 (1877); *Kent v. Church of St. Michael*, 32 N.E. 704 (1892)).

[270] *See* Hazard et al., *supra* note 109, at 1915 & nn.301–03 (noting the following cases that explain when a binding class action is required to ensure payment of all creditors, including absentees, that an order for accounting in a case with multiple plaintiff creditors creates an interlocutory judgment favoring each creditor as if they were a named party, and that a complaint against stockholders for accounting can only be maintained when the plaintiff represents a common interest: *Guffanti v. National Surety Co.*, 90 N.E. 174 (N.Y. 1909); *Kerr v. Blodgett*, 48 N.Y. 62, 66 (1871); *Bouton v. Van Buren*, 127 N.E. 477 (N.Y. 1920)). So long as absent class members were fairly represented, courts consistently held them bound for the sake of preventing a destructive and inequitable multiplicity of suits by individual claimants. *See id.* at 1916 & nn.304–07 (collecting cases where representatives were not "fairly selected," absentees did not receive "actual and efficient protection," and "relief injured absentees while favoring representatives"). Class judgments that ordered individual fund distributions to absent claimants would not preclude future challenges by those claimants. *See* Bone, *supra* note 105, at 279, 282 & n.162 (citing *In re* Dennet, 221 F. 350, 354–57 (9th Cir. 1915)).

[271] *See* Hazard et al., *supra* note 109, at 1905–07.

dispersed mass of shareholders, managers, and creditors of public corporations.[272] Hence, the first shareholder derivative actions were brought during this period, providing a critical means for dispersed public shareholders to keep corporate managers in check.[273]

Finally, so-called "spurious" class actions sought adjudication of individual contract and tort obligations, such as claims to individualized distributions from a common fund, or claims for tort damages.[274] Courts usually would order notice to encourage joinder and refuse to bind absentees to any personalized aspects of the judgment.[275] In other words, courts treated "spurious" class actions like earlier generations of creditor suits: they forced participants to proceed on behalf of all claimants and give absentees notice of their opportunity to intervene, and refused to bind absentees to adjudication of personal, individualized issues.[276]

Of course, nowhere was this array of class action precedent synthesized into a concrete rule of absentee preclusion.[277] But while formal law was ambiguous, outside of courts commercial actors were crafting their own aggregate resolutions to new industrial torts. The spread of factories, railroads, and telecommunications resulted in thousands of people injured either in the same way during physical labor or at the same time in a single mass accident.[278] The large corporations liable for these mass torts turned to a nascent corporate defense bar for help, and soon after a personal injury plaintiffs' bar formed to provide legal services to the swelling ranks of injured Americans.[279] Together, this emergent coalition of repeat players struck a series of private deals that resembled class actions without the judge: under these private aggregate settlements, claimants gave up their right to sue in exchange for predetermined

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[272] *See id.* at 1907 (comparing *Hawkins v. Glenn*, 131 U.S. 319 (1889), which bound absent shareholders to suit by a creditor against the corporation, to *Swan Land & Cattle Co. v. Frank*, 148 U.S. 603 (1893), which denied preclusion of the absent corporation and shareholder to the creditor suit against other individual shareholders).

[273] COFFEE, *supra* note 25, at 34, 49–50 (describing derivative actions as the "chief regulator of corporate management" from the 1900s to the 1940s).

[274] *See* Bone, *supra* note 105, at 282 & n.162 ("Representative suits that did not automatically bind all class members were those in which the judgment or decree had a direct effect on the personal rights or duties of individual class members by, for example, adjudicating contract rights or obligations or determining tort liability.").

[275] *See* Hazard et al., *supra* note 109, at 1904 n.246 (noting as examples *Bacon v. Robertson*, 59 U.S. (18 How.) 480 (1856) and *Compton v. Jesup*, 167 U.S. 1 (1897)).

[276] *See* Bone, *supra* note 105, at 282 & n.164 ("The procedure in these cases was similar to the procedure in the earlier privateer suits. Notice was sent to absent class members inviting them to come in and participate, and the decree had only limited effects on those who did not make themselves parties . . . .").

[277] *See* Hazard et al., *supra* note 109, at 1923–25.

[278] Issacharoff & Witt, *supra* note 5, at 1580–81, 1596 (discussing industrial workplace injuries and "mass torts such as dam breaks, mine explosions, and train wrecks").

[279] *Id.* at 1581.

compensation based on group-level attributes, categorical rules-of-thumb, and actuarial statistics.[280]

As it had in *Smith v. Swormstedt* seventy years prior, the Supreme Court in *Supreme Tribe of Ben-Hur v. Cauble* again stated that absentee preclusion was possible with adequate representation in the specific context of a novel commercial dispute.[281] The Court in *Ben-Hur* confronted one of "a flood" of suits challenging the fee structures and penalties imposed on members by fraternal benefit associations, meaning that same issue was being litigated again and again.[282] To facilitate use of these new trust-like devices, the Court allowed a prior class judgment to bind all members "properly represented,"[283] but it failed to explicate or marshal any good case law, leaving the law of class action preclusion as muddled as ever.[284]

3. *Depression-Era Bankruptcy*

i. Individuals and Small Businesses

Consumer credit first became widely available in the early twentieth century, which led directly to steep annual increases in the volume of individual bankruptcy filings prior to and during the Depression.[285] Far less stigma attached to bankruptcy as a result, and far more people viewed bankruptcy as a tool more for debtor relief than for creditor collection. For the first time, public advocates argued that debtors deserved discharge because they were victims of aggressive lenders, rather than because of their import to future commerce.[286]

Congress responded by revamping individual bankruptcy to accommodate the explosion of consumer credit. In the early years of the Depression, Congress expanded protections specifically for bankrupt farmers who pledged their land to finance their borrowing.[287] Congress also clarified and beefed up the power of landowning or wage-earning debtors to negotiate a consensual readjustment with a majority of creditors.[288]

The expanding use and importance of wage labor also drove individual bankruptcy's Depression-era growth. New Deal legislation introduced a new method of personal bankruptcy by which debtors and creditors agreed to a

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[280] *See id.* at 1580–89.

[281] 255 U.S. 356, 366–67 (1921); s*ee* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 430 n.256 (2001) (arguing that *Ben-Hur* exhibits the Court's comfort with aggregation of claims related to insurance business).

[282] Hazard et al., *supra* note 109, at 1927–28.

[283] *Ben-Hur*, 255 U.S. at 367.

[284] Hazard et al., *supra* note 109, at 1929–37.

[285] SKEEL, DEBT'S DOMINION, *supra* note 6, at 189–91.

[286] *See* HANSEN & HANSEN, *supra* note 21, at 8–17 (discussing consumer bankruptcy rates and views of consumer discharge).

[287] The Supreme Court upheld these protections as a valid use of the Bankruptcy Clause. Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 28.

[288] *Id.* at 29–30.

repayment plan that would maximize the debtor's future earning potential.[289] Creditors started to prefer "repayment" over "fresh start" because, for the first time, enough individual debtors maintained wage-earning jobs during and after their bankruptcies.[290] Personal bankruptcy rates in the ensuing decades were highest in states that most empowered creditors to access a debtor's postbankruptcy wages.[291]

With broad support from commercial interests, pro-debtor advocates, and the bankruptcy bar, Congress's expansion of individual bankruptcy went basically untouched by a conservative Supreme Court otherwise hostile to big government.[292] Meanwhile, the same New Deal Congress that insured industrial and old-age risks through administrative systems of workmen's compensation and social security opted to leave insolvency risk to the courts and private bankruptcy lawyers.[293] In part this reflected the success that the emergent personal bankruptcy bar had in defeating several New Deal proposals for an administrative agency to oversee federal bankruptcy.[294]

ii. Corporations

Once the Great Depression sparked mass distrust of financial markets, the Roosevelt Administration and Congress engaged in a major overhaul of corporate bankruptcy.[295] In 1933 and 1934, Congress codified the equity receivership model of reorganization—first for railroads, then for all corporations—in legislation the Supreme Court upheld.[296] Almost immediately, creative lawyers used the new provisions to push through a railroad reorganization that discharged creditor claims against both the railroad *and* the railroad's nonbankruptcy guarantor—the first nondebtor (or third-party) release of its kind.[297]

Spurred by a massive SEC study of the collusive culture permeating reorganization practice,[298] Congress in 1938 took aim at Wall Street's iron grip by empowering judges and SEC administrators to oversee

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[289] Freyer, *supra* note 56, at 759. *See generally* HANSEN & HANSEN, *supra* note 21, at 60–77 (describing Chapter 13 debates). `

[290] Lubben, *supra* note 56, at 393–94; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 27.

[291] *See generally* HANSEN & HANSEN, *supra* note 21, at 30–77 (discussing effects of state garnishment laws on bankruptcy rates from 1900 to 1940).

[292] SKEEL, DEBT'S DOMINION, *supra* note 6, at 44–47; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 48–50.

[293] Witt, *supra* note 20, at 331–32.

[294] *Id.*; SKEEL, DEBT'S DOMINION, *supra* note 6, at 92–93.

[295] Lubben *supra* note 56, at 391–93.

[296] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 28.

[297] *See* Stoll v. Gottlieb, 305 U.S. 165, 168 (1938) (describing a petition filed on June 20, 1934, under the newly enacted Chapter 77B of the Bankruptcy Act); Epling, *supra* note 18, at 1749 (citing *Stoll* as the first nondebtor release).

[298] *See generally* SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1936–1940).

reorganizations of public corporations.[299] Consequently, starting in the 1940s, plans of reorganizations were crafted and evaluated by judges and court-appointed trustees, not by litigants or the debtor's management. Public officials determined the reorganizing firm's potential value and distributed that value among the debtor, creditors, and shareholders, without deference to private bargaining before or during the bankruptcy.[300]

4. *Depression-Era Class Actions*

A revamped federal class-action procedure, Rule 23 of the Federal Rules of Civil Procedure, was enacted in 1938.[301] The new rule set forth three types of class actions—"true," "hybrid," and "spurious"—but like its predecessors, the rule did not provide much in the way of forward guidance, especially because it remained silent on the preclusive effect of class action judgments.[302] The rule drafters also integrated the derivative action into a special subsection for public shareholders to sue corporate managers.[303]

In practice, "true" class actions included suits for injunctive or declaratory relief brought by and against members of noncorporate businesses, labor unions, investor groups, manufacturers, and recipients of trust, bond, and maritime proceeds.[304] Courts repeatedly certified true class actions and treated them as binding on absentees.[305] "Hybrid" class suits were the nonbankruptcy vehicle for aggregating creditor claims to the same property, usually similarly situated bondholders.[306] As they did with nineteenth-century creditors' bill suits, courts treated hybrid class actions as binding on absentees but also forced the class representatives to give notice and solicit absentees to encourage participation before final judgment.[307]

"Spurious" class actions became a vehicle for market-related contract damages and usually did not bind absentees.[308] Most common were wage-and-hour suits under the Fair Labor Standards Act of 1938 (FLSA), brought by and against groups of employees who had signed standardized

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[299] *See* SKEEL, DEBT'S DOMINION, *supra* note 6, at 101–27; Lubben, *supra* note 56, at 398–99; Troy A. McKenzie, *"Helpless" Groups*, 81 FORDHAM L. REV. 3213, 3222 (2013).

[300] Roe, *supra* note 220, at 196–98.

[301] FED. R. CIV. P. 23 (1938) (amended 1966); *see* Resnik, *"Vital" State Interests*, *supra* note 24, at 1783.

[302] Hazard et al., *supra* note 109, at 1938, 1940–42.

[303] FED. R. CIV. P. 23(b) (1938) (amended 1966)*; see* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1752 (4th ed. 2022).

[304] *See* COFFEE, *supra* note 25, at 56–59.

[305] Hazard et al., *supra* note 109, at 1937–38.

[306] *See* COFFEE, *supra* note 25, at 55 (noting that federal bankruptcy made hybrid class actions less relevant).

[307] *See* 7A WRIGHT & MILLER, *supra* note 303, § 1752.

[308] The suits also stayed open for absentees to intervene and take advantage of *favorable* rulings, until the final judgment issued. COFFEE, *supra* note 25, at 56 & 251 n.10.; Hazard et al., *supra* note 109, at 1938.

contracts with the same employer.[309] Further spurious suits included securities fraud claims brought by public investors, antitrust claims brought by competing businesses, and claims to employment fund benefits.[310] Additionally, for the first time, tort victims of the same accident could litigate together in a formal class action, although again without the ability to bind absent class members.[311]

Overall, the 1938 overhaul of the federal class action rule did not clarify or change much of anything.[312] The Supreme Court's ruling in *Hansberry v. Lee* a couple of years later did at least establish a clear constitutional rule: an absent party that was *not* "adequately represented" in a prior class suit cannot be bound to the judgment in that suit.[313] But litigants were still left unclear as to whether absentee preclusion was permitted so long as there *was* adequate representation.[314] Like past advancements in class action preclusion, the outcome in *Hansberry* was mandated not by logic or legal doctrine but rather by the need to facilitate market exchange—in this case, the transfer of real property subject to collusive covenants.[315]

C. *Mass Market Aggregation*

The postwar years gave rise to the age of mass markets. After the war, consumer demand for automobiles and household goods surged because of pent-up savings from wartime rationing and pervasive employment, leading into a new era of mass consumption through chain stores like Sears.[316] New standardized forms of contracts and credit instruments fueled mass consumption. Off-the-shelf goods were increasingly sold using "shrinkwrap" contracts, the fine-print terms of which could not be accessed without paying for and opening the product.[317] The Uniform Commercial

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[309] 29 U.S.C. § 203; *see* Resnik, *"Vital" State Interests*, *supra* note 24, at 1784 (recounting the FLSA's creation of minimum wage-and-hour requirements covering roughly eleven million employees at the time of enactment). While the FLSA was effectively the "first" class action statute, the wage laborers it benefited received a vastly watered-down style of class suit, one that could never bind absentees. *Id.* at 1785–87 (noting that 1940s courts allowed spurious class actions under the FLSA but "insisted that each employee assent to representation by a fellow employee"); *see also* David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 676 (2018) (noting that the FLSA was the "first statute contemplating class action enforcement").

[310] 7A WRIGHT & MILLER, *supra* note 303, § 1752 n.44.

[311] *Id.*

[312] Hazard et al., *supra* note 109, at 1937–41; *see, e.g.*, Burbank & Farhang, *supra* note 26, at 1499.

[313] 311 U.S. 32, 42–43 (1940).

[314] *See* Hazard et al., *supra* note 109, at 1945–46 (noting that *Hansberry* "provided little guidance" on what constituted representation adequate to justify nonparty preclusion).

[315] *Cf. id.* at 1942 (noting that *Hansberry* "implicitly took issue" with leading class-action cases and commentary).

[316] Martin, *supra* note 163, at 13–14 (discussing the birth of the consumer class in the United States).

[317] *See* Oren Bar-Gill et al., *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7, 20 (2017) (tracing the rise of consumer litigation over shrinkwrap contracts since 1954).

Code offered the first attempt at synthesizing the array of state-level sales and credit practices into one coherent body of law for the national market.[318]

Nationwide market exchange had a "homogenizing" effect on consumer culture, as consumerism pervaded even the most important facets of civic identity.[319] Civil rights activists took the tools of industrial-era labor organizing outside of the factory and put them to use "in venues of consumption, through boycotts and sit-ins."[320] When Congress finally enacted the Civil Rights Act of 1964, it did so only under its *commerce* power, and codified the race and sex protections therein as protections against *workplace* discrimination.[321]

1. *Bankruptcy for the Masses*

i. Individuals and Small Businesses

Demand for consumer goods translated into demand for consumer credit and, eventually, an uptick in personal bankruptcy in the 1950s.[322] But consumer debt truly exploded as state legislatures and courts enabled the use of installment credit, debit cards, and wage garnishment by retailers and commercial banks, causing annual bankruptcy filings to jump from roughly 25,000 in the early 1950s to roughly 175,000 by the late 1960s.[323] Heading into the 1970s, the spike in consumer debt put pressure on Congress to undertake the first major reform of the bankruptcy laws since the Depression.[324]

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[318] Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1030 (2002); *see, e.g.*, SCOTT & TRIANTIS, *supra* note 53, at 17–21 (noting that the drafting process of UCC credit provisions "came to be dominated by representatives of banking and commercial interests," while the drafting and revision process of UCC sales provision has pit industry against consumer interests).

[319] LEVY, *supra* note 50, at 489 (summarizing formation of "national . . . consuming culture" and mass media).

[320] *Id.* at 489–90 (describing "commodification of politics" in which "civic identity became entangled with consumption" and the lines "blurred" between "citizen and customer").

[321] *Id.* at 535 (explaining that Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, specifically prohibited discrimination on the basis of race, color, religion, sex, and national origin in the workplace); Reba Graham Rasor, *Regulation of Public Accommodations via the Commerce Clause – The Civil Rights Act of 1964*, 19 SW. L.J. 329, 329–30 (1965) (explaining that Congress relied on their powers under the Commerce Clause to define a place of public accommodation as "any of four types of businesses if its operations 'affect commerce'"); *cf.* Kay & Mott, *supra* note 192, at 95–96 (analyzing the manner in which antidiscrimination laws treat victims as "a series of individuals, each the subject of a formal right to equal pay," without providing "concrete means" for group-level remedies).

[322] *See* HANSEN & HANSEN, *supra* note 21, at 107; SKEEL, DEBT'S DOMINION, *supra* note 6, at 136–37.

[323] Martin, *supra* note 163, at 10, 13–15.

[324] SKEEL, DEBT'S DOMINION, *supra* note 6, at 136 (attributing "sudden interest" in "global reconsideration of the bankruptcy laws" to record-high levels of bankruptcy filings in the 1960s); *accord* HANSEN & HANSEN, *supra* note 21, at 108 (noting that reformers sought "to address concerns about the rapid rise in consumer bankruptcy").

The Bankruptcy Reform Act of 1978 ended up as the first overhaul of federal bankruptcy outside the context of acute economic crisis.[325] Both creditor and debtor interest groups supported provisions in the Act designed to incentivize individual debtors to negotiate repayment plans based on future income.[326] The commercial credit industry also got Congress to prohibit the discharge of several discrete types of debt.[327] Promoted as technical improvements to the bankruptcy process, none of these changes engendered any organized opposition.[328]

ii. Corporations

After World War II, corporations that filed for reorganization came under the supervision of public bankruptcy officials.[329] Bankruptcy judges ousted incumbent managers and appointed outside trustees to take over debtor operations at the start of a bankruptcy case.[330] These bankruptcy judges worked with SEC experts to value the debtor's assets and liabilities.[331] This reliance on judicial administration, with no heed to litigant consent or input from market actors, reflected lingering Depression-era mistrust of corporations and the relative dormancy of postwar capital markets.[332]

Corporate owners, managers, and lawyers chafed immediately at the extensive oversight and, where possible, sought out the pre-New Deal culture of insider dealing. Public corporations often tried to file for bankruptcy under the federal chapter for privately held companies, which gave litigants far more control over the reorganization process.[333] After a tragic fire in 1944, the Ringling Brothers Circus used Connecticut's equity receivership law to pull off the earliest example of the mass tort bankruptcy, something that would not have been possible under the newly revamped federal law.[334]

The 1978 Act's new system of corporate bankruptcy, Chapter 11, greatly empowered private litigants to negotiate and confirm plans of reorganization without participation or heavy scrutiny from bankruptcy

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[325] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 32 (discussing the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549).

[326] *See, e.g.*, *id.* at 35. The Act allowed debtors to honor certain debts post-bankruptcy *even if* the debt was purportedly discharged, and it empowered repayment debtors to discharge fraudulent debts. SKEEL, DEBT'S DOMINION, *supra* note 6, at 154–56.

[327] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 35–36.

[328] SKEEL, DEBT'S DOMINION, *supra* note 6, at 150–51.

[329] Roe, *supra* note 220, at 198 (dubbing the 1940s to the 1970s as the "age of bankruptcy-by-administration").

[330] *Id.* at 197 ("[T]he judge, with a valuation number in hand, could mechanically figure out how far down the firm's creditor hierarchy to go until value was fully allocated.").

[331] *Id.*

[332] *Id.* at 198; *see* SKEEL, DEBT'S DOMINION, *supra* note 6, at 171–72 (noting that the Great Depression had already "winnowed out" many firms).

[333] Roe, *supra* note 220, at 201–02; SKEEL, DEBT'S DOMINION, *supra* note 6, at 162–63.

[334] *See* McKenzie, *Mass Tort Bankruptcy*, *supra* note 4, at 59, 60–61, 76–77.

judges.[335] Whereas most corporate debtors before the 1950s were bond-financed ventures providing critical infrastructure like transportation, communications, and public utilities, by the late 1970s most corporate debtors were stock-financed industrial, retail, or operational firms dealing mostly with other market actors.[336] Lawmakers and courts had less reason, given this heavily commercial context, to replace debtor-creditor negotiations with judicial evaluations.

Chapter 11 was meant to accommodate the bankruptcy of large public firms, in which a centralized small group of officers and managers represented the debtor, on behalf of a dispersed large group of shareholders, against various dispersed classes of different creditors.[337] To overcome these coordination challenges, the new Code left corporate management in charge of business operations during bankruptcy and provided an exclusive period in which only the debtor could propose a reorganization plan to creditors.[338] The Code further sidelined the bankruptcy court if a majority of creditors (grouped into classes based on similar debt types) approved the debtor's plan; if so, judicial review of valuation, priority, and distribution would be bypassed entirely.[339]

2. *Rise of the "Modern" Class Action*

i. Class Actions in the 1950s and 1960s

The Supreme Court's 1950 decision in *Mullane v. Central Hanover Bank and Trust Company* was, like *Hansberry* before it,[340] another halting step toward preclusion of absent class members.[341] And like its opinion in *Ben-Hur*, the Court in *Mullane* hinted at an expansive preclusion rule in the process of facilitating a new breed of commercial transaction.[342] *Mullane* was not a case about class actions proper, but in affirming a New York statute allowing investment companies to settle disputes on behalf of low-income trusts without individual notice to every trust beneficiary, the Court confirmed that certain arrangements could justify preclusion of absent

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[335] Roe, *supra* note 220, at 201–03 (characterizing the 1978 Code as "deal-oriented").

[336] SKEEL, DEBT'S DOMINION, *supra* note 6, at 172; Roe, *supra* note 220, at 203.

[337] *See* Lubben, *supra* note 56, at 399–400, 399 n.433.

[338] Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 35 ("The new Chapter 11 left the debtor in possession, with a trustee to be appointed only for cause; gave the debtor in possession a limited exclusive period to file a reorganization plan; adopted a modified form of the absolute priority rule, to be applied only when a class dissents; [and] limited the involvement of the SEC in reorganization cases . . . .").

[339] Roe, *supra* note 220, at 202.

[340] *See* Hansberry v. Lee, 311 U.S. 32, 44–46 (1940).

[341] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319–20 (1950).

[342] *See* Resnik, *"Vital" State Interests*, *supra* note 24, at 1790–91 ("[T]he *Mullane* Court changed due process doctrine to facilitate the viability of then-new economic products . . . .").

litigants without violating the Due Process Clause.[343] At least in the case of state banking trusts, individual notice to known claimants and public notice reasonably calculated to reach unknown claimants were sufficient to justify the preclusion of every beneficiary in any state.[344]

Business disputes continued to generate most class actions. Private investors began experimenting in the late 1950s with "spurious" class actions to sue each other for antitrust violations and securities fraud.[345] Courts in the late 1960s further buoyed investors by allowing private securities fraud suits based on public statements made to "the market."[346] Without the capability to bind absent shareholders, however, the "spurious" class action was terrible for defendants and ineffective for class representatives.[347]

What remained clear was that corporate interests wanted damages aggregation with preclusion. Resistance to the possibility of binding mass tort class actions came not from the business community but from commentators who worried that defendants could settle cheaply by paying off class counsel.[348] Those fears were likely born from the clear uptick in private aggregation of automobile claims during the postwar years: personal injury liability insurance companies and corporate defense lawyers were independently resolving car-crash claims through "rules-of-thumb, settlement formulae, and claims categories for the ready resolution of ordinary cases."[349]

ii. The "Golden Age" of Class Actions (1966–1980)

Rule 23 was redrafted in 1966 because of consensus that the old version was more confusing than constructive.[350] The drafters' main concern was facilitating civil rights class actions, which they did in the new Rule

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343 *See* Resnik, *Reorienting*, *supra* note 28, at 1036–37, 1037 n.94 ("The point was to lower administrative costs for beneficiaries as well as for banks and to expand investment options, while closing off the potential for an array of claims.").

344 *See id.* at 1037 ("*Mullane* approved . . . the ability of New York to adjudicate the rights of all the beneficiaries and thereby permitted what today we call nationwide jurisdiction."); John Leubsdorf, *Unmasking* Mullane*: Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS L.J. 1693, 1730 (2015) (discussing the *Mullane* principle "that one can cut off the claims of thousands of nonparticipating people in a proceeding, but only if notice by mail goes to those whose addresses are known").

345 COFFEE, *supra* note 25, at 56 & 251 n.11.

346 *Id.* at 45, 58–59 & 252 nn.18–19 (describing expansion of the private right of action for securities fraud beyond "face-to-face transactions").

347 *See id.* at 59 (suggesting lack of preclusion was one reason for the revision of Rule 23 in 1966).

348 David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, 165 U. PA. L. REV. 1565, 1568 (2017) [hereinafter Marcus, *Mass Tort Class Action*].

349 Issacharoff & Witt, *supra* note 5, at 1614 ("[B]y the mid-1960s, automobile accident tort claims were being settled with much greater speed than other personal injury tort claims."); *id.* at 1609–14 (documenting push for aggregate treatment of car-crash claims by insurers and repeat personal injury lawyers from the 1930s to 1960s).

350 FED. R. CIV. P. 23 (1966); HENSLER ET AL., *supra* note 12, at 12 & 38 n.15.

23(b)(2).[351] They also sought to codify, with the new Rule 23(b)(1), a *Mullane*-style class action for fund administrators who needed aggregation of a mass of claimants.[352] These two new class types fixed the problems that plagued suits previously deemed "spurious"—they extended preclusive effect to absent class members while eliminating their rights to notice and to opt out.[353]

These changes ushered in a brief string of meaningful victories for civil rights plaintiffs in the 1970s, at least when the claims arose from common employment contracts. Standardized wages made it possible to include claims for back pay in classes certified under Rule 23(b)(2), which was meant only for injunctive or declaratory relief, not money judgments.[354] And for a time lower courts were generally lax in allowing employees to challenge a broad array of allegedly discriminatory policies and decisions—deeming appropriate class treatment for any claims that "kept the litigation focused on the [employer's] aggregate conduct, not individual litigant circumstances."[355] It took the Supreme Court only a few years to put an end to such laxity, however, in a decision requiring a much closer connection between the named class members and the employees whom they sought to represent.[356]

Owners and managers of public corporations continued to receive special treatment under Rule 23.1, which integrated derivative suits and class actions.[357] Like the prior generation of derivative actions, actions under Rule 23.1 were expensive and usually settled quickly by those in control of the litigation—the plaintiffs' lawyers representing the shareholder class and the corporate managers named as defendants.[358] These suits frequently ended in settlements that compensated claimants and lawyers from the corporation's assets, leaving untouched the personal assets of managers whose conduct exposed the corporation to liability. In effect these settlements both bound and shortchanged absent shareholders.[359]

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351 COFFEE, *supra* note 25, at 60; Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 500 (2016).

352 *See* Resnik, *"Vital" State Interests*, *supra* note 24, at 1790–91.

353 *See* COFFEE, *supra* note 25, at 59–60 (explaining how drafters fixed the problems that blunted the utility of "spurious" class actions for civil rights claims); Resnik, *"Vital" State Interests*, *supra* note 24, at 1790–91 (noting drafters' similar motivations in (b)(1) and (b)(2) drafting).

354 David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 640 (2013) [hereinafter Marcus, *History Part I*].

355 *Id.* at 640–41.

356 *See* E. Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403–06 (1977) (requiring that a class representative show the same injury and interest as class members).

357 FED. R. CIV. P. 23.1 (1966); COFFEE, *supra* note 25, at 45 (describing the replacement of derivative suits by class actions starting in the 1970s).

358 COFFEE, *supra* note 25, at 41–42.

359 *Id.* at 42–45, 50 & 265 n.60.

Rule 23(b)(3) replaced the "spurious" class action as the vehicle for "money judgment[s] in commercial litigation."[360] With seemingly little attention, the drafters gave (b)(3) class actions preclusive effect with respect to absentees, but they also made it harder for plaintiffs to certify (b)(3) classes in the first instance.[361] These changes helped shareholders and other commercial plaintiffs seeking damages via class actions but, arguably, even more helped defendants, who could now both oppose certification *and* try to bribe class counsel to take a settlement that bound absentees to low payouts.[362] Worried that defendants would do just that, the drafters' commentary warned that only "very exceptional" mass torts would qualify for (b)(3) certification.[363] By denying certification in most cases, courts could protect absent class members whose individual tort claims would be shortchanged by class representatives.[364]

Although it served those defending a mass of pending lawsuits, the new (b)(3)-style class action terrified potential defendants, who hated the notion that class actions would be used to enable filing of previously nonviable claims, instead of being used to provide an optional procedure for streamlining adjudication of already-filed claims.[365] Corporate executives and business-group representatives sounded alarms in the media, warning of a litigation onslaught that would stymie American capitalism.[366] These dire predictions did not bear out, needless to say.[367]

Now with the ability to bind absentees, antitrust and securities class actions did become more frequent under the new Rule 23(b)(3).[368] Private antitrust class actions triggered the first popular comparison of class actions to "legalized blackmail."[369] Federal courts accommodated bankers and investors by removing evidentiary obstacles to certification of securities

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[360] *Id.* at 60–61.

[361] *See* Burbank & Farhang, *supra* note 26, at 1500 & n.26.

[362] *See* COFFEE, *supra* note 25, at 62–63 (recounting (b)(3)'s revised emphasis on "judicial economy" and empowerment of defendants to negotiate favorable settlements with class counsel); Burbank & Farhang, *supra* note 26, at 1501 & n.29 (discussing the advantages to defendants in revised (b)(3) procedure); Marcus, *History Part I*, *supra* note 354, at 605 (noting that the only contemporaneous concern from the drafters over (b)(3) revisions was fear it would help defendants).

[363] Marcus, *Mass Tort Class Action*, *supra* note 348, at 1568 (citing FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment).

[364] COFFEE, *supra* note 25, at 62; HENSLER ET AL., *supra* note 12, at 24.

[365] HENSLER ET AL., *supra* note 12, at 18 (linking business-group concerns to potential for (b)(3) classes).

[366] *Id.* at 15–19 (analyzing surge in class action criticisms in the "popular and business presses," including *Fortune*, *The Wall Street Journal*, and *The New York Times*).

[367] Class action filing *rates* rose in the early 1970s, but this was no deluge that overwhelmed courts—class actions still comprised a single-digit percentage of civil cases filed in key federal district courts. *See* COFFEE, *supra* note 25, at 63; HENSLER ET AL., *supra* note 12, at 18 (arguing that empirical research "generally did not support claims that federal courts were deluged with class actions in the decade following the revision of Rule 23").

[368] Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 93 N.C. L. REV. 906, 908–09 (2018).

[369] Marcus, *History Part I*, *supra* note 354, at 635–36; *see* COFFEE, *supra* note 25, at 45–46.

fraud class actions, which reduced everyone's litigation costs, and by further requiring the class to send out and pay for individual notice to every class member, which increased the costs for class members only.[370]

The individual notice requirement was most burdensome on consumers with small damages claims, and indeed, in contrast to accommodation of investors, federal courts initially resisted Rule 23's use by consumers.[371] The Supreme Court quickly made clear that the federal courts did not have diversity jurisdiction over small-dollar state-law claims even when aggregated together,[372] which was "widely perceived" as a rebuke to the new (b)(3)-style of class action.[373] Since most consumer protection laws at the time were at the state level, the Court had effectively reserved the new Rule 23 for high-spending consumers only.[374]

In the age of mass markets, however, consumers did not have to be rich to flex their collective political power. Bipartisan pushback from Congress dismantled the Court's restrictive approach to consumer claims, resulting in federal regulation of lending, credit reporting, and consumer warranties.[375] By the late 1970s, Congress had provided a menu of consumer claims that federal courts had little choice but to certify under Rule 23.[376]

After a heated start, doctrine and practice under the new Rule 23 were somewhat stable by 1980.[377] Compared to a decade prior, the Supreme Court had cut back civil rights class actions and, in tandem with Congress, expanded both the scope and the plaintiff-side costs of securities and consumer class actions.[378] Both defense and plaintiff interests were thus

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370 *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); *see also* Marcus, *History Part I*, *supra* note 354, at 634–37 (discussing bifurcation, presumption of reliance, and *Eisen*).

371 *See* HENSLER ET AL., *supra* note 12, at 20 (noting that *Eisen* is widely seen as repudiation of small-claim (b)(3) classes).

372 Snyder v. Harris, 394 U.S. 332, 338 (1969); *see also* Zahn v. International Paper, 414 U.S. 291, 300 (1973) (rejecting pendent jurisdiction for class member claims).

373 HENSLER ET AL., *supra* note 12, at 16. The rebuke was indeed specific to (b)(3) classes, because the Court made sure to carve out an exception for state-law claimants pursuing a "common fund" that preserved federal jurisdiction for (b)(1) classes. *See* Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. 798, 831 (2014).

374 Marcus, *History Part I*, *supra* note 354, at 627–28 (explaining how the Court's decisions in "*Snyder* and *Zahn* put all but the most valuable of state law claims beyond Rule 23's reach"). Proposed legislation around the same time would have made the bias explicit by putting minimum value requirements on individual class member claims. *See* Burbank & Farhang, *supra* note 26, at 1504–05.

375 HENSLER ET AL., *supra* note 12, at 16–17; Burbank & Farhang, *supra* note 26, at 1504.

376 Marcus, *History Part I*, *supra* note 354, at 649. Even still, some lower federal courts continued to deny certification of Truth in Lending Act claims explicitly to protect commercial lenders from high statutory penalties. *Id.* at 627–30. Similar damages caps on various federal claims were proposed by members of both parties in the 1980s. Burbank & Farhang, *supra* note 26, at 1506.

377 HENSLER ET AL., *supra* note 12, at 22.

378 Marcus, *History Part I*, *supra* note 354, at 644 (reviewing existing data showing "significant decreases in filing rates . . . , except for securities class actions"). According to a snapshot of the federal dockets in 1972, civil rights comprised the plurality of then-pending class action suits. COFFEE, *supra*

comfortable with practice under the rule, as were judges.[379] Business groups were no longer warning of economic collapse—instead they were publicly praising the class action's ability to resolve cases of mass liability.[380]

Perhaps most importantly, the waters were so calm because the new Rule 23 did not cause an avalanche of mass tort class actions.[381] The few classes certified in the 1970s arose from mass *accidents*—one-off events with a finite and ascertainable group of victims, such as airplane crashes and building collapses.[382] By contrast, *dispersed* tort claims resisted easy aggregation. Although traceable to the same defendant-side conduct—widespread distribution of defective products (like medical devices), or widespread exposure to toxic substances (like asbestos)—dispersed tort claims arose at different times, in different jurisdictions, and under different circumstances.[383] Consequently, courts uniformly refused to certify classes of dispersed claims for most of the 1970s, shunting them off like the "spurious" class actions of old for pretrial management and eventual dismissal.[384]

D. *Transactional Aggregation*

Aggregate litigation's creation, use, and durability reflect its role as a basic piece of the legal infrastructure needed to sustain markets. Thus, functional-market needs explain the class action's original use—as a vehicle to clarify, dispute, or enforce common legal attributes of property and standardized contracts.[385] And they further explain American bankruptcy's

note 25, at 63. But during the 1980s, "the Title VII class action all but disappeared." Marcus, *History Part I*, *supra* note 354, at 647.

379 Marcus, *History Part I*, *supra* note 354, at 644–46 (reviewing measures of class action's stability); Burbank & Farhang, *supra* note 26, at 1512–13 (same).

380 HENSLER ET AL., *supra* note 12, at 22–23 (describing a period of "relative tranquility" including pullback from "the business community, which had led the charge against class actions"); Marcus, *History Part I*, *supra* note 354, at 646 (documenting pro-Rule 23 statements by U.S. Chamber of Commerce and other "[d]efense interests").

381 HENSLER ET AL., *supra* note 12, at 24.

382 Marcus, *History Part II*, *supra* note 41, at 1823 (2018).

383 *Id.*

384 HENSLER ET AL., *supra* note 12, at 23; Marcus, *Mass Tort Class Action*, *supra* note 348, at 1568–69. State courts followed essentially the same pattern. *Id.* at 1572.

385 The market-based account helps reconcile competing views from the two leading historians of the pre-modern class action. One view, championed by Stephen Yeazell, is that courts made pragmatic, case-by-case evaluations of whether specific class suits provided representation for absentee "interests." YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 105, at 222, 224; *accord id.* at 207–10 (discussing the "interest" concept as representing abstract or pragmatic social goals); Hazard et al., *supra* note 109, at 1850, 1856 (arguing that nonconsensual preclusion required "identity" or "adequate representation" of interests). In response, Robert Bone contended that courts "struggled in a coherent, if internally conflicted way" to distinguish between "personal" and "impersonal" aspects of legal claims—the former requiring individual consent, the latter amenable to absentee preclusion. Bone, *supra* note 105, at 272 & n.146; *accord id.* at 218 ("[S]ocial context never played the dominant role Professor Yeazell supposes it did . . . . The *central* point of continuity in representative suit history has been the search for

emergence and longevity as a product of expanding markets and the homogenizing legal relations left in their wake.[386]

Covering the past four decades, this final chapter tells much the same story. Starting with William Rubenstein's "transactional model," scholars have documented the ways litigants, lawyers, and judges treat aggregate litigation as a market transaction—a process that expressly values finality over accuracy or participation, in which lawyers bid and bargain over settlement terms rather than work up evidence and narrow issues for trial.[387] The higher a litigant's willingness to pay for settlement terms, the more likely that litigant will secure their terms of choice, including the settlement's preclusive effects.[388] The upshot is that absentee preclusion itself now resembles a "commodity" that, like any market good, goes most bountifully to the highest bidder.[389]

1. *Bankruptcy in the Era of Absolute Finality*

Enactment of the 1978 Code and deregulation of credit cards together ushered in yet another spike in consumer debt and individual bankruptcy filings in the 1980s and '90s.[390] The commercial credit industry responded by lobbying for reforms that would force wage-earning debtors to repay

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'impersonal' forms of litigation . . . ."), 233 & n.36, 247 n.78. The presence of property and market relations is the common thread between these interpretations. Social groups were defined in part by their legal attributes, and some groups—those contracting about property ownership, in particular—took on many legal benefits and burdens that were standardized in form and thus impersonal. *Cf.* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 666 (2014) (comparing Yeazell's focus on class members' economic and social interests with Bone's focus on "formal relationships among legal rights, duties, and remedies").

[386] *See, e.g.*, COLEMAN, *supra* note 63, at 248 ("The timing of the acceptability of and necessity for [bankruptcy laws] varied from place to place and from interest group to interest group. Nevertheless, as American life in general and debtor-creditor relations in particular become inexorably commercialized, depersonalized, and channeled through the corporate, legalistic, and institutionalized structure of commercial finance, the need for bankruptcy systems became imperative."); Witt, *supra* note 20, at 318 ("For those in the Jeffersonian tradition, part of the outrage of federal bankruptcy laws rationalizing and commercializing power in the nineteenth century seems to have been that it reconstituted everyone as a merchant."); Sauer, *supra* note 130, at 336 (noting that the 1898 Act "reflected the impersonal social dynamic that a maturing capitalist brought in its train"). Just as the market-based account reconciled views of the pre-modern class action, *see supra* note 385, early American bankruptcy debates formed around competing visions of the same fundamental activity—market exchange. *See* COLEMAN, *supra* note 63, at 286 ("[T]hough the debate focused on such matters as English versus American style, procedural and technical matters, and constitutionality, *the real struggle* was between the impersonal and barely perceived system, order, and rationality and the older forces of personal responsibility and respectability." (emphasis added)).

[387] *See* Rubenstein, *supra* note 281, at 372–73 (summarizing the transactional model's descriptive trends).

[388] *See* NAGAREDA ET AL., *supra* note 7, at 201–02.

[389] Rubenstein, *supra* note 281, at 372; *see* D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 483 (2016) (describing the "conventional" account that the goal of mass litigation "is to wrap up all of the claims and resolve the entire litigation in a single transaction—to essentially buy peace").

[390] HANSEN & HANSEN, *supra* note 21, at 136–37; Martin, *supra* note 163, at 16–17, 20–22.

(not discharge) credit card debts.[391] Congress eventually enacted such reforms in 2005,[392] and though significant, the reforms also reveal bankruptcy's basic entrenchment. Wholesale repeal of nationwide aggregation for bankrupt individuals is well beyond the present realm of possibility.[393]

On the corporate side, key definitional changes in the 1978 Code helped asbestos manufacturers and other mass tort defendants push through the first wave of mass tort bankruptcies in the 1980s and '90s.[394] Based on relatively sparse statutory authority, courts confirmed plans that set up trust funds to compensate all existing and future tort victims in exchange for the release of all claims related to injuries from the debtor's product, whether brought against the debtor *or* the debtor's insurance company.[395] So voracious was the need for this one-two punch of future-claims and nondebtor releases, corporate bankruptcy professionals and asbestos debtors successfully lobbied Congress to add a provision to the Bankruptcy Code approving of this approach specifically for asbestos bankruptcies.[396] Even in the face of that seeming limitation, litigants and courts have not hesitated to apply the asbestos model to other mass tort bankruptcies.[397]

Transactional bankruptcy blossomed in the 1990s as reorganization plans were increasingly prenegotiated prior to the debtor's filing, with judges relegated to "overseeing sales and approving parties' prearranged deals."[398] Corporate reorganization in the twenty-first century has gone even further, replacing complex multilateral negotiations with the ultimate market mechanism—the "whole-firm sale," a single auction of the entire firm to the

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[391] SKEEL, DEBT'S DOMINION, *supra* note 6, at 85, 187–88; Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 39–40.

[392] Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified at 11 U.S.C. § 707(b)).

[393] *See* MANN, *supra* note 20, at 29 (reviewing "durability" of the Code's "basic architecture"); Freyer, *supra* note 56, at 760.

[394] SKEEL, DEBT'S DOMINION, *supra* note 6, at 147–50, 217–18 (noting changes in the 1978 Code that encouraged managers and courts to pursue mass tort bankruptcies); Resnik, *"Vital" State Interests*, *supra* note 24, at 1799–800 ("Tort defendants such as Johns Manville (for asbestos) and A.H. Robins (the defendant in the Dalkon Shield IUD litigation) brought tort claimants into such proceedings.").

[395] *See, e.g.*, Simon, *supra* note 18, at 16 (recounting a trend in which "bankruptcy judges use a variety of Code provisions not just to settle the tort liabilities of the company that filed for bankruptcy, but also grant releases to similar firms who are facing related liabilities but have not themselves filed for bankruptcy").

[396] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4108, 4113–17 (codified at 11 U.S.C. § 524(g)); SKEEL, DEBT'S DOMINION, *supra* note 6, at 220 ("In 1994, bankruptcy professionals and the managers of Manville itself persuaded Congress to give its explicit imprimatur on the Manville solution to the question of how to bind future claimants.").

[397] *See, e.g.*, Simon, *supra* note 18, at 16 ("Third party releases and channeling injunctions have expanded beyond the asbestos context to cover other mass tort liability, notwithstanding the fact that Congress limited § 524(g) to asbestos litigation. This trend goes hand in hand with litigants' increasing reliance on bankruptcy as a tool to resolve mass tort liability.").

[398] *See* Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 428–33, 428 n.106 (2006) (extending Rubenstein's transactional model to post-1980s corporate bankruptcy).

highest bidder, who pays off the firm's prebankruptcy creditors in exchange for the unvarnished power to restructure the firm going forward.[399] Built on a single sentence in the Code authorizing debtors to sell assets piecemeal to pay critical vendors or finance operations,[400] whole-firm sales were rare, even in the 1990s, but underlying shifts in markets and technology created an environment such that, by 2007, roughly one-third of public firm bankruptcies were resolved by whole-firm sales.[401]

Transactional bankruptcy has ultimately led to an era of "absolute finality," in which aggressive bankruptcy plans are increasingly confirmed and insulated from future attacks.[402] Nondebtor releases have expanded in use and application, now applying to insurers, affiliates, distributors, and co-defendants, and they are regularly paired with injunctive relief designed to minimize future claiming.[403] Not only are transaction-based claims given more access to aggregate procedures, now agreements made *during* aggregate litigation are also given deference solely based on their status as consummated. Outside of direct appeal, there is virtually no chance of reversing any confirmed bankruptcy plan, regardless of its legality.[404]

2. *Class Action Backlash*

With little controversy and mild business support, the Supreme Court in the 1980s continued to facilitate securities and consumer class actions while limiting civil-rights class actions.[405] For damages class actions under Rule 23(b)(3), the Court rejected an attempt to prohibit multistate classes but simultaneously required that the class pay for individual notices to class members as a matter of constitutional law.[406] For plaintiffs seeking to

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[399] Roe, *supra* note 220, at 205.

[400] 11 U.S.C. 363(b)(1) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . .").

[401] Roe, *supra* note 220, at 205–06. The technique flourished during an overall boom in hostile takeovers that sought to rescue public firms by replacing (not entrenching) current management, which is exactly what the whole-firm sale accomplished. *See id.* at 208. Additionally, as investment contracts became both more complex and more liquid, a whole-firm sale to a single buyer emerged as the better alternative to dealing with an increasingly dispersed, removed, and protean population of creditors. *See id. at* 208–09 (discussing that "[t]hese two market developments (of merger market depth and claims trading liquidity) largely explain the apogee of the age of the sale.").

[402] *See generally* Albert Togut & Lara R. Sheikh, *The "Absolute Finality" Rule: Confirmation Orders After* Travelers v. Bailey *and* United Student Aids Funds, Inc. v. Espinosa, 20 NORTON J. BANKR. L. & PRAC. 2 Art. 2 (2011).

[403] *See* Simon, *supra* note 18, at 43–44; Epling, *supra* note 18, at 1768 (concluding that "[t]hird-party releases are a useful reorganization tool, and their disappearance from reorganization cases is unlikely"); Gary Svirsky et al., *supra* note 18, at 10.

[404] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079, 1084 (2022) (listing factors that combine to "mean that there is often no appellate review of key issues in bankruptcy cases"). *See generally* Togut & Sheikh, *supra* note 402 (discussing the era of "absolute finality").

[405] Marcus, *History Part II*, *supra* note 41, at 1796–97 (explaining that "[o]nly one of the conservative and business groups active in the 1980s filed an amicus brief in *Shutts*, and only one did in *Falcon*").

[406] *Id.* at 1792–93 (referencing Phillips Petrol. Co. v. Shutts, 472 U.S. 797 (1985)).

represent a class of co-employees alleging discrimination, the Court required significant evidence of class-wide discrimination *prior* to certification, which drastically decreased the odds of certification.[407]

The ground shifted when defendants started advocating for certification of dispersed mass tort classes.[408] Companies facing mass tort exposure saw no benefit in defending or trying to settle thousands of separate individual suits, a path that would be extremely expensive even in the best-case scenarios.[409] Defendants' demand for aggregation of mass torts was thus "ineluctabl[e]"—those with enough foresight filed for class certification or negotiated aggregate settlements; those without eventually fell subject to individual judgments that left them insolvent, forced to give over their assets to creditors via bankruptcy proceedings.[410]

Thus, defendants' demand for aggregation drove judges to embrace settlement of mass tort class actions, the only major expansion of class action doctrine during the 1980s.[411] A federal court in 1979 certified the first class of dispersed tort claimants under Rule 23(b)(3), permitting women injured by a defective birth control device to sue the manufacturer for damages.[412] Soon after, a few courts pushed the envelope further by certifying classes of people who were injured by medical products or exposed to toxic substances (even those who had yet to manifest an injury or file a lawsuit).[413]

Meanwhile, civil rights and antipoverty class actions generated the first wave of allegations that class actions were undemocratic vehicles for judicial imperialism.[414] Dormant with respect to all other types of class actions, the Reagan Administration actively opposed class actions alleging employment discrimination.[415] This conservative opposition advanced a vision of lawsuits as the realm of only individual, personalized disputes.[416]

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407 *Id.* at 1793 (discussing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982)).

408 Marcus, *History Part I*, *supra* note 354, at 646.

409 Marcus, *History Part II*, *supra* note 41, at 1825.

410 *Id.* Just as businesses demanded aggregation in response to industrial-era harms, this second generation of aggregate settlement evolved to resolve mass tort claims arising from asbestos and pharmaceuticals. *See* Issacharoff & Witt, *supra* note 5, at 1618–19.

411 Marcus, *History Part II*, *supra* note 41, at 1825.

412 *Id.* at 1823 (discussing *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 892– 93 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982)).

413 *See* COFFEE, *supra* note 25, at 99 (discussing "breakthrough in the resistance" to certification of "'mass exposure' cases" involving asbestos, Agent Orange, and the Dalkon Shield); HENSLER ET AL., *supra* note 12, at 24–25 (same); Marcus, *Mass Tort Class Action*, *supra* note 348, at 1567 ("Only in the early 1980s, with decisions by two judicial mavericks, did the link between the class action and dispersed mass tort litigation really emerge." (discussing *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 725 (E.D.N.Y. 1983); *"Dalkon Shield"*, 526 F. Supp. 887).

414 Marcus, *History Part II*, *supra* note 41, at 1817–19; Resnik, *"Vital" State Interests*, *supra* note 24, at 1795.

415 Marcus, *History Part II*, *supra* note 41, at 1812–14.

416 *Id.* at 1820 ("The idea that litigation could mobilize groups, while deemphasizing individual-litigant identities as mostly irrelevant, was precisely what conservatives hostile to an imperial judiciary castigated with their attempt to reset antidiscrimination litigation and combat the [Legal Services Corporation].").

Securities class actions fared better. Although business groups mentioned securities claims in their initial warnings about the revised Rule 23, the reality was that securities class actions were in use before 1966 because they provided a clear benefit to investors.[417] Consequently, securities class actions were widely accepted by the mid-1970s, and went virtually unopposed in the 1980s amid an actual surge in suits challenging a new wave of IPOs.[418] At the end of the decade, the Supreme Court approved the "fraud-on-the-market" presumption that dramatically boosted the prospects of certification.[419]

Defendants continued to get more aggressive in pushing for mass torts class settlements in the 1990s, and courts grew more accommodating.[420] Pioneering judges implicitly analogized to bankruptcy, justifying certification on the grounds that dispersed tort plaintiffs were collectively better off with a one-shot distribution instead of a race to the courthouse.[421] Like plenty of corporate debtors before them, companies in mass product distribution chains recognized and gladly accepted the obvious benefits of aggregate treatment over drawn-out marathons of individual suits.[422] Unlike other plaintiff-side lawyers, however, personal injury lawyers *opposed* class treatment, which threatened the fees from their own inventory of clients.[423]

At the same time, mass tort class actions started to come under fire. Legal commentators warned that collusion between defendants and class counsel was leading to mass settlements that resembled legislation more than traditional judgments.[424] More importantly, prominent jurists began to worry that mass tort class actions coerced defendants into paying generously to settle even weak claims.[425] Meanwhile, critics in business and the media, oblivious to the fact that defendants were always the primary architects and advocates, raged against these supposedly extortionate settlements in which greedy personal injury lawyers sold out their victimized clients.[426]

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[417] *Id.* at 1831–32.

[418] *Id.* at 1832–33.

[419] *See* Rubenstein, *supra* note 281, at 386–87 (citing Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988)).

[420] HENSLER ET AL., *supra* note 12, at 477 (noting certification of settlement classes were "common" by the mid-1990s); Marcus, *History Part II*, *supra* note 41, at 1825–26 (discussing defendants' "newfound ardor" for using Rule 23 as a "strategic management tool").

[421] *See* Marcus, *History Part II*, *supra* note 41, at 1827.

[422] Early movers included manufacturers and distributors of asbestos, medical devices, and pharmaceuticals. *See id.* at 1824–25, 1824 n.339.

[423] *Id.* at 1823–25.

[424] *Id.* at 1829–30; HENSLER ET AL., *supra* note 12, at 27.

[425] *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1294, 1298–99, 1304 (7th Cir. 1995) (Judge Richard Posner expressing this view in a case concerning a putative class of hemophiliacs allegedly infected by contaminated blood products).

[426] Marcus, *History Part II*, *supra* note 41, at 1828–29.

Business groups took the opportunity to launch their own offensive against the class action.[427] The U.S. Chamber of Commerce, which had not filed an amicus brief in the Supreme Court addressing class actions from 1969 through 1994, proceeded to file anti-class-action amicus briefs in seven of the ten class-action cases before the Court in the following two decades.[428] Anti-class-action amicus briefs from defense-side lawyer associations and conservative law reform organizations followed the same pattern.[429]

In the late 1990s, seemingly in response to all these criticisms, the Supreme Court issued two blockbuster decisions, *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, which denied certification of asbestos claims and drastically limited the use of Rule 23 for personal injury claims.[430] Echoing extortion critics, the Court made it harder to certify big classes of tort claimants by requiring more particularized cohesion and commonality among class members prior to certification.[431] In response to sellout concerns, the Court ruled that the array of class representatives and counsel did not account for major conflicts of interest between class members.[432] And in response to constitutional issues of due process and judicial power, the Court admonished ambitious lower courts for approving private settlements that extinguished legal rights without legislative input or individual consent.[433]

All told, the transaction model of the class action was firmly in place by century's end.[434] Although courts pointed to Rule 23's formal text and doctrine, the underlying commercial nature of the claims provided the only

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[427] *See, e.g.*, STEPHEN C. YEAZELL, LAWSUITS IN A MARKET ECONOMY: THE EVOLUTION OF CIVIL LITIGATION 67–68 (2018) [hereinafter YEAZELL, LAWSUITS IN A MARKET ECONOMY] ("The Chamber of Commerce and its constituents . . . in recent decades . . . mounted a counterattack that has drawn some blood.").

[428] Burbank & Farhang, *supra* note 26, at 1525 (noting the Chamber's amicus briefs aimed to limit class actions).

[429] *Id.* ("In aggregate, business associations, conservative law reform organizations, and defense-side lawyer associations filed three briefs in twenty cases from 1969 to 1994 . . . and fifty-one briefs in ten cases from 1995 to 2014.").

[430] Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); *see, e.g.*, Marcus, *Mass Tort Class Action*, *supra* note 348, at 1588, 1592 (noting continued influence of *Amchem* and *Ortiz* on class action practice); Rubenstein, *supra* note 281, at 377–81 ("The spirit of the Court's decisions evidenced a general dislike for mass tort class actions . . . [that] reflected a pervasive feeling among much of the judiciary.").

[431] *See, e.g.*, Rubenstein, *supra* note 281, at 376–77.

[432] *See, e.g.*, *id.* at 380–81, 404–06; Issacharoff, *Governance and Legitimacy*, *supra* note 33, at 340–41.

[433] *See, e.g.*, Issacharoff, *Private Claims*, *supra* note 42, at 208–09 ("Perhaps naively, the Court in the asbestos cases may have thought that it was restoring the primacy of . . . the 'day-in-court ideal' of individual claimants represented by individual attorneys proceeding to trial.").

[434] *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 151 (2003).

plausible explanation for the divide.[435] The class action's transactional shift, it turns out, is an intensification of the same market forces that shaped pre-modern class action.[436]

3. *Class Actions by Contract*

Congress and the Supreme Court have imposed significant restrictions on the class action over the past twenty-five years.[437] The Court's anti-class-action turn has been especially dramatic compared to its tepid attitude in the 1980s.[438] Fortune 100 companies have put significant resources behind legislation targeting virtually every type of class action.[439]

Of course, not all class actions have been equal targets.[440] Securities class actions remain common, amenable to certification, and subject only to reforms at the margins.[441] Torts and civil rights claims, meanwhile, have been subject to more restrictive rules of class certification, and small economic claims have been routinely shut out of the formal court system.[442]

Amid this onslaught, transactional dynamics have grown only more prominent. So long as defendants and class counsel agree, class settlements can potentially resolve all claims arising from the same factual

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435 *See* Rubenstein, *supra* note 281, at 427–49 ("To be sure, the resistance is classically framed in more recognizable, doctrinal terms. . . . Yet, . . . none of these distinctions is entirely convincing. . . . Indeed, all of the doctrinal explanations (predominance, superiority, and adequacy) are more symptom than cause.").

436 Rubenstein drops an intriguing footnote to say his transactional model is "similar" to Bone's analysis of pre-twentieth century class action, but he does not elaborate, other than noting that Bone did not compare different types of damages class actions. *Id.* at 429 n.253. This is partly right and partly wrong. Bone argued that nineteenth-century judges were largely formalistic in ruling on absentee preclusion, trying in earnest to identify all the inherently "impersonal" elements of the disputed claims. *See* Bone, *supra* note 105, at 218, 247–48, 247 n.78. But Rubenstein does not think judges are so formalistic, arguing instead that they decide class action issues based on "an instinctual response . . . about the illegitimacy of business deals concerning personal injuries." Rubenstein, *supra* note 281, at 428–29. By perhaps identifying with the wrong side of the Bone-Yeazell debate, *see supra* note 385, Rubenstein just reinforces the strength of an account built around market exchange.

437 *See, e.g.*, KAGAN, *supra* note 23, at 267–70 (surveying conservative pushback on class actions in Congress and the Supreme Court starting in the 1990s).

438 *See, e.g.*, J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 226 (2017). In cases about class actions, the Supreme Court of the 1980s was more likely than not to rule in favor of enhancing or expanding the class action, but from 1997 to 2014, the Court broke hard the other way, ruling to restrict or contract the class action in nearly two-thirds of cases. Burbank & Farhang, *supra* note 26, at 1520 fig.2.

439 *See, e.g.*, Glover, *supra* note 26, at 1288; Resnik, *"Vital" State Interests*, *supra* note 24, at 1805.

440 *See, e.g.*, Alexandra D. Lahav, *Mass Tort Class Actions – Past, Present, and Future*, 92 N.Y.U. L. REV. 998, 1010 (2017).

441 COFFEE, *supra* note 25, at 132 ("So when does the class action still survive? Federal claims under the securities and antitrust laws today remain certifiable as class actions—but increasingly the camel must pass through a steadily narrowing eye of a needle."); Burbank & Farhang, *supra* note 26, at 1523 (noting "the greater difficulty the Court has retrenching class action law in the securities context").

442 *See, e.g.*, Glover, *supra* note 26, at 1299; ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION 23–27 (2017).

nucleus, though unsurprisingly, courts are especially deferential to securities class settlements.[443]

Most significant of all transactional shifts has been a series of Supreme Court decisions that have allowed companies to ban class actions and force arbitration in practically every type of contract.[444] In effect, corporations at risk of class actions now have the contractual option to force every plaintiff—whether it be thousands of employees alleging discrimination or wage-theft, or millions of consumers alleging improper fees—to bring their claims in an individual arbitration.[445] Virtually every corporation in commercial exchange with the public now uses arbitration clauses, and the result has likely been the exclusion of claims that otherwise would be easy to aggregate.[446] The Court's class arbitration cases are the literalization of commodified preclusion: claim value is the same as claim merit, and as such rich people are more worthy of the judicial system's protection than are poor people *because* the rich sue over more money.[447]

III. AGGREGATE LITIGATION IS BUILT FOR BUSINESS

The previous Part made the case that market needs have determined the origins, use, and acceptance of aggregate litigation. This concluding Part uses aggregation's commercial history to rebut criticisms of aggregation.

A. *The Illusion of Individual Trials*

Recall that a cluster of aggregation's critics operate by idealizing the traditional individual lawsuit.[448] As past commentators have explained, this normative choice to measure everything against a world of individual trials is usually undefended by critics.[449]

Aggregate litigation's history adds yet another problem: in a market society, guaranteed individual trials are an unworkable fantasy. Private market actors have long demanded both formal and informal methods of

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[443] *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 336 (3d Cir. 2011) (Scirica, J., concurring); COFFEE, *supra* note 25, at 157 (suggesting that a "majority of the Court is willing to accept almost any technique to resolve securities class actions").

[444] *See* Glover, *supra* note 26, at 1297–98 (summarizing a successful corporate campaign to expand mandatory arbitration to antitrust, securities, antidiscrimination, contracts of adhesion, and shrinkwrap contracts).

[445] *See, e.g.*, YEAZELL, LAWSUITS IN A MARKET ECONOMY, *supra* note 427, at 68 (discussing the role of the Supreme Court's arbitration case law in "enabling business defendants to escape . . . from class actions" brought by employees and customers "for any dispute arising out of the transaction").

[446] *See* Glover, *supra* note 26, at 1298–302 (reviewing empirical evidence of the overall effects of arbitration clauses); Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 633–35 (2020) (same, as to consumer contracts only).

[447] *See* Glover, *supra* note 26, at 1308 ("Many claims eliminated by forced arbitration and class-action waivers, then, are not so much low merit as they are low value. For a majority of the Supreme Court, though, those two may as well be the same thing.").

[448] *See supra* Subsection I.C.1.

[449] *See, e.g.*, Silver, *supra* note 34, at 1419.

aggregate resolution instead of "traditional" bilateral lawsuits.[450] By ignoring this inevitable demand for commercial aggregation, critics insistent on individual trials have not reckoned with the full consequences of their position, which would jeopardize the most basic of market relations.

1. *Extortion: Litigants Do Not Want to Defend a Mass of Individualized Lawsuits*

Extortion does not work as a critique of aggregation in bankruptcy. Critics cite aversion to the *risk* of bankruptcy as creating the potential for extortion.[451] But the threat of extortion does not exist when that risk has already manifested in fact.[452]

Worries of risk aversion are especially illogical because bankruptcy mandates aggregation to *mitigate* risks faced by the market actors. American bankruptcy debates always have turned on "competing views" about which "commercial risks" were worthy of insurance.[453] A national voluntary discharge became permanent because creditors and debtors alike recognized that its mandatory aggregation was a necessary safety net for everyone with a stake in credit-backed market exchange.[454] By contrast, because waged labor was not as valuable to industrial proprietors as sustained access to credit, there was far less need to entice workers with guaranteed compensation for work-related injuries.[455] The result was full-scale commercial embrace of national bankruptcy a generation before the New Deal.[456]

As bankruptcy's centuries of unopposed use demonstrate, credit-based exchange requires aggregation regardless of the variance in possible outcomes. But even beyond bankruptcy, commercial markets would not be possible without a significant amount of purportedly "extortionate" aggregation.[457] No opposition emerged to the increased variance of creditor

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[450] *See* William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISC. 136, 142–43 (2013) (suggesting the private aggregation tradition as counterevidence to normative primacy of individual lawsuits).

[451] *See* Silver, *supra* note 34, at 1374–75 (detailing how extortion critics treat fear of bankruptcy as the source of defendants' risk aversion).

[452] *Id.* at 1408.

[453] Witt, *supra* note 20, at 329 n.143 (citing Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986)).

[454] *See* Sauer, *supra* note 130, at 331.

[455] *See* Witt, *supra* note 20, at 305–06, 325–26 (comparing bankruptcy support from "powerful constituencies of creditors, debtors, and bankruptcy lawyers" to contemporaneous advocacy from industrial defendants and court rulings that "made it exceedingly difficult for industrial workers to go to law for insurance against the risks of their work").

[456] *Id.* at 324 ("[W]here bankruptcy legislation created middle-class insurance at the federal and state levels for much of the nineteenth century, the kinds of risks incident to the lives of the poor and the industrial working class went largely unattended.").

[457] *Cf.* Nicholas Almendares, *The False Allure of Settlement Pressure*, 50 LOY. U. CHI. L.J. 271, 296, 313–14 (arguing that the extortion claim "proves too much" by applying it to every possible instance of aggregation).

bills or limited-fund cases (the earliest class actions) or in securities fraud class actions (the most durable of modern class actions).[458]

Worse still for extortion critics, the purportedly coerced have historically been the first to demand aggregate treatment. The earliest class actions were instigated by the solo defendant who rejected the option to defend identical property claims over and over again—these defendants accepted the heightened variance of aggregation in order to enforce property use and exchange.[459] Similarly, faced with new waves of similar claimants injured by mechanized operations, repeat defendants in the industrial era fought to *avoid* individualized claims processing.[460] And in the 1980s, it was defendants who pressured courts to allow mass tort settlement classes, an expansion that faced no corporate or partisan pushback at the time.[461]

This long history of solo litigants' demanding aggregation is consistent with the lack of empirical support for the extortion thesis. Extortion critics measure aggregation against a fantasy—there has never been a world in which masses of individual trials follow the denial of formal aggregation.[462] When aggregation is denied, virtually all individual claims are either dismissed or settled.[463] Nor is there historical evidence that aggregate outcomes differ from individual outcomes at all, let alone in a way that benefits claimants systematically.[464] In the end, pure bias for rich litigants and repeat defendants is the only position consistent with how aggregation's opponents have deployed the extortion criticism.[465]

2. *Due Process: Claimants Do Not Want to Litigate Alone*

Due process critics target aggregate litigation's preclusive effects on absent claimants. They contend that claimants have a constitutional right to

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[458] Rubenstein, *supra* note 281, at 396, 401–02 (demonstrating that oft-certified securities classes involve as much variance in claim values as rarely certified mass tort classes).

[459] *See* PISTOR, *supra* note 53, at 29–31 (describing the importance of lawsuits to the enclosure movement).

[460] *See* Issacharoff, *Private Claims*, *supra* note 42, at 209 (contending that a return to the "'day-in-court ideal' . . . cannot withstand the realities of . . . the emergence of a raft of alternative mechanisms outside Article III courts that bundle claims in efforts to achieve closure").

[461] *See* Marcus, *History Part II*, *supra* note 41, at 1820–21, 1831 ("Unlike the other episodes of the class action's second era, the mass tort class action experiment did not trigger partisan rancor.").

[462] For a claim that seems ripe for direct examination, the alleged differences between individual and aggregate outcomes are investigated via experiment, likely because mass claiming is never actualized through mass trials. *Cf.* TIDMARSH & TRANGSRUD, *supra* note 7, at 20–21 (discussing two experiments using simulated juries).

[463] Issacharoff, *Private Claims*, *supra* note 42, at 209–10, 209 n.83; Silver, *supra* note 34, at 1422–23. Small-dollar claims are obviously off the table once aggregation is denied. *Id.* at 1426–28.

[464] Glover, *supra* note 26, at 1308 n.135 ("[R]esearch shows that the filing of meritless claims to extract shakedown settlements is rare."); Silver, *supra* note 34, at 1423.

[465] *See* TIDMARSH & TRANGSRUD, *supra* note 7, at 20–21; Glover, *supra* note 26, at 1300 ("[J]udges' motivations were clear to those paying attention: '[I]t is a judicial empathy for the complaint of corporate defendants that large class actions present a great deal of pressure to settle cases.'" (quoting Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375–79 (2005))).

individualized adjudication that cannot be circumvented without affirmative consent from each individual claimant.[466]

The problem is that the original and most durable type of binding aggregation—English bankruptcy law in the mid-1500s—was a product of demand from the very litigants who were sacrificing their rights to individual lawsuits—competing commercial lenders.[467] Eighteenth-century commercial creditors *supported* proposals to discharge their own claims against cooperative debtors and simultaneously *opposed* proposals that would have conditioned bankruptcy on the participation of all creditors.[468] Railroad investors, spread across the country, urged corporate reorganizations that ran roughshod over their original individual contracts.[469]

The consistent thread running through bankruptcy's history is that commercial creditors have long fought *against* the individualized vision touted by due process critics.[470] To this day, corporate debtors and the wider business bankruptcy community have developed and endorsed aggressive techniques that blatantly prioritize finality over creditors' rights to individual process.[471]

To the extent business groups oppose class actions by defending the due process rights of absent class members, they are pulling up the ladder behind them. The first class actions to bind absentees were creditors' bills or other bankruptcy-mimicking situations.[472] And practically every expansion of the class action's preclusive effect has been justified using this same limited-fund rationale.[473] That rationale blatantly concerns the defendants' interest in clarity and finality as much as it concerns equitable distribution among claimants.[474]

The timing and choice of target in the class-action realm also suggest the due process criticism is motivated by an unstated bias for defendants. Vast amounts of aggregate litigation for centuries have violated the

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[466] *See* Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 186 (2016).

[467] *See* Tabb, *Bankruptcy Discharge*, *supra* note 62, at 328–29, 329 n.21.

[468] *See* Kadens, *supra* note 58, at 1266–67 (noting opposition to a 1706 proposal by Daniel Defoe).

[469] *See* McKenzie, *Future of Aggregate Litigation*, *supra* note 4, at 850 ("Remedies framed with individual actors in mind—a single creditor and a single debtor—were simply inadequate for the task of resolving the financial distress of firms with multiple claimants.").

[470] *See* Sauer, *supra* note 130, at 336–37 (arguing that creditors and businesses supported federal bankruptcy because the collective nature of commercial markets precluded support for individualized debt collection).

[471] *See* Lindsey D. Simon, *Claim Preclusion and the Problem of Fictional Consent*, 41 CARDOZO L. REV. 2561, 2597 & n.116 (2020) (attributing finality over a debtor's assets as the reason bankruptcy judgments can bind nonparties).

[472] *See* Resnik, *"Vital" State Interests*, *supra* note 24, at 1767.

[473] *See supra* text accompanying notes 106–08 (discussing *Mayor of York v. Pilkington*), 122–24 (discussing *Hallett v. Hallett*), 340–44 (discussing *Mullane v. Central Hanover Bank and Trust Company*), 394–97 (discussing mass tort class actions in the 1980s).

[474] *See* Resnik, *"Vital" State Interests*, *supra* note 24, at 1791 (describing Rule 23(b)(1)'s protection of defendants from inconsistent judgments).

individualistic norm in the exact same way as modern class actions.[475] But when claimants without capital assets started filing class actions regarding noncommercial conflicts, suddenly their individual due process rights became so fundamental that they required denial of aggregation.[476]

Denying aggregation to preserve the individual autonomy of absent claimants is pure rhetoric. As justification to deny aggregation of claims that could never be brought individually, like negative-value or futures claims, due process is disingenuous and a mask for flat-out "bias" toward defendants.[477] Claimants with large-dollar claims *do* possess and exercise individual autonomy by opting out of class actions when individual litigation is more promising.[478] Indeed, the chance to opt out shows just how perverse it is for due process critics to focus on damages class actions and exclude bankruptcy.[479] Creditors with claims against insolvent debtors *cannot* opt out of bankruptcy, which is designed to extinguish autonomy to go it alone and race to collect debt.[480]

Constitutional guarantees of individual trials would disable markets, which need aggregate litigation to function.[481] When it comes to the basic legal "coding" of capital assets, individual trials are disposable—bankruptcy is essential.[482] Class suits and other aggregate procedures based on categorical rules-of-thumb and actuarial estimates have long been the vehicle of choice for even dispersed commercial litigants.[483]

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475 *See* Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1 U. ILL. L. REV. 43, 51, 63 (1989).

476 *See* Valdes, *supra* note 103, at 634–37 ("With such a venerable heritage, with such catholic politics, why does this traditional procedure today provoke such opposition, as if class actions were the sudden invention of contemporary social justice zealots? . . . The current fanfare over the loss of individual rights in the class action should serve to remind us that this nicety did not prevent the judicial collectivization of the parish miners nearly 400 years ago. . . . Not by simple coincidence, the preoccupation over the fate of the individual in the class action mushroomed, as part of the backlash against class actions, alongside the rise of plaintiff classes during the past half-century or so.").

477 TIDMARSH & TRANGSRUD, *supra* note 7, at 20–21; COFFEE, *supra* note 25, at 150–52 (recognizing that individual autonomy for small-dollar claimants who cannot afford to sue alone is "rhetoric" and that requiring notice-based process for future claimants is nonsensical).

478 *See* COFFEE, *supra* note 25, at 151 (arguing that class members with large damages claims exercise individual autonomy by opting out of class actions); Rubenstein, *supra* note 281, at 432 ("[The class action's] affront[] to individualism should not be exaggerated. In many class actions, individuals can opt out and thereby preserve their own litigative autonomy.").

479 *See, e.g.*, Redish, *supra* note 41, at 1130 (bemoaning the so-called "'faux' class action," in which large monetary recovery cannot be delivered directly to every individual small-dollar claimant).

480 *See, e.g.*, Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960 (2022).

481 *See* Issacharoff, *Private Claims*, *supra* note 42, at 204 (questioning the viability of indefeasible rights to individual due process in mass society).

482 *See* PISTOR, *supra* note 53, at 137 (describing bankruptcy as "the place where losses are realized and allocated" and "the acid test for the rights and privileges the parties negotiated or that state law granted them").

483 Issacharoff & Witt, *supra* note 5, at 1608–10 (comparing tort liability patterns in the 1920s and 1980s).

3. *Judicial Role: Litigants Demand Aggregation Regardless of Legislation*

Criticism of the judicial role in aggregate litigation rests on a traditional distinction between "private" adjudication and "public" legislation.[484] The core concern of judicial critics is that legislation has more democratic legitimacy than court judgments, and so legislation should regulate multilateral social relations, while courts should only resolve discrete bilateral disputes.

Once again, the embrace of the judicial criticism by business groups is disingenuous. Commercial litigants have long demanded and received aggregation in contexts bereft of legislation. For most of the nineteenth century, courts and investors invented and implemented corporate reorganizations without *any* legislative input.[485] Common-law style judicial decision-making seeded all the contemporary moves and controversies of today's corporate reorganization law.[486]

When they did sound the alarm, judicial critics chose both an odd time and an odd target. The first barrage from judicial critics in the 1980s followed over a decade of legislative embrace of the class action, during which Congress had enacted more statutory-based vehicles for private litigation than ever before.[487] And their selective targeting of civil rights and antipoverty class actions had no good justification.[488] Nothing in the judicial criticism prescribes different litigation modes for commercial and noncommercial cases.[489] One could require individual adversarial lawsuits

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[484] Marcus, *History Part II*, *supra* note 41, at 1806–08.

[485] *See* Resnik, *Reorienting*, *supra* note 28, at 1053; Skeel, *Corporate Bankruptcy*, *supra* note 191, at 1356 n.108 ("[T]he railroads' lawyers and bankers used the judicial system to effectuate what in many respects was a negotiated workout—i.e., private ordering.").

[486] *See, e.g.*, Miller & Waisman, *supra* note 57, at 158 ("[T]he progenitor of modern United States reorganization law is the equity receivership that was fashioned in the late nineteenth century to resolve the financial distress and failures that permeated the railroad industry after the Civil War."); Tabb, *History of the Bankruptcy Laws*, *supra* note 57, at 23 ("Vestiges of many of the judicial doctrines developed in the receivership cases remain in present-day corporate reorganizations. Furthermore, many of the issues confronted in the receivership cases—notably, how to protect dissenting creditors and ensure that the sale price is fair—are still sources of considerable controversy in the current debate over the merits of Chapter 11.").

[487] *See, e.g.*, Marcus, *History Part II*, *supra* note 41, at 1806–07.

[488] *Id.* at 1788.

[489] *See* Rubenstein, *supra* note 281, at 413 ("[T]he adversarial model does not really explain why fairness hearings blessing securities settlements are more institutionally acceptable than fairness hearings blessing mass tort settlements."). In addition, as a critique aimed specifically at class action, the context made little sense, because individual civil rights suits had just as much potential to effect social change through individual suits. *See* TIDMARSH & TRANGSRUD, *supra* note 7, at 27 ("In theory, a lawsuit brought by a single student, prisoner, or employee could achieve the same result. Therefore, some criticism of aggregation in structural-reform cases is a disguise for the argument that judges lack authority to reform governmental or corporate institutions. . . . [S]ometimes criticism about the institutional legitimacy of aggregation . . . mask[s] . . . disagreement with the substantive law.").

in personal injury or civil rights cases just as easily as in impersonal business cases.[490]

To this day, commercial demand for aggregation is plentiful regardless of the extent of legislative activity.[491] Despite extensive congressional legislation, bankruptcy courts continue to effect changes of massive social significance, just as litigants push the Bankruptcy Code's text to its breaking point in demanding protection for corporate owners.[492] The business community has encouraged the federal court takeover of state-law class actions and seems broadly content with a handful of Delaware judges' regulating the entire national market for corporate control.[493] Just as significantly, commercial demand for aggregation continues to manifest without, or despite, legislative permission.[494]

The collective history of bankruptcy and class actions suggests neither basic commerce nor advanced capitalism can work on legislation without ex-post litigation by courts.[495] Markets need legislative codes *and* aggregate litigation. Judicial critics have never confronted this basic lesson from history.

B. *The Inconsistent Response to Genuine Sellout Risk*

Because markets demand aggregate litigation, in which individuals form a group and delegate representation, the sellout criticism is apt and sellout risk is acute. Sellout risk is an inherent feature of group representation, arising any time group members delegate their own control or "votes" to expert "officials."[496] Any aggregate settlement requires

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[490] *See* Rubenstein, *supra* note 281, at 428 (arguing that "nothing about the differing nature" of "impersonal business" cases and "very personal" cases determines whether either is "susceptible to adversarial adjudication").

[491] *See id*. at 430 ("[T]he transactional model . . . challenges the reflexive assumption that these large cases are better resolved by the legislature than the judiciary. . . . It is not immediately obvious that in the presence of too many lawsuits, legislative action is more appropriate than an aggregated judicial solution.").

[492] *See, e.g.*, Levitin, *supra* note 404, at 1084 ("In the new world of large Chapter 11 bankruptcies, a single judge of the debtor's choosing is effectively the only check on what the debtor can do."); Bratton & Skeel, *supra* note 232, at 1583 ("As in the receivership era, nearly all [recent developments in corporate bankruptcy] have been driven by innovations in practice and judicial decisions, rather than legislative change.").

[493] *See* COFFEE, *supra* note 25, at 159 (noting that "the preferred solution of the corporate bar" is to adopt bylaws that require "any class or derivative action . . . be brought exclusively in the corporation's jurisdiction of incorporation (which effectively would mean [Delaware] for the majority of public corporations"); Issacharoff & Marotta-Wurgler, *supra* note 446, at 627–32 (discussing the federalized common law through the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332(d), 1453, 1711–15).

[494] *See* Glover, *supra* note 26, at 1288–89.

[495] *See* Rubenstein, *supra* note 281, at 430 ("[T]he problems being addressed by large private class actions do not end up in court because of legislative failure and do not involve functions commonly ascribed to legislative bodies.").

[496] *See generally* Almendares, *supra* note 40, at 2–7, 9–11, 14.

participating claimant-side lawyers to act as agents of absent claimants and implies some level of categorical treatment of claimants.[497] That is why the ultimate path for mass workouts, in *any* context, is judicial review of negotiated settlements for "structural assurances of fairness," with little regard to legal formalities.[498]

The sellout criticism does not provide any reason to favor commercial aggregation. Yet, business groups have never objected to the collusion that inheres in corporate governance. Legal personhood obscures the fact that every lawsuit filed by, or against, a public corporation is aggregate litigation with acute sellout risk.[499] Managers represent shareholders every time they act on behalf of the corporation, the risks of which prompted the development of an entire body of law and a new form of aggregate litigation—the derivative suit. And of course, from inception, derivative suits incented corporate managers to use corporate funds to pay off the suing shareholders and their lawyers.[500]

Instead of focusing on the commercial realms in which the sellout risk is most acute, however, sellout critics have largely done the opposite. The earliest commentary warning of sellout risk in class actions rightly emphasized the benefits to defendants—fears confirmed by judicial approval of early mass tort settlements.[501] But the first well-funded activism based on the sellout criticism targeted a settlement in which a *government* defendant agreed to provide social services and income support—terms that were blatantly beneficial to all class members.[502] These conservative critics wanted to limit tax-funded benefits to dispersed and vulnerable claimants, not protect them from *losing* benefits.[503] More recently, business groups have remained silent in the face of acute sellout risk in securities, derivatives, and M&A class settlements of nonclass mass tort settlements, in which absent claimants were arguably (or blatantly) sold out by their lawyers.[504]

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[497] *See* Lahav, *supra* note 4, at 1408–09.

[498] *See* Issacharoff, *Private Claims*, *supra* note 42 (explaining the structural similarities between judicial aggregate settlements, private aggregate settlements, and bankruptcy prepacks, as well as their common inability to avoid the need for separate representation of various claimant factions).

[499] *Cf.* YEAZELL, MEDIEVAL GROUP LITIGATION, *supra* note 105, at 117 (discussing how incorporation decreased the number of association-based class actions).

[500] *See supra* note 359.

[501] *See* Marcus, *History Part II*, *supra* note 41, at 1827 ("Observers had long feared that plaintiffs' lawyers would use aggregate procedure to collude with defendants and settle liability cheaply; indeed, the prospect prompted opposition to the 1966 amendments to Rule 23.").

[502] *Id.* at 1827–28 (explaining that antipoverty settlement "troubled critics not because class members got ripped off but because the agency supposedly used litigation to circumvent congressional intent").

[503] *See* Resnik, *"Vital" State Interests*, *supra* note 24, at 1795; Marcus, *History Part II*, *supra* note 41, at 1817–19 (discussing the criticism of antipoverty class actions based on the view of judicial function).

[504] *See* COFFEE, *supra* note 25, at 120–21 (summarizing the risks of collusion in derivative and M&A class actions); Issacharoff, *Private Claims*, *supra* note 42, at 183–88, 204–15 (discussing mass tort workouts in bankruptcy and MDLs); Rubenstein, *supra* note 281, at 408 ("Opportunities for class counsel to compromise the class's interests are obvious and abundant. Though these particular concerns have long been the subject of scholarly criticism, they rarely led courts to deny certification in securities classes.").

Finally, aggregation's commercial origins also dispel the notion that greedy plaintiffs' lawyers are solely responsible for sellout risk. Long before the prevalence of bankruptcy lawyers, bankruptcy law was concerned with preventing the debtor from cutting deals with certain creditors and bilking others.[505] Early class actions also spurred judicial inquiries into the prospects for disloyalty by named plaintiffs representing the class—decades before the emergence of for-profit class action lawyers.[506] There is no reason to penalize claimants for the economic incentives in the market for professional legal services.[507]

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In sum, there is no way for business groups to reconcile support for any of the above criticisms with the history of commercial demand for aggregate litigation. The extortion criticism runs counter to the history of individual commercial litigants' demand for aggregation, the due process criticism runs counter to all the instances in which groups of litigants gladly sacrificed individual trial rights, and the judicial criticism runs counter to the commercial demand for aggregate lawsuits, regardless of the existence of relevant legislation. As for sellout risk—the one apt criticism—business groups never deploy it to oppose commercial aggregation in which the risk is at its most acute.

CONCLUSION

Mass markets generate mass conflicts that demand resolution on a mass scale, regardless of formal law on the books.[508] When business groups criticize aggregate litigation, they are attacking a foundational tool of their own prosperity. Any assertion that group lawsuits stymie commercial enterprise is woefully incomplete if it does not account for the pervasive commercial need for aggregate litigation.

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505 *See, e.g.*, THOMPSON, *supra* note 201, at 11 (noting that individuals, not lawyers, initiated "en masse" filings under the 1867 Act); SKEEL, DEBT'S DOMINION, *supra* note 6, at 34–35 (discussing the lack of a pre-1898 bankruptcy bar).

506 *See* Hazard et al., *supra* note 109, at 1910; Bone, *supra* note 105, at 275–78 & nn.150–55 (discussing the industrial-era use of the "adequacy of representation" concept).

507 *See* McKenzie, *Future of Aggregate Litigation*, *supra* note 4, at 884 ("[A]ny form of aggregation that relies on the active hand of lawyers or other professionals (who stand to gain substantial compensation for their role) is likely to generate resentment and scrutiny. For that reason, introducing institutional structures that check the conduct of lawyers in an aggregation device is compatible with preserving the viability of the device.").

508 *See* Glover, *supra* note 26, at 1315 ("The elimination of a mechanism for aggregating claims does not eliminate the mass harm or the mass of individuals affected by that harm.").