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Rescuing Business:
The Making of Corporate Bankruptcy Law
in England and the United States
Bruce Caruthers & Terence Halliday

A book review by
Todd Zywicki

RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES.

Bruce G. Carruthers & Terence C. Halliday*
Clarendon Press, Oxford 1998. Pp. 582.

Reviewed by
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INTRODUCTION

As I wrote this review of *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States* in Spring 2000, a comprehensive bankruptcy reform package was passed both the House and Senate by overwhelming bipartisan majorities. Every House Republican and almost half of House Democrats voted for reform; the Senate bill received overwhelming majority support from members of both parties. Public opinion polls show similarly high level of support for bankruptcy reform among the populace at large. Given these high levels of support among the public and on Capitol Hill, it appears inevitable that some comprehensive bankruptcy reform package will pass this year.

In contrast to this bipartisan and popular support for reform, bankruptcy lawyers and academics have formed a united front to fight reform efforts. The primary weapon in the anti-reformers' arsenal is the claim that reform legislation is animated solely by "rich and powerful special interest groups, namely the consumer credit industry, with high-

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powered and well-connected lobbyists and close ties with key legislators."[1] Visa and Mastercard, it is charged,[2] have used their wealth and clout to hijack the bankruptcy reform process and corrupt the delicate artistry and balance of the Bankruptcy Code to enrich themselves.[3]

Proponents of the anti-reform argument, therefore, contend that the influence of private interests over the drafting and the amendment of the Bankruptcy Code is something new, something unique to the current reform effort. This essential component of the anti-reform argument has made it necessary to revisit past bankruptcy reform efforts to demonstrate that they were *not* the result of special-interest influence and special-interest bargains. Thus, sinking current reform efforts requires mythologizing the bankruptcy reform efforts of the past. The "Myth of the 1978 Code" goes roughly as follows: "Bankruptcy reform today ain't like bankruptcy reform back in the 'good ol' days.'" Back in the good ol' days, motives were pure and wise political statesmen properly deferred to the wisdom and judgment of bankruptcy experts who in 1978 bestowed upon us a bankruptcy charter to rival the Code of Justinian. These bankruptcy experts–lawyers, judges, and academics–were animated solely by the desire to craft a bankruptcy code for the ages, that could stand as a beacon of the amazing things that could be accomplished when good-hearted politicians and bankruptcy wise men combined forces to drive the consumer credit industry from the bankruptcy temple. By contrast, current reform proposals are the handiwork of crass, self-interested special interests. As Professor

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[1] Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 353 (1999). One major problem with this theory is that it does not appear to be true. *See* Todd J. Zywicki, *With Apologies to Screwtape: A Response to Professor Alexander*, ___ J. BANKR. L. & PRACTICE ___ (forthcoming Fall 2000).
[2] Pun intended.

Elizabeth Warren has drawn the contrast based on her experience working with the National Bankruptcy Review Commission, "The interests of the lobbyists and their collateral acquaintances came as a surprise, but it should not have. Long past were the days when Frank Kennedy could meet with Larry King, Joe Lee, Conrad Cyr, Vern Countryman, Gerry Smith and a handful of other people to work out the basic structure of the 1973 Commission recommendations on consumer bankruptcy."[4]

Alas, the "Myth of the 1978 Code" is false. As recounted in painstaking detail by Bruce G. Carruthers and Terence C. Halliday in *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*, the 1978 Code reflects the compromise of many competing interest groups all seeking to further their self-interests. At the heart of the bankruptcy reform process as presented by Carruthers and Halliday were bankruptcy professionals: academics, judges, and lawyers. Indeed, the special interests of the bankruptcy bar itself appears to have provided the driving role in the structure of the Chapter 11 process as it emerged from Congress in 1978. Understanding the causes of the disproportionate influence exercised by the bankruptcy bar in 1978 helps to illuminate the causes of bar opposition to the current bankruptcy reform proposals and why that opposition is so out of step with all other players in the bankruptcy arena.

This essay reviews *Rescuing Business* with an eye toward discerning what it tells us about the structure of the bankruptcy reform struggle today. Part I describes and critiques the thesis of *Rescuing Business*, outlining the book's argument as it relates to the

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[3] Thus, Professor Tabb sarcastically observes, "How very thoughtful of VISA, Mastercard, and the rest to worry about the welfare of the average citizen. The fact that radical amendments to the bankruptcy law would swell their coffers by many millions of dollars a year was merely a happy byproduct of their concern." Tabb, *supra* note, at 351.
[4] Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 488 (1997); *see also What Will Happen to the Commission's Report?* 31 BANKR. CT. DEC. (CRR), Issue 13 (Nov. 11,

formation of the 1978 Code. Although the book provides valuable historical information about the dynamics of the 1978 Code, it is saddled with an unworkable and unrealistic analytical structure that undermines its attempt to extrapolate from its historical account generalities that still apply to the politics of bankruptcy reform circa 2000. Thus, Part II of this essay draws on the historical insights of *Rescuing Business*, but combines them with a more effective model of legislative change to help to understand the dynamics of bankruptcy reform today.

I. RESCUING BUSINESS

As its subtitle suggests, *Rescuing Business* studies "the making of corporate bankruptcy law in England and the United States." The book is structured in three analytical sections. First, it offers a sociological model that outlines the way in which complex economic legislation is manufactured. Second, it renders an extended and detailed comparison of the political dynamics that structured the making of bankruptcy law in the United States and England. Third, it discusses the uniquely important role played by bankruptcy professionals in structuring the bankruptcy legislative process.

The book is only partly successful in accomplishing the three goals that it sets for itself. As a piece of historical reportage, the book succeeds admirably. It is chock full of information and investigative journalism that provides a window into the legislative negotiations that culminated in the 1978 United States Bankruptcy Code and the 1984 English Insolvency Act. It draws on a vast spectrum of previously available literature, but supplements it within a number of interviews with major players in the reform processes. The book, however, falls short in its attempt to provide a workable model for

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1997) (quoting Gerald Smith's criticism that "special interest groups" were attempting to influence the National Bankruptcy Review Commission).

understanding the nature of legislative change generally and the particular role of professionals in controlling the pace and direction of legislative change. As a result, the value of the book is primarily limited to its value as a case study of the 1978 American and 1986 English bankruptcy legislation experiences and provides little help in predicting the future direction of legislative change, such as the current reform efforts in America. This Part discusses each of these three elements of the book in turn, considering first the general model advocated by Carruthers and Halliday, next the historical case studies that comprise the bulk of their work, and finally their insights as to the role of professionals in structuring legislative change.

A. The Sociological Model of Legislative Change

Carruthers and Halliday advocate a sociological model of legislative change. As a result, their analysis is limited by the constraints of sociology. Sociology is descriptive, not predictive, in its focus. As a result, it has tried to swim against the tide of the social science research of recent decades, which has increasingly tried to model itself after the natural sciences by constructing models that can generate testable hypotheses subject to empirical testing. Sociology, by contrast, is obsessed with details rather than generalities. The conclusions of sociological inquiry are contingent and fact-dependent, making it impossible to generate reliable predictive outcomes of future cases in which facts change. Generalizing from sociological research thus is rendered an *ad hoc* enterprise.[5]

Sociologists also reject simplifying assumptions about human nature and human motivations, positing instead that the sources of human action are unique from person to person and from situation to situation. This rejection of a single-cause explanation for

[5] *See* Michelle J. White, Review Essay, *Economic Versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 L. & SOC'Y REV. 685 (1991).

human behavior distinguishes the method of sociology from that of economics or evolutionary psychology, which make simplifying assumptions about human nature that provide a basis for predicting the likelihood of human behavior from specific fact situations in other contexts.

This focus on classification and particularity rather than prediction and generalization undercuts both the conceptual value and readability of *Rescuing Business*. Thus, early in the book the authors posit a “recursive loop” between “law on the books” and “law in action.”[6] The authors believe that prior efforts to explain the link between “law on the books” and “law in action” are to be faulted because of their failure to take account of the recursive nature way in which law “flows from the ‘books’ into ‘action.’”[7] Unfortunately, Carruthers and Halliday fail to provide an explanation for why it matters that the loop is recursive in nature, or even why it is valuable to classify law into the categories of “law on the books” and “law in action” in a discussion of the political economy of bankruptcy reform. The weakness of the sociological method to say anything interesting about the *process* of legislative change (as opposed to a reporting on the facts relevant to this particular legislative enactment) is evidenced in their eschewing of any simplifying assumptions about how professionals act in the legislative arena:

> We do not therefore assume that the actions of professionals in the bankruptcy reforms can be simply attributed to one or another set of interests. We shall observe complex patterns of behavior where, sometimes, the satisfaction of private professional interests in a felicitous outcome of civic professional actions, while at other times, private professional advantage seems explicitly to drive substantive and administrative recommendations, and other times yet again, public interests take priority over private advantage. Nevertheless, in all these cases, we affirm one central proposition:

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[6] BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPCY LAW IN ENGLAND AND THE UNITED STATES 53 (1998).
[7] *Id.*

> the recursive process of legal change in bankruptcy as in many other areas of law, cannot be understood without a close analysis of professional innovation and intervention.[8]

This paragraph illuminates the central problem with the sociological model. It is trivially obvious that professionals play an important role in legislative reform. What matters is whether that role is generally benign or malign. To understand this requires understanding the motivations of professionals, or at least those active in the reform process. A theory that merely observes that individuals act out of a variety of motives, selfish and selfless, provides little insight as to when we would expect one impulse to prevail rather than the other.

For instance, it has long been supposed that the undue influence of environmental lobbyists in the writing and enforcement of environmental regulation was largely positive, as these self-proclaimed "public interest" groups purportedly solved free-rider and collective action problems associated with the provision of environmental protection legislation, regulation, and litigation.[9] Closer examination, however, reveals that environmental lobbyists appear to be motivated in large part by the same forces as other special interests, namely the desire to acquire wealth, power, and prestige for themselves and their organizations.[10] Leadership in environmental lobbying organizations is a direct path to powerful government jobs, providing an additional private incentive to work in these positions. Understanding the private goals of environmental lobbyists in turn raises

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[8] *Id.* at 56.
[9] *See* Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715, 1742 (1998); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 71-75 (1992).
[10] *See* Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 874-88 (1999).

substantial questions about whether it is appropriate to cede to them such a large role in the enactment and enforcement of environmental law and regulation.[11]

The decision to use a descriptive rather than predictive model also frustrates the book's central narrative of comparing legislative change in Britain with America. Having spent some 200 pages in detailed comparisons of the two systems, it appears that the best the book can muster as a conclusion is that the process of reform in the two countries is, well, different. The reader is left with little guidance as to what differences or similarities in influence or process is relevant to determining when differences and similarities in the two systems would be likely to arise.

B. The Real History of the 1978 Code

The most valuable contribution of *Rescuing Business*, therefore, is not in drawing normative implications from the process of bankruptcy reform or in its model for understanding the outcome of legislative reform. But its attention to historical detail provides a useful archaeological investigation into the creation of the 1978 Code.

Contrary to the Myth, the 1978 Code was far from pure. Much of *Rescuing Business* details the lobbying efforts of individuals and interests on all sides of the 1978 Code. The bulk of the book is a detailed investigation of the goals and actions of the various constituencies affected by bankruptcy reform. The central thesis of *Rescuing Business* is that bankruptcy law results from the interaction of two different legislative markets. On one side is the structure of pre-existing property rights that exist outside bankruptcy by virtue of contract and state law. On the other side is bankruptcy law, which provides authority to weaken or otherwise redesign these pre-existing property rights

[11] *See id*. at 876-79.

inside bankruptcy. Nonbankruptcy rights can be thought of as "bargained" property rights; Carruthers and Halliday dub the legislative process as a "metabargain," because bankruptcy law erects the overarching architecture that sets the ground rules for the actual contractual bargains entered into between commercial parties.[12] There are thus "two logics interwoven in the law-making: a political logic and a market logic."[13]

The logic of the market is one of economic efficiency. "According to this logic, market efficiency is best served when assets in a corporate bankruptcy are taken from failed companies and re-allocated to successful companies."[14] Under the market logic, therefore, the only normative goal of the economic and political systems would be to further economic efficiency by creating rules and institutions designed to enable resources to flow to their most highly valued uses and into the hands of the most competent managers. In such a regime, reorganization would have no intrinsic value, but serve as just one of several mechanisms that might be used (including contractual mechanisms) for accomplishing this goal.[15]

Metabargaining, by contrast, is less concerned about economic efficiency and more concerned about goals of "equity, fairness, or justice."[16] Like most such invocations of terms such as "equity," "fairness," and "justice," the use of these terms by Carruthers and Halliday is arbitrary and selective. Thus, for instance, those with enforceable property

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[12] This focus may be too narrow. As David Skeel has suggested, any such "metabargain" should also take into account multiple other areas of nonbankruptcy law, such as corporate law and anti-takeover law and regulations. *See* David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325 (1998).
[13] CARRUTHERS & HALLIDAY, *supra* note 6, at 155.
[14] *Id.* at 155-56.
[15] Proposals for such alternative regimes have been plentiful in recent years; indeed, far too plentiful to enumerate here. Two of the most prominent are Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992) and Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993).
[16] CARRUTHERS & HALLIDAY, *supra* note 6, at 155.

rights outside bankruptcy apparently have no claim in equity, fairness, or justice to have their property rights honored. Carruthers and Halliday provide no explanation for why contractual creditors should lack a moral claim to having their promises performed.[17] Carruthers and Halliday intone these first-year law-student terms to right a perceived imbalance of power between so-called "strong" and "weak" creditors outside bankruptcy. There are concerns about equity that are not reflected in a market process that is dominated by "strong" creditors at the expense of the "weak." They write:

> Metabargaining consequently overlays the market logic brought into the political arena by conventional players in day-to-day bankruptcies with a political logic that demands the balance of efficiency with the values of equity and fairness, the muscle of large economic actors with the vulnerabilities of small individual consumers. The political arena brings new players along with competing principles.[18]

As Justice Scalia has remarked, bankruptcy law has little to do with notions of "natural justice."[19] In the bankruptcy context, incantations of fairness and justice seem to be little more than cover for rent-seeking activity. Indeed, in their hard-headed analytical moments they seem to acknowledge that bankruptcy politics actually has very little to do with equity, fairness, and justice, and much more to do with the self-interest of politicians and constituents. Because this reality contradicts their ideological predispositions, Carruthers and Halliday must struggle to cloak the self-serving acts of politicians and powerful interest groups in the preferred language of equity and fairness:

> Politicians cannot simply ignore the fallout from a strict adherence to efficiency. In their calculus of political trade-offs, they must weigh the market principle of pragmatism against concepts of equity, no matter whether rehabilitation would be best served by

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[17] *See* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. REV. 177, 215-21 (noting that bankruptcy is a moral as well as economic and legal decision).
[18] CARRUTHERS & HALLIDAY, *supra* note 6, at 155-56.
[19] *See* Dewsnup v. Timm, 502 U.S. 410, 435 (Scalia, J., dissenting).

> ignoring weak creditors. Legislators attuned to the sensibilities of constituents, especially for political parties close to weak creditors, like consumers and workers, know that any solution for corporate creditors must include the fact or appearance of concessions to weaker players in the market and politics . . . .[20]

They conclude, "Saving businesses, coupled with better protected weaker creditors, compounds political capital."[21] It is unclear what to make of passages such as these, as Carruthers and Halliday seem reluctant to abandon their belief that there is some actual claim to equity by their favored claimants that others lack. Nonetheless, they also seem to note that these claims are driven by cynical self-interest. Given that the claims to justice are not in the least persuasive, it is evident that the self-interest of politicians and interest groups is in the drivers' seat.

More fundamentally, their belief that the bankruptcy process can systematically transfer wealth from "strong" creditors to "weak" is profoundly flawed. Secured lenders are only minimally hurt by a system that sacrifices economic efficiency to satisfy selective claims of equity and fairness. After all, secured lenders can simply raise their interest rates *ex ante* or change other credit terms to compensate for this expected loss.[22] Of course, there will likely be a dead-weight loss due to the cost of this readjustment, otherwise the new package of terms would have been chosen initially. Depending on the relevant cross-elasticity of demand between secured credit and other forms of capital, there may also be some *ex ante* distributive effects of increasing the relative attractiveness of unsecured credit or equity. One doubts that these dead-weight and distributive effects at

[20] CARRUTHERS & HALLIDAY, *supra* note 6, at 155.
[21] *Id.*
[22] *See* Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAPMAN L. REV. (forthcoming Spring 2000) (describing the large number of potential price and nonprice terms that even unsecured creditors can alter to offset losses imposed by regulation of selective terms of credit contract, including interest rates, grace periods, penalty fees, and customer service benefits).

the margin will be very large, although that is an empirical question. More fundamentally, Carruthers and Halliday seem to be unaware that secured creditors will be able to reallocate almost all of the losses imposed on them by an inefficient bankruptcy system. At the new equilibrium, the amount of redistribution from so-called “strong” to “weak” creditors will be minimal and bought at the cost of unnecessary dead-weight social losses.

Failing to understand that secured creditors can adjust *ex ante* to changes in bankruptcy rules that change their rights *ex post*, Carruthers and Halliday incorrectly believe that secured creditors took a bigger hit in bankruptcy reform than they thought they would.[23] In particular, they express surprise that secured creditors did not put up a tougher fight against cramdown and other judicial mechanisms for protecting the secured creditors' bargain.[24] By contrast, as Professor David Skeel has observed, once it is recognized that secured creditors can easily adjust to any changes in the bankruptcy regime by altering credit terms such as interest rates, the relative passivity of secured creditors toward most aspects of bankruptcy reform is understandable.[25] Consistent with Professor Skeel's intuition–but contrary to Carruthers and Halliday's conclusions–*Rescuing Business* stresses the interest of secured creditors in a certain and predictable bankruptcy system.[26] Thus, secured creditors were willing to yield on several substantive issues to insure a professional and expeditious bankruptcy process that would provide reliability and certainty. As *Rescuing Business* observes, “Banks could accept cramdown if the judge

[23] *See, e.g.*, CARRUTHERS & HALLIDAY, *supra* note 6, at 193-94.
[24] *See id*. at 190-94.
[25] *See* David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 508 (1998) (“Because secured creditors have priority both inside bankruptcy and out, secured creditors are not so concerned about large issues such as the restrictiveness or generosity of bankruptcy law–or even whether bankruptcy law should be retained or repealed.”).
[26] *See id*. at 508-09 (noting that the primary interest of secured creditors is “to assure that the bankruptcy process is as smooth as possible, lest their recovery be diminished by administrative and other costs”).

and courts in which it occurred were highly competent, neutral, and efficient."[27] The costs of changes in bankruptcy's substantive rules could be adapted into changed credit terms in the future, even if they were somewhat detrimental to secured creditors. More important was that whatever those rules were, they needed to be clearly and fairly enforced so that secured creditors would know exactly how to compensate for them in the *ex ante* bargain. Carruthers and Halliday's failure to recognize that the burden of inefficient bankruptcy rules would be felt largely by subsequent debtors and third-parties throughout the country who are not directly involved in the bankruptcy process leads them to misunderstand the motives of secured creditors in constructing the 1978 Code. Once the economic realities are understood, it is difficult to believe that sophisticated lenders simply made a mistake in trading strong substantive property rights for greater procedural efficiency and flexibility.[28]

This suggests that to the extent that the bankruptcy system is used to redistribute wealth from secured creditors to "weaker" creditors, most of the cost of this redistribution will not be borne by secured creditors. Who then bears this cost? This cost will be borne by parties outside of Carruthers and Halliday's vision. By raising the front-end cost of secured credit, for instance, the costs will be borne by small businesses who are dependent on secured credit for start-up financing because of the difficulty of making credible commitments to public equity and unsecured credit markets. Increasing barriers to entry harms the public generally through a dampening of entrepreneurship and dynamic competition. Moreover, these losses will fall heaviest on the poorest and least-developed

[27] CARRUTHERS & HALLIDAY, *supra* note 6, at 188.
[28] *See id.* at 193 ("Bankers realized the high stakes of trading their strong security for greater procedural efficiency and flexibility. Yet they may not have comprehended in 1978 the full scope of their concessions. Looking back some fifteen years after the Bankruptcy Code became law, another Congressional staffer concluded that '. . . secured creditors generally took a bigger hit than they realized they were taking.'").

regions of the country that have the greatest potential and need for economic growth.[29] Perhaps more importantly, by locking capital and assets into their status quo allocations, Carruthers and Halliday ignore the opportunity cost of failing to release capital and assets to higher-valued uses. This means that the redistribution comes at the expense of entrepreneurs, employees, consumers, and suppliers who would have otherwise had business, employment, purchasing, and marketing opportunities that were foreclosed at the margin by maintaining capital and assets in their current uses. To put the point another way, the trade-off from saving economically inefficient firms can be captured in the following observation: inefficient reorganizations save some firms that would otherwise fail, but at the cost of foreclosing the creation of *other* firms that would have otherwise been created but for the marginal increase in the cost of capital that results from the continued deployment of capital and assets in inefficient uses.

It is a truism of politics that these unknown prospective beneficiaries will have substantially less political clout than current suppliers, managers, and employees who would lose their jobs if their firm were liquidated. Indeed, it is natural for politicians to place greater weight on the concerns of "seen" victims of a firm closing more than the "unseen" and faceless individuals who are foreclosed from an opportunity that they never even knew about.[30] The inability to identify those actually harmed and the inability of those victims to identify one another raises insurmountable collective action problems for forming a constituency to offset those seeking to protect their jobs.

[29] *Cf.* Zywicki, *Externalities*, *supra* note 10, at 868-73 (noting that the cost of environmental regulations that reduce entry by new firms transfer wealth from less-developed poorer regions of the country to more-developed wealthier regions of the country).

[30] Similarly, the incumbent beneficiaries of a rent control law will be politically more powerful than the faceless multitudes who would be able to find reasonably priced housing if the rent-control statute were repealed. For a general

But this political bias in favor of known and politically powerful groups at the expense of unknown victims has little to do with concerns about fairness and equity and much more to do with the reality of rent-seeking politics. There is nothing equitable, fair, or just about imposing costs on third-parties just because they do not know that they are bearing costs and cannot do anything about it. Indeed, these would seem to be the "weakest" parties of all. Otherwise, cartels that could keep their price-raising practices a secret would be entitled to similar protection against antitrust enforcement because the victims of the cartel are consumers who do not know that they are victims because they do not know about the existence of the cartel agreement. Such claims of equity, fairness, and justice, therefore, are little more than cover for rent-seeking political claims. Political power, not moral entitlement, is the driving factor in the metabargain described by Carruthers and Halliday.

It appears that the belief that these claims really do represent claims of equity, fairness, and justice results from economic confusion on behalf of Carruthers and Halliday. I am aware of no *moral* theory that would rank the moral entitlements of incumbent job-holders over those who are never hired because of the opportunity cost associated with preserving the status quo. The moral claim on behalf of the status quo seems even more dubious once the dead-weight loss to society as a whole is added to the balance. There is simply no coherent mechanism for weighing the relative claims of fairness and justice between the winners and losers of a mandatory reorganization policy.[31] Despite Carruthers and Halliday's insistence to the contrary, the only plausible justification for a mandatory

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discussion of the problem, see Frederic Bastiat, *What is Seen and What is Not Seen*, *in* FREDERIC BASTIAT, SELECTED ESSAYS ON POLITICAL ECONOMY 1 (George B. de Huszar ed. 1964) (Seymour Cain translation).

reorganization policy must necessarily be economic. Namely, policy-makers must put on one side of the scale the traditional belief in a going-concern surplus that will otherwise be foregone with reorganization. The other side of the scale must include the opportunity cost of the foregone opportunities of liquidating and reinvesting capital and assets, plus the tangible economic costs associated with the administrative and court costs of reorganization. This necessitates an economic cost-benefit analysis. Specious and arbitrary appeals to equity and fairness have little to contribute to this cost-benefit analysis.

Having bootstrapped a fairness justification for reorganization, Carruthers and Halliday conclude that the only way to accomplish the social goals furthered by reorganization is to force secured creditors to abide by the reorganization scheme. This requires a delicate balance and to obtain that balance politicians and reformers must "whittle away some of the strong creditors' rights without triggering an adverse reaction that might sink statutory reforms altogether."[32] This allocation of the relative costs and benefits is wholly justified–"strong" creditors are unjustly enriched outside bankruptcy, and it is only appropriate that metabargaining at the statutory level is used to correct this imbalance. Reformers in both the United States and Britain:

> wanted to use the law to equalize the imbalanced relationship between sophisticated creditors and unsophisticated debtors. Furthermore, it was clear that rigorous enforcement of the rights of sophisticated secured creditors would make it harder to engineer a successful corporate reorganization. . . . Meta-bargaining therefore offered a site where inequities and inefficiencies in everyday practice might be corrected by

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[31] *See* Friedrich A. Hayek, *Equality, Value, and Merit, in* THE ESSENCE OF HAYEK (Chiae Nishiyama & Kurt R. Leube eds. 1984); FRIEDRICH A. HAYEK, 2 LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 62-78 (1976).

[32] CARRUTHERS & HALLIDAY, *supra* note 6, at 157.

> redirecting the force of [secured lending] and changing the rules of bargaining.[33]

This claim raises an obvious question–what if consensual market relationships are already more or less in balance? If so, then political metabargaining does not bring the system into balance, rather it generates economic rents for those with sufficient political clout to influence the political system.[34] *Rescuing Business* rejects this premise, but provides little evidence to explain why. It is no mere coincidence that the authors opt to use the value-laden terms "strong" and "weak" creditors to describe the two groups of creditors. It is because the strong are preying on the weak, and it is only the political process that can bring these two back into balance.

> Freedom of contract may be desirable because it facilitates mutually advantageous exchanges, but in practice it can conflict with the uncertain realities of commercial life and the hardships of corporate extinction. For example, the parties to a contract do not always bargain as equals. Agreements may reflect a measure of coercion as well as consensus. Moreover contracts that seemed desirable before bankruptcy may later prove to be burdensome. Contractual agreements sometimes need to be revised or adjusted after the fact in order to ensure that small creditors are not left completely destitute, or to salvage troubled corporations rather than liquidate them.[35]

Animated by this belief that secured creditors inequitably take advantage of debtors and "weak" creditors outside bankruptcy, Carruthers and Halliday find it appropriate that secured creditors should bear the primary cost of the metabargain designed to redress this balance. But Carruthers and Halliday offer no sound evidence that the prebankruptcy

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[33] *Id*. at 164.

[34] I use the concept of rent-seeking here in its purest form–using the political process to increase one's economic return above what it would receive in a competitive market. In the context of bankruptcy, the baseline for measuring economic rents would seem to be the return that a junior creditor would receive from an insolvent debtor. The importance of understanding the rent-seeking nature of bankruptcy generally is discussed *infra* at notes 68-72 and accompanying text.

[35] CARRUTHERS & HALLIDAY, *supra* note 6, at 171.

market bargain is unjust or that non-bankruptcy protections are inadequate to rectify any perceived imbalance (such as consumer protection laws or unconscionability limits on contractual enforcement). Nor do they offer any support for the view that the parties to a legislative metabargain actually bargain as equals. Indeed, politics usually exacerbate, not ameliorate, relative inequalities in wealth and power. Lacking support for the view that nonbankruptcy bargains are systematically unfair, Carruthers and Halliday are similarly unable to rebut the related claim that the political metabargain is anything other than rent-seeking by politically powerful groups, such as labor unions and bankruptcy professionals.

As the foregoing discussion suggests, *Rescuing Business* is plagued from beginning to end by the authors' ideological predilections and a fundamentally weak understanding of economics and capital markets. Saddled with a weak and unworkable sociological theory of legislative influence and change, they are unable to draw any persuasive and useful conclusions from their voluminous research. At the same time, it should be recognized that the book provides impressive reportage on the statements and behavior of the various parties involved in the bankruptcy reform process. Hitched to a more workable theory, their research can provide interesting insights to the process of statutory reform. A brief discussion of how such a model might appear is provided *infra*.

C. The Role of Bankruptcy Professionals in Reform

Perhaps the most interesting and original contribution of *Rescuing Business* is its recognition of the role played by bankruptcy professionals in the bankruptcy reform process. As the authors note, under the 1978 Code bankruptcy has become an increasingly lucrative and prestigious practice area, drawing many talented and expensive lawyers, accountants, and other professionals into bankruptcy court.[36] The prestige and financial benefits are a direct result of the policies brought into play by the 1978 Code. Indeed, Carruthers and Halliday suggest that the final structure of the 1978 Code is impossible to understand without recognizing the dominant role played by bankruptcy lawyers in structuring the Code. As subsequent experience has borne out, reorganizations may succeed or fail and creditors may get little or most of their credit repaid. The one great constant, however, is that bankruptcy professionals are rewarded handsomely for their services, largely independent of whether they actually create any value in a given case.

Carruthers and Halliday argue that the structure of bankruptcy practice and law reform provides fertile ground for professional dominance of both the bankruptcy process and the bankruptcy reform process. They provide a useful model of the conditions that tend to increase professional control over the legislative process:

> First, professions exert greater influence when they can attain exclusive technical authority. . . . Second, professions will be more influential when they can translate substantive policy issues into technical terms. . . . Third, professions may expand their influence when they can persuade political authorities that expert recommendations embody central cultural values. . . . Fourth, professions exert greater influence when states are weak and have limited resources, or states have not yet penetrated certain policy domains, and private experts are the logical groups on which to depend. Fifth, professional power increases the greater a given profession's credibility, credentials, and capacity for political mobilization.[37]

They conclude that bankruptcy legislation provides a process amenable to dominance by professional interests. "Because bankruptcy legislation is both infrequent, seemingly non-ideological, not of great electoral interest, and highly technical, it appears to be a site

[36] *See id.* at 3.
[37] *Id.* at 74.

particularly amenable to professional dominance."[38] They add that "this proposition must be qualified historically" as nineteenth-century bankruptcy law-making resulted from economic crises that spawned great ideological and political interest.[39] As a result, professionals exerted less control over nineteenth century bankruptcy legislation. By 1938, however, professionals already played an important role in bankruptcy law-making, an influence that mounted by the enactment of the 1978 Code. "By 1978," they write, "there was comparatively little economic pressure or political controversy and, under these conditions, professionals thrived. They got rather less a free hand when economic changes stimulated pressure groups to take a much closer interest in the legislation of the 1980s and early 1990s."[40]

Indeed, Carruthers and Halliday observe that bankruptcy professionals were the dominant group throughout the entire process culminating in the 1978 Code. They extensively document professionals' hammerlock on the entire process. Hearings in Washington[41] and throughout the country[42] were dominated by professional interests. "Omnipresent . . . were lawyers," Carruthers and Halliday observe.[43] Elsewhere they write, "Professionals – almost entirely lawyers and judges – permeated every facet and stage of reforms."[44] Thus, while those directly affected by the bankruptcy legislation such as creditors, employees, and tax authorities had some say in the formation of the bill, "lawyers and judges dominated the deliberative process, particularly those identified with the National Bankruptcy Conference and the National Conference of Bankruptcy Judges, the

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[38] *Id.*
[39] *Id.* at 74 n.13.
[40] *Id.* at 74 n.13.
[41] *See id.* at 83.
[42] *See id.* at 87.
[43] *Id.* at 91.

two organizations whose members had a universal interest in all provisions of the draft legislation."[45] Exhaustive study of the legislative process reveals two key facts to Carruthers and Halliday.

> [F]irst, professionals and their organizations dominated proceedings in sheer length of time and breadth of appearances; and second, many groups who would be significantly affected by the legislation showed little interest in it. Time and again, legislators and staffers repeated the refrain that "very, very few evidenced any interest in bankruptcy legislation," or that given groups were "asleep at the switch."[46]

In part, the apathy of non-professional interests results from the "mantle of technical complexity" that professionals drew over the legislation made it difficult for many affected parties to recognize what was happening.[47]

Carruthers and Halliday also note the incentives and influence of bankruptcy judges as an organized interest group of their own. In part, their interests in increasing the status and wealth of bankruptcy professionals overlapped with that of the organized bankruptcy bar. But bankruptcy judges saw the enactment of the 1978 Code as a rare opportunity to enact fundamental change in their wealth and prestige as judges, "the best opportunity for decades to advance their collective fortunes."[48] Thus, like any other special interest group, they lobbied hard to achieve their goals–indeed, they wrote their own bill and even hired their own lobbyist.[49] "On matters concerning judicial status, salary, methods and terms of judicial appointment, court powers–any facet of the legislation that had an impact on their own status position and power in the bankruptcy field–they acted like 'trade groups

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[44] *Id.* at 92; *see also id.* at 144 ("professional specialists pervaded every stage and every element of the reforms").
[45] *Id.* at 83.
[46] *Id.* at 92.
[47] *See id.* at 148-49.
[48] *Id.* at 97.
[49] *See id.*

protecting their own personal interests.'"[50] Indeed, their submissions to Congress were dominated by issues related to their private interests in increased status, rather than substantive issues of bankruptcy law.[51]

The absence of economic crisis and strong ideological predilections in 1978 enabled bankruptcy professionals to dominate the entire bankruptcy reform process. Moreover, creditors and other interested parties were either indifferent to much of the bill's provisions, or faced collective action and free rider problems in forming a coherent constituency to counterbalance the influence of bankruptcy professionals. Unsurprisingly, the end result of this process was to increase the wealth and prestige of bankruptcy lawyers and judges.

The chapter 11 process that emerged in the 1978 Code also bears the mark of professional influence. The current chapter 11 process is one dominated by bankruptcy professionals, seemingly to the near-exclusion of almost all other relevant parties.[52] Father Drinan, a Congressman during the enactment of the Code, observed that the Code could be characterized as a "'full employment bill' for lawyers."[53] Indeed, as Carruthers and Halliday observe, the enormous fees and delay occasioned by professionals under the American chapter 11 process is one of the major reasons why just a few years later England explicitly rejected proposals for a comparable lawyer-driven reorganization practice in the 1986 English Insolvency Act. As they observed, "*even lawyers* close to the Cork Committee agreed that it was highly desirable to keep lawyers at bay and the courts at

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[50] *Id.*
[51] *See id.* at 99.
[52] *See* Todd J. Zywicki, *Mend It, Don't End It: The Case for Retaining the Disinterestedness Requirement for Debtor in Possession's Professionals*, 18 MISS. C. L. REV. 291, 301 (1998) (summarizing criticisms of attorneys' fees in bankruptcy).
[53] CARRUTHERS & HALLIDAY, *supra* note 6, at 302.

arms length during reorganizations."[54] According to the English reformers, "The transaction costs exacted by disputes among parties represented by lawyers would 'eat up huge amounts of money' that could otherwise be directed to reviving the company."[55] For this reason, among others, English reformers opted for a less-contentious and less lawyer-driven system of reorganization.

The massive influence of the bankruptcy bar over the drafting of the 1978 Code culminated a decades-long evolution of increasing influence of bankruptcy professionals over the shape of American bankruptcy legislation. Bankruptcy lawyers played a relatively minor role in the enactment of the 1898 Bankruptcy Act, which provided the first permanent American bankruptcy law. Soon after the enactment of the Bankruptcy Act, however, "lawyers assumed an increasingly prominent role in the debates. Within a few years, the debates on proposals to amend or repeal the [Bankruptcy] Act were dominated by bankruptcy lawyers and references to their interest in the bankruptcy law."[56] Thus, the powerful influence of bankruptcy lawyers reflected in the 1978 Code was consistent with a pattern of growing professional influence dating back into the nineteenth century.[57] Following the enactment of the 1978 Code, "bankruptcy professionals experienced a meteoric rise in their professional identity, their market position, and the rewards accompanying both."[58]

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[54] *Id*. at 299 (emphasis added).
[55] *Id*.
[56] Skeel, *Bankruptcy Lawyers*, *supra* note 25, at 506.
[57] As Professor Skeel observes, another reason for the disproportionate influence of lawyers over bankruptcy legislation is the fact that bankruptcy law has emananted from the Judiciary committees of the House and Senate rather than the Commerce committee. *See* David A. Skeel, Jr., *The Rise and Fall of the SEC in Bankruptcy* (University of Pennsylvania Law School Institute for Law and Economics, Nov. 1999) (visited May 9, 2000) <http://papers.ssrn.com/paper.taf?abstract_id=172030>.
[58] CARRUTHERS & HALLIDAY, *supra* note 6, at 421.

D. Normative Implications of Professional Influence

The powerful influence exerted by bankruptcy professionals over the making of bankruptcy law is problematic. The interests of bankruptcy lawyers and judges will often diverge from that of their clients and the bankruptcy system as a whole. As Professor Skeel observes, "Bankruptcy lawyers do further their clients' interests on some issues, but in at least one crucial way they may not: all bankruptcy lawyers have an interest in increasing the use of bankruptcy."[59] As a corollary, chapter 11 lawyers will also have an interest in increasing the complexity and overall cost of the bankruptcy system. Furthermore, bankruptcy lawyers will have an incentive to reinforce the technical and opaque nature of the bankruptcy system that Carruthers and Halliday identify as factors increasing the propensity for professional dominance of the legislative process.[60] What they seemingly fail to recognize, however, is that this technicality and opacity is actually an endogenous variable, as bankruptcy professionals will have an incentive to increase these characteristics of the bankruptcy process so as to further reinforce professional dominance over the legislative process.

The power of bankruptcy professionals will be further heightened by the federal nature of the bankruptcy process.[61] Competition among states helps to erode the dead-weight costs of inefficient legal rules by allowing parties to opt out of inefficient rules by contract or through migration and "voting with your feet."[62] By contrast, one cannot opt-out of inefficient national laws. As a result, parties will have no escape from the dead-weight

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[59] Skeel, *Bankruptcy Lawyers, supra* note 25, at 511.
[60] *See supra* notes 37-40 and accompanying text.
[61] *See, e.g.*, Zywicki, *Externalities*, *supra* note, at 905 (noting that regulation on the federal level enables lawyers to exercise market power and restrict entry that might otherwise chip away at the economic rents that they earn).
[62] *See* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. (forthcoming 2000) (describing choice of law as mechanism for eroding dead-weight losses caused by inefficient laws).

loss of these laws. This will be an especially large problem in settings such as bankruptcy, in which the legal regime itself is nonwaiveable.[63] The national and mandatory nature of bankruptcy law provides bankruptcy lawyers with market power. Because of this market power, bankruptcy lawyers can charge a monopoly price for their services in a way that many other practice areas cannot. This monopoly power will tend to increase the fees charged for bankruptcy attorney services, an undeniable result of the 1978 Code.[64]

This tendency toward higher and more excessive fees is exacerbated by the absence of adequate client oversight in the chapter 11 process.[65] Outside bankruptcy, a lawyer's fees are set by market forces and monitored by actual clients, as is the reasonableness of the labor performed. In bankruptcy, by contrast, the "client" is the estate as a whole. Because the estate is "everyone," this effectively means that the estate is "no one." The debtor in possession is not spending its own money, it is spending the creditors' money.[66] Collective action and free rider problems will tend to deter individual creditors from reviewing fees, as will reciprocity constraints. In short, there is no effective client and few effective monitoring devices to ensure the reasonableness of the price or value of services performed.[67]

Finally, it must be recognized that *both* the bankruptcy metabargaining process *and* the bankruptcy bargaining process are fundamentally rent-seeking processes, which has important implications for the role of bankruptcy lawyers in lobbying and bankruptcy

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[63] Skeel, *Bankruptcy Lawyers*, *supra* note 25, at 520.
[64] *See id*.
[65] *See* Zywicki, *Mend It*, *supra* note 52, at 299-301; Todd J. Zywicki, *Of Bubbling Pots and Bankruptcy Ethics: A Comment on Wolfram and Smith*, 18 MISS. C. L. REV. 399, 401-02 (1998).
[66] *See* Zywicki, *Mend It*, *supra* note 52, at 298.
[67] *See id*. at 298-303. Supervision by the United States Trustee and the Bankruptcy Court is episodic and *ex post* in nature. Thus, it is difficult for them to determine the reasonableness of the tasks undertaken. Moreover, they lack the comprehensive information needed to evaluate the prices charged for bankruptcy fees relative to the prevailing market

representation. The traditional economic argument for mandatory reorganization is that there are economic rents generated by maintaining the current deployment of assets because of investments in firm-specific capital. The existence of such rents, however, means that at least some of those rents will be dissipated in pursuing legislation designed to protect them. If there are economic rents to be earned by maintaining the current deployment of assets, then beneficiaries would be willing to expend up to the current expected value of those rents in support of laws that protected those rents.[68] Knowing that such rents exist as a result of these investments in firm-specific capital, politicians can threaten to "extort" some or all of them by passing or withholding legislation that influences the value of such rents.[69] The final distribution of these economic rents will depend on the outcome of bargaining between the lobbying interests and the politicians.[70] Lawyers and lobbyists play an important role in brokering this metabargain, financially benefiting from providing these services.

The bankruptcy process itself is also a rent-seeking game, in which the lawyers are again the brokers. The essence of American bankruptcy law is the attempt by the debtor-in-possession and junior creditors to evade the strict requirements of the absolute priority rule that would otherwise give secured creditors control over the decision whether to reorganize. The baseline for comparison, therefore, is the return of an unsecured creditor and the debtor under pure absolute priority. Thus, the debtor and unsecured creditors are

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rates charged in other practice areas. Finally, they lack information about the various discounts and other informal deals frequently provided to clients in other practice areas.

[68] *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopoly and Theft*, 32 WESTERN ECON. J. 5 (1967).

[69] *See* FRED MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997); Zywicki, *Externalities*, *supra* note 10, at 898-99 (applying rent-extraction analysis to command-and-control environmental regulation).

[70] Politicians capture some of this in the day-to-day perquisites of their job, *see* Franklin G. Mixon, Jr. et al., *Rent-Seeking and Hidden In-Kind Resource Distortion: Some Empirical Evidence*, 78 PUB. CHOICE 171

the primary beneficiaries of any going-concern surplus created by reorganization. This too is an economic rent–a return to unsecured creditors, management, employees, and others, that exceeds what they would receive under their baseline nonbankruptcy rights. Given the existence of this rent, unsecured claimants would be willing to expend up to the value of this rent in attorneys' fees and side-payments to other parties (such as equity holders and management) in order to effectuate a reorganization. Like lobbying expenditures, lawyers' fees are simply the necessary price of engaging in the bankruptcy process. The role of the lawyers representing unsecured creditors, therefore, is to erode nonbankruptcy law rights by imposing costs and transferring wealth from senior creditors, and thereby to create a surplus for unsecured creditors that can be shared with others. Indeed, this inherent conflict between secured and unsecured creditors in fighting over a fixed amount of assets traditionally has proved a major stumbling block in achieving bankruptcy reform. Empirical evidence suggests that lawyers are paid handsomely for performing this wealth-transfer service and that the going-concern surplus is routinely shared among a variety of junior claimants.[71] Indeed, as Carruthers and Halliday note, the lawyers' fees for performing these services come from the pockets of unsecured creditors.[72]

Thus, lawyers are essential participants at both stages of this rent-seeking process, both at the metabargain and bankruptcy bargaining process. As a result it should not be surprising to see the bankruptcy process dominated by the interests of the bankruptcy bar.

(1994), or in direct retention of some of the wealth that is transferred, *see* John D. Jackson et al., *Instant Winners: Legal Change in Transition and the Diffusion of State Lotteries*, 80 PUB. CHOICE 245 (1994).

[71] *See* Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. PA. L. REV. 125 (1990).

[72] *See* CARRUTHERS & HALLIDAY, *supra* note 6, at 517 ("In the market, the incentives were principally monetary, essentially diverting resources from unsecured creditors to professionals.").

II. LESSONS FOR BANKRUPTCY REFORM TODAY

Rescuing Business provides several important insights for understanding the bankruptcy reform process today. In particular, the historical findings of *Rescuing Business* can be harnessed to a more realistic understanding of the motives of the participants in the bankruptcy reform process to gain insight into the process of bankruptcy reform.

The current bankruptcy reform struggle follows many of the same patterns described by Carruthers and Halliday in *Rescuing Business*. This stability of coalitions is interesting in that the central issues in the Bankruptcy Reform Act of 1999 (the "BRA") differ from those studied in *Rescuing Business*. The focus of *Rescuing Business* is on business bankruptcies and the chapter 11 process. By contrast, the BRA is motivated primarily by concerns about high levels of consumer bankruptcies. Despite this crucial difference in the aims of the legislation, the concerns of the parties on all sides of the bankruptcy reform process can be understood by examination of the backdrop provided by *Rescuing Business*.

One possible difference between the BRA and the 1978 Code is the surprisingly high degree of public salience on the issue, especially the high degree of popular support and the overwhelming bipartisan political support for reform. According to Carruthers and Halliday, the 1978 Code was distinct from prior bankruptcy laws in that it was not enacted in a period of economic or ideological crisis. Carruthers and Halliday observe that this relatively low-level of public and political cognizance of the issue helps to explain why professionals were able to exert so much control over the legislative process.

In contrast to the sanguinity surrounding the enactment of the 1978 Code, there is a widespread public perception today that the consumer bankruptcy system is in disarray, riddled with fraud and opportunism. There is also a heightened awareness that responsible consumers inevitably bear some of the cost of rampant personal bankruptcy, whether in higher interest rates, higher downpayments, greater credit rationing, fewer benefits, or more severe penalties and finance charges.[73] There is also a widespread perception that bankruptcy has lost some of its traditional stigma, undermining the moral values of reciprocity, personal responsibility, and promise-keeping.[74] Thus, bankruptcy is not just an economic question of whether a particular debtor repays a particular loan, but rather credit relations are embedded in a larger social framework of trust, reciprocity, and promissory obligations. Widespread personal bankruptcy tears at the threads of reciprocity that underlie all market, social, and political transactions.[75] Finally, public outrage continues to mount in the face of high-profile abuse of the bankruptcy process by high-income debtors who file bankruptcy with little financial or social consequence. These outrages mock the efforts of those who budget and sacrifice so as to live responsibly and within their means. Unsurprisingly, public opinion polls show overwhelming support for bankruptcy reform to reduce this abuse.

This widespread public support for bankruptcy reform is reflected in the overwhelming levels of political support for bankruptcy reform. Politicians and their constituents are troubled by bankruptcy filing rates in excess of 1.3 million personal filings

[73] *See* Zywicki, *Economics of Credit Cards*, *supra* note 22 (noting changes in various credit terms in response to increasing credit card defaults and larger numbers of personal bankruptcy filings).
[74] *See* Todd J. Zywicki, *Bankruptcy and Reciprocity* (working paper, George Mason University School of Law, August 1999); Zywicki & Jones, *supra* note 17, at 215-21; F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187 (1998); David Frum, *Bankruptcy Reform Is a Moral Issue*, WALL ST. J., Feb. 11, 2000, at A14.

per year in an era of unprecedented prosperity, low unemployment, low interest rates, and rising personal wealth due to booming real estate and stock market asset values. As a result of this runaway bankruptcy system, bankruptcy reform has been supported even by those not generally considered to be allies of the consumer credit industry. Democratic Congressman Barney Frank, for instance, observes "I think people should have to pay their bills. . . . I am for toughening bankruptcy laws. It's only a minority who ever go bankrupt, and those costs get passed on to the majority who pay their bills."[76] Similarly, a number of staunch liberals and members of the Congressional Black Caucus voted in favor of the BRA.

This relatively high level of public support and salience in favor of bankruptcy reform may help to explain why bankruptcy reform is likely to be enacted despite the fact that the predominant beneficiary of reform is the dispersed public at large. Recall, that as discussed *supra*, the costs of bankruptcy reorganization are largely externalized on consumers generally and also on an unidentifiable group of potential entrepreneurs and employees who confront higher costs of capital at the margin as a result of the failure to free up assets for redeployment to more efficient uses. Similarly, much of the costs of 1.3 million consumer bankruptcies is distributed across the bulk of consumers who confront higher credit costs and fewer benefits at the margin. In addition, there is a dead-weight cost borne by society at large as a result of the capital market inefficiencies that result from the uncertainty of contractual performance. In most cases, it is not feasible for politicians to represent these dispersed interests, as each individual consumer lacks an adequate

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[75] *See* Todd J. Zywicki, *The Ubiquity of Reciprocity* (working paper, George Mason University School of Law, October 1999).
[76] Anne E. Kornblut, *Credit Card Issuers Seek to Curb Debtors' Bankruptcy Relief*, BOSTON GLOBE, Oct. 11, 1999, at A1.

incentive to support reforms that will reduce a widely-distributed "bankruptcy tax" such as that borne by consumers generally. Nonetheless, it appears that politicians have found sufficient support within the public to favor such reforms.

As noted, bankruptcy losses can also have distributive and dead-weight efficiency losses. Thus, it is not surprising that the unsecured consumer credit industry also supports reform. In particular, credit unions and credit card companies are among the strongest supporters of reform. The essential bankruptcy problem confronting an unsecured creditor is one of postcontractual opportunism. It is difficult to tell *ex ante* whether a particular debtor will be likely to repay the amounts borrowed. By contrast, the borrower will have private information about his likelihood of defaulting and filing bankruptcy. Given this information assymetry, creditors are required to assume that all debtors are potential bankrupts and establish the credit terms according to the worst-case scenario so as not to expose themselves to problems of adverse selection.[77] The borrower's inability to credibly signal his trustworthiness to the creditor, therefore, results in a dead-weight loss relative to the optimal credit terms if such postopportunistic behavior could be restrained. Restricting postcontractual opportunism by reducing the benefits of filing bankruptcy, therefore, will alleviate some of these adverse selection problems and thereby reduce some of this deadweight loss. The failure to police postcontractual opportunism in the form of bankruptcy, therefore, imposes dead-weight losses on all consumers regardless of their *actual* trustworthiness because of their inability to signal their actual degree of trustworthiness.

[77] *See* Zywicki, *Economics of Credit Cards*, *supra* note 22.

Absent reforms designed to restrain postcontractual opportunism, creditors do, in fact, adjust to the heightened risk of *ex post* loss by altering their credit terms *ex ante*.[78] So for instance, credit card issuers have responded to higher systematic levels of risk by increasing late fees and penalties on tardy customers and those who exceed their credit lines, as both of these behaviors are highly correlated with increased default risk.[79] Similarly, credit card issuers have started reducing credit limits so as to reduce their exposure to losses resulting from opportunistic behavior. But this is only a second-best solution to the optimal solution, which would be to police postcontractual opportunism directly by limiting opportunistic use of bankruptcy.[80] Contrary to common perception, it does not appear that credit card issuers have been knowingly lending to higher-risk borrowers in recent years. Rather it appears that the *entire pool* of borrowers presents greater risks as a result of changes in social norms and other factors that have increased the propensity of individuals to file bankruptcy regardless of their objective economic risk characteristics.[81] Thus, it appears that the upward spiral in bankruptcy filing rates in recent years can be best understood as an unexpected increase in the risk of post-contractual opportunism for which the market only now has started to adjust.

Because unsecured creditors such as credit unions and credit cards are most vulnerable to bankruptcy opportunism, at the margin they could also be expected to lose

[78] *See* Jones & Zywicki, *supra* note 17, at 217-18 (describing market responses of Memphis creditors in response to the high bankruptcy filing rates there).
[79] *See* Zywicki, *Economics of Credit Cards*, *supra* note 22.
[80] *See* Todd J. Zywicki, *Why So Many Bankruptcies and What to do About It* (working paper, George Mason University School of Law, November 1999) (arguing that institutional reforms such as means-testing and expanded use of secured credit are appropriate responses to rising level of post-contractual opportunism). Personal reputation also provides an additional mechanism to prevent post-contractual opportunism by creating a "bond" that will be forfeited by acting opportunistically. *See* Todd J. Zywicki, *The Reciprocity Instinct: An Evolutionary Analysis of Norms, Promise-Keeping, and Bankruptcy* (working paper, George Mason University School of Law, November 1999).

market share to creditors less vulnerable to such losses. This would include secured creditors, most notably home equity lenders, and financial arrangements such as rent-to-owns that are substitutes for traditional forms of secured lending.

This combination of dead-weight cost and the threatened loss of market share to lenders who are better insulated against postcontractual opportunism helps to explain the support of unsecured creditors for greater restrictions on opportunistic bankruptcies by high-income filers. This also casts into doubt the feverish rhetoric of usually sober bankruptcy commentators in criticizing the lobbying efforts of unsecured creditors to reduce opportunistic bankruptcy.[82] Absent reform, the market will adjust–it always does. But market adjustments alone may not be the most efficient response to opportunistic bankruptcy filings. In short, it appears that the interests of the unsecured creditors lobby is actually in alignment with the unrepresented bulk of American consumers who are forced to bear the deadweight costs associated with high bankruptcy filing rates.

As predicted by a consistent application of the Carruthers and Halliday model, secured creditors have been relatively uninvolved in the current round of bankruptcy reform. While there is little to gain from participation, there is also little to lose. As noted, they can respond to almost any reasonable regime so long as it is sufficiently predictable. Thus, while they have lobbied in favor of a clear reassertion of the rules governing collateral valuation in the cramdown context, they have remained generally uninvolved in the reform process.

Opposition to the BRA is centered in the same groups that supported the 1978 Code–namely, bankruptcy lawyers and judges. This is to be expected. The core

[81] *See* Todd J. Zywicki, *Credit Cards and Bankruptcy*, (working paper, George Mason University, School of Law, March 2000).

provisions of the BRA promise fewer bankruptcies and a simpler bankruptcy process. As a result, it flies in the face of the efforts in the 1978 Code to increase access to bankruptcy and to make it more complex and expensive.

As noted above, bankruptcy lawyers favor increased bankruptcy filings.[83] The goal of the BRA is stem the rising tide of bankruptcies that has escalated since the enactment of the 1978 Code, especially in the past decade. Moreover, the "means-testing" provisions of the BRA are aimed particularly at high-income bankruptcy filers who are potentially the most lucrative group of bankruptcy clients. Although the details differ and are unresolved as of this writing, under the means-testing provisions of the bill, any debtor who earns above the median national income and has sufficient income to repay a substantial portion of his debts without significant hardship would be presumed to have engaged in abuse of chapter 7 and therefore would be required to file chapter 13 rather than chapter 7. While estimates vary, credible studies approximate that this would affect some 7-10% of bankruptcy filers and would recapture roughly $3 to $4 billion in debt that would otherwise be discharged in bankruptcy.[84] By contrast, few chapter 7 filings make any distribution at all to unsecured creditors and those that do usually distribute trivial amounts.[85] Thus, by targeting a discrete group of high-income debtors with substantial repayment capacity, this modest reform would substantially alter the bankruptcy filing decision for high-income filers. By reducing the financial advantages to high-income earners of filing bankruptcies, the BRA will have its greatest effect in reducing or slowing the growth of this group of potential filers and will increase the amounts of debt they repay.

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[82] *See, e.g.*, Tabb, *supra* note 1.
[83] *See supra* notes 59-60 and accompanying text.
[84] For a summary discussion of these empirical studies, see Jones & Zywicki, *supra* note 17, at 192-98.
[85] *See id.* at 185 and n.30 (summarizing empirical studies).

The means-testing provisions of the BRA, therefore, would replace the current open-ended inquiry as to substantial abuse with a rule-based inquiry as to the existence of substantial abuse.[86]

The rule-based nature of the means-testing inquiry also explains the vehement opposition of bankruptcy judges to the BRA.[87] As Carruthers and Halliday observe, the primary concern of bankruptcy judges in the legislative process is their desire to enhance their relative power and prestige.[88] Means-testing potentially threatens these desires. By enacting a rule that reduces judicial discretion, means-testing promises greater predictability and equality in the treatment of bankruptcy filers. But this reduction in discretion also reduces judicial power by limiting the need for the judge to make a detailed case-by-case inquiry and ruling in every contested case. In short, it makes the decision more routine and administrative in nature, and in this sense less "judicial."[89] As such decisions become more routine and administrative in nature, they also tend to undercut the call of bankruptcy judges to be awarded Article III judicial status.

Consistent with *Rescuing Business*, bankruptcy lawyers and judges have criticized reformers for their failure to defer to the "expertise" of the community of bankruptcy professionals. As Carruthers and Halliday assert, this is a tactic that is typical of situations of professional control over the legislative process. Thus, it has been observed with

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[86] *See id.* at 199; Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105 (1998).

[87] *See, e.g.*, Christine Dugas, *Bankruptcy Judge Fears Reform Will Hurt Poor Most, Too Much Credit Extended, He Believes*, USA TODAY, June 3, 1999, at p. 5B (interview with Bankruptcy Judge Joe Lee), *available in* 1999 WL 6844334.

[88] *See supra* notes 48-51 and accompanying text.

[89] For instance, Professor Kenneth Klee has proposed a similar means-testing regime for consumer bankruptcy that would be handled almost exclusively by administrators rather than judges. *See* Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L. J. 431 (1997). *But see NBC Says Credit Industry's Reform Proposals Mean-Spirited*, 32 BANKR. CT. DEC. (CRR) 4 (Apr. 7, 1998) (quoting Klee's revised position that "[m]eans testing is mean-spirited").

dismay that bankruptcy reform legislation continued to progress despite "numerous pleas . . . by almost every nonpartisan segment of the bankruptcy community . . . to 'go slow.'"[90] Of course, it was apparent to all participants in the reform process at the time that the call to "go slow" was really an attempt to waylay the legislation completely, perhaps in hopes of a Democratic capture of one or both houses of Congress in 1998 that might waylay the legislation.[91] Bankruptcy professionals, noticeably miffed at the determination of Congress to advance legislation without seeking their "expert" input, called for legislative hearings and further consideration. The apparent purpose of these hearings was solely to solicit the input of bankruptcy professionals, as most of the parties directly affected by bankruptcy reform (such as creditors) had already expressed their support for the legislation. As their subsequent testimony at the hearings demonstrated, the real goal of bankruptcy professionals was to scuttle the legislation by deflecting blame onto the consumer credit industry, rather than to improve the legislation or to respond to concerns about bankruptcy abuse. As Carruthers and Halliday might predict, much of the professional's criticism was focused on the view that Congress simply lacked the expertise to understand such a technical and difficult area of law as bankruptcy and that they should simply defer to "expert" opinion.

These debates also evidence another aspect of Carruthers and Halliday's thesis regarding the role of professionals in the bankruptcy reform process. It has been argued that future bankruptcy filers are underrepresented in the bankruptcy reform process because of their difficulty in recognizing that they may be in such a position and the inherent

[90] Tabb, *supra* note 1, at 349.
[91] *See id.* at 350 ("[B]y asking Congress to take more time [bankruptcy] professional groups probably tipped their hand that they not only were worried about the reform *process*, but also by the *substance* of those reforms. [House Judiciary Chairman George] Gekas, nobody's fool, suspected as much.").

collective action problems associated with combining these "prospective filers" into a workable lobbying group.[92] As Carruthers and Halliday note, however, the interests of professionals will overlap with those of prospective debtors, and this group will be well-represented at the metabargaining table.[93] Thus, while managers did not make the case in 1978 for greater managerial discretion and powers for reorganizing firms, bankruptcy lawyers did.[94] Similarly, although managers are not repeat players in bankruptcy, bankruptcy lawyers are.[95] Individual debtors will be amply represented by professionals in the consumer bankruptcy arena. Moreover, as suggested *supra*, most parties directly affected by bankruptcy will be represented in the legislative process. By contrast, the costs of an inefficient bankruptcy system will be borne primarily by those who find credit less obtainable or more expensive. Because these individuals are diffuse and difficult to organize, costs will tend to be imposed on them. In the consumer bankruptcy context, therefore, solvent consumers will be forced to bear at least some of the cost associated with bankruptcy and the entire economy will be harmed by the dead-weight costs that result.

Given that prospective debtors will tend to be represented by professionals, the call by law professors for greater input from debtors into the bankruptcy reform decision

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[92] *See* CARRUTHERS & HALLIDAY, *supra* note 6, at 92 (discussing difficulties of managers in lobbying for reorganization legislation); *Academics to Congress: Slow Down!* BANKR. CT. DEC. WEEKLY NEWS & COMMENT (Apr. 3, 1998), at A1 (describing letter from law professors to Congress and stating that "virtually no one has spoken for those Americans who have declared bankruptcy or who may one day be forced into that position").

[93] In this sense, bankruptcy lawyers are similar to criminal defense lawyers. Like prospective bankruptcy debtors, prospective criminal defendants cannot form a workable lobbying group. Nonetheless, the interests of prospective criminal defendants would appear to be well-represented in the legislative and judiciary processes by the criminal defense bar. *See* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 500 (1999) ("While criminal defendants cannot plausibly be viewed as a coherent interest group, criminal defense attorneys are an effective lobbying force.").

[94] CARRUTHERS & HALLIDAY, *supra* note 6, at 92.

[95] *See id.*

can be best understood as a call for greater input from *bankruptcy professors* in the reform process, thereby increasing the status and influence of bankruptcy academics. As Carruthers and Halliday observe, a primary difference between legislative metabargaining and routine bankruptcy bargaining is that in the legislative process "[a]cademics – most commonly law professors – obtain an influence rarely seen in practice."[96] Thus, this call for greater input from law professors can be understood at least in part as a self-interested attempt by academics to increase their status and influence over the legislative process.[97]

The self-interested motives of professionals is perhaps best evidenced in their strong opposition to a provision of the BRA that would elevate spousal and child support obligations to first priority in bankruptcy. In turn, this would drop attorneys' fees obligations from its current position of first priority to second priority.

This dispute over the priority of attorneys' fees also reinforces the specious nature of Carruthers and Halliday's belief in the coherence of many claims in the legislative process for "fairness" and "justice." Bankruptcy professionals have criticized the BRA, offering vague criticisms that it would somehow be injurious to women and children, and that it is thus inequitable. Such claims are false and illogical, as the BRA contains multiple new protections for collecting financial obligations from a bankrupt former spouse.[98] But

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[96] *Id*. at 521.

[97] Carruthers and Halliday attempt to downplay the self-interested motives of the role of law professors and lawyers to increase their status by participating heavily in the reform debate, arguing that "they personally stood to gain relatively little for they already stood at the apex of their professions." *Id*. at 530. This ignores, however, that status (unlike wealth, for instance) is a *relative* concept, not absolute. *See* Todd J. Zywicki, *The State of Nature and the Nature of the State*, 1 BIOECONOMICS (forthcoming 2000). Thus, status is a zero-sum game, meaning that more status for one person necessarily means less for another. There is a constant struggle to remain at the apex of one's profession and not to be supplanted by someone else.

[98] The legislation actually contains numerous provisions that substantially improve the position of divorced families to collect against bankruptcy filers. Among its numerous provisions expanding the rights of former spouses and children are the following provisions: (1) Extends the scope of nondischargeabiltiy of spousal support obligations to make nondischargeable certain property settlements; (2) excepts state child support collection authorities from the reach of the automatic stay; (3) elevates the priority level of child support to first priority; and (4) makes exempt property available

even if true and coherent, these accusations point to the difficulties of using ill-defined and subjective terms such as "fairness," "justice," and "equity" in characterizing bankruptcy legislation. Even if it were true that members of nonintact families were harmed financially by the BRA, the overwhelming majority of families are *not* trying to collect from a bankrupt. They are either intact families or trying to collect from a nonbankrupt parent. But *every* family is affected by the higher costs in goods, services, and credit that result from widespread personal bankruptcy. Moreover, every parent is affected by the increased difficulty of raising responsible and trustworthy children in a world of rampant financial promise-breaking. Thus, while only relatively few women and children could even possibly be affected by the specific provisions of the BRA, *every* family is negatively affected by the current bankruptcy crisis. Assuming that the claims of the bankruptcy bar were accurate, how could one possibly weigh the fairness claims of divorced spouses of bankrupt debtors against the claims of the overwhelming majority of families forced to pay higher prices in goods, services, and credit as a result of widespread personal bankruptcy?

Furthermore, as suggested earlier, vague claims of "fairness" are often little more than cover for some private rent-seeking agenda. The confused claims of bankruptcy professionals tend to obscure the fact that the real motivation for these criticisms is opposition to the bill's proposal to elevate alimony and child support from seventh to first priority position for distribution, thereby dropping attorneys' fees and expenses from first

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for the enforcement of domestic and child support obligations. The bill also closes some loopholes in the dischargeability of credit card obligations. But this certainly is not unique. Current law already makes a multitude of exceptions to discharge, including such things as tax obligations, fraudulently incurred debts, student loans, and drunk driving tort judgments. As a result, the bill no more "pits" postpetition child support obligations against credit card issuers than current law "pits" child support obligations against the victims of drunk drivers, the victims of fraud, student loan obligations, or tax obligations. Given the immense size of many of these debts and the powerful forces pressing many of them (such as governmental tax obligations) it is disingenuous to single out small amendments to an already-existing nondischargeability provision for special criticism. In addition, divorced mothers also have access to numerous to second priority. Ironically, bankruptcy professionals have therefore argued against the BRA as being improperly protective of some woman and children while simultaneously opposing this key provision of the BRA's package of reforms aimed at increasing protection of child support and alimony obligations. Put more directly, it appears that bankruptcy professionals express heart-felt concern for the negative consequences of certain constituences, but only to the extent that the cost of this concern is borne by unsecured creditors and constituencies *other* than bankruptcy lawyers.

This example suggests a deeper lesson that helps to resolve a central confusion in Carruthers and Halliday's analysis. They reject the argument that the primary motive of bankruptcy professionals in drafting the 1978 Code was a selfish motivation to increase their wealth, influence, and prestige. Indeed, this is the core, if unacknowledged, assumption of their argument. Every other interest in the bankruptcy reform process, whether bank, labor union, public utility, or tax collector, is assumed to been interested in advancing only their narrow self-interests. Bankruptcy professionals, however, were amazingly (and uniquely) able to regularly subordinate their selfish desires and to mix them with genuine concerns for the public good. No explanation for this anomaly is provided:

> Why were professionals so firmly committed to the business of saving business? There are two sorts of crude reductionism that would answer this question simplistically. One would postulate that professionals acted only in their material interests: the prospect of fees and wealth drove their involvement. A jurisdictional reductionism would posit that professionals acted more subtly to enlarge their jurisdictions of work, perhaps as steps towards higher status, more power, and greater gratification. Utilitarian motivations are clearly present, and utilitarian benefits of many sorts clearly resulted. But the evidence of this book demands a more complex account of orientations that played in often unpredictable and intriguing ways. These dispositions must be

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enforcement powers under state law that are generally unavailable to unsecured creditors, such as garnishment and even criminal enforcement.

> recognized if we hope to craft a realist view of how and when professionals will engage in statutory law-making.[99]

They reject both of these reductionist theories rooted in self-interest, however. They claim, "Professional engagement in bankruptcy reforms possessed a civic element that must be recognized."[100] They continue:

> The bankruptcy reforms gave professionals statesmanlike capacities to construct reformed institutions in the public interest. We can never entirely unravel the complex of professional orientations and view this as pure civic professionalism or as self-abnegating public service. Human motivations rarely allow such unalloyed depictions. But concepts of public service, market morality, equity, protection of the weak, and improvement of public institutions all infused discussions over systemic law-making. Nonetheless, this mix of orientations represents only the dispositional element of a larger complex of dynamics within and among professions that have not yet been integrated effectively into the new theories of institutionalization.[101]

Carruthers and Halliday are not so naï ve as to believe that bankruptcy professionals were wholly selfless. But they do believe that, unlike other interests, professionals were animated by a mixture of self-interest and selfless concern for the public good.

They provide no explanation as to when "statesmanlike" interests will predominate over baser motives. It is entirely plausible that professionals may be motivated by mixed motives, including their personal views of equity, fairness, and the public good. Often these beliefs may be in good faith but mistaken. But there are limits to this benevolence. What is apparent from the forgoing, as well as from *Rescuing Business*, is that this benevolence seems to be limited to pursuing the public good with *other people's money*. It appears to be quite consistent through time that the primary interest of bankruptcy professionals is to increase their wealth, status, and power. Thus, to the extent that

99 CARRUTHERS & HALLIDAY, *supra* note 6, at 529-30.
100 *Id*. at 533.

professionals can express support for broad ranging social policies at little or no cost to themselves, they will do so.[102] Indeed, these costless expressions of selflessness may provide great strategic advantage in convincing observers (such as Carruthers and Halliday, for instance) that they are actually acting from selfless motives. In the realm of bankruptcy legislation, of course, such expressions usually are effectively costless, as the cost is borne by creditors not by the professionals themselves. Thus, it is not surprising that bankruptcy professionals would express great concern about the plight of divorced spouses and their children, and in particular, that bankruptcy professionals would be willing to sacrifice the claims of unsecured creditors in order to see these goals satisfied.

But to the extent that satisfying these demands comes from the pockets of professionals rather than unsecured creditors, support for such propositions wanes. Thus, bankruptcy professionals loudly support the claims of non-intact families – except to the extent that this means surrendering first priority to them. When their expressions of selfless concern conflict with their private interest, such expressions of selflessness are muted.

Carruthers and Halliday have simply missed the point. The relevant question is not whether bankruptcy professionals are occasionally motivated by impulses other than self-interest. The real question is whether bankruptcy professionals will act on these other motivations when they *conflict* with their personal self-interest. Read critically, *Rescuing Business* tends to indicate that bankruptcy professionals will act on self-interest when it is in their incentive to do so, and will act on other impulses when it costs them nothing to do so. When the beneficence is to be provided by unsecured or secured creditors, or labor

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[101] *Id*. at 534.

[102] *See* Donald J. Boudreaux, Roger E. Meiners, and Todd J. Zywicki, *Talk Is Cheap: The Existence Value Fallacy*, ENVTL. L. (forthcoming 2000) (observing that individuals often will express greater demand for a good if they do not actually have to pay for it).

unions or tax collectors, one would predict that bankruptcy professionals would be more supportive than when the beneficence is to be underwritten by bankruptcy lawyers and accountants. Moreover, it is evident that at least some such expressions of public concern are strategically motivated. Carruthers and Halliday simply fail to inquire as to whether expressions of professional “statesmanship” would come from the pockets of professionals or some other constituency. Failing to ask this question, they are unable to rebut the hypothesis of professional self-interest as the primary motivation for bankruptcy professionals as with all other groups in the bankruptcy reform process. Given their assumption of self-interest by all other parties, this failure is striking.

Given the persistence of professional self-interest in the bankruptcy reform process, it is amusing to read complaints about the purportedly undue influence exercised by “special interest” groups such as credit card issuers and credit unions. Even if it were true, the underlying logic of these is attacks is puzzling. The support of credit card issuers and other unsecured creditors for reform is rooted in their desire to increase their ability to collect on contractual obligations that are valid and legally-enforceable outside bankruptcy. This raises an obvious, if largely semantic question: To what extent can a party be described as a “special interest” when their goal is to collect a valid debt? If a corporate debtor defaults on a debt and BankAmerica sues for collection in state court, does that effort to collect make BankAmerica a special interest? If BankAmerica lobbies a state legislature to pass a law that eliminates some procedural obstacle to collecting on a valid debt, does that classify as “special interest” lobbying? If BankAmerica lobbies Congress to tighten up bankruptcy laws to make contractual obligations more enforceable, is that “special interest” lobbying? It seems difficult and strange to classify BankAmerica as a “special interest” in trying to make valid contractual obligations more enforceable. But this appears to be the essence of recent efforts by unsecured creditors to reduce bankruptcy abuse by high-income and fraudulent debtors. By contrast, it seems much more obvious to classify as a “special interest” an effort to use bankruptcy to redistribute wealth from valid contractual creditors to parties with no extant nonbankruptcy claim, such as bankruptcy professionals. Despite this incongruity, it has become fashionable to categorize valid creditors as “special interests” while insulating bankruptcy professionals from being tagged with this sobriquet.

Conclusion

Carruthers and Halliday have written a comprehensive and fascinating study of the major bankruptcy reforms in America in 1978 and England in 1986. They have provided extensive research, including much new research. Saddled by an unworkable analytical theory, however, the book’s conclusions turn out to be much less satisfying than their research. Armed with a clear-headed model of the legislative process, I have tried to isolate areas in which their research can be understood to enlighten the understanding of the current and future bankruptcy reform debates. Nonetheless, they provide a valuable first step in developing a comprehensive understanding of the history of bankruptcy law and bankruptcy reform in American and British history. We can look forward to further efforts by scholars to synthesize these and other insights.[103]

[103] Indeed, Professor David Skeel is already working on a comprehensive history of the politics of American bankruptcy law. *See* David A. Skeel, Jr., Bankruptcy Lawyers and the Politics of American Bankruptcy, (unpublished manuscript, on file with author).