Fall 1998

Why Bankruptcy Judges Need Not and Should Not be Article III Judges

Thomas E. Plank

Why Bankruptcy Judges Need Not and Should Not Be Article III Judges

by

*Thomas E. Plank**

Congress has provided that United States Courts of Appeals appoint the bankruptcy judges in each circuit for terms of fourteen years.[1] Because the President[2] does not appoint them for life terms, bankruptcy judges may not exercise the "judicial Power" under Article III of the Constitution.[3] For this reason, Congress has limited the jurisdiction of bankruptcy judges to adjudicating "core proceedings"[4] in bankruptcy cases under the Bankruptcy Code.[5] Bankruptcy judges must refer noncore proceedings to a United States district judge, who does have life tenure under Article III.[6]

The distinction between core and noncore proceedings requires that, in every bankruptcy case, the bankruptcy judge classify each issue that arises. If the issue is a noncore proceeding, the parties must litigate the issue in a separate forum. In addition, each decision that an issue is a core proceeding gives

---

*Associate Professor of Law, University of Tennessee College of Law. I thank Amy Hess, Judy Cornett, Tom Davies, Carol Parker, and Bob Pushaw for their helpful comments on drafts of this Article. I also thank Hilary Williams for her excellent research assistance.

[1]28 U.S.C. § 152(a)(1) (1994).

[2]*See* U.S. CONST. art. II, § 2, cl. 2:

> He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3]U.S. CONST. art. III, § 1:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[4]*See infra* note 26 and accompanying text.

[5]Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 11 U.S.C. §§ 101-1330).

[6]*See infra* note 28 and accompanying text.

an unhappy litigant an additional ground to challenge the judgment of the bankruptcy judge. Both of these facts impose costs in bankruptcy cases.

In addition, because bankruptcy judges are not Article III judges and therefore may not exercise the "judicial Power," which extends to "all Cases, in Law and Equity, arising under . . . the Laws of the United States,"[7] they may adjudicate "core proceedings" only if such adjudication is not the exercise of such "judicial Power." Although Congress defined "core proceedings" to comply with this limitation, two Supreme Court decisions, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[8] and *Granfinanciera, S.A. v. Nordberg*,[9] suggest that bankruptcy judges may not adjudicate some issues that Congress has designated as core proceedings.

This necessity for drawing the distinction between core and noncore proceedings and the uncertainty about the constitutionality of the definition of core proceedings prompted the Bankruptcy Review Commission[10] to recommend[11] that Congress make bankruptcy judges Article III judges, appointed by the President for life terms. The Review Commission stated that Article III status for bankruptcy judges would increase the efficiency of the bankruptcy process by eliminating the costs of drawing jurisdictional lines between core and noncore proceedings and the costs thought to derive from the uncertainty over the constitutionality of the current definition of core proceedings.[12] Professor Susan Block-Lieb has also made a forceful argument that giving bankruptcy judges Article III status would improve the efficiency in resolving bankruptcy cases by eliminating these two sources of cost.[13]

Other facts support conferring Article III status on bankruptcy judges. First, bankruptcy judges adjudicate a substantial part of the commercial law

---

[7]U.S. CONST. art. III, § 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[8]458 U.S. 50 (1982); *see infra* Part I.D.2.

[9]492 U.S. 33 (1989); *see infra* Part I.D.3.

[10]Pursuant to the Bankruptcy Reform Act of 1994, Congress created a National Bankruptcy Review Commission to study the Code and recommend further changes. Pub. L. No. 103-394, §§ 601-610, 108 Stat. 4106, 4147-50 (1994).

[11]NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS § 3.1, at 718 (1997) [hereinafter NBRC Report].

[12]*Id.* at 722-24, 732-35, 737-39.

[13]Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529 (1998).

cases in this country, and their decisions guide businesses and their lawyers in structuring transactions. Thus, the initial adjudications of bankruptcy judges have a great impact on the lives of citizens. Because of their importance, bankruptcy judges deserve Article III status.[14] Second, the initial adjudications made by bankruptcy judges and those made by United States district court judges are qualitatively the same. Except for the fact that district court judges conduct jury trials and bankruptcy judges ordinarily do not,[15] both judges exercise the judicial function—interpreting and applying a set of rules to specific facts in a dispute between persons to reach a particular decision that binds the contestants. This similarity of function raises a question about the constitutionality of permitting non-Article III bankruptcy judges to adjudicate core proceedings in bankruptcy.

Notwithstanding these arguments for change, I argue in this Article that the current system of bankruptcy adjudication is both constitutional and desirable for reasons of history and constitutional policy, whatever the costs.[16] In Part I of this Article, I argue that the current system of bankruptcy adjudication by non-Article III adjudicators is constitutionally sound because it reflects the history and tradition of the predominant method of bankruptcy adjudication when the Constitution was adopted: initial adjudication of bankruptcy issues by bankruptcy commissioners appointed by the Lord Chancellor of England, and later review by the law or equity courts in England. Accordingly, Congress's power to enact "Laws on the subject of Bankruptcies"[17] includes the discretion to create a summary procedure for adjudicating bankruptcy issues by adjudicators who are not Article III judges.

In Part II, I contend that there is no need, as a matter of constitutional policy, to give bankruptcy judges Article III status to ensure their independence. Although bankruptcy judges do not have the protection of life tenure designed to ensure the independence of Article III judges exercising the "judi-

---

[14]The Review Commission also cited this reason for changing the status of bankruptcy judges. NBRC Report, *supra* note 11, at 722 & n.1739.

[15]The question of the right to a jury in bankruptcy is a troubling one that is related to but is theoretically distinct from the question of the constitutional status of bankruptcy judges. *See infra* Part I.D.3.

[16]In this Article, I do not challenge the argument about the costs, but I am somewhat skeptical of the amount of savings. Whether Article III status for bankruptcy judges would reduce costs and increase efficiency in bankruptcy cases is a difficult empirical question. One could be certain that an Article III bankruptcy court system would be more efficient only if such a system could eliminate the need to draw any jurisdictional boundary lines. This cannot happen. First, retaining separate bankruptcy courts, with Article III bankruptcy judges, would still require jurisdictional delineation. Second, the federal government in theory has limited powers under the Constitution. *See infra* Part III. For this reason, there remains the theoretical need to draw jurisdictional boundaries for bankruptcy even if Congress eliminated bankruptcy courts and gave bankruptcy jurisdiction to all United States district judges. Thus, making bankruptcy judges Article III judges will not eliminate the costs attendant on such line drawing.

[17]U.S. CONST. art. I, § 8, cl. 4 (Congress may "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

cial Power,"[18] the current system of appointment and removal by Article III judges does provide the essential elements for an independent bankruptcy judiciary. Furthermore, it provides an opportunity for observing the benefits of this unique judicial selection system.

Finally, in Part III, I explain why, as a matter of policy, we should retain bankruptcy adjudication by non-Article III judges. I believe that Congress, courts, and scholars have increasingly failed to recognize and respect the limited nature of the powers of the federal government and the limits of Congress's power to enact "Laws on the subject of Bankruptcies."[19] Reversing this failure—particularly, recognizing the constitutional requirement that a debtor in bankruptcy must be insolvent[20] in some sense—is more important than saving costs. To echo Professor Wright's observation in the context of federal court jurisdiction,[21] efficiency in bankruptcy, though significant, should not outweigh the value of respecting the limits on federal power contained in the Constitution. Giving bankruptcy judges Article III status would remove a substantial impediment to allowing them to adjudicate nonbankruptcy issues. Retaining the current status of bankruptcy judges requires Congress and courts to maintain an understanding of the constitutional limits of bankruptcy.

I. BANKRUPTCY ADJUDICATION UNDER THE CONSTITUTION

A. Core Proceedings and the Judicial Power

Section 1 of Article III of the Constitution vests the "judicial Power" of the United States in the Supreme Court and in such inferior courts as Congress establishes.[22] Section 2 of Article III states that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States."[23] Notwithstanding these constitutional provisions, bankruptcy judges appointed by the United States Courts of Appeals for fourteen year terms initially adjudicate most issues that arise in a bankruptcy case.

United States district courts have jurisdiction over bankruptcy cases and

---

[18]*See infra* note 300 and accompanying text.

[19]*See* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn. L. Rev. 487 (1996).

[20]*See infra* note 344.

[21]*See* Charles Alan Wright, Law of Federal Courts § 1, at 2 (5th ed. 1994) (noting that efficiency of judicial administration, though important, is not the sole or controlling consideration in the allocation of jurisdiction between federal and state courts).

[22]U.S. Const. art. III, § 1; *see supra* note 3.

[23]U.S. Const. art. III, § 2, cl. 1; *see supra* note 7.

issues,[24] but under § 157 of Title 28 of the United States Code, they may refer bankruptcy matters in their district to bankruptcy judges.[25] Section 157 also empowers bankruptcy judges to hear and determine all "core proceedings" arising in a bankruptcy case.[26] The definition of core proceedings covers just about every dispute or issue necessary for adjusting the relationship between an insolvent debtor and its creditors.[27]

On the other hand, bankruptcy judges may hear and determine noncore proceedings relating to a case under the Bankruptcy Code (including conducting jury trials) only if the parties consent. Otherwise, they may only propose findings of facts and conclusions of law to the district court.[28] Thus,

---

[24]28 U.S.C. § 1334 (1994), *enacted by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 101(a), 98 Stat. 333, 333.

[25]28 U.S.C. § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."). To date, all district courts have done so. 1 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY ¶¶ 3.01[1], 3.02[1], at 3-5, 3-33 (15th ed. rev. 1998).

[26]28 U.S.C. § 157(b)(1) ("Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.").

[27]*See id.* § 157(b)(2):

> Core proceedings include, but are not limited to—
> (A) matters concerning the administration of the estate;
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
> (C) counterclaims by the estate against persons filing claims against the estate;
> (D) orders in respect to obtaining credit;
> (E) orders to turn over property of the estate;
> (F) proceedings to determine, avoid, or recover preferences;
> (G) motions to terminate, annul, or modify the automatic stay;
> (H) proceedings to determine, avoid, or recover fraudulent conveyances;
> (I) determinations as to the dischargeability of particular debts;
> (J) objections to discharges;
> (K) determinations of the validity, extent, or priority of liens;
> (L) confirmations of plans;
> (M) orders approving the use or lease of property, including the use of cash collateral;
> (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

[28]*Id.* § 157(c):

> (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but

district judges adjudicate noncore proceedings related to bankruptcy.

Hearing and determining core proceedings require bankruptcy judges to perform judicial functions. They adjudicate contested matters between specific parties. At first blush, one might suspect that bankruptcy judges are exercising the "judicial Power" over "Cases, in Law and Equity," under Article III. The Supreme Court, however, has upheld the exercise of judicial functions by adjudicators who are not Article III judges.[29] Unfortunately, the precedents are confusing.[30] Justice Brennan in *Marathon*[31] tried to bring order to the chaos. His opinion, however, did not command a majority, and the concurrence of then Justice Rehnquist chastised Justice Brennan for his effort.[32] Professor Block-Lieb[33] and others[34] have suggested that the existing precedents are not very satisfactory in explaining why bankruptcy judges need not be Article III judges.

The history of bankruptcy offers an explanation. The historical analysis resembles the Supreme Court precedent justifying the conduct of courts martial of military personnel by judges who are not Article III judges.[35] Military judges perform a judicial function, but a long history and tradition that pre-

---

> that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

Id. § 157(e):

> (e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

[29]*See generally* WRIGHT, *supra* note 21, § 11, at 47-60; Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 921-26, 929-33 (1988).

[30]WRIGHT, *supra* note 21, § 11, at 60; Fallon, *supra* note 29, at 916-33.

[31]458 U.S. 50 (1982).

[32]*Id.* at 90-92 (Rehnquist, J., concurring).

[33]Block-Lieb, *supra* note 13, at 553-63.

[34]NBRC Report, *supra* note 11, at 736 & nn.1789-91.

[35]*See* Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). In this case, a seaman sentenced to prison by a court martial for attempted desertion brought an action for trespass against the Marshall of the District of Columbia who carried out the sentence. Rejecting the action, the Court stated that Congress's power to provide for the trial and punishment of military and naval offenses, U.S. CONST. art. I, § 8, cl. 14, "is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States." *Id.* at 79; *see also* Solorio v. United States, 483 U.S. 435, 438-47 (1987); O'Callahan v. Parker, 395 U.S. 258, 268-273 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987); *id.* at

dates the adoption of the Constitution dictates that they do not exercise the "judicial Power."

Similarly, the long history and tradition predating the Constitution supports the conclusion that bankruptcy judges adjudicating bankruptcy issues do not exercise the "judicial Power" over "Cases, in Law and Equity." When the Constitution first authorized Congress to enact "Laws on the subject of Bankruptcies,"[36] the English bankruptcy acts[37] provided the dominant method of resolving bankruptcies.[38] Under these acts, commissioners appointed by the Lord Chancellor of England made the initial adjudications of almost all bankruptcy issues in England. Bankruptcy commissioners were not judges. The original adjudication of bankruptcy matters by bankruptcy commissioners was not considered a "Case"[39] in law or equity. A bankruptcy matter did not become a "Case" in law or equity until one of the parties in the initial bankruptcy proceeding sought review of the initial bankruptcy adjudication by a law or equity court.[40] As I discuss below,[41] the 1785 Pennsylvania bankruptcy act and the first United States bankruptcy act enacted in 1800 adopted this general adjudicatory structure.[42]

The original treatment of initial bankruptcy adjudication made sense.[43]

276-80 (Harlan, J., dissenting); *see also* Fallon, *supra* note 29, at 919-20; David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980).

[36]U.S. CONST. art. I, § 8, cl. 4; *see supra* note 17.

[37]*See infra* Part I.B.

[38]The English bankruptcy acts were not the only means of resolving bankruptcies. England had adopted insolvency acts throughout the eighteenth century, and the American jurisdictions used a variety of means for adjusting the relationship between the insolvent debtor and his or her creditors. *See infra* Part I.C.1-2; *see also* Plank, *supra* note 19, at 513-26.

[39]Robert Pushaw has thoroughly analyzed the meaning of "Case" in Article III. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994):

> In the eighteenth century, "case" referred to a cause of action requesting a remedy for the claimed violation of a legal right, in which a judge's primary role was to answer the legal question presented through "exposition"—the process of ascertaining, applying, and interpreting the law in light of precedent and the facts presented. A dispute between parties was a usual—but not necessary—ingredient of a "case," and resolving any such disagreement was less important than legal exposition.

Id. at 449 (footnotes omitted).

[40]*See* Fallon, *supra* note 29 (arguing more generally that review by Article III judges of adjudications by non-Article III adjudicators satisfies the requirements of Article III).

[41]*See infra* Part I.C.2-3.

[42]Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). The 1800 statute was based on the English Bankrupt Act in effect at that time. *See infra* note 240 and accompanying text.

[43]*See, e.g., Ex parte* Bowes, 4 Ves. Jun. 168, 176, 31 Eng. Rep. 86, 90 (Ch. 1798):

> [U]pon the construction of the Bankrupt Laws it is . . . of essential necessity, that the [act of bankruptcy of] lying two months in prison should be upon a case of imprisonment founded in debt and nothing else; for it is obvious, the reason, that induced the legislature to constitute that specific act of bankruptcy, was the pre-

The adversarial procedures of a case at law or equity between discrete litigants conducted by a common law judge and jury or by the Lord Chancellor were not suitable for adjusting the relationship between an insolvent debtor and his or her many creditors.[44] In addition, there was much less justification for such adversarial procedures when the liquid assets of the debtor would repay only a fraction of the claims of the creditors.[45] The nature of bankruptcy still justifies the use of a summary procedure. Although the nature of bankruptcy by itself may not justify the non-Article III status of today's bankruptcy judges, the tradition of the English bankruptcy commissioners with review by the law or equity courts does.

To be sure, the adjudicatory scheme of the current Bankruptcy Code is broader than that used two hundred years ago. The English and American bankruptcy commissioners did not have all the powers that bankruptcy judges today have. Judges and sometimes juries would review the decisions of the commissioners. In the larger scheme of resolving the relationship between an insolvent debtor and her creditors, however, the differences between bankruptcy adjudication in the eighteenth century and today are matters of legislative choice. Both the substance and procedure of bankruptcy law were created by the legislature. Bankruptcy law was never part of the common law. The courts of law and equity became involved only to the extent necessary to interpret the statutes. From the nature of preconstitutional bankruptcy adjudication emerges a general principle: The details of bankruptcy adjudication are a matter of legislative discretion requiring only a right of appeal to a court of law or equity.

A broad view of this principle of legislative discretion permits a greater jurisdiction for bankruptcy judges today than that which the Supreme Court might allow under the *Marathon*[46] and *Granfinanciera*[47] decisions. The apparent logic of *Marathon*, in which the Court held that non-Article III bankruptcy judges could not adjudicate a breach of contract claim by a debtor in possession against a third party who had not filed a claim in the bankruptcy case, may suggest some limitation on this discretion in the case of the adjudi-

---

sumption of insolvency; that the affairs of the man were in such confusion, that the best method of settling them would be that summary proceeding.

[44]In recent years, courts have become more involved in resolving multiparty disputes. *See generally* WRIGHT, *supra* note 21, § 72, at 507-25 (discussion of class actions); Abram Chayes, *The Supreme Court 1981 Term—Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 17-44 (1979). Still, the development of procedures to accommodate multiparty litigation does not negate the substantially bi-polar nature of most litigation in the law and equity courts.

[45]*See infra* note 344.

[46]458 U.S. 50 (1982).

[47]492 U.S. 33 (1989).

cation of causes of action against noncreditor third parties.[48] Even such a restrictive view justifies, for the most part, the current grant of jurisdiction to bankruptcy judges.

Similarly, the decision in *Granfinanciera*, which held that a third party sued by the trustee in bankruptcy to recover a fraudulent conveyance was entitled to a jury trial, suggests some limitations on congressional discretion over bankruptcy adjudication. Nevertheless, even a restricted view of congressional discretion suggests that the actual result in *Granfinanciera* is too narrow. A historical analysis of preconstitutional practice shows that the transferee of a fraudulent conveyance who does not voluntarily submit to bankruptcy jurisdiction may nevertheless be required to adjudicate the question of receiving a fraudulent conveyance in the bankruptcy court. Even under a restrictive view of Congress's discretion, the transferee would be entitled to a jury trial only on appeal after an adverse initial ruling.[49]

B. Adjudication Under the English Bankruptcy Acts

1. *The Law*

Bankruptcy law in England was the creation of Parliament, not the common law. When the United States Constitution was adopted, the English bankruptcy acts consisted of the 1570 Statute of 13 Elizabeth,[50] the 1604 Statute of 1 James,[51] the 1623 Statute of 21 James,[52] and the 1732 Statute of 5 George II,[53] as extended and amended.[54] These acts governed bankruptcy

---

[48]*See infra* Part I.D.2.

[49]*See infra* Part I.D.3.

[50]13 Eliz., ch. 7 (1570) (Eng.). This was the first act that allowed creditors to begin a bankruptcy case against "merchants" who committed certain "acts of bankruptcy." The English Parliament passed the first bankruptcy act in 1542 during the reign of King Henry VIII. 34 & 35 Hen. 8, ch. 4 (1542-1543) (Eng.). This act authorized creditors to initiate a bankruptcy proceeding against persons who committed certain fraudulent acts. The 1542 Act is generally considered the first English bankruptcy act. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 7 (1995) [hereinafter Tabb, *History*]; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 329 (1991) [hereinafter Tabb, *Discharge*]. Although the 1542 Act remained in effect until 1824, the later acts so changed and amplified the bankruptcy law that it retained little independent significance. *See* Bromley v. Goodere, 1 Atk. 75, 77, 26 Eng. Rep. 49, 50 (Ch. 1743) (allowing interest to creditors where bankrupt's estate is sufficient to pay all creditors); 1 Edward Christian, The Origin, Progress, and Present Practice of the Bankrupt Law Both in England and in Ireland 9 (London, W. Clarke & Sons 2d ed. 1818). Christian called the Statute of 13 Elizabeth, as of 1818, "the foundation of all the bankrupt law." *Id.* at 10.

[51]1 Jam., ch. 15 (1604) (Eng.). This act amended the Statute of 13 Elizabeth. *Id.* § 3; *see also infra* notes 88, 107-113 and accompanying text.

[52]21 Jam., ch. 19 (1623) (Eng.). This act amended the Statute of 13 Elizabeth and the Statute of 1 James. *Id.* § 3; *see also infra* notes 88, 114-118 and accompanying text.

[53]5 Geo. 2, ch. 30 (1732) (Eng.). The 1732 Statute of 5 George II revised and expanded, without significant change, several earlier bankruptcy acts that had expired, principally the 1705 Statute of Anne, 4 Anne, ch. 17 (1705) (Eng.), which itself modernized the bankruptcy system and first introduced the discharge of the bankrupt's existing debts, *id.* § 7, as amended in 1706 by 5 Anne, ch. 22 (1706) (Eng.), which

law until a revision of the English bankruptcy acts in 1824.[55]

Under these English bankruptcy acts, a bankruptcy case began when creditors filed a petition with the Lord Chancellor alleging that an individual who was a "merchant" had committed an "act of bankruptcy."[56] As a matter of course, the Lord Chancellor issued against the alleged bankrupt a "Commission of Bankrupt." The commission named five commissioners from among a list of standing bankruptcy commissioners, who were lawyers, to conduct the proceedings.[57] The five commissioners, or a quorum of three, determined almost all of the issues arising in the bankruptcy proceeding.[58] These involved the administration of the estate and the case, the eligibility of the bankrupt, the property of the bankrupt, the allowance of claims by creditors, the distribution of the bankrupt's assets, and the discharge of the bankrupt's debts.

If any of the participants objected to decisions of the commissioners, they had several avenues of recourse. An unhappy bankrupt or creditor could seek review by the Lord Chancellor by filing a petition in Chancery. The Lord Chancellor would review the depositions, affidavits, and other evidence pro-

---

conditioned a discharge on the consent of eighty percent of the creditors in both number and value of the debts, *id.* § 2. The Statute of 4 Anne was to expire after several years, but it was extended periodically by Parliament until several years before the enactment of the 1732 Act. *See* Tabb, *Discharge*, *supra* note 50, at 340 & n.96.

[54]Tabb, *History*, *supra* note 50, at 12; Tabb, *Discharge*, *supra* note 50, at 340, 344. The 1732 Act remained in effect until the end of the session of Parliament ending after June 1735. 5 Geo. 2, ch. 30, § 49 (1732) (Eng.). It was further continued by 9 Geo. 2, ch. 18, § 2 (1736) (Eng.); 16 Geo. 2, ch. 27 (1743) (Eng.); 24 Geo. 2, ch. 57, § 8 (1751) (Eng.); 31 Geo. 2, ch. 35, § 2 (1757) (Eng.); 4 Geo. 3, ch. 36, § 1 (1763) (Eng.); 12 Geo. 3, ch. 47, § 1 (1772) (Eng.); 16 Geo. 3, ch. 54 (1776) (Eng.); 21 Geo. 3, ch. 29, § 8 (1781) (Eng.); 26 Geo. 3, ch. 80, § 2 (1786) (Eng.); 28 Geo. 3, ch. 24, § 2 (1788) (Eng.); 34 Geo. 3, ch. 57 (1794) (Eng.); and 37 Geo. 3, ch. 124 (1797) (Eng.), when it was made perpetual. In addition, several acts made minor amendments to the provisions of 5 Geo. 2, ch. 30. *See* 19 Geo. 2, ch. 32 (1746) (Eng.) (protecting bona fide transferees of the bankrupt's property before notice of the act of bankruptcy, and allowing sureties to be admitted as creditors); 24 Geo. 2, ch. 57, § 9 (1751) (Eng.) (voiding certificates based on fictitious debts).

[55]An Act to Consolidate and Amend the Bankruptcy Laws, 5 Geo. 4, ch. 98, § 1 (1824) (Eng.).

[56]*See infra* notes 85-90 and accompanying text.

[57]13 Eliz., ch. 7, § 2 (1570) (Eng.). From the early eighteenth century, there were fourteen lists of five commissioners of bankrupt. IAN P.H. DUFFY, BANKRUPTCY AND INSOLVENCY IN LONDON DURING THE INDUSTRIAL REVOLUTION 16 n.32 (1985). Generally, only three of the five commissioners appointed for a bankruptcy case served on that case. *Id.* at 36. The commissioners served at the pleasure of the Lord Chancellor and were removable at will. THOMAS DAVIES, THE LAWS RELATING TO BANKRUPTS 165 (London, Henry Linton 1744).

[58]Sometimes the commissioners would abstain from making a decision until a court ruled on a point of law. *See infra* note 165 and accompanying text; *see also* DAVIES, *supra* note 57, at 30-31. Discussing the case of William Gulston, Davies reports that the commissioners were unsure after hearing evidence whether the bankrupt was a merchant, and asked the creditors to petition the Lord Chancellor, who directed a trial on the issue. *But see* Gulston v. Dale (*In re* Gulston), 1 Atk. 193, 194, 26 Eng. Rep. 125, 126 (Ch. 1743) (reporting that the commissioners were of the opinion that they should not declare Gulston a bankrupt).

duced before the commissioners.[59] The Lord Chancellor, sitting as the court of Chancery, would either resolve the issue[60] or refer the matter to one of the common law courts.[61] In other cases, parties or nonparties to the bankruptcy proceeding challenged these decisions collaterally by filing an action in the law courts[62] or the Court of Chancery.[63] In other instances, the assignees of the bankrupt's property sued to recover property of the bankrupt, including the collection of debts owed to the bankrupt, usually in the law courts[64] but sometimes in the Court of Chancery.[65] Most actions in a law court entailed

---

[59]*See, e.g., Ex parte* Bowes, 4 Ves. Jun. 168, 170, 176-77, 31 Eng. Rep. 86, 87, 90-91 (Ch. 1798) (on a petition to the Lord Chancellor to supersede a commission of bankruptcy, relying solely on the evidence taken before the commissioners consisting of depositions and affidavits and refusing to allow additional evidence, the Lord Chancellor superseded the petition on the grounds that the petitioning creditor's actions were an abuse of the bankruptcy law).

[60]*See, e.g., infra* notes 63, 127, 129, 130, 139.

[61]*See, e.g.,* Hassells v. Simpson, 1 Dougl. 89n., 99 Eng. Rep. 60 (K.B. 1785) (after the Master of the Rolls in Chancery directed an issue to try the question of whether Jackson, a mercer and broker, committed an act of bankruptcy, court held that executing an indenture selling all of his household furniture, goods, chattels and personal estate was an act of bankruptcy); *Ex parte* Harrison, 1 Bro.C.C. 173, 28 Eng. Rep. 1062 (Ch. 1782) (upon petition to Lord Chancellor to supersede commission of bankruptcy, the Lord Chancellor directed an issue to be tried by the law courts, on whether the bankrupt, a brickmaker, was a merchant); Hankey v. Jones, 2 Cowp. 745, 98 Eng. Rep. 1339 (K.B. 1778) ("an issue directed by the Court of Chancery, to try whether the defendant was a bankrupt, and also the validity of the petitioning creditor's debt;" jury verdict for plaintiff and damages on both issues; overturning the verdict, the court held that the question of whether the bankrupt was a merchant was a question of law, and that bankrupt was not a merchant); *Ex parte* Cottrell *in re* Eaves, 2 Cowp. 742, 98 Eng. Rep. 1338 (K.B. 1778) (in "a case out of chancery for the opinion of this Court" the court ruled that a payee of a bond payable in the future was entitled to come into the bankruptcy); Crispe v. Perrit, Willes 467, 125 Eng. Rep. 1272 (C.P. 1744) (action of trover brought at the direction of the Lord Chancellor against assignee under a separate commission of bankrupt; court held that a joint creditor of partners may take a separate commission against one partner); *see also infra* note 289.

[62]*See, e.g.,* Willison v. Smith, 3 Dougl. 96, 99 Eng. Rep. 557 (K.B. 1782), *discussed infra* note 131; *see also infra* notes 97, 132.

[63]*See Ex parte* Williamson, 2 Ves. Sen. 249, 28 Eng. Rep. 161 (Ch. 1751) (denying petition to disallow certificate of bankruptcy on the grounds that the petitioners, who had several bills in Chancery and Exchequer challenging the sale of certain shares as fraud, were not creditors, and four-fifths of the creditors who had proved debts under the commission signed the certificate).

[64]*See* Martin v. Pewtress, 4 Burr. 2477, 98 Eng. Rep. 299 (K.B. 1769) (trover by assignees to recover property of the bankrupt fraudulently transferred); Hague v. Rolleston, 4 Burr. 2174, 98 Eng. Rep. 134 (K.B. 1768) (action of trover by assignees to recover goods delivered to agent before act of bankruptcy and delivered to defendant after act of bankruptcy; court held that the transfer was void); *see also infra* note 98. To avoid lengthy cases in law and equity when the commissioners and a creditor could not agree, assignees could refer disputed matters to arbitrators chosen by the assignees, the majority by value of creditors, and disputant. 5 Geo. 2, ch. 30, § 34 (1732) (Eng.).

[65]*See, e.g.,* Kemp v. Westbrook, 1 Ves. Sen. 277, 27 Eng. Rep. 1030, Ves. Sen. Supp. 141, 28 Eng. Rep. 482 (Ch. 1749) (on bill brought by assignee under commission of bankruptcy for accounting and redemption of goods pledged by bankrupt to defendant, the Lord Chancellor held that, notwithstanding the statute of limitations and the plaintiff's right to bring action in trover in law court, the assignee had the right to come into chancery to establish what was due, ordered an accounting, and ordered the defendant either to return the goods upon payment of any amount due to the defendant and, if the defendant had been overpaid, to pay such excess to the assignee); Barwell v. Ward, Ridg.t.H. 285, 27 Eng. Rep. 831 (Ch.

a jury trial[66] (often by a special jury of merchants).[67]

a. Administration of the Estate and the Case[68]

Commissioners were required to set at least three meetings of creditors for the examination of the bankrupt and the transfer of the bankrupt's property to the commissioners.[69] The commissioners could appoint provisional assignees to receive all of the bankrupt's property.[70] At the meetings of creditors, creditors could prove their debts.[71]

The commissioners had important enforcement powers. The commissioners orally or by written interrogatories could examine the bankrupt and any other person summoned to or present at meetings of creditors "touching all Matters relating to the Person, Trade, Dealings, Estate and Effects" of the bankrupt and "any Act or Acts of Bankruptcy."[72] If the bankrupt or other person refused to answer or failed to answer to the satisfaction of the commissioners, the commissioners could commit them to prison until they answered.[73] Persons imprisoned by the commissioners could seek their release

---

1745) (upon a bill filed in chancery by assignee under commission, the Lord Chancellor (i) held that the transfer by the bankrupt of an estate to one defendant for a fraction of its value just before bankrupt's act of bankruptcy was a fraudulent conveyance and ordered that the estate be reconveyed to the assignee (subject to a security for payment of consideration) and (ii) held that the endorsement of two notes by the bankrupt after act of bankruptcy to second defendant was void and ordered the notes returned to the assignee, notwithstanding that the assignee could have filed an action for trover in the law courts).

[66]*See supra* note 64; *infra* notes 80, 97, 132.

[67]*See, e.g.*, Martin v. Pewtress, 4 Burr. 2477, 98 Eng. Rep. 299 (K.B. 1769) (trial before Lord Mansfield by special jury), *discussed supra* note 64; Richardson v. Bradshaw, 1 Atk. 128, 26 Eng. Rep. 84 (K.B. 1752) (issue directed out of chancery tried before special jury on whether bankrupt was a merchant).

[68]Concern about efficiency of the process is not new, and the statutes tried to address excessive or improper expenses of the bankruptcy proceeding. For example, because "Commissions of Bankrupts have been often Executed with great Expence in Eating and Drinking, at the Meetings of the Commissioners, or some of them therein Named, to the great Prejudice of the Bankrupts and their Creditors," the Statute of 4 Anne prohibited the commissioners from charging such expenses to the bankruptcy estate. 4 Anne, ch. 17, § 20 (1705) (Eng.). This provision was continued in the statute of 5 George II, chapter 30. 5 Geo. 2, ch. 30, § 42 (1732) (Eng.).

[69]*See* 5 Geo. 2, ch. 30, §§ 1, 2 (1732) (Eng.).

[70]*See id.* § 30. At the first meeting of creditors, the creditors could elect new assignees. *See id.* §§ 26, 30. The Lord Chancellor reviewed issues that arose between the assignees and the commissioners or others. *See, e.g., Ex parte* Belchier, Amb. 218, 27 Eng. Rep. 144 (Ch. 1754) (rejecting commissioners' claim that assignee who employed broker to sell tobacco owned by the bankrupt should bear the loss arising when the broker died insolvent before paying the assignee the proceeds of the sale).

[71]*See* 5 Geo. 2, ch. 30, §§ 26, 33 (1732) (Eng.); *see also infra* note 129 and accompanying text.

[72]5 Geo. 2, ch. 30, § 16 (1732) (Eng.). Witnesses summoned before the commissioners were protected from arrest. *See Ex parte* Kerney, 1 Atk. 54, 26 Eng. Rep. 36 (Ch. 1744) (witness who had been summoned to meeting of commissioners but who was arrested petitioned for release from prison and for censure of sheriff's officer). Earlier statutes had also given the commissioners the power to apprehend the bankrupt and bring him or her before the commissioners to be examined, *see* 1 Jam., ch. 15, § 6 (1604) (Eng.), and to examine the bankrupt, *see id.* § 7.

[73]*See* 5 Geo. 2, ch. 30, § 16 (1732) (Eng.). Commissioners were required to specify the questions in their warrant of imprisonment. *See id.* § 17. The 1604 Statute of 1 James also authorized the commissioners to commit to prison a bankrupt who refused to answer questions. 1 Jam., ch. 15, § 8 (1604) (Eng.).

by writ of habeas corpus.[74]

In addition to their power of commitment, the commissioners could cause judges of the courts of record or the justices of the peace to issue a warrant for the imprisonment of any person "proved before them [the commissioners] to become bankrupt."[75] Thereafter, the commissioners by warrant could order the delivery of a bankrupt in jail to the commissioners for examination and discovery.[76] The commissioners could also issue a warrant for the seizure of the personal property of the bankrupt in the possession of the bankrupt or other persons in any prison.[77]

Even after receiving his certificate of discharge, the bankrupt was required to meet with the assignees or to attend any courts of record to enable the assignees to gather property of the estate. If the bankrupt refused, the assignees could request, and the commissioners could issue, a warrant for imprisonment of the bankrupt[78] Finally, upon petition of any person, proceedings of commissioners were to be made of record, and such proceedings were evidence in any court of record.[79]

The commissioners could be sued for their decisions.[80] They did not have

---

[74]*See, e.g.*, Thomas Miller's Case, 2 Blackst. 881, 96 Eng. Rep. 518 (K.B. 1773), *discussed infra* note 80; Rex v. John Perrot, 2 Burr. 1122, 97 Eng. Rep. 745 (K.B. 1761) (commissioners committed bankrupt to prison for claiming he could provide no details about a discrepancy in his accounts of £13,513 other than that he was an extravagant man; the court upheld the commitment against the argument that the commitment amounted to a life sentence, since he could give no more details, and ruled that the bankrupt could be committed indefinitely); Rex v. Nathan, 2 Strange 880, 93 Eng. Rep. 914 (K.B. 1730) (bankrupt committed by commissioners of bankrupt on a warrant that recited that the bankrupt had notoriously prevaricated; the court discharged the bankrupt on a writ of habeas corpus on grounds that the statute, 1 Jam., ch. 15 (1604) (Eng.), required written interrogatories); Hollingshead's Case, 2 Ld. Raym. 851, 92 Eng. Rep. 68 (K.B. 1701) (bankrupt who refused to be examined was committed by commissioners by a warrant stating that bankrupt should remain in custody until discharged by due course of law; court discharged bankrupt on petition for habeas corpus; the warrant was defective because the statute only allowed commitment until party submitted to commissioners to be examined); Bracy's Case, 1 Ld. Raym. 99, 91 Eng. Rep. 962 (K.B. 1696) (holding that a witness may be committed for refusing to answer questions about goods owned by the bankrupt before bankruptcy, but discharging the witness because the warrant stated that the witness should be in prison "until he should conform himself to the authority of commissioners;" under the statute the witness may be committed only until he answers questions).

In 1732, Parliament provided that, in the case of formal defects in the warrant of the commissioners, the judge before whom the writ was brought could recommit the individual to prison for the same reasons that the commissioners could originally commit the individual. *See* 5 Geo. 2, ch. 30, § 18 (1732) (Eng.).

[75]5 Geo. 2, ch. 30, § 14 (1732) (Eng.).

[76]*See id.*

[77]*See id.* (consisting of the "Goods, Wares, Merchandizes and Effects [except necessary clothing] and . . . Books, Papers or Writings" of the bankrupt).

[78]*Id.* § 36 (the bankrupt would be imprisoned until released by the commissioners, by special order of the Lord Chancellor, or "by due course of Law").

[79]*See id.* § 41; *see also, e.g.*, Janson v. Willson, 1 Dougl. 257, 99 Eng. Rep. 168 (K.B. 1779) (holding that the depositions of the act of bankruptcy, when recorded according to 5 Geo. 2, ch. 30, § 41 (1732) (Eng.), are evidence in an action at law, to prove the precise time when the act of bankruptcy was committed, if specified therein).

[80]I have found one reported case of a suit against commissioners. *See* Miller v. Searle, 2 Blackst. 1141,

either the complete judicial immunity of judges of courts of record[81] or the more limited immunity of justices of the peace.[82] Nevertheless, Parliament provided some protection. The 1623 Statute of 1 James allowed the commissioners either to enter a general issue plea or to plead that any act that formed the basis of the suit was done under their authority under the bankruptcy acts. If they pled their authority under the acts, they did not have to plead or prove any other matter under the acts or the issuance of their commission. The plaintiff was limited to trying before a jury the question of whether the action complained of was of the defendant's "own Wrong, without any such Cause alleged by the said Defendant."[83]

b. Eligibility of the Bankrupt for a Bankruptcy Case

Unlike the current Code, which has jurisdictional requirements for only a few types of debtors,[84] the English bankruptcy acts contained two crucial

---

96 Eng. Rep. 673 (K.B. 1777). The court held that the commissioners could be sued for trespass and false imprisonment. This case was later overruled by *Doswell v. Impey*, 1 B. & C. 163, 170, 107 Eng. Rep. 61, 63 (K.B. 1823). This case arose out of *Thomas Miller's Case*, 2 Blackst. 881, 96 Eng. Rep. 518 (K.B. 1773), in which a witness who had been committed to prison for failure to provide complete answers to commissioners investigating the transfer of property by a bankrupt obtained his release on a writ of habeas corpus because the judges believed that the witness had answered as well as he could.

There are several cases of trespass by a bankrupt against messengers of the commissioners who seized property of the bankrupt, and the issue turned on whether the commissioners had jurisdiction, that is, whether the bankrupt was a merchant or had committed an act of bankruptcy. *See, e.g.*, Patman v. Vaughan, 1 T.R. 572, 99 Eng. Rep. 1257 (K.B. 1787) (in an action by an innkeeper brought against a messenger of bankruptcy commissioners for seizing and taking goods, the court ruled that the plaintiff was a merchant subject to the bankruptcy acts and upheld a jury verdict for the defendant); Wells v. Parker, 1 T.R. 34, 99 Eng. Rep. 957 (K.B. 1785) (whether messenger was liable for trespass), *discussed infra* note 97; Alexander v. Vaughan, 1 Cowp. 397, 98 Eng. Rep. 1151 (K.B. 1776) (in an action of trespass against the messenger to a commission of bankruptcy for seizing the books, papers, and bills of exchange of the plaintiff-bankrupt, the court entered a nonsuit on the grounds that the plaintiff was a merchant, within the description of the bankrupt laws); Wilson v. Day, 2 Burr. 827, 97 Eng. Rep. 583 (K.B. 1759) (in an action of trespass against a messenger of the commissioners for breaking and entering bankrupt's house and taking away goods that the bankrupt had sold to the plaintiff, the messenger pled justification under a commission of bankruptcy; at the trial, the issue was referred to the opinion of the court, and the court held that the transfer by the bankrupt was an act of bankruptcy and upheld the title of the messenger under the commission).

[81]Judges of courts of record had essentially complete immunity for judicial acts. *See* Miller v. Searle, 2 Blackst. 1141, 1145, 96 Eng. Rep. 673, 674-75 (K.B. 1777) (referring to judges of the "Kings's Superior Courts of Justice"), *discussed supra* note 80; ABIMBOLA A. OLOWOFOYEKU, SUING JUDGES: A STUDY OF JUDICIAL IMMUNITY 15-17 (1993).

[82]Justices of the peace, who were not judges of courts of record, could more easily be sued for their decisions if they exceeded their jurisdiction. Miller v. Searle, 2 Blackst. 1141, 1145, 96 Eng. Rep. 673, 675 (K.B. 1777) (referring to courts of special or limited jurisdiction), *discussed supra* note 80; OLOWOFOYEKU, *supra* note 81, at 17-19.

[83]1 Jam., ch. 15, § 16 (1604) (Eng.).

[84]Domestic and foreign (if engaged in business in the United States) insurance companies, banks, savings banks, cooperative banks, savings and loan associations, building and loan associations, homestead associations, credit unions, and domestic licensed small business investment companies, industrial banks, and similar institutions which are insured banks as defined in the Federal Deposit Insurance Act may not

jurisdictional requirements. Only a "merchant" who had committed an "act of bankruptcy" could be a bankrupt. Under the Statute of 13 Elizabeth, a bankrupt had to be a "Merchant or other Person using or exercising the Trade of Merchandize by way of Bargaining, Exchange, Rechange, Bartry, Chevisance, or otherwise, in Gross or by retail, or seeking his or her Trade of Living by Buying and Selling."[85] This definition proved to be troublesome for close cases, and later statutes and court decisions amplified and expanded the definition so that by the end of the eighteenth century, almost any type of business activity not closely dependent upon the ownership of land qualified one to be a merchant.[86]

Initially, the acts of bankruptcy necessary for a commission of bankrupt were specific types of conduct by which the bankrupt attempted to avoid paying his creditors, such as fleeing the country or evading service of process.[87] Parliament quickly expanded the "acts of bankruptcy" to include a larger list of both purposeful actions to defraud creditors and passive conditions, such as remaining in prison after having been arrested for not paying a debt,[88] that suggested insolvency.[89] One of the important acts of bankruptcy

---

be debtors under the Code. 11 U.S.C. § 109(b)(2), (d) (1994). Railroads may only file a petition for reorganization under Chapter 11 of the Code, *id.* § 109(b)(1), (d), and stockbrokers and commodity brokers may only file a petition for liquidation under Chapter 7 of the Code, *id.* § 109(b), (d). Municipalities may file a petition under Chapter 9 if they meet certain requirements, including a requirement that they be insolvent in a cash flow sense. *Id.* §§ 109(c), 101(32)(C). Farmers and wage earners who meet certain requirements may file petitions for reorganization under Chapters 12 and 13, respectively. *Id.* § 109(e), (f). Involuntary proceedings may be brought against individuals or entities under Chapters 7 or 11 other than a "farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation." *Id.* § 303(a). The debtor may have an involuntary case dismissed if it can show that it is paying it debts (other than debts that are the subject of a bona fide dispute) as those debts become due. *Id.* § 303(h)(1).

[85]13 Eliz., ch. 7, § 1, cls. (2), (3) (1570) (Eng.) (clause numbers omitted).

[86]*See* Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 160, 162-63 (1982); Lawrence M. Friedman & Thadeus F. Niemira, *The Concept of the "Trader" in Early Bankruptcy Law*, 5 ST. LOUIS U. L.J. 223, 233-46 (1958); Plank, *supra* note 19, at 507-10; Tabb, *Discharge*, *supra* note 50, at 344.

[87]Under the Statute of 34 & 35 Henry VIII, the acts were "flee[ing] to Parts unknown, or keep[ing] their Houses." 34 & 35 Hen. 8, ch. 4, para. 1 (1542-1543) (Eng.). The Statute of 13 Elizabeth made the acts of bankruptcy more specific, consisting of the following:

> depart the Realm; or begin to keep his or her House or Houses, or otherwise to absent him or herself; or take Sanctuary; or suffer him or herself willingly to be arrested for any Debt or other Thing, not grown or due for Money delivered, Ware sold, or any other just or lawful Cause, or good Consideration or Purposes, . . . suffer him or herself to be outlawed, or yield him or herself to Prison, or depart from his or her Dwellinghouse or Houses, to the Intent or Purpose to defraud or hinder any of his or her Creditors, . . . of the just Debt or Duty of such Creditor or Creditors . . . .

13 Eliz., ch. 7, § 1 (1570) (Eng.) (clause numbering omitted). *See generally* Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189, 193-95 (1938).

[88]The Statute of 1 James expanded the acts of bankruptcy set forth in the Statute of 13 Elizabeth. It added (i) willfully or fraudulently procuring the bankrupt's arrest or the attachment or sequestration of

was fraudulently conveying one's property to defraud one's creditors.[90]

After the Lord Chancellor issued a "commission of bankrupt," the commissioners met, heard evidence from the petitioning creditor and witnesses other than the bankrupt,[91] and decided whether the alleged bankrupt was a merchant or had committed acts of bankruptcy.[92] To assist their determination, the commissioners could summon any person for examination into whether these jurisdictional requirements were met.[93] Despite the complexities of these requirements, in many cases these decisions were routine.[94]

The alleged bankrupt or a particular creditor could challenge a decision of the commissioners on either point. The challenger could seek from the Lord Chancellor a dismissal of the commission. Sometimes the Chancellor would directly rule whether the bankrupt was a merchant or had committed an act of bankruptcy.[95] More often, the Lord Chancellor would refer the issue to

---

the bankrupt's goods and (ii) making a fraudulent grant or conveyance of property, both with the intent of defrauding creditors, and (iii) continuing to lie in prison for six months after being imprisoned for debt, which need not be done with the intent of defrauding or hindering creditors. 1 Jam., ch. 15, § 2, cls. (5), (7), (9) (1604) (Eng.); *see* Treiman, *supra* note 87, at 196.

The Statute of 21 James added several new acts of bankruptcy. These included petitioning the King or the courts to compel any creditor to accept less than full payment of the creditor's debt or for an extension of time to pay a debt; lying in prison for more than two months after being arrested for nonpayment of a debt; or escaping from prison after being arrested for a debt of £100 or more. 21 Jam., ch. 19, § 2, cls. (5), (7), (8) (1623) (Eng.). These provisions remained a feature of bankruptcy law through the eighteenth century. *See* WILLIAM COOKE, A COMPENDIOUS SYSTEM OF THE BANKRUPT LAWS 86-89 (Dublin, 1786). Other provisions included failing to pay a debt of £100 or more within six months after it was due and being arrested for the debt, and obtaining release ["enlargement"] from prison by obtaining bail. 21 Jam., ch. 19 § 2, cls. (6), (8). These acts of bankruptcy were repealed in 1711. 10 Anne, ch. 15, § 1 (1711) (Eng.). *See generally* Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 36-37 (1986).

[89]*See, e.g.*, Coppendale v. Bridgen, 2 Burr. 814, 818, 97 Eng. Rep. 576, 578 (K.B. 1759) (stating that "lying two months in prison is a strong presumption that the person was insolvent at the time of the arrest").

[90]*See* 1 Jam., ch. 15, § 2, cl. (7) (1604) (Eng.); *see also* Treiman, *supra* note 87, at 196; Weisberg, *supra* note 88, at 36-37.

[91]Typically, the commissioners would not hear from the alleged bankrupt before declaring him a bankrupt and seizing his property. *See infra* note 151.

[92]*See* COOKE, *supra* note 88, at 8-9, 96 ("Though the evidence produced at the first meeting is all *ex parte*, yet it is both the practice and the duty of the commissioners to enquire minutely into the fairness of the petitioning creditor's debt, and the manner in which it arose, as well as the facts of trading and the act of bankruptcy."); *see also infra* note 151.

[93]*See supra* note 72 and accompanying text.

[94]Julian Hoppit reports that during the eighteenth century 33,000 businesses in England and Wales were adjudicated bankrupt under the bankruptcy acts. JULIAN HOPPIT, RISK AND FAILURE IN ENGLISH BUSINESS 1700-1800, at 42 (1987).

[95]*See, e.g., Ex parte* Bowes, 4 Ves. Jun. 168, 170, 31 Eng. Rep. 86, 87 (Ch. 1798), *discussed supra* note 59 (petition to the Lord Chancellor to supersede a commission of bankruptcy, challenging the determination that bankrupt was a merchant or had committed an act of bankruptcy; petition granted on other grounds); *In re* Burchall, 1 Atk. 141, 26 Eng. Rep. 92 (Ch. 1742) (on a petition to prevent the issuance of a commission of bankruptcy, holding that a "money scrivener" was within the definition of a merchant under the bankruptcy acts); Lingood v. Eade, 1 Atk. 196, 26 Eng. Rep. 127 (Ch. 1747) (denying a petition for a

the law courts for decision on either point.[96] In addition, the bankrupt or someone claiming through the bankrupt would bring an action in the law courts challenging the disposition of the bankrupt's property in the bankruptcy proceeding. The plaintiff would assert that the bankrupt had not committed an act of bankruptcy or was not a merchant and therefore the commissioners had no authority to dispose of the bankrupt's property.[97] In other instances, assignees appointed to gather and dispose of the bankrupt's property would sue the bankrupt or third parties to collect damages for conversion of the bankrupt's property or to collect a debt owed to the bankrupt. The defendants would defend such actions by claiming a lack of jurisdiction over the bankrupt's property.[98]

---

new trial, the Lord Chancellor holding that absconding to avoid an attachment upon an award for the nondelivery of goods was not an act of bankruptcy because it was not absconding to avoid the payment of a debt).

[96]*See, e.g.*, Hassells v. Simpson, 1 Dougl. 89n., 99 Eng. Rep. 60 (K.B. 1785), *discussed supra* note 61 (act of bankruptcy); *Ex parte* Harrison, 1 Bro.C.C. 173, 28 Eng. Rep. 1062 (Ch. 1782), *discussed supra* note 61 (merchant); Hankey v. Jones, 2 Cowp. 745, 98 Eng. Rep. 1339 (K.B. 1778), *discussed supra* note 61 (merchant); *see also infra* note 289 and accompanying text.

[97]*See, e.g.*, Wells v. Parker, 1 T.R. 34, 99 Eng. Rep. 957, 1 Bro.C.C. 178 n.2, 28 Eng. Rep. 1065 (K.B. 1785). Parker, "found, by the commissioners, a bankrupt, as a brickmaker," 1 Bro.C.C. at 178 n.2, 28 Eng. Rep. at 1065, sued Wells, a messenger of the bankruptcy commissioners, for trespass for seizing Parker's goods. The jury found by special verdict as follows: for Parker if he were not a bankrupt within statutes, and for Wells if the court was of the opinion that Parker was a bankrupt. The Court of Common Pleas held that Parker, a brickmaker, was not a merchant, and gave judgment for plaintiff. On a writ of error from Common Pleas, the Kings Bench held that Parker was a merchant, and entered judgment for Wells. On further appeal to the House of Lords, Parker was awarded a new trial on the grounds that the findings were not sufficient for a final judgment. Parker v. Wells, 1 T.R. 783, 99 Eng. Rep. 1377 (K.B. 1787).

See also Saunderson v. Rowles, 4 Burr. 2064, 98 Eng. Rep. 77 (K.B. 1767) (a victualler had been declared a bankrupt; a creditor of the victualler claiming under a bill of sale to him brought an action in trover against the defendants, who claimed the same goods under the assignment under the commissioners of the bankrupt's property; court held that victualler was not a merchant to be liable to a commission of bankruptcy); Port v. Turton, 2 Wils. K.B. 169, 95 Eng. Rep. 748 (C.P. 1763) (owner of coal mine committed an act of bankruptcy and was declared bankrupt; he later sold plaintiff coal; the defendants, assignees of bankrupt under commission, seized the coal; plaintiff as purchaser sued in trover for the coal; court held that selling the coal did not make seller a merchant and upheld a verdict for plaintiff); Newton v. Trigg, 3 Lev. 309, 83 Eng. Rep. 704, 3 Mod. 327, 87 Eng. Rep. 217 (K.B. 1691) (Newton, declared a bankrupt by commissioners, sued the assignee of the bankrupt's goods sold by commissioners for trespass for entering bankrupt's house and taking his goods; upon a special verdict for Newton, court held that bankrupt, an innkeeper, was not a merchant and therefore could not be a bankrupt); Crisp v. Prat, March N.C. 34, 82 Eng. Rep. 399 (K.B. 1639) (commissioners sold copyhold estate in which bankrupt held a joint life estate with son, with remainder to wife; after death of bankrupt, lessee of son sued assignees of commissioners in ejectment to void sale of copyhold; court held that bankrupt as an innholder was not a merchant and the sale was void against the son's interest).

[98]*See, e.g.*, Roberts v. Teasdale, Peake 38, 170 Eng. Rep. 71 (K.B. 1791) (action in trover by assignees under a commission against transferee of bankrupt's cotton; defendants claimed that the bankrupt had colluded with creditors to obtain the commission and that commission was void; jury found for defendants, but motion for new trial was granted; court held there was no collusion); King v. Leith, 2 T.R. 141, 100 Eng. Rep. 77 (K.B. 1787) (action on the case for money had and received by the assignees under a commission of bankrupt against third party who, despite notice of act of bankruptcy, sold goods of bankrupt after act of bankruptcy and paid proceeds to the bankrupt; upon a verdict for the assignees, motion for a new

c. Property of the Bankruptcy Estate

The English bankruptcy acts gave the commissioners broad powers over the property of the bankrupt, including property that the bankrupt had transferred before bankruptcy. The 1570 Statute of 13 Elizabeth provided that, upon the issuance of a commission of bankrupt, the commissioners "by virtue of this Act and said commission, shall have full Power and Authority to take by their Discretions such Order and Direction" with the body and property of the bankrupt.[99] The commissioners could search, view, rent, appraise, and sell all of the property of the bankrupt.[100] Furthermore, the act provided that "every Direction, Order, Bargain, Sale and other Things done by [the commissioners] . . . shall be good and effectual in the Law, to all Intents, Constructions and Purposes" against the bankrupt[101] and against any other person claiming by, through, or from the bankrupt.[102]

If any party aggrieved filed a complaint with the commissioners claiming

---

trial denied; court held that action for assumpsit would lie against defendant, since effects become property of assignee from time of bankruptcy); Bartholomew v. Davies, 1 T.R. 573, 99 Eng. Rep. 1258 (K.B. 1786) (assignees brought action of trover against defendant who claimed under an execution against the goods of the bankrupt; issue was whether bankrupt, who bought and sold horses, was a merchant; jury found he was a merchant and gave verdict for plaintiff-assignees; court agreed); Butcher v. Easto, 1 Dougl. 295, 99 Eng. Rep. 191 (K.B. 1779) (action by assignee under a commission to obtain goods sold by bankrupt to defendant; bill of sale of all goods held an act of bankruptcy); Devon v. Watts, 1 Dougl. 86, 99 Eng. Rep. 59 (K.B. 1779) (action of trover by assignees under a commission of bankrupt to recover value of lease (£400) assigned by bankrupt to defendant Watts when bankrupt was insolvent; denying a motion for a new trial after a verdict for plaintiff, the court held that assignment of lease was an act of bankruptcy); Harman v. Fishar, Cowp. 117, 98 Eng. Rep. 998 (K.B. 1774) (action of trover brought by assignees under a commission against a creditor of bankrupt to recover two promissory notes transferred by bankrupt in contemplation of bankruptcy to the creditor; the court held that the notes were property of the bankrupt, because they were not transferred until after act of bankruptcy, and that the transfer would have been a preference since the effect was to defraud other creditors); Buscall v. Hogg, 3 Wils. K.B. 146, 95 Eng. Rep. 981 (C.P. 1770) (trover for goods, by assignees; at trial, the Chief Baron had ordered that assignees be nonsuited because the bankrupt, an innkeeper (generally not a merchant) and a seller of wines to others, was not a merchant subject to bankruptcy laws; upon motion for new trial, court granted new trial to determine amount of business from selling wine, rum, and brandy to others.

[99]13 Eliz., ch. 7, § 2, cls. (2)-(9) (1570) (Eng.). The property of the bankrupt subject to the power of the commissioners consisted of "Lands, Tenements, Hereditaments, as well Copy or Customary Hold as Freehold" held by the bankrupt or held by the bankrupt and his wife or children for the use of only the bankrupt, and "such Use, Interest, Right or Title as such [bankrupt] then shall have in the same, which he or she may lawfully depart withal," and any such property held by a person of trust "to any secret Use" of the bankrupt, *id.* at cls. (3)-(6), and also "his or her Money, Goods, Chattels, Wares, Merchandizes and Debts, wheresoever they may be found or known," *id.* at cl. (7), and also "Annuities [and] Offices," *id.* at cl. (8), and "Fees, Annuities, and Offices," *id.* at cl. (9). *See Ex parte* Butler *in re* Richardson, Amb. 73, 27 Eng. Rep. 45 (Ch. 1749) (relying on this section in holding that the commissioners could sell the salary and profits from the bankrupt's office as Under Marshall of the City of London, with the consent of Lord Mayor and Aldermen).

[100]13 Eliz., ch. 7, § 2, cls. (8), (9) (1570) (Eng.) (the sale required to be by deed enrolled in a court of record).

[101]*See id.* at cl. (11).

[102]*See id.* at cls. (11), (12).

that a third person had any property of the bankrupt or owed the bankrupt money, the commissioners could summon and examine such third party.[103] After "due Proof thereof to be made before the said Commissioners . . . by Witness, Examination or otherwise," as the commissioners thought appropriate, any person concealing property of the bankrupt (including debts) would forfeit double the value of the property so concealed.[104] In addition, any person who wrongfully obtained or retained property of the bankrupt would also forfeit double the value of such property.[105] The commissioners could levy such forfeitures in the same manner as they could seize the property of the bankrupt.[106]

Later acts expanded and specified in greater detail the powers of the commissioners over property of the estate, including property conveyed before the act of bankruptcy. The 1604 Statute of 1 James gave the commissioners the power to convey any property, including debts owed to the bankrupt, that the bankrupt conveyed before bankruptcy without valuable consideration (other than a wedding gift to children).[107] Every such conveyance by the commissioners "shall be good and available to all Intents, Constructions and Purposes in the Law," against the bankrupt, his heirs and assigns, persons claiming through the bankrupt, and the transferee.[108]

This statute also expanded the commissioners' power to collect debts owed to the bankrupt. Acknowledging that the powers given by the 1570 Statute of 13 Elizabeth[109] to the commissioners over debts owed to the bankrupt were not "so full and perfect," the Statute of 1 James provided that the commissioners could assign such debts to the use of the creditors, notwithstanding any law, statute, use or custom to the contrary.[110] At this time, there were significant restrictions on the assignability of debts.[111]

The act also strengthened the commissioners' power over persons who

---

[103]*See id.* § 5.

[104]*Id.* § 6.

[105]*See id.* § 7 (property "other than such as he or they can and do prove to be due by Right and Conscience" for the just value thereof).

[106]*See id.* §§ 6, 7. Section 2 of the act does not specifically mention "levy" but the broad language giving the commissioners power to "take by their Discretions such Order and Direction" the property of the bankrupt, *id.* § 2, would include the power to levy, especially in light of the commissioners power to sell property of the bankrupt.

[107]1 Jam., ch. 15, § 5 (1604) (Eng).

[108]*Id.*

[109]*See supra* note 99 and accompanying text.

[110]1 Jam., ch. 15, § 13 (1604) (Eng.). This section gave the person to whom the debts were assigned the same rights to recover the debt that the bankrupt would have had. The statute also protected obligors who without notice of the bankruptcy paid a debt owed to the bankrupt. *Id.* § 14.

[111]*See* Lampet's Case, 10 Co. Rep. 46b, 48a, 77 Eng. Rep. 994, 997 (K.B. 1612) (stating that the sages and founders of the law provided that no "possibility, right, title, nor thing in action, shall be granted or assigned to strangers .... And as they cannot be granted by the act of the party; so a right in action shall not be transferred by act in law, as to the lord by escheat ...."). *But see* Garrard Glenn, *The Assignment*

were alleged to have property of the bankrupt (including debts owed to the bankrupt) and who were liable to examination under the Statute of 13 Elizabeth.[112] Section 10 of 1 James provided that the commissioners could issue a warrant to apprehend and bring such persons before the commissioners for examination and could imprison persons who refused to appear before the commissioners or to answer the commissioners' questions.[113]

In 1623, Parliament again expanded the commissioners' power.[114] It explicitly gave the commissioners power (directly or by warrant authorizing third persons) to break open the houses, chambers, shops, warehouses, doors, trunks or chests of the bankrupt and to seize the body and the "Goods, Chattels, Ready Money and other Estate" of the bankrupt.[115] This authority did not extend to property in the possession of third parties.[116] Commissioners could also dispose of goods and chattels of others when the bankrupt was the "reputed owner" to the same extent as if they belonged to the bankrupt.[117] The commissioners could also examine the wife of a bankrupt to discover property of the bankrupt that the wife or a third party might have held or transferred.[118]

The 1732 Statute of George II reiterated the requirement that, upon the issuance of a commission, the bankrupt appear before the commissioners for an examination, disclose to the commissioners all of his or her property, and transfer all of the property to the commissioners.[119] The commissioners could also determine the amount of any mutual debts between the bankrupt and a creditor and could set off such mutual debts.[120]

---

of Choses in Action; Rights of Bona Fide Purchaser, 20 VA L. REV. 621, 635-44 (1934) (discussing circumstances when specified types of debts became assignable).

[112]*See supra* note 103 and accompanying text.

[113]1 Jam., ch. 15, § 10 (1604) (Eng.). Those summoned could receive any costs and charges that the commissioners allowed. If they committed perjury, they could be indicted in any of the courts of record. *See id.* § 11.

[114]In addition, commissioners could disencumber an estate in fee tail or other estate subject to a future interest to the same extent that the bankrupt could. *See* 21 Jam., ch. 19, § 12 (1623) (Eng.). If the bankrupt had any conditional interest in or right to redeem any property, the commissioners could appoint an assignee to satisfy the condition or redeem the property, and after such redemption the commissioners could convey the property recovered or redeemed to the same extent as any other property of the estate. *See id.* § 13.

[115]*Id.* § 8.

[116]*See* COOKE, *supra* note 88, at 96.

[117]*See* 21 Jam., ch. 19, § 11 (1623) (Eng.).

[118]*See id.* § 6. The wife of the bankrupt expressly became subject to the penalties for failing to appear or to answer questions that any other person was subject to.

[119]5 Geo. 2, ch. 30, § 1 (1732) (Eng.).

[120]*See id.* § 28. If they did not set off a debt in the proceedings before the commissioner, however, they were precluded from doing so later. *See* Brown v. Bullen, 1 Dougl. 407, 99 Eng. Rep. 261 (K.B. 1780) (action of assumpsit for money had and received will lie for a creditor's share under an order of the commissioners for a dividend; the proceedings before the commissioners are conclusive evidence of debt;

Adding to the provisions concerning recovery of concealed property,[121] the statute provided that any person who accepted property in trust to conceal the property of the bankrupt forfeited £100 and double the value of the estate concealed. The assignees could recover this forfeiture by an "Action in Debt" in courts of record in Westminster.[122] In addition, the assignees under the commission—first specifically authorized by the 1705 Statute of Anne[123] and continued in the 1732 Statute of George II[124]—exercised the power to sue to collect the debts owed to the bankrupt as directed by the 1604 Statute of 1 James[125] and to recover property of the bankrupt.[126]

d. Allowance of Creditors' Claims

The commissioners received proofs of creditors' claims both for deciding the creditor's eligibility to file a petition[127] and for distributing the assets of the bankrupt to the creditors.[128] The commissioners received evidence and

---

assignees cannot set off against the dividend a debt due from plaintiff not presented before the commissioners).

[121]*See supra* note 104 and accompanying text.

[122]*See* 5 Geo. 2, ch. 30, § 21 (1732) (Eng.).

[123]*See* 4 Anne, ch. 17, § 11 (1705) (Eng.), *discussed supra* note 53.

[124]5 Geo. 2, ch. 30, §§ 26, 30 (1732) (Eng.). The practice of appointing assignees to take title to the property of the bankrupt and to liquidate the estate developed before it was explicitly authorized by statute. JAMES B. BURGES, CONSIDERATIONS ON THE LAW OF INSOLVENCY: WITH A PROPOSAL FOR REFORM 256-57 (London, T. Cadell 1783). The use of assignees was implicitly contemplated by the 1604 Statute of 1 James. *See supra* note 110 and accompanying text.

[125]*See supra* note 110 and accompanying text.

[126]*See supra* notes 64, 65, 98.

[127]One creditor who was owed at least £100 could file a petition, as could two creditors owed a total of £150, and three or more owed a total of £200. *See* 5 Geo. 2, ch. 30, § 23 (1732) (Eng.); *see also* Butcher v. Easto, 1 Dougl. 295, 99 Eng. Rep. 191 (K.B. 1779), *discussed supra* note 98 (debt contracted before bankruptcy may be ground for petition for commission); *Ex parte* Hillyard, 2 Ves. Sen. 406, 28 Eng. Rep. 259 (Ch. 1751) (if there is no debt at law, even though there is a strong case for a debt in equity, there is no basis for a commission); *Ex parte* Lord, 2 Ves. Sen. 26, 28 Eng. Rep. 18 (Ch. 1750) (upon a petition to set aside a bankruptcy commission as fraudulent, alleging that the affidavits of three creditors were false, the Lord Chancellor rejected the petition and directed that the commissioners should inquire whether the three petitioning creditors were in fact creditors and the consideration for which and the time when the debts were created, and inquire into the reality of any other debt).

Creditors with the requisite amount of debt petitioning for a commission must provide a bond "conditioned for proving his, her or their Debts, as well before the Commissioners named in such Commission as upon a Trial at Law, in case the due issuing forth of the same shall be contested and tried, and also for proving the Party a Bankrupt at the Time of taking out such Commission and further to proceed on such Commission." 5 Geo. 2, ch. 30, § 23 (1732) (Eng.). If the petitioning party did not prove a debt or an act of bankruptcy, then upon the petition of a party aggrieved, the Lord Chancellor could examine the question and order satisfaction for damages. *Id.* Also, the Lord Chancellor could assign such bond to the party aggrieved to sue on the bond in his or her own name. *Id.*

[128]*See* 5 Geo. 2, ch. 30 §§ 26, 33 (1732) (Eng.). Creditors other than the petitioning creditor could establish a debt in a court of law and submit a judgment to the commission. If the creditor did not establish the debt in the court before the bankrupt received his or her discharge, however, the bankrupt's discharge would preclude the debt. The petitioning creditor was deemed to have made his election and

adjudicated the validity and amount of the debts.[129] Parties aggrieved by the decisions of the commissioners sought review by the Lord Chancellor.[130] The validity of a creditor's debt was also occasionally reviewed by a law court when an aggrieved party challenged the validity of the bankruptcy commission,[131] but on other occasions the court refused to question the commissioners' decision on the validity of the debt.[132]

e. Distribution of Assets

At a meeting designated by the commissioners for making a dividend to creditors, the assignees were to produce to the commissioners an account of

---

did not have the option of suing at law. *See Ex parte* Crinsoz, 1 Bro.C.C. 270, 28 Eng. Rep. 1122 (Ch. 1783); *Ex parte* Ward, 1 Atk. 153, 26 Eng. Rep. 99 (Ch. 1743); COOKE, *supra* note 88, at 112-15.

[129]*See, e.g., Ex parte* Macklin, 2 Ves. Sen. 675, 28 Eng. Rep. 430 (Ch. 1755) (on petition of daughter to be let in as a creditor of bankrupt father who received child's earnings while living with him, Lord Chancellor referred to commissioners to inquire how much father received to child's use; child by agreement was admitted a creditor for particular sum to avoid an inquiry); COOKE, *supra* note 88, at 112-15.

[130]*See, e.g.,* Francis v. Rucker, Amb. 672, 27 Eng. Rep. 436 (Ch. 1768) (upon petition of creditor admitted by commissioners for principal amount of bill of exchange accepted by creditor, but not for additional twenty percent penalty imposed by Pennsylvania law for nonpayment of bills of exchange, Lord Chancellor held that creditor should be permitted to prove the twenty percent penalty as it arose under original contract, and if creditor could not prove under the commission, the twenty percent would be discharged by the bankrupt's certificate); *Ex parte* Artis, 2 Ves. Sen. 489, 28 Eng. Rep. 314 (Ch. 1752) (treatment of an annuity to wife of bankrupt); *Ex parte* Groome, 1 Atk. 115, 26 Eng. Rep. 75 (Ch. 1744) (involving a husband's promise to pay wife £600 if she survived him; husband was declared bankrupt and died before dividend made; commissioners disallowed wife's claim for £600; Lord Chancellor dismissed wife's petition that she be allowed as a creditor before commissioners because the debt was not due at time of act of bankruptcy); *Ex parte* Winchester, 1 Atk. 116, 26 Eng. Rep. 76 (Ch. 1744) (ordering the admission of a putative contingent creditor); *Ex parte* Byas, 1 Atk. 124, 26 Eng. Rep. 81 (Ch. 1743) (petition of creditor admitted as an unsecured creditor; the assignees under commission of bankruptcy had received payment on a note owned by bankrupt but pledged prepetition to the creditor as security for debt; court ordered that assignees should pay to the creditor the amount they received).

[131]*See, e.g., Ex parte* Cottrell *in re* Eaves, 2 Cowp. 742, 98 Eng. Rep. 1338 (K.B. 1778) (in "a case out of chancery for the opinion of this Court" the court ruled that a payee of a bond payable in the future was entitled to come into the bankruptcy); Willison v. Smith, 3 Dougl. 96, 99 Eng. Rep. 557 (K.B. 1782) (in an action against a bankrupt who had received a discharge in which the plaintiff claimed that the discharge had been obtained by fraud, the court held that the plaintiff should also prove the debt of the creditor who had petitioned for the commission of bankruptcy); Rex v. Cole, 1 Ld. Raym. 443, 91 Eng. Rep. 1194 (K.B. 1699) (Cole was indicted for being a bankrupt and refusing to give commissioners account of his effects; court held that the defendant should be acquitted because the debts had been contracted when he was an infant; "no man can be a bankrupt for debts which he is not obliged to pay"); Meggot v. Mills, 1 Ld. Raym. 286, 91 Eng. Rep. 1088 (K.B. 1697) (upon a motion for a new trial in an action of trover for goods by assignees of the commission against a transferee of the bankrupt, the court expressed the view that a commission cannot be based on a debt incurred while the bankrupt was a "merchant" if the debt had been repaid before the act of bankruptcy).

[132]*See* Brown v. Bullen, 1 Dougl. 407, 99 Eng. Rep. 261 (K.B. 1780) (the proceedings before commissioner are conclusive evidence of creditor's debt), *discussed supra* note 120; Yeo v. Allen, 3 Dougl. 214, 99 Eng. Rep. 619 (K.B. 1783) (in an action against a bankrupt who had obtained a certificate of discharge, the court ruled that there could be a trial on the issue of whether the defendant-bankrupt was a "scrivener" and therefore a "merchant" but that the debt of the creditor who petitioned for a commission of bankruptcy and the act of bankruptcy were not to be disputed).

what the assignees had collected and what remained outstanding. The commissioners could examine these assignees about their accounts. The commissioners would then order the net balance of the bankrupt's estate, after the payment of expenses, as "they or the major Part of them shall think fit" to be divided pro rata among the bankrupt's creditors who proved their debts under the commission.[133] The commissioners had to prepare a written "Order for a Dividend" to be filed with the assignees and in the proceedings under the commission.[134]

The statute also gave the cooperating bankrupt a specified allowance out of the net bankruptcy estate if the creditors received repayment of at least fifty percent of the debt owed to them.[135] If the creditors received less than fifty percent, the bankrupt received whatever the commissioners thought appropriate, not to exceed three percent of the net bankruptcy estate.[136]

f. Discharge of Debts

For a bankrupt to receive a discharge of debts, the commissioners had to certify to the Lord Chancellor that the bankrupt had made a full discovery of his assets and had otherwise complied with the act. The Lord Chancellor (or two of the Justices of the Courts of King's Bench or Common Pleas, or two Barons of the Court of Exchequer to whom the Lord Chancellor referred the certificate) approved the certificate of discharge and heard any objections by creditors to granting the discharge.[137] The commissioners had full discretion

---

[133]5 Geo. 2, ch. 30, § 33 (1732) (Eng.):

> [A]nd the said Commissioners, or the major Part of them, shall order such Part of the neat Produce of the said Bankrupt's Estate, as by such Accounts or otherwise shall appear to be in the Hands of the said Assignees, as they or the major Part of them shall think fit, to be forthwith divided amongst such of the Bankrupt's Creditors, who have duly proved their Debts under such Commission, in Proportion to their several and respective Debts.

The 1543 Statute of Henry VIII and the 1750 Statute of 13 Elizabeth also provided for the gathering and sale of the bankrupt's property and a pro rata distribution of the proceeds to creditors to satisfy their claims, although in much less detail. 34 & 35 Hen. 8, ch. 4, para. 1 (1542-1543) (Eng.); 13 Eliz., ch. 7, § 2, cl. (10) (1570) (Eng.); *see also* Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1, 14-17 (1919).

[134]*See* 5 Geo. 2, ch. 30, § 33 (1732) (Eng.).

[135]*See id.* § 7. The allowance was five percent not to exceed £200 if the creditors received fifty percent; 7.5 percent not to exceed £250 if the creditors received 62.5 percent; ten percent not to exceed £300 if the creditors received seventy-five percent.

[136]*See id.* § 8. *See also* THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND 117 (Philadelphia, John Thompson 1801) (noting that "at present the commissioners exercise the authorities given to them by the various statutes of bankruptcy, subject to the controul of the superior courts, particularly of the court of Chancery: they are nominated in England by the Chancellor").

[137]*See id.* § 10. This provision was first introduced by 4 Anne, ch. 17, §§ 7, 19 (1705) (Eng.). The bankrupt could not receive a discharge unless eighty percent of the creditors, by number and by the value of the outstanding debts, consented. The consent requirement, first added by 5 Anne, ch. 22, § 2 (1706)

over whether to certify the discharge; the bankrupt could not compel the commissioners to do so.[138] The statute provided that the certificate was conclusive evidence of the discharge of prebankruptcy debts unless the discharge had been obtained by fraud.[139]

2. The View of the Legal Commentators

Legal commentators of the day recognized the peculiar status of the bankruptcy procedures.[140] As a creation of the legislature and not part of the common law, they recognized that the bankruptcy acts gave broad powers to bankruptcy commissioners to adjudicate issues that arose in the bankruptcy proceeding. Blackstone described the proceedings before the commissioners as an "extrajudicial method of proceeding, which is allowed merely for the benefit of commerce."[141] He also noted that bankruptcy was "an innovation on the common law" and that the proceedings on a commission of bankrupt "depend entirely on the several statutes of bankruptcy."[142] Blackstone then summarized the duties of the commissioners: to meet, to receive proof of the bankrupt being a merchant and having committed an act of bankruptcy, and then to declare him a bankrupt; to name provisional assignees; to summon and examine the bankrupt, the bankrupt's wife, and any other person; to commit

---

(Eng.), was refined by 5 Geo. 2, ch. 30, § 10 (1732) (Eng.), to count only creditors with debts of £20 or more. These two acts also contained provisions making void any contract or security given to any creditor to induce the creditor to give consent. 5 Geo. 2, ch. 30, § 11 (1732) (Eng.); 5 Anne, ch. 22, § 3 (1706) (Eng.).

[138]*See* COOKE, *supra* note 88, at 338.

[139]5 Geo. 2, ch. 30, § 7 (1732) (Eng.) (If a bankrupt is arrested or prosecuted for a prebankruptcy debt, "the Certificate of such Bankrupt's conforming, and the Allowance thereof according to the Directions of this Act, shall be and shall be allowed to be sufficient Evidence of the Trading, Bankruptcy, Commission and other Proceedings precedent to the obtaining such Certificate, and a Verdict shall thereupon pass for the Defendant, unless the Plaintiff in such Action can prove the said Certificate was obtained unfairly and by Fraud, or unless the Plaintiff in such Action can make appear any Concealment by such Bankrupt to the Value of ten Pounds"); *see* Willison v. Smith, 3 Dougl. 96, 99 Eng. Rep. 557 (K.B. 1782) (in an action against a bankrupt who had pleaded a discharge in which the plaintiff claimed that the discharge had been obtained by fraud, the court directed an issue to try "whether the commission was duly issued"); *Ex parte* Bax, 2 Ves. Sen. 388, 28 Eng. Rep. 248 (Ch. 1751) (overruling exceptions to certificate of discharge of commissioners, all but one waived by counsel; rejecting the charge that the commissioners proceeded ex parte and holding that commissioners may proceed ex parte if the parties will not attend the commissioners); *Ex parte* Williamson, 2 Ves. Sen. 249, 28 Eng. Rep. 161 (Ch. 1751) (denying petition to disallow certificate of bankruptcy on the grounds that the petitioners, who had several bills in Chancery and Exchequer challenging the sale of certain shares as fraud, were not creditors, and four-fifths of the creditors who had proved debts under the commission signed the certificate); Twiss v. Massey, 1 Atk. 67, 26 Eng. Rep. 43 (Ch. 1737) (plaintiff brought bill against defendant, who had received a discharge in bankruptcy under a joint commission, claiming that debt was debt of individual defendant; defendant pleaded his certificate of discharge; Lord Chancellor upheld the certificate).

[140]Several treatises on bankruptcy simply reproduced the statute and offered annotations of the cases without much discussion of the larger questions presented by bankruptcy. *See, e.g.*, COOKE, *supra* note 88; DAVIES, *supra* note 57; EDWARD GREEN, THE SPIRIT OF THE BANKRUPT LAWS (London, 4th ed. 1780).

[141]2 WILLIAM BLACKSTONE, COMMENTARIES *477.

[142]*Id.* at *478-79.

to prison an uncooperative bankrupt or witness; to authenticate a certificate of discharge of debts of a cooperating bankrupt; to allow a cooperating bankrupt a certain percentage of the net proceeds of the estate; upon petition, to enter the proceedings of record; to break into houses to seize property of the bankrupt; to assign property of the bankrupt to the assignees chosen by them or the creditors; and to direct that a dividend be paid to creditors who have proved their debts.[143] He also noted that the assignees could pursue any legal method of recovering property vested in them on their own authority.[144]

In 1783, James Bland Burges, a barrister and bankruptcy commissioner and later a member of Parliament,[145] published a detailed critical study of the English bankruptcy system and proposed a reform of the system.[146] In Part II of his study he reviewed the historical development of the insolvency acts[147] and the bankruptcy acts. Among his many criticisms, Burges excoriated the extraordinary degree to which the Parliament in the bankruptcy acts had changed the rights of British subjects under the common law. In particular, Burges had this view of the appointment of commissioners:

> Having thus defined the subjects upon which the act [1570 Statute of Elizabeth] was to operate, the legislature proceeded to chalk out a new mode of procedure.
>
> Here we observe a remarkable difference. The pageantry of ennobled judges, having produced its effect, was removed from the scene. . . .
>
> Whether the great men of the nation found it no longer convenient to administer the affairs of Bankrupts, or whether they had executed this important trust but badly, we cannot tell. We find however new delegates appointed [the bankruptcy commissioners].[148]

Burges then criticized the great power that Parliament had given to the commissioners to "take by their Discretions such Order and Direction"[149] over the bankrupt or the property of the bankrupt:

> The order and direction here prescribed was undoubtedly

---

[143]*Id.* at *478-87.

[144]*Id.* at *486-87.

[145]DUFFY, *supra* note 57, at 44 n.133.

[146]BURGES, *supra* note 124. Burges's proposals are also discussed in DUFFY, *supra* note 57, at 44-45, 84-85, and in Ian P.H. Duffy, *English Bankrupts 1571-1861*, 24 AM. J. LEGAL HIST. 283, 290 & n.44 (1980).

[147]*See infra* Part I.C.1.

[148]BURGES, *supra* note 124, at 213-14.

[149]*See supra* note 99 and accompanying text.

> just and judicious, had it been restrained within any warrantable bounds. . . . But what security could be given for these subaltern appointees? Was it fitting that so large a proportion of English citizens should be subjected to the arbitrary control of obscure and fortuitously selected individuals. Were their effects to be seized, were their estates to be sold, were their bodies to be imprisoned, at the mere discretion of temporary judges? Were they to forfeit, for an inability to discharge a debt, the choicest privileges of municipal and natural law? Yet this undoubtedly now became the case. The great mercantile part of a commercial nation was cut off from the advantages enjoyed by their fellow citizens. They became subject to an unknown law, and were excluded from the common blessing of a trial by jury.[150]

Despite these criticisms, he did not recommend abolishing the use of bankruptcy commissioners.

In Part III of his study, he identified eight basic causes for the insufficiency of the bankruptcy system then in effect.[151] With these causes in mind, he recommended a new system for insolvent debtors that would have made significant changes in the bankruptcy and insolvency acts. First, he urged that the distinction between merchants and nonmerchants be abolished.[152] Second, he suggested that a simple requirement of debtor insolvency should replace "acts of bankruptcy" as a jurisdictional requirement for a proceeding.[153]

On the procedural aspects of bankruptcy, he recommended that the Lord Chancellor continue to issue commissions.[154] To improve the quality of the bankruptcy adjudicators, he recommended abolishing the then current list of commissioners and replacing them with a Board of Insolvency consisting of

---

[150]BURGES, *supra* note 124, at 215 (referring to the power set forth in 13 Eliz., ch. 7, § 2, cls. (2)-(7), *discussed supra* note 99 and accompanying text); *see also id.* at 227 (noting that the commissioners "to whom the authority of judging was delegated, were invested with so enormous a discretionary power").

[151]*Id.* at 318-41. These were (1) the distinction between merchants and nonmerchants, (2) the system of imprisonment for debt, (3) the ability of the commissioners to declare a person a bankrupt and to break open his house and seize his property on the basis of evidence produced by the petitioning creditor, without giving to the bankrupt any opportunity to be heard, (4) the ability of the majority of creditors (by value of their debts) to choose assignees, (5) creditor control over whether the bankrupt received a certificate of discharge, (6) specific inadequacies in the process, that is, (a) the practice of some commissioners in refusing to allow the bankrupt to see the evidence against him, (b) inadequate facilities for conducting the commissions, and (c) inadequate pay to attract the most able commissioners, (7) the expense of the commission, and (8) the poor drafting of the bankruptcy acts. *Id.* at 318-41.

[152]*Id.* at 318-23, 342-45, 348-53.

[153]"Generally, then, every one who is indebted to another, and who neglects or refuses to pay what he justly owes, shall be liable to a Commission of Insolvency." *Id.* at 350.

[154]*Id.* at 357.

nine commissioners and a staff.[155] Of the nine commissioners, who would receive life terms, five would be attorneys appointed by the Lord Chancellor and four would be business persons nominated by the business community and approved by the Lord Chancellor.[156] The commissioners would have the following authority:

> They would have the sole power of declaring Insolvency; of issuing process; of directing a seizure of the effects, or a personal imprisonment of an Insolvent. They will have the exclusive right of determining all contested matters relative to debts and claims, and of granting Certificates.
>
> . . . [I]n all these matters, the judgement of the Commissioners should be final, subject only to the future correction of the Chancellor, by the summary process of Petition.[157]

Burges also suggested reforms in the procedure. The most significant innovation was his recommendation that, upon the issuing of the commission, the commissioners should immediately notify the alleged insolvent debtor of the commission. The commissioners should decide whether to declare the debtor an insolvent only after hearing from both the petitioning creditor and the alleged insolvent.[158] Finally, he recommended that creditors no longer have control over granting the certificate discharging the debtor's debts. Instead, the commissioners should only discharge those debts if they were paid in full or if the commissioners decided that the debtor showed that his insolvency was the product of "unavoidable accidents and misfortunes."[159]

Edward Christian, who was a barrister, commissioner of bankrupt, and law professor at Cambridge, wrote about the English bankruptcy system early in the nineteenth century while the eighteenth-century bankruptcy acts remained in effect.[160] In this study, Christian remarked that Parliament had granted "expressly and directly to commissioners of bankrupt large and extensive powers."[161] He mentioned the following powers:[162] (i) the commissioners could convey a copyhold estate or an estate in fee tail without the limitations normally attendant to such conveyances outside of bankruptcy;

---

[155]*Id.* at 358-71. The staff would consist of a secretary, a solicitor, three perpetual assignees, a comptroller, an accountant, clerks and messengers. *Id.* at 360, 364-70.

[156]*Id.* at 361-62.

[157]*Id.* at 363.

[158]*Id.* at 371-74. He suggested other relatively minor changes in the conduct of the proceedings, and he urged providing for imprisonment or involuntary servitude in lieu of the death penalty for uncooperative insolvents. *Id.* at 375-86.

[159]*Id.* at 387-89.

[160]1 & 2 CHRISTIAN, supra note 50.

[161]2 *id.* at 8.

[162]*Id.*; *see also* 1 *id.* at 194.

(ii) no officer of a court in a civil case had the power of the commissioners to break open doors to seize the bankrupt's property;[163] (iii) commissioners could compel answers to their questions, and no court of equity had a similar power;[164] and (iv) commissioners could "seize or assign all the debts due to the bankrupt, which cannot be taken in execution by any process of the courts of law."

Christian also analyzed the relative jurisdiction of the Lord Chancellor, the Court of Chancery, and the law courts over bankruptcy. He noted that, because of the extent of their new powers, as early as 1583 commissioners by motion referred legal matters to the Court of Common Pleas for advice.[165] This practice was the foundation for the Lord Chancellor's later practice of referring legal questions to the law courts. As Christian noted, although the courts had no direct supervisory role over the commissioners, obtaining such advice would protect the commissioners from liability for their actions. Further, Christian noted that there was nothing extraordinary about the jurisdiction of the law courts over bankruptcy. Bankruptcy was a creation of the English bankruptcy acts. "The jurisdiction in all these great questions [under the acts] became immediately vested in the courts of law by their inherent authority to interpret laws, or to put a sound construction upon the declarations of the legislature."[166]

In addition, although the Lord Chancellor had little express supervisory power over the commissioners, he did entertain petitions from bankrupts or creditors challenging the decisions of the commissioners, as well as requests for advice from commissioners. Christian stated that the most extensive part of the Lord Chancellor's bankruptcy jurisdiction was to review the decisions of the commissioners on whether to admit or disallow the proof of debts.[167]

Because the Lord Chancellor appointed the commissioners and also could supersede a commission and issue a new commission to different commissioners, commissioners generally followed the advice of the Lord Chancellor.[168] Nevertheless, the commissioners were expected to exercise their powers and

---

[163]*See supra* note 115 and accompanying text.

[164]1 CHRISTIAN, *supra* note 50, at 375:

> The jurisdiction of the commissioners in this instance [examination of witnesses] is much more extensive than that which the court of Chancery possesses.
>
> The reason is obvious. The commissioners have their authority from the legislature, and it is given to them alone. The court of Chancery must act according to the ancient universal principles of the court.

[165]2 *id.* at 8-10. "In the execution of these new, great, and transcendent powers, which no superior court ever possessed, it might be expected that the commissioners would frequently be at a loss how to proceed." *Id.* at 8.

[166]*Id.* at 20.

[167]*Id.* at 11.

[168]*Id.* at 11-16.

not simply to refer all questions to the Lord Chancellor.[169] Furthermore, the ability to challenge the decisions of the commissioners was not unlimited. Christian cites *Clarke v. Capron*[170] as an example. In that case, after the commissioners had ordered a dividend to creditors, the assignees filed a bill to have the proof of the debt of one of the creditors expunged. The Lord Chancellor ruled that the Court of Chancery could not strike the order of dividend, and that the proper procedure was to have filed a petition challenging the debt before the order of dividend had been entered by the commissioners. Otherwise, allowing the bill of complaint "would totally defeat the summary proceeding under commissions."[171]

These legal commentators described the essential features of the bankruptcy acts: a summary adjudicatory procedure for bankruptcy created by Parliament that delegated the initial adjudication of bankruptcy issues to statutorily created bankruptcy commissioners. Parliament did not delegate this adjudication to the existing common law courts (with their juries) or to the Lord Chancellor.

Parliament did not specify all of the details of adjudication. For example, the legislation did not provide any procedure for review of the commissioners' decisions. The Lord Chancellor and the law courts filled this void. In a few instances, the Parliament specifically required the parties in a bankruptcy proceeding to resort to the courts, as in the case of an assignee suing to recover certain debts owed to the bankrupt.[172]

Nevertheless, Parliament delegated to the commissioners the main bulk of bankruptcy adjudication. Further, the legislation gave the commissioners of bankrupt great powers to assist their adjudication. From this picture we see that Parliament exercised great discretion on the subject of bankruptcies. The only broad limitation to this discretion was the power of the courts of record—the Lord Chancellor sitting in the Court of Chancery or the law courts—to ensure that the commissioners' adjudications conformed to the requirements of the law. Indeed, although the law courts frequently used juries in reviewing bankruptcy issues, the primary function of the law courts was not the determination of facts by the jury but the resolution of legal questions: the resolution of "cases."[173]

---

[169]*Id.* at 15 ("They ought upon all occasions to decide according to the best of their ability. They ought not to pray the aid of Hercules, without exerting their own strength.").

[170]2 Ves. Jun. 666, 30 Eng. Rep. 832 (Ch. 1795).

[171]*Id.* at 668, 30 Eng. Rep. at 833, *quoted in* 2 CHRISTIAN, *supra* note 50, at 17. The Lord Chancellor also remarked "I have no more right to reverse an order of the commissioners than the Court of King's Bench." *Id.* at 667-68, 30 Eng. Rep. at 833.

[172]*See supra* note 122 and accompanying text.

[173]Many reports recite that the jury found for the plaintiff or the defendant subject to the opinion of the court "on the following case," referring to the specific legal question that was the source of the controversy. *See, e.g.*, Harman v. Fishar, Cowp. 117, 98 Eng. Rep. 998 (K.B. 1774), *discussed supra* note 98;

There were good policy reasons for Parliament's exercise of its discretion to craft a summary bankruptcy procedure. The substance and the procedure of the common law were not capable of the quick and inexpensive adjustment of the relationship between insolvent debtors and their creditors. Creditors faced with a failing debtor required quick action. Salvaging a portion of their claims required all creditors to cooperate, whether they wanted to or not. The need for quick action and mandatory cooperation outweighed the importance of the normal resolution of specific issues between an individual creditor and the bankrupt. Moreover, creditors would likely receive repayment of only a portion of their debts. They therefore needed a more expeditious and less formal adjudicatory process than that offered either by the law courts or by the chancery. The prospect of only partial payment would not justify the more extensive procedures of a law or an equity court. These reasons justify Parliament's delegation of the initial adjudication of almost all bankruptcy related issues to commissioners, not to law courts or the Lord Chancellor.

As I discuss in the next subpart, this rationale also justifies the summary procedures that Parliament adopted in the case of the insolvency acts. These acts delegated to local justices of the peace the initial adjudication of issues arising out of the release of debtors from prison in exchange for an assignment of all of the insolvent debtor's property to the creditors. Similarly, this rationale justifies the adoption by Pennsylvania of the only fully developed bankruptcy act in America before the adoption of the Constitution, an act modeled very closely on the English bankruptcy acts, and the enactment by Congress of the Bankruptcy Act of 1800.

C. Other Early Bankruptcy Adjudication

1. *The English Insolvency Acts*

The English bankruptcy acts were not the only response of Parliament to the insolvency of its citizens. Periodically, Parliament enacted insolvency acts typically entitled "An Act for the Relief of Insolvent Debtors" or something very similar.[174] Under these acts, a debtor imprisoned for unpaid

---

Hankey v. Jones, 2 Cowp. 745, 98 Eng. Rep. 1339 (K.B. 1778), *discussed supra* note 61; Alderson v. Temple, 4 Burr. 2235, 2236, 98 Eng. Rep. 165, 166 (K.B. 1768) (action in trover by assignees of bankrupt against a creditor of bankrupt to recover a note transferred by bankrupt to the creditor; court, after jury verdict for assignees, subject to the opinion of the court on the following case, "whether the plaintiffs ought to recover," held that the bankrupt's endorsement of note to creditor was fraudulent and void as a preference and also, because there was no assent by the creditor to the transfer of the note, the property was still in the bankrupt at the time of the bankruptcy); Port v. Turton, 2 Wils. K.B. 169, 95 Eng. Rep. 748 (C.P. 1763), *discussed supra* note 97; Tribe v. Webber, Willes 464, 125 Eng. Rep. 1270 (C.P. 1744) (in an action in assumpsit for money had and received by assignees to recover payments by bankrupt to creditor, verdict for plaintiff "subject to the opinion of this Court on the following case," whether and when the bankrupt committed an act of bankruptcy); *see also* Pushaw, *supra* note 39.

[174]*See, e.g.*, 2 & 3 Anne, ch. 16 (1703) (Eng.) ("An Act for the Discharge out of Prison such Insolvent

debts[175] could petition the justice of the peace for release from prison. The debtor had to assign to the clerk of the justice of the peace the debtor's real and personal property (with exemptions for wearing apparel, bedding, and working tools). The property would then be assigned to assignees for liquidation in satisfaction of the debtor's debts. The creditors received a pro rata share of the proceeds from the debtor's property. Creditors could no longer imprison the debtors for the preexisting debts. The insolvency acts, however, did not discharge the debts, and creditors could execute on any future goods acquired by the debtor to satisfy the preexisting debts.[176] At first, only those with a small amount of debts (£50 or £100) were eligible for release from prison.[177] Over time, however, more people became eligible.

Debtors" who will serve in the army or navy); 6 Geo., ch. 22 (1719) (Eng.) (act for "Relief of insolvent Debtors"); 11 Geo., ch. 21 (1724) (Eng.) (same); 2 Geo. 2, ch. 20 (1729) (Eng.) (act for "Relief of Insolvent Debtors"); 21 Geo. 2, ch. 31 (1748) (Eng.) (same); 28 Geo. 2, ch. 13 (1755) (Eng.) (same); 9 Geo. 3, ch. 26 (1769) (Eng.) (same); 12 Geo. 3, ch. 23 (1772) (Eng.) (same); 14 Geo. 3, ch. 77 (1774) (Eng.) (same); 16 Geo. 3, ch. 38 (1776) (Eng.) (same); 18 Geo. 3, ch. 52 (1778) (Eng.) (same); 21 Geo. 3, ch. 63 (1781) (Eng.) ("An Act for the Discharge of certain Insolvent Debtors"). According to Charles Tabb, the first of such acts was 22 & 23 Car. 2, ch. 20 (1670) (Eng), and later acts included 2 W. & M., sess. 2, ch. 15 (1690) (Eng.); 5 & 6 W. & M., ch. 8 (1694) (Eng.); 7 & 8 Will. 3, ch. 12 (1696) (Eng.); 8 & 9 Will. 3, ch. 18 (1697) (Eng.); 1 Anne, stat. 1, ch. 25 (1701) (Eng.); 2 & 3 Anne, ch. 16 (1703) (Eng.); *see also* Tabb, *History*, *supra* note 50, at 12 n.47.

[175]Imprisonment for debt was an important creditor collection device in the seventeenth and eighteenth centuries. It reflected a common belief that the refusal to pay debts was willful. The intent was not to punish debtors, but to provide an incentive for debtors who owned property which could not be reached by the legal process of the day to pay their debts. *See generally* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1974); Cohen, *supra* note 86, at 155. In eighteenth century England, creditors' remedies were limited to the writ of *fieri facias*, which authorized the sheriff to seize the tangible goods of the debtor and sell enough of them to pay the debt; the writ of *levari facias*, which enabled the sheriff to seize the personal property of the debtor and the rents from the debtor's real property to satisfy the debt (but not the right to possess or cause the sale of the debtor's lands); the writ of *elegit*, which allowed delivery of the goods to the creditor at an appraised value in satisfaction of the debt and, if there remained a deficiency, gave the creditor possession of one half of the debtor's lands until the debt were repaid (but did not allow the creditor to force the sale of the debtor's lands); or the writ of *capias ad satisfaciendum*, which imprisoned the debtor until the debt was paid. *See* 3 BLACKSTONE, *supra* note 141, at *414, *417-19. Debtors of substance sometimes preferred imprisonment because, once the body of the person was taken in execution on the writ, no other writ could be issued against his or her goods or lands. *See id.* Creditors used this writ because they could not force the sale of either the debtor's lands or negotiable instruments (and certain other intangible property). *See* Cohen, *supra* note 86, at 154-55; Duffy, *supra* note 146, at 285; Treiman, *supra* note 87, at 195 n.21. The intangible property that was not subject to execution and levy included annuities, bank notes, bonds, book debts, negotiable instruments, and stocks and shares in public funds. *See* Duffy, *supra* note 146, at 285.

[176]*See, e.g.*, 2 & 3 Anne, ch. 16 (1703) (Eng.) (summary of provisions); 6 Geo., ch. 22 (1719) (Eng.); 11 Geo., ch. 21 (1724) (Eng.); 2 Geo. 2, ch. 20 (1729) (Eng.); 21 Geo. 2, ch. 31 (1748) (Eng.); 28 Geo. 2, ch. 13, §§ 3, 18, 20, 21 (1755) (Eng.); 9 Geo. 3, ch. 26, §§ 4, 11, 27, 33 (1769) (Eng.); 12 Geo. 3, ch. 23, §§ 4, 12, 27, 28, 34 (1772) (Eng.); 14 Geo. 3, ch. 77, §§ 4, 12, 28, 29, 34 (1774) (Eng.); 16 Geo. 3, ch. 38, §§ 4, 14, 33, 34, 41 (1776) (Eng.); 18 Geo. 3, ch. 52, §§ 4, 14, 33, 38, 45 (1778) (Eng.); 21 Geo. 3, ch. 63, §§ 5, 15, 32, 33 (1781) (Eng.).

[177]*See* Treiman, *supra* note 87, at 195 n.22 (citing 2 W. & M., sess. 2, ch. 15, § 9 (1690) (Eng.) (limiting the benefits of that insolvency act to debtors with unpaid debts of less than £100)); *see also* 2 & 3

The maximum amount of allowable debt grew to £1,000-£2,000, and creditors holding debts that exceeded the maximum were also induced to comply with their terms.[178]

As a technical matter, the English insolvency acts were distinct from the English bankruptcy acts.[179] Unlike the bankruptcy acts, debtors did not receive a discharge of their debts. With one exception,[180] the acts did not operate prospectively: They released only those debtors in prison as of a date certain.[181] These acts applied to nonmerchants and to merchants not eligible for a commission of bankrupt under the bankruptcy acts, and the debtors, not the creditors, initiated the proceedings by petition. Nevertheless, they incorporated the essential feature of the bankruptcy acts in providing for the distribution of the debtor's property to satisfy creditor claims on a pro rata basis. The important features of the insolvency acts later became part of the permanent bankruptcy law.[182]

Anne, ch. 16 (1703) (Eng.) (limiting relief to debtors who did not owe more than £100 to one person and who agreed to serve or procured another to serve in the British army or navy); 6 Geo., ch. 22 (1719) (Eng.) (limited to debtors who did not owe more than £50 to one person); 11 Geo., ch. 21 (1724) (Eng.) (debtors owing debts to the Crown and debts of £100 or more to one person not released).

[178]Creditors holding debts greater than the maximum who did not consent to the release of the debtor were required to pay for the maintenance of the debtor in prison. If they did not pay, the prisoner was released. *See, e.g.*, 2 Geo. 2, ch. 20 (1729) (Eng.) (no release for debt to the King or debt of more than £500 to any one creditor, unless the creditor consented); 21 Geo. 2, ch. 31 (1748) (Eng.) (same); 28 Geo. 2, ch. 13, § 31 (1755) (Eng.) (same; except creditors who did not consent to release to pay a sum for the maintenance of the prisoner; if the sum were not paid, then the prisoner was released); 9 Geo. 3, ch. 26, § 40 (1769) (Eng.) (same, except debt limit raised to £1,000); 12 Geo. 3, ch. 23, § 42 (1772) (Eng.) (same); 14 Geo. 3, ch. 77, § 42 (1774) (Eng.) (same, except debt limit raised to £2,000 and release for debt to King allowed if Privy Council agreed); 16 Geo. 3, ch. 38, §§ 49, 50 (1776) (Eng.) (same, except no release for debt to King, and debt limit of £1,000 to any one person); 18 Geo. 3, ch. 52, §§ 55, 56 (1778) (Eng.) (same); 21 Geo. 3, ch. 63, §§ 5, 13, 48 (1781) (Eng.) (debt limit £500 but not released for debts to Crown).

[179]*See, e.g.*, 2 BLACKSTONE, *supra* note 141, at *484; Treiman, *supra* note 87, at 195 n.22.

[180]The Statute of 32 Geo. 2, ch. 28 (1758) (Eng.), a general insolvency act for debtors in prison for sums of less than £100, provided for the assignment of the debtor's property to creditors and release from prison. If the creditors did not consent to the release, they were required to pay the fees for continuing the debtor's imprisonment. If they failed to pay, the debtor was released from prison. *Id.* §§ 13, 14. This act also provided a new remedy to creditors against debtors not eligible for a commission of bankrupt. Upon notice to the debtor and other creditors by whose action the debtor was imprisoned, the creditor could compel a debtor who did not seek release from debtor's prison to give an account of his or her property and to assign the property for the benefit of the petitioning creditor and other consenting creditors. *Id.* § 17. If the debtor refused, he would be transported to a colony in America for indentured service for seven years. *Id.*

[181]*See, e.g.*, 6 Geo., ch. 22 (1719) (Eng.) (releasing debtors in prison on June 24, 1719, for existing debts); 11 Geo., ch. 21 (1724) (Eng.) (September 29, 1724); 2 Geo. 2, ch. 20 (1729) (Eng.) (September 29, 1728); 21 Geo. 2, ch. 31 (1748) (Eng.) (January 1, 1747); 28 Geo. 2, ch. 13 (1755) (Eng.) (January 1, 1755); 9 Geo. 3, ch. 26 (1769) (Eng.) (September 29, 1768); 12 Geo. 3, ch. 23 (1772) (Eng.) (January 1, 1772); 14 Geo. 3, ch. 77 (1774) (Eng.) (April 28, 1774); 16 Geo. 3, ch. 38 (1776) (Eng.) (January 22, 1776); 18 Geo. 3, ch. 52 (1778) (Eng.) (January 28, 1778); 21 Geo. 3, ch. 63 (1781) (Eng.) (persons in prison on January 1, 1781; also persons who had escaped during disturbances on June 2 through June 8, 1780 that destroyed several jails and who surrendered or offered to surrender by September 1, 1780).

[182]In 1783, James Bland Burges suggested a reform that melded many of the features of the bankruptcy

The insolvency acts delegated to the justice of peace and assignees picked by the justices the duty to adjudicate issues that arose under the acts. The justices could issue a warrant requiring that an imprisoned debtor be brought to the court.[183] The justices examined witnesses, determined the truth of the debtor's disclosure of his or her assets, and decided whether the debtor was entitled to the benefits of the acts.[184] The justices appointed the assignees who gathered and liquidated the debtor's property and determined the validity of the debts of the creditors.[185] The justices also resolved whether the debtor had engaged in fraudulent practices—fraudulently obtaining or transferring property.[186] Finally, the justices could imprison any debtor who, after receiving a release from prison under the act, refused to appear before the assignees or to answer questions from the assignees about the debtor's property. They could imprison the debtor without bail until the debtor did appear and answer.[187] The act gave the courts of record only one responsibility: to adjudicate claims of mismanagement by the assignees and to remove and replace assignees.[188]

Holdsworth says that the justices of the peace were not well suited to do the duties imposed by the acts on them.[189] Nevertheless, delegating these duties to a judicial officer who did not have life tenure, whose court was not a court of record, and whose proceedings were of a summary nature was consistent with Parliament's delegation under the bankruptcy acts of bankruptcy adjudication to commissioners of bankrupt. The nature of the problem to be resolved neither required nor justified the expense and the formality of the courts of record.

---

acts and the insolvency acts, such as abolishing the distinction between merchants and nonmerchants, replacing a simple requirement of debtor insolvency for "acts of bankruptcy" as a jurisdictional requirement for a proceeding, and abolishing creditor approval for the debtor's discharge. *See supra* notes 146-159 and accompanying text.

[183]*See, e.g.*, 9 Geo. 3, ch. 26, § 6 (1769) (Eng.); 12 Geo. 3, ch. 23, § 6 (1772) (Eng.); 14 Geo. 3, ch. 77, § 6 (1774) (Eng.); 16 Geo. 3, ch. 38, § 6 (1776) (Eng.); 18 Geo. 3, ch. 52, § 6 (1778) (Eng.); 21 Geo. 3, ch. 63, § 6 (1781) (Eng.).

[184]*See, e.g.*, 9 Geo. 3, ch. 26, §§ 10, 21, 37 (1769) (Eng.); 12 Geo. 3, ch. 23, §§ 11, 21, 38 (1772) (Eng.); 14 Geo. 3, ch. 77, §§ 11, 21, 38 (1774) (Eng.); 16 Geo. 3, ch. 38, §§ 13, 25, 45 (1776) (Eng.); 18 Geo. 3, ch. 52, §§ 14, 26, 43 (1778) (Eng.); 21 Geo. 3, ch. 63, §§ 14, 27, 43 (1781) (Eng.).

[185]*See, e.g.*, 9 Geo. 3, ch. 26, § 11 (1769) (Eng.); 12 Geo. 3, ch. 23, § 12 (1772) (Eng.); 14 Geo. 3, ch. 77, § 12 (1774) (Eng.); 16 Geo. 3, ch. 38, § 14 (1776) (Eng.); 18 Geo. 3, ch. 52, § 14 (1778) (Eng.); 21 Geo. 3, ch. 63, § 15 (1781) (Eng.).

[186]*See, e.g.*, 16 Geo. 3, ch. 38, §§ 38, 39 (1776) (Eng.); 18 Geo. 3, ch. 52, §§ 42, 43 (1778) (Eng.); 21 Geo. 3, ch. 63, §§ 37, 38, 39 (1781) (Eng.).

[187]*See, e.g.*, 9 Geo. 3, ch. 26, § 43 (1769) (Eng.); 14 Geo. 3, ch. 77, § 46 (1774) (Eng.); 16 Geo. 3, ch. 38, § 54 (1776) (Eng.); 18 Geo. 3, ch. 52, § 51 (1778) (Eng.); 21 Geo. 3, ch. 63, § 52 (1781) (Eng.).

[188]*See, e.g.*, 9 Geo. 3, ch. 26, § 48 (1769) (Eng.); 14 Geo. 3, ch. 77, § 52 (1774) (Eng.); 16 Geo. 3, ch. 38, § 60 (1776) (Eng.); 18 Geo. 3, ch. 52, § 67 (1778) (Eng.); 21 Geo. 3, ch. 63, § 63 (1781) (Eng.).

[189]8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 236 (2d ed. 1925).

2. *The Early American Experience*

Neither the English bankruptcy acts nor the English insolvency acts were received as part of the common law incorporated into the American law.[190] Instead, the legislatures of the American colonies and states responded to the insolvency of debtors and their creditors before the adoption of the Constitution in a dizzying variety of ways. At some time during the eighteenth century, most jurisdictions enacted statutes allowing debtors to petition a court of general or limited jurisdiction for relief. These statutes usually required the debtor to surrender his or her property for liquidation and distribution by an official or by a designee of the creditors. In most cases, debtors could petition for release from prison.[191] A few jurisdictions allowed the discharge of the debts as well as release from prison, usually with the consent of some or all of the creditors,[192] but also in a few shortlived instances without credi-

[190]*See* Plank, *supra* note 19, at 518-25. Some English statutes did become incorporated into the common law of American jurisdictions. For example, several early English statutes authorizing the sheriff or the justices of the peace to call out the *posse comitatus* to suppress riots, for example, 8 Hen. 6, ch. 9 (1429) (Eng.); 2 Hen. 5, stat. 1, ch. 8, § 2(5) (1414) (Eng.); 13 Hen. 4, ch. 7 (1411) (Eng.); 17 Rich. 2, ch. 8 (1393) (Eng.), were incorporated into the common law of Maryland. *See* Note, *Baltimore City's Liability for Riot Damage: The Mayor as Conservator of the Peace*, 33 MD. L. REV. 73, 87-93 (1973).

[191]*See, e.g.*, An Act for the Relief of Insolvent Debtors, within this Government, ch. 76, 1740 Del. Laws, § 1, 2 (petition to courts from which arresting process issued; also providing for the disposition of the debtor's property "in like manner as Assignees of Commissioners of Bankrupts"), *amended by* ch. 118, 1751 Del. Laws; An Act for the Relief of Insolvent Debtors, ch. 28, Mar. Sess., 1774 Md. Laws (three years duration but continued by subsequent acts until it expired 1787, revived 1788, and continued until at least 1810) (petition to justices of peace); An Act for the Relief of Insolvent Persons, with respect to the Imprisonment of Their Persons, ch. 22, 9th Sess., 1786 N.Y. Laws (Mar. 31, 1786) (total debts not more than £15); An Act for the Relief of Insolvent Persons, with respect to the Imprisonment of Their Persons, ch. 98, 10th Sess., 1787 N.Y. Laws (Apr. 20, 1787) (same); An Act for Giving Relief in Cases of Insolvency, ch. 92, 11th Sess., 1788 N.Y. Laws (Mar. 21, 1788) (requiring consent of three-fourths by value of creditors); An Act Directing the Manner of Levying Executions, and for Relief of Poor Prisoners for Debt, ch. 37, 1705 Va. Laws (debts under 10 pounds money or 2,000 pounds in tobacco), *found in* 3 STATUTES AT LARGE BEING A COLLECTION OF THE LAWS OF VIRGINIA 385, 386-88 (William Waller Hening ed., 1823) [hereinafter LAWS OF VIRGINIA]; An Act Declaring the Law Concerning Executions, and for Relief of Insolvent Debtors, ch. 12, 1748 Va. Laws, §§ 24, 26 (effective June 1, 1751), *found in* 5 LAWS OF VIRGINIA, *supra*, at 526, 589 (Hening 1819); ch. 1, 1753 Va. Laws, § 31, *found in* 6 LAWS OF VIRGINIA, *supra*, at 325, 342-43 (Hening 1819); ch. 22, 1769 Va. Laws, § 7, *found in* 8 LAWS OF VIRGINIA *supra*, at 326, 329 (Hening 1821).

See also COLEMAN, *supra* note 175, at 79 (Connecticut; a shortlived 1765 act that also discharged liens); *id.* at 208-10 (Delaware, 1734-1808); *id.* at 234 (Georgia, 1766-1770); *id.* at 164-65 (Maryland, 1708-1711, 1725-1727, 1733, 1774-1787, 1788-1817); *id.* at 40-42 (Massachusetts, 1698-1725, periodically during 1727-1787, permanently thereafter); *id.* at 56-57 (New Hampshire, 1767-1776, 1782-1791); *id.* at 132-135 (New Jersey, 1686, periodically from 1730 to 1771); *id.* at 107-08, 115-16 (New York, 1730, 1732-1734, 1743, 1747, 1750, 1751, 1756, 1776, 1786, 1787); *id.* at 218-20 (North Carolina, 1749-1773); *id.* at 143-45, 147 (Pennsylvania, 1730, 1770, 1784-1793); *id.* at 91 (Rhode Island, 1745); *id.* at 66-67 (Vermont, 1782-1797); *id.* at 195-96 (Virginia, periodically beginning in 1705).

[192]*See, e.g.*, An Act for the Relief of Insolvent Debtors, 1771 N.J. Laws, *found in* 5 LAWS OF THE ROYAL COLONY OF NEW JERSEY 1770-1775, at 81-86 (Bernard Bush ed., 1986) [hereinafter LAWS OF NEW JERSEY]; ch. 370, 1783 N.J. Laws, *found in* THE FIRST LAWS OF THE STATE OF NEW JERSEY 338 (John D. Cushing, ed. 1981); An Act for the Relief of Insolvent Debtors, ch. 34, 9th Sess., 1786 N.Y. Laws

tor consent.[193] In a few jurisdictions, the debtor could obtain release from prison in exchange for service.[194]

Some jurisdictions provided relief on petitions of specific individuals to the legislature, again usually releasing debtors from prison upon surrender of their property.[195] Some legislatures also discharged individual debtors from their debts[196] or provided individualized relief, such as moratoria from imprisonment and imposing on dissenting minority creditors a majority creditor

---

(Apr. 13, 1786) (general relief act applying to "insolvent" debtors and not just debtors in prison; required consent of debtors with three-fourths of total debt) (repealed by Act of Feb. 8, 1788, ch. 29, 11th Sess., 1788 N.Y. Laws.); An Act for the More Effectual Relief of Insolvent Debtors, No. 882, 1759 S.C. Laws (Apr. 7, 1759) (only discharging the debts of creditors who agreed to accept a dividend from an assignment of the debtor's property).

See also COLEMAN, *supra* note 175, at 134-35 (New Jersey, 1771-1775, 1783-1787); *id.* at 109, 113, 123 (New York, 1755-1772, 1784-1819).

[193]*See, e.g.*, An Act Respecting Insolvent Debtors, ch. 34, Apr. Sess., 1787 Md. Laws (debtors owing more than £300 applied to, and were discharged by, the Chancellor, *id.* § 2, and debtors owing less applied to, and were discharged by, county courts, *id.* § 16); 1775 N.J. Laws, *found in* 5 LAWS OF NEW JERSEY, *supra* note 192, at 321 (removing creditor consent requirement from existing law that was to expire in 1776); An Act for Relief of Insolvent Debtors Within This State, ch. 34, 7th Sess., 1784 N.Y. Laws (Apr. 17, 1784) (releasing and discharging debtors then in prison); Act of Nov. 24, 1784, ch. 14, 8th Sess., 1784 N.Y. Laws (same).

See also COLEMAN, *supra* note 175, at 79 (Connecticut, 1765-1767); *id.* at 134 (New Jersey, 1775); *id.* at 218-22 (North Carolina, 1749-1773, for debtors worth less than £2; 1773-1774 & 1777-1778, for all debtors); *id.* at 92-93 (Rhode Island, 1756, relieving all debtors insolvent as of June 1, 1756; 1771-1772, a general law repealed nine months later); *id.* at 181-82 (South Carolina, 1721-1744) (discharging debts of debtors owing more than £2 but having less than £5 of property or annual income).

[194]*See, e.g.*, An Act for the Relief of Insolvent Debtors, within this Government, ch. 76, 1740 Del. Laws, § 11, *amended by* ch. 118, 1751 Del. Laws (indentured servitude up to seven years for various groups; debtor discharged from debt if the creditors refused service); An Act for the Relief of Insolvent Debtors, 1771 N.J. Laws, *found in* 5 LAWS OF NEW JERSEY, *supra* note 192, at 81, 86 (requiring up to seven years of service by certain debtors to obtain discharge) (expired 1776; revived 1783; repealed 1787).

See also COLEMAN, *supra* note 175, at 78-79 (Connecticut, 1763-1764); *id.* at 208-10 (Delaware, 1734-1915, indentured servitude up to seven years for various groups; debtor discharged from debt if the creditors refused service); *id.* at 164-65 (Maryland, 1725-1727, 1733); *id.* at 40-42 (Massachusetts, 1698-1737); *id.* at 133 (New Jersey, 1761); *id.* at 107 (New York, 1732); *id.* at 141-42, 144 (Pennsylvania, 1706-1767, various groups of debtors indentured up to five or seven years).

[195]*See, e.g.*, An Act for the Revival and Continuance of an Act Entitled, An Act for the Relief of Poor Distressed Prisoners for Debt, 1751 N.J. Laws ("sundry Persons . . . by their petition . . . praying the Relief of the Legislature"), *found in* 3 LAWS OF NEW JERSEY, *supra* note 192, at 173; *see also* COLEMAN, *supra* note 175, at 79-83 (Connecticut, 1765-1818); *id.* at 165-68 (Maryland, 1715-1774); *id.* at 55-56 (New Hampshire, 1745-1765); *id.* at 113-15 (New York 1771-1775, 1776-1786); *id.* at 145, 147 (Pennsylvania, 1731, 1760-1793); *id.* at 88-89 (Rhode Island, intermittently); *id.* at 69-71 (Vermont, 1785-1821).

[196]*See, e.g.*, Act of Nov. 24, 1784, ch. 14, 8th Sess., 1784 N.Y. Laws (discharging debts of several named individuals with consent of creditors with two-thirds of total debt); An Act Granting Relief to Certain Insolvent Debtors, ch. 87, 8th Sess., 1785 N.Y. Laws (Apr. 28, 1785) (releasing from prison certain named debtors and discharging their debts); *see also* COLEMAN, *supra* note 175, at 79-81 (Connecticut, 1765-1818); *id.* at 165-66 (Maryland, 1715-1723); *id.* at 92-93, 95-97 (Rhode Island, 1756-1828, petitions granted on the basis of a general law enacted in 1756 that relieved all debtors insolvent as of June 1, 1756); *id.* at 145 (Pennsylvania, 1760-1776, one petition); *id.* at 69-71 (Vermont, 1786-1821).

agreement with the debtor.[197]

A very few jurisdictions enacted legislation similar to the English bankruptcy acts.[198] Pennsylvania provides the most relevant example in its 1785 Act for the Regulation of Bankruptcy.[199] Pennsylvania was the most economically developed North American jurisdiction.[200] In addition, one of the delegates to the constitutional convention, Jared Ingersoll of Pennsylvania, was an experienced commercial and bankruptcy lawyer.[201]

The Pennsylvania act was a revised composite of the English bankruptcy

---

[197]*See, e.g.*, COLEMAN, *supra* note 175, at 79-81 (Connecticut, 1765-1800, granting a stay from arrest to a debtor who became insolvent in 1774 because of a loss of his ship and who entered into an agreement with a majority of creditors allowing the debtor to continue in business for ten years without arrest after a minority of the creditors refused to agree and threatened imprisonment, and granting a stay of arrest and full discharge of debts to two insolvent partners who entered into a composition agreement with a majority of their creditors to pay fifty percent of their debts in rum if the debtors performed their agreement); *id.* at 165-66 (Maryland, 1715-1723); *id.* at 109 (New York, 1755, forcing minority creditors to accept compositions with majority of creditors); *id.* at 145 (Pennsylvania, 1760-1776, same); *id.* at 69-71 (Vermont, 1785-1821).

[198]*See id.* at 45 (Massachusetts, 1714-1717, modeled on the 1705 Statute of 4 Anne); *id.* at 54-55 (New Hampshire, 1715-1718, modeled on the Massachusetts statute); *id.* at 151-52 (Pennsylvania, 1785-1793, discussed below); *id.* at 91 n.11 (Rhode Island, 1678-1768, modeled on the earlier English bankruptcy statutes). A short lived Virginia statute followed the substance of the English bankruptcy acts but provided no mechanism for adjudication of issues by a court or other body. An Act for the Relief of Insolvent Debtors, for the Effectual Discovery and More Equal Distribution of their Estates, ch. 8, Nov. Sess., 1762 Va. Laws, *found in* 7 LAWS OF VIRGINIA, *supra* note 191, at 549-63 (Hening 1820) (repealed by ch. 2, May Sess., 1763 Va. Laws, *found in* 7 LAWS OF VIRGINIA, *supra* note 191, at 643 (Hening 1820); COLEMAN, *supra* note 175, at 196-97 (Virginia, 1762-1763).

[199]*See* An Act for the Regulation of Bankruptcy, ch. 683, 1785 Pa. Stat. § 2, *found in* 12 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 70 (Clarence M. Bush, St. printer, 1896); *see also* COLEMAN, *supra* note 175, at 151-52.

[200]*See* CHESTER WHITNEY WRIGHT, ECONOMIC HISTORY OF THE UNITED STATES 61 (2d ed. 1949) (describing Pennsylvania as "one of the most peaceful and prosperous of the colonies"); JAMES A. BARNES, WEALTH OF THE AMERICAN PEOPLE: A HISTORY OF THEIR ECONOMIC LIFE (1949) (stating that Philadelphia was "the largest and most important city in all English-speaking America").

[201]*See, e.g.*, Miller v. Hall, 1 Dall. 229 (Pa. 1788) (in which Ingersoll successfully obtained the release from prison of a Maryland resident arrested in an action by a resident of Pennsylvania on a debt contracted in Pennsylvania but discharged under Maryland's shortlived general insolvency law, *see supra* note 193); Thompson v. Young, 1 Dall. 294 (Pa. Ct. C.P. of Philadelphia County 1788) (in which Ingersoll unsuccessfully represented Pennsylvania resident trying to collect on a debt discharged under Maryland's insolvency act, the court following *Miller v. Hall, supra*); Gorgerat v. McCarthy, 1 Dall. 366 (Pa. Ct. C.P. of Philadelphia County 1788) (in which Ingersoll was unable to obtain the release from prison of a debtor who had declared himself a bankrupt under the laws of France but who had not yet received a discharge of debts); Gibbs v. Gibbs, 1 Dall. 371 (Pa. Ct. C.P. Philadelphia County 1788) (priority dispute over bankrupt's property between judgment creditor and bankruptcy commissioners; Ingersoll represented the bankruptcy commissioner); *see also* Robert J. Lukens, *Jared Ingersoll's Rejection of Appointment as One of the "Midnight Judges" of 1801: Foolhardy or Farsighted?*, 70 TEMP. L. REV. 189, 201-02 & n.57 (1997). He also litigated the validity of an order of relief from imprisonment under a New Jersey relief act. *See* Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 224-25 (1957). It appears that Ingersoll played a small public role at the constitutional convention. *See* Lukens, *supra*, at 202. To what extent other delegates consulted with him is not known.

acts.[202] Creditors could file a petition with the President of the Supreme Executive Council[203] alleging that an individual who was a "merchant" committed an "act of bankruptcy." The President would issue against the alleged bankrupt a commission of bankrupt naming five commissioners as commissioners of the bankrupt.[204] The five commissioners, or a quorum of three, determined almost all of the issues arising in the bankruptcy proceeding.

The commissioners were empowered to do the following:

> (1) Set meetings for the examination of the bankrupt and the transfer of the bankrupt's property to the commissioners[205] and for the receipt of proof of creditors' debts.[206]
>
> (2) Summon and examine the bankrupt,[207] any persons suspected of having property of the bankrupt,[208] or the wife of the bankrupt.[209]
>
> (3) Commit to prison the bankrupt or other persons who refused to appear or who failed to answer questions to the satisfaction of the commissioners.[210]

---

[202]The Pennsylvania courts relied on the English precedent in interpreting the Pennsylvania act. *See* Price v. Ralston, 2 Dall. 60, 66 (Pa. Ct. C.P. of Philadelphia County 1790) ("[t]he legislature in adopting, not only the general spirit, but frequently the very words of the bankruptcy law of England," the court relied on English precedent to rule that certain bonds were not property of the estate).

[203]Pennsylvania at this time did not have an individual executive like a governor. Instead, the executive power resided in the Council. *See* PA. CONST. of 1776, § 1 (providing for governance by an assembly and a council and its president); *id.* § 3 (providing that supreme executive power vested in the president and council); *id.* § 19 (providing for the election of the twelve person council by the people and the election of the council's president and vice-president by joint ballot of the council and the assembly); *id.* § 20 (establishing constitutional powers of the council, including power to appoint and sit as judges). The President of the Council "was not the chief executive, but merely president of the council; an executive voice, but still a plural executive." Matthew J. Herrington, *Popular Sovereignty In Pennsylvania, 1776-1791*, 67 TEMP. L. REV. 575, 588 (1994). Fearing the power of a chief executive, the framers of the Pennsylvania constitution created the Council as an alternative to creating an office of the governor. HARRY MARLIN TINKOM, THE REPUBLICANS AND FEDERALISTS IN PENNSYLVANIA, 1790-1801: A STUDY IN NATIONAL STIMULUS AND LOCAL RESPONSE 3 (1950).

[204]*See* 1785 Pa. Stat. § 2 (comparable to 5 Geo. 2, ch. 30, § 2, cl. (1) (1732) (Eng.)).

[205]*Id.* § 11 (comparable to 5 Geo. 2, ch. 30, §§ 1, 2 (1732) (Eng.)).

[206]*Id.* §§ 21, 22 (comparable to 5 Geo. 2, ch. 30, §§ 26, 33 (1732) (Eng.)).

[207]*Id.* § 11 (comparable to 5 Geo. 2, ch. 30, § 16 (1732) (Eng.), *discussed supra* note 72 and accompanying text). In addition to their power to commit a bankrupt to jail for failure to answer questions, the commissioners could by certificate cause judges of the courts of record or the justices of the peace to issue a warrant for the imprisonment of any person "proved before them [the commissioners] to become bankrupt." *Id.* § 26 (comparable to 5 Geo. 2, ch. 30, § 14 (1732) (Eng.)). Thereafter, the commissioners by warrant could order the delivery of a bankrupt in jail to the commissioners for examination and discovery. *Id.* The commissioners could also issue a warrant for the seizure of the personal property of the bankrupt in the possession of the bankrupt or other persons in any prison. *Id.*

[208]*Id.* § 15 (comparable to 1 Jam., ch. 15, § 10 (1604) (Eng.)).

[209]*Id.* § 16 (comparable to 21 Jam., ch. 19, § 6 (1623) (Eng.)).

[210]*Id.* §§ 13, 15 (comparable to 5 Geo. 2, ch. 30, § 16 (1732) (Eng.)). The statute contemplated that persons imprisoned by the commissioners could seek their release by writ of habeas corpus, because it provided that, if upon a writ of habeas corpus, the form of the commissioners' warrant was insufficient, the

(4) Determine the eligibility of the bankrupt,[211] that is, whether (i) the alleged bankrupt was a merchant[212] and (ii) he or she had committed an act of bankruptcy.[213]

(5) "[T]ake by their discretion such order with the body of such [bankrupt] by imprisonment" and also with all of the property of the bankrupt, including appraising and selling such property[214] and suing in their own name to recover debts owed to the bankrupt.[215]

(6) Upon "proof made before the commissioners by examination or otherwise" determine that any person concealing property of the debtor (including debts) would forfeit double the value of the property so concealed.[216]

(7) Order that any person who fraudulently by collusion claimed or detained property of the debtor, "other than such

---

judge or court before whom the writ was brought could recommit the person for the same reasons that commissioners could commit the person. *Id.* § 31 (comparable to 5 Geo. 2, ch. 30, § 18 (1732) (Eng.)).

[211]*Id.* § 11.

[212]Under the statute a bankrupt had to be a "Merchant or other Person using the trade of merchandize by way of bargaining, exchange, rechange, bartry, or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling." *Id.* § 1 (almost identical to 13 Eliz., ch. 7, § 1 (1570) (Eng.)).

[213]The commissioners could declare a person a bankrupt if the person

> shall depart the state or begin to keep his or her house, or otherwise to absent him or herself, or suffer him or herself willingly to be arrested for debt, or other things not due, for money delivered, wares sold, or other good consideration, or yield him or herself to prison, or wilfully or fraudulently procuring him or herself to be arrested, or his or her goods, money, or chattel to be attached or sequestered, or depart from his or her dwelling house, or make or cause to be made any fraudulent conveyance of his or her lands or chattels whereby his, her or their creditor may be defeated or delayed in the recovery of their debts, or being arrested for debt shall after his, her or their arrest, be in prison for two months for that arrest, or any other arrest or detention for debt, or being arrested for £50 or more shall escape from prison.

Id. § 1 (almost identical to the acts of bankruptcy in 34 & 35 Hen. 8, ch. 4 (1542-1543) (Eng.); 13 Eliz., ch. 7, § 1 (1570) (Eng.); 1 Jam., ch. 15, § 2 (1604) (Eng.); 21 Jam., ch. 19, § 2 (1623) (Eng.), as amended by 10 Anne, ch. 15, § 1 (1711) (Eng.)); *see supra* notes 87-88 and accompanying text.

[214]*Id.* § 3 (comparable to 13 Eliz., ch. 7, § 2, cls. (2)-(9) (1570) (Eng.), *discussed supra* note 99). Such "direction and other thing done by the said commissioners so authorized or the major part of them shall be good in law" against the bankrupt and against any other person claiming through the bankrupt before the bankruptcy. *Id.* § 3 (comparable to 13 Eliz., ch. 7, § 2, cls. (11), (12) (1570) (Eng.), *discussed supra* note 102).

[215]*Id.* § 3. The statute did not specifically authorize the appointment of assignees to receive all of the bankrupt's property, but it appeared to contemplate or at least to allow such assignees. *See id.* §§ 6, 22 (providing for the assignment of debts owed to the bankrupt, and requiring every assignee to produce a book of accounts).

[216]*Id.* § 8 (comparable to 13 Eliz., ch. 7, § 6 (1570) (Eng.), *discussed supra* note 104). The statute also provided that money forfeited by the act must be sued for and recovered by a creditor by an "action of debt, suit, indictment, or information, in any courts of record." *Id.* § 20 (comparable to 1 Jam., ch. 15, § 12 (1604) (Eng.)).

as they prove to be due for money due, wares delivered, or other just consideration, before the commissioners," also forfeited double the value of such property.[217]

(8) Convey any property, including debts owed to the bankrupt, that the bankrupt conveyed before bankruptcy without valuable consideration as if the bankrupt were seized or possessed of such property.[218]

(9) Break open the houses, chambers, shops, warehouses, doors, trunks or chests of the bankrupt and seize the "body, goods, money and other estate, deeds, books of account, or other writings" of the bankrupt (directly or by warrant authorizing third persons).[219]

(10) Dispose of goods and chattels of others when the bankrupt was the "reputed owner" the same as if they belonged to the bankrupt.[220]

(11) Compound with the debtors of the bankrupt and setoff the amount of any mutual debts between the bankrupt and a creditor.[221]

(12) Receive proofs of creditors' claims for purposes of both (i) determining the eligibility of the creditors to file a petition for a commission[222] and (ii) distributing the assets of the bankrupt to the creditors.[223]

(13) Order the distribution of the residue of the bankrupt's estate, after the payment of expenses, pro rata among

---

[217]*Id.* § 9 (comparable to 13 Eliz., ch. 7, § 7 (1570) (Eng.), *discussed supra* note 105).

[218]*Id.* § 10 (excluding a wedding gift to children) (comparable to 1 Jam., ch. 15, § 5 (1604) (Eng.)).

[219]*Id.* § 18 (comparable to 21 Jam., ch. 19, § 8 (1623) (Eng.)). In addition, commissioners could disencumber an estate in fee tail or other estate subject to a future interest to same extent that the bankrupt could. *Id.* § 4 (comparable to 21 Jam., ch. 19, § 12 (1623) (Eng.)). If the bankrupt had any conditional interest in or right to redeem any property, the commissioners could appoint a person to satisfy the condition or to redeem the property to the same extent as the bankrupt, and after such redemption the commissioners could convey the property recovered or redeemed to the same extent as any other property of the estate. *Id.* § 5 (comparable to 21 Jam., ch. 19, § 13 (1623) (Eng.)).

[220]*Id.* § 19 (comparable to 21 Jam., ch. 19, § 11 (1623) (Eng.)).

[221]*Id.* § 33 (comparable to 5 Geo. 2, ch. 30, §§ 10, 28 (1732) (Eng.)).

[222]One creditor who was owed at least £200 could file a petition, as could two creditors owed £300, and three or more owed £400. *Id.* § 2 (comparable to 5 Geo. 2, ch. 30, § 23 (1732) (Eng.), but twice the amounts). Creditors petitioning for a commission had to provide a bond "conditioned for proving their debts as well before the commissioners as upon a trial at law in case the due issuing forth the same shall be contested, and also for proving the party a bankrupt." *Id.* § 2 (comparable to 5 Geo. 2, ch. 30, § 23 (1732) (Eng.)). If the petitioning party did not prove a debt or an act of bankruptcy, then upon the petition of a party aggrieved, the president could assign such bond to the party aggrieved to sue on the bond in his or her own name. *Id.* (comparable to 5 Geo. 2, ch. 30, § 23 (1732) (Eng.)).

[223]*Id.* § 22 (comparable to 5 Geo. 2, ch. 30, §§ 26, 33 (1732) (Eng.)).

> the creditors who have proved their debts.[224]
>
> (14) Determine what allowance the debtor would receive if the creditors received less than fifty percent of the debt owed to them, not to exceed three percent of the net proceeds of the bankrupt's estate received or recovered by the commissioners.[225]
>
> (15) Certify that a bankrupt had conformed to the requirements of the act, which would enable the bankrupt to receive a discharge of the bankrupt's debts from the President of the Supreme Executive Council.[226] The certificate was conclusive evidence of the discharge of the prebankruptcy debts and the release from prison for prebankruptcy debts.[227]

As in England, the commissioners could be sued for their decisions. To discourage such suits, the Pennsylvania statute provided that in any suit the commissioners or other persons under their authority could plead the statute, and, if they were vindicated, they would be entitled to double the costs.[228]

3. *The Early Judiciary Acts and the Bankruptcy Act of 1800*

The English bankruptcy acts, the understanding of prominent English legal commentators like Blackstone on the role of those acts, the English insolvency acts, and the Pennsylvania bankruptcy act were part of the background in 1787 when the delegates gathered at the Constitutional Convention in Philadelphia and in 1789 when the Constitution was ratified. With this background, the Constitution empowered Congress to enact "Laws on the subject of Bankruptcies."[229] At the same time, it conferred the "judicial Power"[230] on judges appointed by the President for life terms. The actions taken shortly after the adoption of the Constitution confirm the framers' understanding of the benefits and permissibility of a summary bankruptcy procedure by non-Article III judges with a right of review by an Article III judge.

---

[224]*Id.* § 22 (comparable to 5 Geo. 2, ch. 30, § 33 (1732) (Eng.)). The cooperating bankrupt received a specified allowance of the net proceeds of the bankrupt's estate received or recovered by the commissioners if the creditors received repayment of at least fifty percent of the debt owed to them. *Id.* § 23 (comparable to 5 Geo. 2, ch. 30, § 33 (1732) (Eng.)). The allowance was five percent not to exceed £300 if the creditors received fifty percent; 7.5 percent not to exceed £375 if the creditors received 62.5 percent; ten percent not to exceed £450 if the creditors received seventy-five percent. The maximum amounts were about fifty percent larger than those of the English bankruptcy acts. *See supra* note 135.

[225]*Id.* § 24 (comparable to 5 Geo. 2, ch. 30, § 8 (1732) (Eng.)).

[226]*Id.* § 23 (comparable to 5 Geo. 2, ch. 30, § 10 (1732) (Eng.)).

[227]*Id.* §§ 23, 25 (comparable to 5 Geo. 2, ch. 30, §§ 10, 13 (1732) (Eng.)).

[228]*Id.* § 36 (comparable to 1 Jam., ch. 15, § 10 (1604) (Eng.)).

[229]U.S. CONST. art. I, § 8, cl. 4; *see supra* note 17.

[230]U.S. CONST. art. III, §§ 1, 2; *see supra* notes 3, 7.

The first Congress enacted the Judiciary Act of 1789.[231] It created two sets of inferior federal courts, a district court for each state, and three circuit courts.[232] It established the justices of the Supreme Court and a district judge for each court, and required two justices of the Supreme Court and the applicable district judge to sit as the circuit court.[233] It allocated some of the "judicial Power" authorized by § 2 of Article III to the district and circuit courts.[234] In addition, the first Congress on June 1, 1789 appointed a committee to prepare a bankruptcy act,[235] most probably to be modeled after the English bankrupt acts.[236] The Second, Third, and Fourth Congresses also prepared but did not enact bankruptcy legislation.[237] The Fifth Congress prepared and debated bankruptcy legislation extensively,[238] and in 1800 the Sixth Congress enacted the first federal bankruptcy law.[239]

This law followed the English bankruptcy acts in substance and procedure.[240] It provided for a petition by creditors against a merchant who com-

---

[231]Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[232]*Id.* §§ 2-4, 1 Stat. at 73-75.

[233]*Id.* §§ 1-4, 1 Stat. at 73-75.

[234]*Id.* §§ 9, 11, 1 Stat. at 76-79. The conventional view is that the act did not confer all of the federal jurisdiction on the district courts. *See* WRIGHT, *supra* note 21, § 1, at 5. *But see* David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521 (1989).

[235]1 ANNALS OF CONG. 433, 1143-44 (Joseph Gales ed., 1789-1790) (committee to prepare a bill on "the subject of bankruptcy" appointed on June 1, 1789; a motion to appoint a committee to prepare bankruptcy legislation tabled on February 1, 1790).

[236]1 ANNALS OF CONG. 1143-44 (Joseph Gales ed., 1790) (on motion to table a motion to appoint a committee to prepare bankruptcy legislation tabled on February 1, 1790, one of the speakers referred to England's prospering under its "system of bankruptcy").

[237]2 ANNALS OF CONG. 166, 618, 708, 741 (1791-1792) (committee to prepare bankruptcy bill appointed on November 9, 1791; petition from persons from South Carolina urging the passage of a "Bankrupt law" tabled on December 3, 1791; committee appointed on November 21, 1792; bill to establish system of bankruptcy reported, read twice and committed on December 10, 1792); 3 ANNALS OF CONG. 142, 256, 970 (1793-1794) (committee appointed on December 13, 1793; bill reported, read twice and committed on January 22, 1794 and on December 9, 1794); 4 ANNALS OF CONG. 149, 240, 1739-40 (1795-1796) (committee appointed December 1795; bill reported January 1796; motion to consider in committee as a whole defeated December 1796).

[238]5 ANNALS OF CONG. 692, 786-88, 796-97, 970, 2426, 2441-42, 2465-69, 2489-90, 2552-54, 2556, 2577-83, 2649-77 (1797-1799). After several postponements, the House of Representatives, on Jan. 14, 1799, engaged in a lengthy debate and defeated a bill establishing a bankruptcy system by a vote of 47-44. *Id.* at 2649-77.

[239]Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). Probably because of the extensive debate during the preceding Fifth Congress, the bill passed the House of Representatives on February 21, 1800 with little debate or legislative maneuvering by a margin of 49-48 (the Speaker breaking a tie), 6 ANNALS OF CONG. 247, 388-89, 507-08, 533-34 (1800), and passed the Senate on March 28, 1800, by a margin of 16-12, also without any amendments or recorded debate, *id.* at 108-11, 115-16, 124-26.

[240]The bill finally enacted, based on the English bankruptcy acts, was similar to bills that had been drafted and presented to the earlier Congresses. *See, e.g.*, 5 ANNALS OF CONG. 2466, 2467 (1798) (references to the fact that the bill being debated by the Fifth Congress, which was enacted by the Sixth Congress, had been before Congress for several years (remarks of Mr. Harper) and "served up constantly almost every session" (remarks of Mr. S. Smith)).

mitted an act of bankruptcy, liquidation of the bankrupt's property, and pro rata distribution to the creditors.[241] The act also conferred the initial adjudication of almost all issues to bankruptcy commissioners who were not Article III judges. The United States district judge for each district appointed the commissioners[242] and determined their compensation.[243] The 1800 Act gave the commissioners the following powers:

> (1) Issue warrants to arrest the bankrupt or to break into houses if they had reason to think the bankrupt would hide property or would abscond.[244]
>
> (2) Give notice of the meetings of creditors.[245]
>
> (3) Summon and interrogate any persons they believed had property of the bankrupt, issue process, commit any person to prison if he or she refused to answer, and issue warrants to apprehend persons summoned who did not appear and commit them to prison.[246]
>
> (4) Initially determine whether a person charged was a bankrupt, that is, was a "merchant" and had committed an act of bankruptcy.[247]
>
> (5) Take possession of and inventory and appraise property of the estate until they or the creditors appointed assignees.[248]
>
> (6) Break the houses, shops, doors, and trunks of the bankrupt.[249]
>
> (7) Redeem property, assign choses in action without limitation, and assign property items fraudulently conveyed away by the bankrupt.[250]

---

[241]Act of Apr. 4, 1800, ch. 19, §§ 1, 5-6, 2 Stat. 19, 19, 23 (repealed 1803). Although the act was to expire by its own terms in 1805, *id.* § 64, 2 Stat. at 36, Congress repealed it in 1803 because it proved to be so unpopular. Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; *see* Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 228 (1976); Tabb, *History*, *supra* note 50, at 14-15.

[242]*See* Act of Apr. 4, 1800, ch. 19, § 2, 2 Stat. at 21. Congress amended this act in 1802 to provide for the appointment of a general list of commissioners by the President, from which the district court picked three specific commissioners upon the filing of a petition. Act of April 29, 1802, ch. 31, § 14, 2 Stat. 156, 164.

[243]*See* Act of Apr. 4, 1800, ch. 19, § 47, 2 Stat. at 33.

[244]*Id.* § 4, 2 Stat. at 22-23.

[245]*Id.* § 6, 2 Stat. at 23.

[246]*Id.* §§ 14, 15, 2 Stat. at 25-26. The commissioners could also summon the persons to appear before the judge, and the judge could commit to prison any person who refused to answer the questions of the commissioners.

[247]*Id.* § 3, 2 Stat. at 22.

[248]*Id.* §§ 5-7, 2 Stat. at 23.

[249]*Id.* § 20, 2 Stat. at 27.

[250]*Id.* §§ 12, 13, 17, 2 Stat. at 24-26.

(8) Allow creditors to prove their debts.[251]

(9) Order the distribution of the estate to creditors who proved debts.[252]

(10) Decide the amount of the benefit to be paid to the bankrupt if the creditors receive less than fifty percent of their debts (not to exceed three percent of the net bankruptcy estate).[253]

(11) Certify to the district judge that the bankrupt cooperated.[254]

(12) Authorize the release of the bankrupt from prison.[255]

The decisions of the commissioners were subject to review in the district court. The judge could overrule the commissioners' denial of the certificate of discharge, and the judge signed the certificate of discharge.[256] The alleged bankrupt could demand a jury trial before the district judge on the issue of whether he or she had committed an act of bankruptcy.[257] The bankrupt or any creditor who disagreed with the commissioners on any issue of fact could petition the district judge for a jury trial.[258] Finally, if a creditor or an assignee did not want the commissioners to decide a creditor's claim, either could demand a jury trial.[259]

Congress delegated the initial adjudication to commissioners of bankruptcy, with the right to appeal to the district court. This grant of original jurisdiction to bankruptcy commissioners and not to Article III judges suggests that the early Congresses did not consider such original bankruptcy jurisdiction to fall within the "judicial Power." The Midnight Judges Act of 1801 confirms this suggestion.

In the waning days of President Adams's administration, the Sixth Congress expanded the federal judicial system in the Midnight Judges Act of 1801 by authorizing the appointment of separate circuit court judges[260] to

---

[251]*Id.* § 6, 2 Stat. at 23.

[252]*Id.* §§ 29-30, 2 Stat. at 29-30. The assignees carried out the distribution.

[253]*Id.* § 35, 2 Stat. at 31. If the creditors got more than fifty percent, a cooperative debtor received an allowance similar to that allowed by the English acts: five percent (not to exceed $500) of the value of the debtor's property for a fifty percent payout to creditors, and ten percent (not to exceed $800) for a seventy-five percent payout. *Id.* § 34, 2 Stat. at 30-31.

[254]*Id.* § 36, 2 Stat. at 31. An insolvent merchant could receive a discharge if two-thirds of creditors in number and value agreed. *Id.*

[255]*Id.* § 60, 2 Stat. at 35-36.

[256]*Id.* § 36, 2 Stat. at 31.

[257]*Id.* § 3, 2 Stat. at 22.

[258]*Id.* § 52, 2 Stat. at 34.

[259]*Id.* § 58, 2 Stat. at 35.

[260]Act of Feb. 13, 1801, § 7, 2 Stat. 89, 90-91.

relieve the justices of the Supreme Court from riding the circuit. Although this Congress, in March of the previous year, had given original bankruptcy adjudication to bankruptcy commissioners in the Bankruptcy Act, the Midnight Judges Act also conferred on the circuit court jurisdiction over "all cases in law and equity, arising under the Constitution and the laws of the United States."[261] This Congress thus distinguished the "judicial Power" from original bankruptcy adjudication. This distinction was deliberate and not just the result of an oversight. The Midnight Judges Act also amended the Bankruptcy Act of 1800 to give the new circuit courts the same duties that the district court had over bankruptcy.[262] These enactments, so shortly after the ratification of the Constitution, show that the framers of the Constitution did not consider original bankruptcy adjudication to fall within the "judicial Power."

D. Congressional Discretion over Bankruptcy Adjudication

The practice of bankruptcy adjudication in England, Pennsylvania, and the United States before and shortly after the adoption of the Constitution establishes that non-Article III judges may as a general matter initially adjudicate bankruptcy issues under Article III of the Constitution. The remaining question is whether and to what extent the Constitution imposes any limitations on bankruptcy judges' initial adjudication. One could argue that a historical interpretation of the Constitution requires that Congress may not give bankruptcy judges any more authority than that given to bankruptcy commissioners under the English bankruptcy acts. If so, Congress would be limited to a system that resembled the Bankruptcy Act of 1800. Because all of the later federal bankruptcy acts expanded the substantive reach of bankruptcy law beyond involuntary petitions initiated only against "merchants" who committed acts of bankruptcy,[263] there seems little legal justification for such a limited view of the range of bankruptcy adjudication.

Instead, history suggests the general principle that the details of the initial bankruptcy adjudication are essentially a matter for legislative discretion, so long as the subject matter of the adjudication is within the "subject of Bankruptcies" under the Constitution. In some instances, the powers of the eighteenth-century bankruptcy commissioners were broader than those conferred on the courts of record. In a few instances, their powers were incomplete. Nevertheless, the most striking feature of the English bankruptcy acts, the English insolvency acts, and the limited experience of the American states before the adoption of the Constitution is the broad powers that the legisla-

[261] *Id.* § 11, 2 Stat. at 92 (copying almost verbatim the language of the Constitution, Article III, § 2, *quoted supra* note 7).

[262] *Id.* § 12, 2 Stat. at 92.

[263] *See* Plank, *supra* note 19, at 533-44.

ture granted to the bankruptcy commissioners without most of the limitations of the common law or equity court procedure.

The next question is the limitations, if any, on Congress's discretion under the Constitution. The eighteenth-century bankruptcy practice suggests three possibilities:

> (1) Congress has unlimited discretion to determine how to adjudicate the adjustment of the relationship between an insolvent debtor and her creditors, including resolving all issues relating to determining what is property of the estate, subject only to the limits of procedural due process.[264]
>
> (2) Because the Parliament (and the Pennsylvania General Assembly) by direction or omission required assignees under the bankruptcy commission to use the law or equity courts to collect debts owed by third parties to the bankrupt or to recover property transferred by the bankrupt, Congress's discretion is similarly limited. It may not authorize bankruptcy judges to adjudicate claims by the trustee against third parties.
>
> (3) Congress has broad discretion to allocate the initial adjudication of bankruptcy matters to bankruptcy judges, but it must extend an opportunity for a jury trial either to parties in a bankruptcy case or to third parties. This last limitation is not strictly speaking a question of the meaning of "judicial Power" or "Case" under Article III. Instead, the right to a jury trial arises for any "suit at common law" under the Seventh Amendment to the Constitution.[265] Nevertheless, it is closely related to the larger question of the significance of eighteenth-century bankruptcy practice on the interpretation of the Constitution.

1. *Unlimited Discretion*

The purpose of bankruptcy law is to provide an efficient way to adjust the relationship between an insolvent debtor and the debtor's creditors. Absent bankruptcy law, secured creditors or those unsecured creditors who first seized the debtor's assets through legal process could dismantle the debtor's business or liquidate in piecemeal fashion the debtor's property. In addition, absent a provision for discharge of debts, these creditors could continue to

---

[264]*See* U.S. CONST. amend. V.

[265]U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

hound debtors and to attach their property until paid. For these one-on-one collection procedures, bankruptcy law substitutes a collective procedure for adjudicating the creditors' claims against the debtor and either a pro rata distribution of the debtor's assets to unsecured creditors or a negotiated reorganization of the debtor's affairs. Despite concerns about the costs of bankruptcy adjudication, history has shown that this collective procedure is superior to the first come, first served process of nonbankruptcy law.[266]

This collective procedure would not be much better than the piecemeal approach, however, if every creditor claim or every question of administration of the debtor's estate had to be resolved though a trial at law or in equity. Hence, the fact of insolvency—generally, the need to divide limited or illiquid assets[267] most efficiently among contending creditors—creates the need for a summary procedure for resolving these issues. All of the early significant bankruptcy legislation—the English bankruptcy acts, the English insolvency acts, the 1785 Pennsylvania statute, and the federal Bankruptcy Act of 1800—recognized this need and adopted the solution of a summary procedure by adjudicators who were not common law or Article III judges and who were not bound by all the procedural requirements of the common law or equity courts.

Accordingly, if a creditor has a claim against the debtor, it should address that claim to the bankruptcy judges. To the extent that the bankruptcy judges or their assignees have possession of or control over the property interests of the debtor, they should have discretion to administer and dispose of the debtor's property. Once the property is liquidated and the creditors paid, or a plan of reorganization in lieu of liquidation adopted, bankruptcy judges should decide to what extent the debtor is entitled to a discharge.

Because bankruptcy judges must resolve legal questions they should have the necessary competence to do so. They need not be common law, equity, or Article III judges to have this competence. Although final resolution of

---

[266]In 1763, Governor Bernard of Massachusetts penned an eloquent justification for bankruptcy law in his message to the London Board of Trade requesting approval of a law directed against absconding debtors:

> This province has long laboured under the want of a Bankrupt Act. . . . As it has been of late, every Insolvency has afforded instances of great partiality and injustice. The Common Method has been for the Creditors who get the earliest advice of a persons [sic] becoming insolvent to sue out attachments against the goods and credit of the insolvent, according to the custom of the Country, and help himself to such thereof as he pleased. A general scramble ensues, there is no regular audit of the Accounts of the Creditors; The goods are sold in a hurry at a low value; and great part of the effects of the debtor are spent in law proceedings and contests between contending attachments.

4 ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY 793 (1881).

[267]*See infra* note 344.

legal issues under the Constitution does require adjudication by Article III judges, such resolution may be done by appeal from the bankruptcy judges to Article III judges. Accordingly, as a general proposition, bankruptcy judges should initially adjudicate all legal issues that arise in a proceeding to adjust the relationship between an insolvent debtor and his creditors, including determining what is included in the property of the estate. The remaining questions are whether the eighteenth-century bankruptcy practice limits the extent to which Congress may allow bankruptcy judges to adjudicate legal issues between an insolvent debtor and a noncreditor third party who had a prebankruptcy relationship with the debtor, and the extent to which such third parties may be entitled to a jury trial.

2. *Debtor Claims Against Third Parties*

Under the early bankruptcy legislation, the assignees of the bankrupt's property sued in a court of record—the common law courts or the equity courts—to enforce contractual claims against third parties or to recover property that the bankrupt conveyed to third parties.[268] A predicate to all such actions in the courts of record was an initial determination by the bankruptcy commissioners that claims against the third party or the property transferred by the bankrupt were the property of the bankrupt. That the legislatures—Parliament, the Pennsylvania General Assembly, and Congress in 1800—provided this mode of recovery does not necessarily mean that they were required to do so. Under a broad view of the legislative discretion over bankruptcy adjudication, the legislature could have provided that all such claims be resolved the same way that creditor claims were resolved: by the bankruptcy judges, subject only to appeal to a court of record.

There is another principle, however, that could suggest why the legislatures did not go so far, at least in the case of resolving claims against a third party. The rationale for requiring a creditor to resort to a summary procedure—limited assets for too many creditor claims—is weaker when the representative of the creditors of an insolvent debtor is seeking to enforce claims against third parties. Although a summary adjudication of debtor's claims against third parties may be less expensive than resorting to the law courts, such a summary procedure raises another issue: Why may the creditors of an insolvent debtor, through the assignees or bankruptcy trustee as their representative, use a summary bankruptcy proceeding to enforce contract claims or to litigate rights to property against third parties when such a summary proceeding is not available to a solvent litigant? If a summary procedure is "better" than an action at law or a suit in equity, why make this better

[268] *See supra* note 98 and accompanying text.

alternative available to the creditors of an insolvent debtor in bankruptcy, but not to solvent parties who have similar claims?

These questions lead to a possible limiting principle: When the debtor has claims against noncreditor third parties that are to be liquidated for the payment of the creditors, but whose realization requires affirmative legal action, the bankruptcy trustee as assignee of the debtor's property should receive the same treatment as any party who was not a debtor. If a solvent person must sue in a court of record, the trustee also must sue.

Applying this limiting principle would increase the costs of conducting the bankruptcy case, and those costs will reduce the amount available to the creditors. One answer is, "So what?" Why should creditors in a bankruptcy case be better off than creditors of a person who is not in bankruptcy? In fact, the prospect of these costs will make the trustee in bankruptcy do the same kind of cost-benefit analysis, the likelihood of recovery against the costs of recovery, that any litigant would.

This limiting principle could explain the result in *Marathon*.[269] Some explanation is necessary, because the Court's expressed rationale is suspect. In *Marathon*, the Court held that bankruptcy judges who were not Article III judges could not adjudicate a breach of contract claim by a debtor in possession against a third party who had not filed a claim in the bankruptcy case. The plurality decision of Justice Brennan and the concurring opinion of then Justice Rehnquist both relied on the unremarkable fact that the resolution of the contract claim was an adjudication of private rights under state law. Justice Brennan for the plurality tried to distinguish the adjudication of this state law claim from the business of bankruptcy courts. He stated that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case."[270] His purpose was to show why the possible justifications for allowing non-Article III judges to adjudicate this contract claim did not apply.

Justice Rehnquist favored a narrower conclusion that the adjudication of the contract claim did not fit any of the Court's previous decisions allowing adjudication by non-Article III judges. He also remarked: "[T]he lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. . . . [T]he

---

[269]458 U.S. 50 (1982).

[270]*Id.* at 71; *see also id.* at 84 (stating that "the cases before us, which center upon appellant Northern's claim for damages for breach of contract and misrepresentation, involve a right created by state law").

claims of Northern arise entirely under state law."[271]

Unfortunately, neither of these opinions analyzed the nature of bankruptcy court adjudication of creditor claims against an insolvent debtor. As Justice White's dissent correctly pointed out, the distinction that the plurality and the concurrence drew does not exist. The debtor-creditor relationship is created by nonbankruptcy law. Indeed, under the Constitution, bankruptcy law may not create the relationship.[272] Similarly, the contract claim arises under nonbankruptcy law. Accordingly, there is no distinction between adjudicating the validity and amount of a creditor's claim against a debtor, a predicate to adjusting the debtor-creditor relationship, and adjudicating the debtor's contract claim against Marathon.[273] Both actions require adjudicating rights arising under nonbankruptcy (primarily state) law. Accordingly, the distinction, if there be any, must rest on something else: the identity of the moving party. If the creditor initiates the effort to collect or adjudicate her debt, then she must file a claim in the bankruptcy proceeding. If the trustee initiates the effort to establish or enforce a right, then the appropriate nonbankruptcy tribunal must adjudicate such action.

Adopting either the reasoning of *Marathon* or the limiting principle that trustee-initiated actions may not be adjudicated by bankruptcy judges would severely curtail several important powers of the trustee under the Code. These include the turnover provisions of § 542(a) and (b) requiring the return of property of the estate to the trustee or the payment of debts owed to the debtor;[274] recovery of preferential and fraudulent transfers;[275] and avoidance of unperfected transfers.[276] Applying either *Marathon* or the limiting principle would essentially require a jurisdictional structure comparable to that of the Bankruptcy Act of 1898, in which the trustees generally had to initiate actions in state or federal courts to the same extent as the debtor.[277]

It is hard to reconcile *Marathon* with the current array of adjudicatory powers that bankruptcy judges have. Nevertheless, bankruptcy courts' jurisdiction over core proceedings should survive any challenges based on *Marathon*. *Marathon* suffers from severe deficiencies. In addition to relying on a nonexistent distinction between adjusting the debtor-creditor relationship, on the one hand, and trustee litigation of the debtor's contract claims against third parties, on the other, the Court failed to consider the full context of

---

[271]*Id.* at 90 (Rehnquist, J., concurring).

[272]*See* Plank, *supra* note 19, at 559-81; *see also infra* note 343 and accompanying text.

[273]*Marathon*, 458 U.S. at 96-97, 100 (White, J., dissenting).

[274]11 U.S.C. § 542(a), (b) (1994).

[275]*Id.* §§ 547, 548.

[276]*Id.* § 544.

[277]Bankruptcy Act of 1898, ch. 541, §§ 23, 38, 30 Stat. 544, 552, 555 (repealed 1978). *See also Marathon*, 458 U.S. at 79 n.31; COMMISSION ON THE BANKR. LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 88-90 (1973).

eighteenth-century bankruptcy adjudication. Although Parliament did not give commissioners the ultimate power to enforce contract or property rights against third parties, it did give them broad powers to adjudicate issues of the property of the estate, including debts owed to the bankrupt. Commissioners could summon, examine, and sanction witnesses "touching all matters relating to the Person, Trade, Dealings, Estate and Effects" of the bankrupt and "any Act or Acts of Bankruptcy."[278] They determined what was property of the estate to be assigned to and collected by the assignees.

Because Parliament[279] had given bankruptcy commissioners such broad powers, the principle of legislative discretion should prevail. It is no stretch to say that Congress could authorize bankruptcy adjudicators to determine the liability of third parties on debts owed to the bankrupt. Such delegation does not preclude resort to the law or equity courts. It simply requires an initial adjudication before bankruptcy judges. Accordingly, so long as there is a right of appeal to Article III judges, Article III of the Constitution permits the adjudication of debtor claims against third parties by bankruptcy judges. The only question that remains is the applicability of another requirement of the Constitution: to what extent are such third parties entitled to a jury trial under the Seventh Amendment.

3. *Right to a Jury Trial*

In *Granfinanciera, S.A. v. Nordberg,*[280] the trustee sued Granfinanciera, S.A. and another entity to recover a fraudulent conveyance by the debtor.[281] The Supreme Court held that the transferee of an alleged fraudulent conveyance who had not filed a claim against the debtor was entitled to a jury trial under the Seventh Amendment, which preserves the right to a jury trial in "Suits at common law."[282] The Court's reasoning was straightforward. In England before the adoption of the amendment in 1791, actions to recover preferential or fraudulent conveyances were tried at law.[283] The majority dedicated the remainder of the opinion to refuting the argument that such actions could also be tried in the Court of Chancery and therefore they were not "Suits at common law." In doing so, the Court limited its analysis to distinguishing between equitable relief, in which there would be no right to a jury trial, and legal relief, which would require a jury trial.

The Court's analysis is deficient. Although the Court's distinction be-

---

[278]*See supra* note 72 and accompanying text.

[279]The Pennsylvania General Assembly and the Congress in the 1800 Bankruptcy Act had also given commissioners these powers.

[280]492 U.S. 33 (1989).

[281]The trustee alleged that during the year before filing a petition the debtor had paid the transferees $1.7 million without receiving reasonably equivalent value. *See* 11 U.S.C. § 548; 492 U.S. at 36.

[282]U.S. CONST. amend. VII; *see supra* note 265.

[283]*See Granfinanciera*, 492 U.S. at 43.

tween equitable and legal relief appears to be correct as far as it goes, it does not go far enough. The Court failed to consider the eighteenth-century fraudulent conveyance actions in the context of eighteenth-century bankruptcy adjudication. The simple legal-equitable distinction fails in this instance because it does not recognize bankruptcy as a *sui generis* creation of the legislature.

Under the eighteenth-century practice, the commissioners initially adjudicated whether there had been a preferential or fraudulent transfer of the bankrupt's property. Such a transfer often was an act of bankruptcy[284] that the commissioners initially determined. They also took charge of all of the property of the bankrupt, including property transferred before the issuance of the commission and debts owed to the bankrupt. They summoned, examined, and sanctioned witnesses in connection with any transfers of property.

The ultimate recovery of any such transfers, either as the result of Parliament's specific grant of recovery power to assignees in some cases or its silence in others, sometimes required a suit at law. This fact, however, does not negate the commissioners' considerable adjudicatory functions. This background suggests that, at the very least, if a defendant in a preference or fraudulent conveyance action today would be entitled to a jury trial, the jury trial need not occur until after the initial adjudication of a preferential or fraudulent conveyance by a bankruptcy judge. Presumably, this could be by appeal or petition to the applicable district judge.

More generally, this background suggests that, but for *Granfinanciera*, Congress could decide that in an action under the Bankruptcy Code by the trustee in bankruptcy asserting or enforcing rights that are property of the estate, defendants do not have a "right to a jury trial." Parliament had granted other, extraordinary adjudicatory powers to the bankruptcy commissioners. Bankruptcy was recognized as an extra-legal procedure outside of the common law.[285] The use of the law courts, with their juries, was the result of legislative discretion and not a right "at common law."

---

[284]*See supra* note 90 and accompanying text; *see also* Worsely v. Demattos, 1 Burr. 467, 97 Eng. Rep. 407 (K.B. 1758) (holding that a deed executed by Slader was a fraudulent conveyance and an act of bankruptcy); Cock v. Goodfellow, 10 Mod. 489, 88 Eng. Rep. 822 (Ch. 1722) (transfer by mother of personal estate to trustee for benefit of children as security for her obligations to children under will from deceased husband after loaning brother £40,000 to stop a run on his business and two months before mother was declared a bankrupt was not a fraudulent preference nor an act of bankruptcy). Later courts ruled that a fraudulent conveyance had to be by deed to be an act of bankruptcy. *See* Martin v. Pewtress, 4 Burr. 2477, 98 Eng. Rep. 299 (K.B. 1769) (holding in an action for trover to recover personal property fraudulently transferred that the property was property of the estate, and stating in dicta that it was not an act of bankruptcy because the transfer was not by deed), *discussed supra* note 64. Christian criticized the distinction as unfounded under the statute, but acknowledged that it was later followed consistently. 1 CHRISTIAN, *supra* note 50, at 139.

[285]*See supra* note 141 and accompanying text.

To conclude otherwise requires a much more thorough analysis of English trial practice than that done by the Court in *Granfinanciera*. Such an analysis would require a detailed examination of the role of the jury in a trial of an issue arising out of a bankruptcy proceeding. Did the jury actually have an important role in establishing all of the facts upon which the cause of action was based? Or, was the jury just an accoutrement to the resolution in a law court of a legal issue—a "case"[286]—that arose out of the initial bankruptcy adjudication?

Several facts suggest that the jury itself was not central to actions at law arising out of a bankruptcy proceeding. In Chancery, the Lord Chancellor relied on the materials produced before the commissioners.[287] In the law courts, the juries heard testimony, but the proceedings before the commissioners were also admissible.[288] Further, the law courts entertained many legal questions because the Lord Chancellor referred the matter to the law courts, not because the parties sought relief in the law courts.[289]

Finally, both the Lord Chancellor sitting as the Court of Chancery and the law courts decided many of the same issues. To the extent that there is a right to a jury arising out of a bankruptcy proceeding based on the actual eighteenth-century English experience, such right would be limited to those actions comparable to *Granfinanciera* in which the trustee is seeking monetary relief from third parties.[290] Other issues arising from the decisions of the commissioners decided by law courts (with their juries) were also decided by

---

[286]*See supra* note 39.

[287]*See supra* note 59 and accompanying text.

[288]*See supra* note 79 and accompanying text.

[289]In a few of these cases, the reports state that the referral was on a "feigned issue." A feigned issue was a proceeding in which the parties by consent could have the jury decide a matter without actually bringing an action. *See* BLACK'S LAW DICTIONARY 616 (6th ed. 1990); *see also* 3 GILES JACOB, THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE ENGLISH LAW 25 (New York, I. Riley 1811) (first American edition from the second London edition) ("If, in a suit in equity, any matter of *fact* is strongly contested, the court usually directs the matter to be tried by jury .... But as a jury cannot be summoned to attend a court of equity, the fact is usually directed to be tried in the court of king's bench, or at the assises, upon a *feigned issue*.") (emphasis supplied) However, in the cases in bankruptcy referred on a "feigned issue," the issue was not a factual issue, but a legal issue. *See, e.g.*, Worsely v. Demattos, 1 Burr. 467, 97 Eng. Rep. 407 (K.B. 1758) ("The present question came before this Court, after a trial at law before Lord Mansfield, upon a *feigned issue* out of the Court of Chancery, to try whether Richard Slader, a merchant, was a bankrupt" and what day he became a bankrupt; plaintiffs Worsely and others were assignees under a commission seeking to recover property fraudulently conveyed) (emphasis added); Dodsworth v. Anderson, Jones T. 141, 84 Eng. Rep. 1187 (K.B. 1681) (appeal from Doddesworth v. Anderson, Raym. Sir T. 375, 83 Eng. Rep. 196 (K.B. 1680) ("Case on a *feigned action* directed by the Court of Chancery, to try whether Grice was a bankrupt" when he had conveyed lands in good faith and for valuable consideration to transferee; jury found that Grice was not a bankrupt, and transferee argued that the court below could not find him to be a bankrupt; court rejected argument and upheld previous court's ruling that Grice was a bankrupt because he was a merchant and had committed an act of bankruptcy) (emphasis added).

[290]*See supra* notes 64, 284 and accompanying text.

the Court of Chancery. These include the eligibility for a bankrupt commission,[291] the assignee's rights to property in the debtor's possession,[292] and the validity of a creditor's debt.[293] Accordingly, these issues meet the test for exclusion from the Seventh Amendment that the trustee in *Granfinanciera* could not meet—specifying instances when issues were decided by the equity courts of the late eighteenth century without a jury.

The result in *Granfinanciera* is questionable because its historical analysis is incomplete and it does not extend to most bankruptcy issues. Requiring a jury trial for some bankruptcy-related matters will create more difficulties and costs for adjusting the relationship between an insolvent debtor and her creditors. These difficulties will arise whether bankruptcy judges become Article III judges with the power to conduct jury trials or whether parties have a jury trial in the district court after the initial adjudication by a bankruptcy court. The latter procedure more closely resembles the eighteenth-century practice of bankruptcy adjudication. It may also weed out less meritorious jury trials.

Granfinanciera is problematic for another reason. The Court suggested that the Seventh Amendment analysis and Article III analysis are the same:

> [O]ur decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.[294]

The Court made this statement to explain why it could look to decisions analyzing Article III for guidance in resolving the Seventh Amendment issue.

This statement is troubling because it ignores the differences in the language of Article III and the Seventh Amendment. Article III provides that the "judicial Power" extends to "Cases in Law and Equity." The term "Cases in Law" does not automatically incorporate a right to a jury trial. If it did, then there would have been no need for the Seventh Amendment.[295]

On the other hand, perhaps we need not read too much into the Court's statement. The statement appears in the discussion of the public rights exception to the right to a jury trial. The statement is only applicable to Article III adjudications involving "public rights." There are other reasons for

---

[291]*See supra* notes 95-96 and accompanying text.

[292]*See supra* note 65 and accompanying text.

[293]*See supra* notes 129-130 and accompanying text.

[294]Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989).

[295]*See* Pushaw, *supra* note 39, at 449.

allowing the adjudication of issues by non-Article III courts, such as the territorial courts exception,[296] the courts martial exception,[297] and the exception for bankruptcy judges.

Whether third parties are entitled to a jury trial at some point is a separate issue from whether an Article III judge must conduct the initial adjudication.[298] Under the general principle of legislative discretion over bankruptcy adjudication, the Constitution authorizes Congress to require the initial adjudication of bankruptcy issues without a jury. The general principle of legislative discretion may also authorize all adjudication of bankruptcy issues without a jury. That is a discussion for another time. However this latter issue is resolved, neither Article III nor the Seventh Amendment requires that bankruptcy judges be Article III judges. The remaining question is whether they ought to be Article III judges as a matter of policy.

II. INDEPENDENCE OF BANKRUPTCY JUDGES

One cornerstone of the Supreme Court's decision in *Marathon* is the principle of judicial independence embodied in Article III of the Constitution.[299] The Court correctly observed that the framers of the Constitution intended to preserve an independent judiciary by appointment of federal judges by the President for essentially life terms and prohibition of the reduction of salaries.[300] Article III judges are removable only for specific reasons

---

[296]*See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). Charles Alan Wright calls the proposition that territorial courts are not created under Article III a "doctrine of doubtful soundness." WRIGHT, *supra* note 21, § 11, at 49.

[297]*See* Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857) (in an action for trespass by seaman sentenced to prison by courts martial for attempting to desert against Marshall of the District of Columbia who carried out the sentence, stating that Congress's power to provide for the trial and punishment of military and naval offenses, U.S. CONST. art. I, § 8, cl. 14, "is given without any connection between it and the 3rd article of the Constitution defining the judicial power of the United States"); Solorio v. United States, 483 U.S. 435, 438-47 (1987); O'Callahan v. Parker, 395 U.S. 258, 276-80 (1969) (Harlan, J., dissenting), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

[298]It may be that, because of the historically unique nature of bankruptcy adjudication, bankruptcy would be the only instance in which an initial adjudication would be followed by an appeal involving a jury trial.

[299]Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59-60 (1982).

[300]*See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). The standard of "good behavior" is the same as that in the English 1701 Act of Settlement and 1760 Act of 1 George III. After the Glorious Revolution of 1688, which deposed James II and invited William (1689-1702) and Mary (1689-1694) to assume the monarchy, English judges were appointed to serve "during good behavior" rather than at the King's pleasure. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 195 (7th ed. 1956); BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 199 (1967). The English Parliament codified the requirements of tenure during good behavior and fixed salaries in the Act of Settlement. Act of Settlement, 12 & 13 Will. 3, ch. 2, § 3 (1701) (Eng.) ("Judge's Commissions [shall] be made *Quamdiu se bene gesserint* [during good behavior], and their Salaries ascertained and established;

upon impeachment by the House of Representatives and conviction by two-thirds of the Senate.[301] Life tenure is probably the strongest element to ensure their independence to apply their individual interpretation of the law to each case, free from inappropriate outside pressures.[302] In addition, the judicial council for each federal circuit[303] may discipline Article III judges to a limited extent.[304]

---

but upon the Address of both Houses of Parliament it may be lawful to remove them."); *see also* 1 BLACKSTONE, *supra* note 141, at *258; SHIMON SHETREET, JUDGES ON TRIAL: A STUDY OF THE APPOINTMENT AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY 10-15 (1976); Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475, 1478 (1970); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1054-55 (1994); John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970).

The Framers of the Constitution intended to create an independent judiciary. *See* THE FEDERALIST, No. 78, at 489-96, No. 79, at 497-99 (Alexander Hamilton) (Benjamin F. Wright ed., 1961); *see also* Pushaw, *supra* note 39, at 485 & n.194, 492-93 & nn.227-29. They did so in response to British refusal before the American Revolution to extend the tenure protections of British judges to colonial judges. *See* DECLARATION OF INDEPENDENCE, para. 11 (U.S. 1776) ("He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 112 (1970).

[301]*See* U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."); *id.* art. I, § 2, cl. 5 (impeachment by House of Representatives); *id.* art. 1, § 3, cl. 6 (conviction by two-thirds of Senators present). *See generally* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643 (1988); Robert S. Catz, *Removal of Federal Judges by Imprisonment*, 18 RUTGERS L.J. 103 (1986); Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763 (1988); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969); Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617 (1994).

[302]*See generally* Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL OF RTS. J. 1, 6-8, 10-12 (1996). Still, even for judges with life tenure, their unpopular judicial decisions generate political pressures for removal, and the threat of removal by a political body, such as the Congress, tempers this independence. *See, e.g.*, Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 574-80 (1996) (summarizing the many—and mostly unsuccessful—attempts by Congress over the past 200 years to intimidate the Supreme Court because of its unpopular judicial decisions, including President Roosevelt's 1937 court-packing proposal).

[303]Each circuit has a judicial council, which consists of the chief judge of the circuit and an equal number of court of appeals judges and district judges. *See* 28 U.S.C. § 332 (1994).

[304]*See* Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) (1994). In each federal judicial circuit, the chief judge or a committee of federal judges must investigate complaints that a judge has engaged in conduct prejudicial to the administration of the business of the courts or is unable to discharge her duties because of mental or physical disability. Thereafter, the judicial council may impose sanctions against the judge subject to the complaint, short of removal, including certification of disability, request for retirement, temporary suspension of assignment of cases, or private or public censure. *Id.* § 372(c)(6). If a judge's conduct warrants removal, the council may forward a recommendation to that effect to the Judicial Conference of the United States, which consists of the Chief Justice of the United States Supreme Court, the chief judges of each judicial circuit, the chief judge of the

Bankruptcy judges do not have the same protections as Article III judges. Nevertheless, bankruptcy judges may have as much real judicial independence as Article III judges. The institutional arrangements of life tenure and limitation on reduction of salary in the Constitution are not the only ways to preserve judicial independence.[305]

Bankruptcy judges are appointed[306] and reappointed by the court of appeals in their respective circuits. Appointment for limited terms always creates pressures on judges to ensure that their decisions do not displease the people empowered to reappoint them and thus create impediments for reappointment. These pressures are readily apparent in the vast majority of states of the United States in which judges serve for limited terms and are reelected by popular vote.[307]

Nevertheless, appointment of bankruptcy judges by Article III judges reduces the inappropriate pressures that might arise from limited terms. Reappointment is in the hands of judges who have life tenure, not political bod-

---

Court of International Trade, and one district court judge from each judicial circuit. *See id.* § 331. The Judicial Conference of the United States may refer the matter to the House of Representatives for impeachment proceedings. *See id.* § 372(c)(7), (8). *See generally* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT (1993); Charles D. Cole, *Judicial Independence in the United States Federal Courts*, 13 J. LEGAL PROF. 183, 196-200 (1988); Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45 (1988); John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193 (1994); Lynn A. Baker, Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985); Drew E. Edwards, Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 CAL. L. REV. 1071 (1987). This Act may not be used if the complaint relates to the merits of a judge's decision or to a procedural ruling. Green v. Seymour, 59 F.3d 1073, 1077-78 (10th Cir. 1995); Duckworth v. Department of Navy, 974 F.2d 1140, 1141 (9th Cir. 1992).

Most scholars have agreed that Congress may not authorize a judicial body to remove federal judges. *See* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, *supra*, at 17-21; Burbank, *supra* note 301, at 648-50; Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 776, 778-85 (1989); Kaufman, *supra* note 301, at 691-703; Kurland, *supra* note 301, at 668, 697-98; Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213-22 (1993); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138; *see also* Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 136-38, 141-43 (1970) (Douglas and Black, JJ., dissenting).

A few scholars have argued that Congress may authorize the removal of judges convicted of serious crimes. *See* BERGER, *supra* note 301, at 131-80; Berger, *supra* note 300, at 1513, 1529-31; Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 882-83 (1930); Jon J. Gallo, Comment, *Removal of Federal Judges—New Alternatives to an Old Problem:* Chandler v. Judicial Council of the Tenth Circuit, 13 UCLA L. REV. 1385, 1396 (1966). The arguments and authorities are reviewed in Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1 (1989), and Simon, *supra* note 301 (concluding that impeachment is not the exclusive means of removing judges).

[305]*See generally* Plank, *supra* note 302.

[306]*See* 28 U.S.C. § 152(a).

[307]*See infra* note 324 and accompanying text.

ies like an executive, a legislature, or the electorate. Judges with the responsibility for appointment and reappointment are less likely to be influenced by interest groups dissatisfied with a bankruptcy judge's decisions. In addition, judges are more likely to understand and respect the need for judicial independence and therefore less likely to allow their views of the outcome of decisions of the bankruptcy judge to influence their decision on the question of whether to reappoint the judge.[308]

Similarly, although Congress, a political body, may impeach and remove Article III judges, only the judicial council may discipline and remove the bankruptcy judges in its circuit for misconduct and other causes.[309] Although some believe that supervision of judges by judges impedes judicial independence,[310] giving judges who have life tenure, instead of a political body like Congress, the responsibility for disciplining bankruptcy judges strengthens their independence. As in the case of reappointment, judges on the judicial council are much less likely to be influenced by interest groups dissatisfied with a bankruptcy judge's decisions and are much more likely to respect the need for judicial independence.[311]

Moreover, the appointment and reappointment by the court of appeals fosters another important element of judicial independence—having judges with high qualifications.[312] It is likely that judges are more capable of selecting competent bankruptcy judges, and are less likely to take into account

---

[308]*Cf. infra* note 311 and accompanying text.

[309]*See* 28 U.S.C. § 152(e):

> A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal.

[310]Paula Abrams argued that the Act interferes with judicial independence. *See* Paula Abrams, *Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers*, 41 DEPAUL L. REV. 59, 96-100 (1991); *see also* Baker, *supra* note 304, at 1125; Edwards, *supra* note 304, at 1083-88.

[311]*See* Williams v. Mercer, 783 F.2d 1488 (11th Cir. 1986).

> Second, while the [Judicial Councils] Act may impose some pressures upon judges' independence, the fact that it places the investigation, and the determination of what actions to take, entirely within the hands of judicial colleagues makes it likely that the rightful independence of the complained-against judge, especially in the area of decision-making, will be accorded maximum respect. Because of their own experience, other judges can be expected to understand the demands unique to their profession; and as each is a decision-maker himself, these other judges may be expected to refrain from applying sanctions that could chill the investigated judge's freedom to decide cases as he sees fit, since such sanctions could be a precedent that could be turned against any judge. Above all, judges will certainly be reluctant to take any action that would predictably inhibit the free and independent functioning of the courts.

Id. at 1508.

[312]*See* Plank, *supra* note 302, at 31-32.

political considerations than the President, acting with the input of the local political establishment. Furthermore, to the extent that immunity from civil liability is an element of judicial independence,[313] bankruptcy judges have the protection of absolute judicial immunity for their judicial acts.[314]

Finally, the lack of a constitutional prohibition against reduction of salaries does not diminish the independence of bankruptcy judges. In my view, prohibition of reduction of salaries[315] is a weak protection for judicial independence. It is much more important that the salaries be sufficient to attract and retain able individuals who can maintain the respect of society.[316]

Bankruptcy judges, who decide many state law issues,[317] have much more judicial independence than judges in most American states. Although judges in a few American states are also appointed for life terms,[318] judges in most

---

[313]*See id.* at 32-33.

[314]*See* Gregory v. United States/United States Bankruptcy Court, 942 F.2d 1498, 1500 (10th Cir. 1991); Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1388-89 (9th Cir. 1987); Guercio v. Brody, 814 F.2d 1115 (6th Cir. 1987) (no absolute immunity in secretary's cause of action for wrongful termination by bankruptcy judge); Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986).

[315]*See* U.S. CONST. art. III, § 1; *see supra* note 300.

[316]*See* Plank, *supra* note 302, at 29-31. In *Atkins v. United States*, 556 F.2d 1028, 1045 (Ct. Cl. 1977), the United States Court of Claims rejected the plaintiff-federal judges' claim that Congress's failure to enact more than a five percent salary increase for judges in a time of sustained high inflation, which had caused a thirty-four percent decrease in real wages over a six and one-half year period, violated the Compensation Clause. The court noted that the Compensation Clause was not designed to ensure a particular level of support for the judiciary but to prevent retaliatory or discriminatory attacks on the judiciary. *Id.* at 1044-45, 1048-49, 1054-57. To this extent, the Compensation Clause may be valuable. It could be considered a very crude proxy for a guaranty of a fixed and adequate salary. However, *Atkins* rejected this suggestion as the specific purpose of the Compensation Clause. *Id.* at 1045-47, 1049-50. *See generally* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 700-06 (1995) (discussing several interpretative issues in the Compensation Clause); Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Judicial Compensation*, 24 UCLA L. REV. 308, 316-18 (1976) (arguing that Congress has a moral, but not a legal, obligation to maintain the real economic value of judicial salaries). Nevertheless, during inflationary times, protection against a salary reduction is meaningless when the buying power of a fixed salary is substantially reduced. For example, the annual salary of an Associate Justice of the Supreme Court in 1789 was $3,500; in 1903 it was $12,500. HOUSE COMM. ON POST OFFICE AND CIVIL SERV., 101ST CONG., CURRENT SALARY SCHEDULES OF FEDERAL OFFICERS AND EMPLOYEES TOGETHER WITH A HISTORY OF SALARY AND RETIREMENT ANNUITY ADJUSTMENTS 23 (Comm. Print 1990). The annual salary of a United States district judge in 1903 was $6,000. *See id.* These salaries would certainly be considered inadequate today. *See generally* Rosenn, *supra* (analyzing changes in real economic value of compensation for federal judges from 1789 to 1975, including an increase in caseloads and a decline in judicial income relative to growth in national income, and concluding that from 1969 to 1975 Congress breached a moral obligation to maintain the real economic value of judicial salaries). Conversely, during sustained deflation, a prohibition against salary diminution gives judges more protection than needed to insure independence.

[317]*See, e.g.*, Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 EMORY L.J. 1193 (1998); Peter V. Panteleo et al., *Rethinking the Role of Recourse in the Sale of Financial Assets*, 52 BUS. LAW. 159, 182-89 (1996).

[318]*See, e.g.*, MASS. CONST. pt. 2d, ch. III, art. I (judicial officers hold offices during good behavior); N.H. CONST. pt. 2d, art. 73 (good behavior); R.I. CONST. art. X, § 5 (good behavior); *see also* N.J. CONST. art.

American states serve a fixed term of between six and twelve years.[319] Some judges have longer terms,[320] and others have terms of only four years.[321] In many of these states, some or all of the judges must run for reelection in elections in which anyone may challenge an incumbent.[322] Many other states

VI, § VI, ¶ 3 (after initial seven-year term, judges who are reappointed by the Governor serve during good behavior). Before the enactment of an amendment to the Rhode Island constitution in 1994, a grand committee of the two legislative houses appointed judges, and those judges held office until their place was declared vacant by a majority of both houses. *See* R.I. CONST. art. X, § 4 (repealed 1994).

[319]*See, e.g.*, ALA. CONST. art. VI, § 155 (six years); ARK. CONST. art. 7, § 6 (eight years, supreme court); CAL. CONST. art. VI, § 16 (twelve years, supreme court and court of appeals; six years, superior court); DEL. CONST. art. IV, § 3 (twelve years); GA. CONST. art. VI, § VII, ¶ I (six years, supreme court and court of appeals); HAW. CONST. art. VI, § 3 (ten years, supreme court, court of appeals, and circuit court); IDAHO CONST. art. V, § 6 (six years, supreme court); ILL. CONST. art. VI, § 10 (ten years, supreme court and appellate court; six years, circuit court); IND. CONST. art. 7, §§ 7, 11 (ten years, supreme court and court of appeals; six years, circuit court); IOWA CODE § 46.16 (minimum of eight years, supreme court; six years, court of appeals); KAN. CONST. art. 3, § 2 (six years, supreme court); KY. CONST. § 119 (eight years, supreme court, court of appeals, and circuit court); LA. CONST. art. V, §§ 3, 8, 15 (ten years, supreme court and court of appeals; six years, trial courts); ME. CONST. art. VI, § 4 (seven years); MD. CONST. art. IV, §§ 5A, 41D (ten years, court of appeals, court of special appeals, and district court); MICH. CONST. art. VI, §§ 2, 9, 12 (eight years, supreme court; six years, other courts); MINN. CONST. art. VI, § 7 (six years); MISS. CONST. art. 6, § 149 (eight years, supreme court); N.Y. CONST. art. VI, §§ 10, 12, 13 (ten years, county court, surrogate court (excluding New York City), and family court); N.C. CONST. art. IV, § 16 (eight years); N.D. CONST. art. VI, §§ 7, 9 (ten years, supreme court; six years, district court); OHIO CONST. art. IV, § 6 (six years); ORE. CONST. art. VII (amended), § 1 (six years); S.C. CONST. art. V, §§ 3, 8, 13 (ten years, supreme court; six years, court of appeals and circuit court); S.D. CONST. art. V, § 7 (eight years); TEX. CONST. art. V, §§ 2, 4, 6 (six years, supreme court, court of criminal appeals, and court of appeals); UTAH CONST. art. VIII, § 9 (ten years, supreme court; six years, other courts of record); VT. CONST. ch. II, § 34 (six years); WASH. CONST. art. IV, § 3 (six years, supreme court); W. VA. CONST. art. VIII, §§ 2, 5 (twelve years, supreme court of appeals; eight years, circuit court); WIS. CONST. art. VII, §§ 4, 5, 7 (ten years, supreme court; six years, court of appeals and circuit court); WYO. CONST. art. 5, § 4 (eight years, supreme court; six years, district court).

[320]*See* MD. CONST. art. IV, § 5 (fifteen years, circuit court); N.Y. CONST. art. VI, §§ 2, 6, 12 (fourteen years, court of appeals, supreme court, and surrogate court (in New York City only)).

[321]*See* ARK. CONST. art. VII, § 17 (circuit court); GA. CONST. art. VI, § VII, ¶ I (superior court, the court of general jurisdiction, and state court, the court of limited jurisdiction); IDAHO CONST. art. V, § 11 (district court, court of general jurisdiction); KAN. CONST. art. 3, § 6 (district court, court of general jurisdiction); KY. CONST. § 119 (district court, court of limited jurisdiction); MISS. CONST. art. 6, § 153 (circuit and chancery courts); TEX. CONST. art. V, §§ 7, 15 (district court, the court of general jurisdiction, and the county court, a court of record with limited jurisdiction); WASH. CONST. art. IV, § 5 (superior court).

[322]*See* ALA. CONST. art. VI, § 152; ARIZ. CONST. art. VI, §§ 12, 30, 38 (in counties having a population of less than 250,000, elections for judges of the superior court and the lower courts of record); ARK. CONST. art. VII, §§ 6, 17; CAL. CONST. art. VI, § 16 (unless voters of county choose a retention election, elections for judges of the superior court); FLA. CONST. art. V, § 10 (elections for judges of the circuit and county courts); GA. CONST. art. VI, § VII, ¶ I; IDAHO CONST. art. V, §§ 6, 11; IND. CONST. art. 7, §§ 7, 11; KAN. CONST. art. 3, § 6 (elections of district court judges if legislature and voters of district so choose); KY. CONST. § 117 (nonpartisan basis); LA. CONST. art. V, § 22; MD. CONST. art. IV, § 3 (circuit court and court of general jurisdiction); MICH. CONST. art. VI, §§ 2, 8, 12 (nonpartisan elections as prescribed by law); MINN. CONST. art. VI, § 7; MISS. CONST. art. 6, §§ 145, 153; MO. CONST. art. V, § 25(b) (circuit court for circuits other than in City of St. Louis and Jackson County, in which voters choose judges in open elections); MONT. CONST. art. VII, § 8; NEV. CONST. art. 6, §§ 3, 5; N.Y. CONST. art. VI, §§ 6, 10, 12, 13 (supreme court, county court, surrogate court, and family court, except in New

provide for retention elections, in which the electorate votes on whether to retain a judge.[323]

The election or retention by popular vote of most state court judges who serve for relatively short terms raises serious questions about the extent of their independence.[324] Voters for example have refused to reelect state court judges because of dissatisfaction with the judges' decisions.[325] In addition, there is some evidence that judges subject to reelection refuse to enforce the constitutional rights of those accused of crimes when they think such enforcement would be unpopular.[326] Similar pressures on judges' decisionmaking exist in the states in which the governor reappoints judges with the consent of the state senate[327] or of the entire legislature.[328]

In the states, judicial bodies do have some role in disciplining or removing

---

York City, where judges are appointed by the mayor); N.C. CONST. art. IV, § 16; N.D. CONST. art. VI, §§ 7, 9; OHIO CONST. art. IV, § 6; OKLA. CONST. art. VII, §§ 3, 9 (nonpartisan elections); ORE. CONST. art. VII (amended), § 1; S.D. CONST. art. V, § 7 (circuit court, by "nonpolitical election"); TENN. CONST. art. VI, §§ 3-4; TENN. CODE ANN. § 17-1-103 (1994) (trial courts); TEX. CONST. art. V, §§ 2, 4, 6, 7, 15; WASH. CONST. art. IV, §§ 3, 5; W. VA. CONST. art. VIII, § 2 (legislature decides whether partisan or nonpartisan); WIS. CONST. art. VII, §§ 4, 5, 7.

[323]*See* ALASKA CONST. art. IV, § 6; ARIZ. CONST. art. VI, §§ 12, 30, 38 (elections for judges of all courts of record except superior court and lower courts of record in counties having a population of less than 250,000); CAL. CONST. art. VI, § 16 (elections for judges of the supreme court and court of appeals and, if decided by voters of county, superior court); COLO. CONST. art. VI, § 25 (excluding county court of Denver); DEL. CONST. art. IV, § 3; FLA. CONST. art. V, § 10 (supreme court and district court of appeals); ILL. CONST. art. VI, § 12; IND. CONST. art. 7, § 11 (supreme court and court of appeals); IOWA CONST. art. V, § 17; KAN. CONST. art. 3, §§ 5-6 (supreme court; district court if legislature and voters of district choose); MD. CONST. art. IV, § 5A (court of appeals and court of special appeals); MO. CONST. art. V, § 25 (supreme court; circuit court in City of St. Louis and Jackson County and in any other circuits in which voters vote to have judges appointed by governor); MONT. CONST. art. VII, § 8 (if no challenger, incumbent subject to retention vote); NEB. CONST. art. V, § 21; N.M. CONST. art. VI, § 33 (at least fifty seven percent affirmative vote); PA. CONST. art. V, § 15; S.D. CONST. art. V, § 7 (supreme court); UTAH CONST. art. VIII, § 9; WYO. CONST. art. 5, § 4.

[324]*See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997); Plank, *supra* note 302, at 23-28.

[325]Examples are Chief Justice Rose Bird of the California Supreme Court in 1986, and Justice Penny White of the Tennessee Supreme Court in 1996. *See* Bright, *supra* note 324, at 313-14, 331-36; Plank, *supra* note 302, at 27.

[326]*See* Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 COLO. L. REV. 75 (1992); Plank, *supra* note 302, at 26-27.

[327]*See, e.g.*, DEL. CONST. art. IV, § 3; ME. CONST. art. V, pt. 1st, § 8; MD. CONST. art. IV, § 41D (district court); N.Y. CONST. art. VI, §§ 2, 9 (court of appeals and court of claims).

[328]*See* CONN. CONST. art. 5th, §§ 2-3 (appointment by legislature upon nomination of governor); VT. CONST. ch. II, §§ 32-34, 36 (governor appoints; judges who choose to continue are retained unless a majority of the members of the legislature disapprove; judges also hold office "during good behavior").

In South Carolina and Virginia, the legislature reappoints judges. S.C. CONST. art. V, §§ 3, 8 (legislature appoints and reappoints by a joint vote); VA. CONST. art. VI, § 7 (legislature appoints and reappoints by a majority vote of each house). Hawaii uses an unusual procedure: the judicial selection commission, of which no more than four of its nine members may be lawyers, decides whether to retain judges who were initially appointed by the governor. HAW. CONST. art. VI, § 3.

judges.[329] Most American states allow a judicial body (usually the state's highest court, and often only after investigation by a commission containing judges, lawyers, and nonlawyers) to retire judges involuntarily for disability or to discipline or remove judges for misconduct, including conduct prejudicial to the administration of justice.[330] Many of these states also require removal of judges convicted of serious crimes and suspension of judges charged with such crimes.[331] Nevertheless, the operation and effectiveness of these provisions for judicial discipline occurs against a background of limited terms and appointment by the electorate or the executive.

The process for appointment and removal of bankruptcy judges resembles that found in the civil law legal systems of France, Germany, and many other countries. In civil law countries, judges are selected from a cadre of individuals who have chosen judicial administration as a separate career path.[332] In France,[333] Germany,[334] and many other civil law countries,[335] a tribunal com-

[329]State court judges may also be removed by impeachment or other actions of political bodies. *See* Plank, *supra* note 302, at 15-19 (including removal upon "address" and in a few jurisdictions by the recall election).

[330]*See generally* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 136-43 (1996-1997); Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811 (1988). In Georgia, a seven-person commission that consists of two judges, three lawyers, and two non-lawyers, may discipline, remove, or retire judges. GA. CONST. art. VI, § VII, ¶¶ VI, VII (providing for removal, suspension, or other discipline by judicial qualifications commission for "willful misconduct in office, or for willful and persistent failure to perform the duties of office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the judicial office into disrepute").

[331]*See* Jeffrey M. Shaman, *Judicial Immunity from Civil and Criminal Liability*, 27 SAN DIEGO L. REV. 1, 20-23 (1990).

[332]*See* GEORGE E. GLOS, COMPARATIVE LAW 28-29 (1979); KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW 128-29 (Tony Weir trans., 2d rev. ed. 1992).

[333]The High Council of the Judiciary, composed of six judges, a member of the highest administrative court, and two citizens, may remove or discipline any judge. *See* Kersi B. Shroff et al., *Judicial Tenure: The Removal and Discipline of Judges in Selected Countries*, *in* 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 1514-16 (1993) [hereinafter RESEARCH PAPERS] (mandatory retirement generally at age 75); William K. Slate II, *New Paradigms of Judicial Discipline: Application of Foreign Models in the American System*, *in* 2 RESEARCH PAPERS, *supra*, at 1442-44.

[334]The Federal Constitutional Court may remove federal judges, including members of the Federal Constitutional Court, upon an accusation by two-thirds of the members of the federal legislature and a two-thirds vote of the members of the court, and a special branch of Germany's highest ordinary federal court, the Federal Court of Justice, may discipline or remove federal judges in the ordinary courts. *See* Shroff, *supra* note 333, at 1527-33; Slate, *supra* note 333, at 1451-53.

[335]In Belgium, judges are subject to discipline by their supervisory courts and to removal by the Court of Cassation, the highest court. *See* Shroff, *supra* note 333, at 1490-91. In Brazil, a two-thirds vote of the appropriate court or a special judicial tribunal may remove or discipline a judge after the probationary period for specified grounds deemed reasons of public interest. *See id.* at 1494-99. In Greece, only specified courts may dismiss a judge, judicial councils may discipline lower judges, and judges of certain higher courts are disciplined by the Supreme Disciplinary Council, which contains only a minority of judges. *See id.* at 1548-52. In Italy, the Superior Council of the Magistrature disciplines or removes judges; the Council consists of judges (two-thirds of the membership) elected by the judges, law professors or lawyers (one-third of the membership) elected by Parliament, and the President of Italy, the Procurator General,

posed primarily or entirely of judges removes or disciplines judges. Unlike bankruptcy judges, however, judges in France,[336] Germany,[337] and most other civil law countries[338] have permanent tenure.[339]

The current bankruptcy adjudicatory structure is unique in America. Although bankruptcy judges do not have the protections of Article III, they nevertheless have the essential elements of judicial independence. The current adjudicatory structure of bankruptcy preserves, although in a different way, the important constitutional value of independence for those who exercise a judicial function. This structure also provides another benefit: institutional diversity. The current method for appointing and disciplining bankruptcy judges could not exist for Article III judges and does not exist in the states. Observation of the quality of adjudication in bankruptcy courts over time would provide valuable information about the relative merits of

---

and the Head of State. *See id.* at 1577-78. The Netherlands provides only for the dismissal or warning of a judge by the Supreme Court. *See id.* at 1611-13. In Poland, disciplinary courts and higher disciplinary courts conduct disciplinary and removal proceedings upon the recommendation of the National Judiciary Council. *See id.* at 1627-31. Sweden allows the removal or discipline of members of the Supreme Court or Supreme Administrative Court by the Supreme Court and removal or discipline of lower judges by the judge's judicial agency, subject to review by the State Disciplinary Board, a nonjudicial body, with further review by a court of general jurisdiction. *See id.* at 1647-52. In Mexico, federal judges are subject to removal or discipline by the Council of the Federal Judiciary, which includes non-judges as two of the seven members. *See* Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U. J. INT'L L. & POL'Y 295, 322-28 (1996); *see also* GLOS, *supra* note 332, at 29; Gerhard O.W. Mueller & Fr' Le Poole Griffiths, *Judicial Fitness: A Comparative Study, Part II*, 52 JUDICATURE 238 (1969).

[336]Judges retire at age sixty-five, and the chief judges retire at sixty-eight. HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE 50 (6th ed. 1993) (gradual development in France from 1800 to 1945); Shroff, *supra* note 333, at 1514-16; Slate, *supra* note 333, at 1437, 1441-42.

[337]Permanent tenure after initial probationary period for all federal judges other than the sixteen members of the Federal Constitutional Court; retirement at age sixty-eight. Shroff, *supra* note 333, at 1527-29; Slate, *supra* note 333, at 1450-53.

[338]These countries include Argentina (federal judges, life tenure), *see* Shroff, *supra* note 333, at 1474; Belgium (mandatory retirement at sixty-seven or seventy years of age), *see id.* at 1489; Brazil (permanent tenure after a two-year probationary period, subject to retirement at age seventy), *see id.* at 1494-96; Greece (after one-year probationary period; retirement at ages 65 or 67), *see id.* at 1547; Italy, *see id.* at 1576; the Netherlands (retirement at 70), *see id.* at 1611; Poland (retirement at sixty-five to seventy), *see id.* at 1626-28; and Sweden, *see id.* at 1647-49.

In Mexico, federal judges other than members of the Supreme Court of Justice have life tenure after an initial six-year term. *See id.* at 1603. In 1995, Mexico adopted a constitutional amendment to change the tenure of members of its Supreme Court of Justice from tenure until mandatory retirement at age seventy to a maximum term of fifteen years. *See* Vargas, *supra* note 335, at 305-06. The rationale for the change was an expansion of the power of this court to declare acts of the federal legislature unconstitutional. *See id.* at 306, 312-14.

[339]Judges in Japan are appointed for ten-year terms, *see* THE JAPANESE LEGAL SYSTEM 549-56, 558-62 (Hideo Tanaka & Malcolm D. H. Smith eds., 1976); Shroff, *supra* note 333, at 1583, judges in most Swiss cantons are elected for fixed terms, the most common of which is six years, GLOS, supra note 332, at 708, and members of Mexico's Supreme Court of Justice have fifteen-year terms, *see* Vargas, *supra* note 335, at 305-06.

judicial appointment and removal against the merits of political appointment, removal, and, in the case of the states, reappointment.[340] We are not likely to have any other opportunity to implement and observe such a unique nationwide adjudicatory system. We should pause before we give up the opportunity that continuation of the current system of bankruptcy adjudication presents.

III. REINFORCING THE LIMITS OF THE BANKRUPTCY CLAUSE

Congress should retain the current structure of bankruptcy adjudication. Having bankruptcy judges who are not Article III judges and who therefore cannot exercise the "judicial Power" over "Cases, in Law and Equity" complements and reinforces the limitations on Congress's power under the Constitution to enact "Laws on the subject of Bankruptcies."[341] If bankruptcy judges retain their current status, Congress must ensure that bankruptcy laws fall within Congress's power under the Bankruptcy Clause. Making bankruptcy judges Article III judges removes an important constraint on Congress's temptation to exceed its bankruptcy power.[342]

---

[340]I am opposed to the election of judges by the electorate, just as I would oppose selecting other professionals, such as heart surgeons, by election. I do not believe that popular election and reelection of judges produces the highest quality judiciary. Given the opposition to some federal judges, however, who have life terms, it is unlikely that the overwhelming majority of states that provide for popular election of judges would change their methods of choosing judges. A continuously successful bankruptcy court system could offer another, and better, alternative to these states.

[341]U.S. CONST. art. I, § 8, cl. 4; *see supra* note 17.

[342]Congress has enacted laws under the bankruptcy power without any serious effort to discern the limits of this power. *See, e.g.*, Consumer Credit Protection Act, Pub. L. No. 90-321, §§ 201-202, 82 Stat. 146, 159-62 (1968) (codified at 18 U.S.C. §§ 891-896 (1994)) (relying on the Bankruptcy Clause as well as the Commerce Clause to make loan sharking a federal crime); Consumer Credit Protection Act, Pub. L. No. 90-321, §§ 301-307, 82 Stat. 146, 163-64 (codified at 15 U.S.C. §§ 1671-1677 (1994)) (relying in part on the Bankruptcy Clause as well as the Commerce Clause to limit the amount of wages that may be garnished in state collection proceedings). Scholars have similarly made proposals on what bankruptcy law should do without regard to what the limits of bankruptcy are. *See, e.g.*, Theodore Eisenberg, *Bankruptcy in the Administrative State*, LAW & CONTEMP. PROBS., Spring 1987, at 3, 25-31 (suggesting that the bankruptcy process be used as a form of supplemental regulation of regulated industries, such as the electric utility industry, to allow an opportunity for increased and presumably better representation of the interests of the customers of the utility who are not technically creditors); Karen Gross, *Taking Community Interests Into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031 (1994) (suggesting that bankruptcy law should take into account the interests of the broader community and not be concerned just with debtors and creditors); David M. Phillips, *Secured Credit and Bankruptcy: A Call for the Federalization of Personal Property Security Law*, LAW & CONTEMP. PROBS., Spring 1987, at 53 (suggesting that Congress could rely on the Bankruptcy Clause to enact a federal personal property security law).

This trend is not limited to bankruptcy legislation. Federal politicians responding to their constituents sponsor legislation without regard to any real limits on their power. *See, e.g.*, Violence Against Women Act, 42 U.S.C. §§ 1681-1688 (1994) (creating a federal cause of action for certain acts of violence against women), upheld as constitutional under the Commerce Clause in *Brzonkala v. Virginia Polytechnic Institute & State University*, 132 F.3d 949 (4th Cir. 1997), *reh'g granted, opinion vacated*; David B. Kopel &

The history and logic that justifies allowing bankruptcy judges who are not Article III judges also limits bankruptcy adjudication to bankruptcy matters, properly understood. I have argued elsewhere[343] that the Bankruptcy Clause empowers Congress to enact legislation that regulates only the relationship between an insolvent[344] debtor and her creditors. Accordingly, bankruptcy laws may apply only to debtors who are insolvent in some sense, and bankruptcy laws may not create direct entitlements or liabilities for parties other than insolvent debtors and their creditors. These limits in turn justify a system of bankruptcy adjudication by judges who are not Article III judges exercising the judicial Power.

A summary bankruptcy procedure is a better way of adjusting the relationship between an insolvent debtor and all of her creditors. An insolvent debtor does not have sufficient assets available to pay her creditors—either because of balance sheet insolvency, that is, the debtor's liabilities exceed her assets, or cash flow insolvency, that is, she is unable generally to pay current debts as they become due.[345] The initial purpose of bankruptcy (and still a primary purpose today) is to enable all of the creditors to maximize their

---

Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997). And, judges routinely uphold expansive legislation under Congress's power to regulate interstate commerce. The Commerce Clause empowers Congress to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has abandoned the historical limits on the Commerce Clause and has allowed regulation of activity that merely affects interstate commerce. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the Commerce Clause empowered Congress to forbid a farmer from raising wheat for consumption on his own farm). Although the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), applied the Commerce Clause limits to overturn Congress's effort to ban weapons from schools, *Lopez* was the first such opinion to do so in over fifty years. Scholars are beginning to question the breadth of the Court's interpretation of the clause. *See, e.g.*, Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635, 1648-59 (1995). Nevertheless, the principal dissent in *Lopez* believed that the Commerce Clause authorized the law in question. It maintained that preventing violence in schools enhanced education, and education enhanced the national economy. *Lopez*, 514 U.S. at 622-25 (Breyer, J., dissenting).

[343]Plank, *supra* note 19.

[344]Insolvency is either balance sheet insolvency, that is, the debtor's liabilities exceed her assets, or cash flow insolvency, that is, she is unable generally to pay current debts as they become due. A debtor can be solvent in the balance sheet sense and still be insolvent in the cash flow sense. This situation typically arises when the debtor has illiquid assets, such as real estate, that cannot be quickly converted into cash, but insufficient liquid assets, such as cash, to pay current debts. The Code uses both concepts. For most debtors, the term "insolvent" in the Code means balance sheet insolvency. 11 U.S.C. § 101(32)(A), (B) (1994). For municipalities filing for bankruptcy relief under Chapter 9 of the Code, "insolvent" defines a form of cash flow insolvency: "generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute or unable to pay its debts as they become due." *Id.* § 101(32)(C). Cash flow insolvency is also a condition to maintaining an involuntary petition by creditors against a debtor. *Id.* § 303(h)(1) ("[A]fter trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute. . . .").

[345]*See supra* note 344.

recovery from these limited resources. The one-on-one adversary proceedings of the common law courts and of today's Article III courts are not as well suited for resolving the collective action problem of multiple creditors pursuing limited debtor assets.

On the other hand, if the debtor is solvent, by definition she has sufficient available assets to pay creditors. There is no need to force all of her creditors to share in her assets. Each creditor can resolve his claim against the debtor in the normal way, each creditor seeking adjudication of his claim against the debtor in a lawsuit in a court of law or equity.

Since 1939, neither the Bankruptcy Act of 1898 nor the Bankruptcy Code has contained a general insolvency requirement.[346] Although the vast majority of debtors under the Code are insolvent, recently some enterprising solvent litigants have filed for bankruptcy to take advantage of the special rules that the Code offers to insolvent debtors, including in particular the summary procedure. An obvious case is *In re Krystal Co.*[347] In this case, the Krystal Company, with total assets of $128,015,000 and total liabilities of $88,471,000,[348] filed a Chapter 11 bankruptcy petition for the sole purpose of accelerating the adjudication of employees' overtime wage claims under the Fair Labor Standards Act and forcing their adjudication in a single forum.[349] The Code allows this strategy. In a Chapter 11 case, all creditors must file their claims with the bankruptcy court, and the bankruptcy court must decide whether to allow those claims. If creditors do not participate in the case, their claims will be discharged.[350]

Totally solvent, the company openly acknowledged that it was filing the

---

[346]The first three American bankruptcy acts contained an insolvency requirement for voluntary and involuntary proceedings. Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19, 20-21 (repealed 1803); Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 441-42 (repealed 1843); Act of Mar. 2, 1867, ch. 176, § 11 (voluntary), § 39 (involuntary, based on acts of bankruptcy), 14 Stat. 517, 521, 536 (repealed 1878). The Bankruptcy Act of 1898 contained no insolvency requirement for voluntary liquidation proceedings, *see* Bankruptcy Act of 1898, ch. 541, § 4, 30 Stat. 544, 547 (repealed 1978), but the Supreme Court's official form of the voluntary bankruptcy petition under the 1898 act originally included an averment that the debtor "owes debts which he is unable to pay in full." General Orders and Forms in Bankruptcy, 172 U.S. 653, 667 (1898) (Form No. 1). In 1939, the Supreme Court revised the official form and omitted these words. General Orders and Forms in Bankruptcy, 305 U.S. 677, 717-18 (1939) (Form No. 1). In 1933 and 1934, Congress amended the 1898 Act to provide for the reorganization of noncorporate persons, farmers, railroads, and corporations, and these provisions did contain an insolvency requirement. Act of Mar. 3, 1933, ch. 204, 47 Stat. 1467; Act of June 7, 1934, ch. 424, 48 Stat. 911. Pursuant to the 1938 Chandler Act, Congress revised the reorganization provisions for corporate and noncorporate persons and added Chapter XIII for wage-earners, all of which contained an insolvency requirement. Act of June 22, 1938, ch. 575, §§ 130, 323, 423, 623, 52 Stat. 840, 886, 907, 918, 932 (repealed 1978).

[347]No. 95-15306 (Bankr. E.D. Tenn. filed Dec. 15, 1995).

[348]*See* Petition Ex. A., ¶ 3, *In re* Krystal Co., No. 95-15306 (Bankr. E.D. Tenn. filed December 15, 1995).

[349]*See* Eleena de Lisser, *Krystal to File for Bankruptcy to End Disputes*, WALL ST. J., Dec. 18, 1995, *corrected*, Dec. 19, 1995, *available in* 1995 WL-WSJ 9912170.

[350]*See* 11 U.S.C. § 1141(d)(1) (1994) (providing that a plan confirmed in a Chapter 11 case discharges

bankruptcy petition to resolve in the bankruptcy forum five separate lawsuits by employees.[351] A company spokesman correctly noted also that the bankruptcy filing would force all claimants to present their claims in the bankruptcy proceeding and therefore foreclose future periodic litigation.[352] The strategy worked. In the proceeding, 84,000 current and former employees of Krystal were given a June 1996 deadline to file any claims they may have had.[353] In November, Krystal filed its reorganization plan to pay in full all claims allowed by the bankruptcy court.[354] At that time, about 1500 wage claims had been disallowed.[355] In January 1997, the company announced that it had settled all of the overtime wage claims for a total amount of about $13 million, subject to the approval of the bankruptcy court.[356] In April 1997, the company emerged from bankruptcy after the bankruptcy court approved a reorganization plan that included the settlement.[357]

This case never should have happened. Not only does it violate the Bankruptcy Clause (since the debtor was solvent), it also violates Article III. The workers who had claims for overtime pay had a cause of action under the Fair Labor Standards Act for back pay and liquidated damages that they could bring in any court of competent jurisdiction,[358] that is, either state[359] or federal court.[360] Perhaps defendants who are subject to suits in several federal jurisdictions should be able to require that all claims be litigated in a single forum. Congress, however, has not chosen to create such a procedure. In any event, to the extent that claimants have a right to try a cause of action in a

---

the debtor from any debt that arose before the date of confirmation, regardless of whether the creditor filed a proof of claim or such claim is allowed by the court).

[351] *The Wall Street Journal* reported:

> "This is not a 'typical' bankruptcy," Carl Long, Krystal's chairman and chief executive officer, said in a prepared statement. "Krystal is not insolvent or going out of business. We are simply utilizing Chapter 11 to resolve all valid claims."

de Lisser, *supra* note 349.

[352] *See id.*

[353] *See Almost 7,000 File Claims Against Krystal*, ATLANTA J. & CONST., June 8, 1996, *available in* 1996 WL 8214398.

[354] *See Krystal Co.: Firm's Reorganization Plan Would Pay Claims in Full*, WALL ST. J., Nov. 19, 1996, *available in* 1996 WL-WSJ 11806715.

[355] *See id.*

[356] *See Krystal Co.: Exit From Chapter 11 Seen as Litigation Is Settled*, WALL ST. J., Jan. 20, 1997, *available in* 1997 WL-WSJ 2406277 [hereinafter *Exit From Chapter 11*] (incorrectly reporting lawsuits on behalf of 750 employees; the actual figure was in excess of 7,000, *see supra* note 353).

[357] *See Krystal Co.: Operating Profits Reported; Firm Leaves Bankruptcy*, WALL ST. J., Apr. 25, 1997, *available in* 1997 WL-WSJ 2411893; *Exit From Chapter 11*, *supra* note 356.

[358] 29 U.S.C. §§ 207, 216(b) (1994).

[359] *See, e.g.*, Swanson v. Best Buy Co., 731 F. Supp. 914 (S.D. Iowa 1990); Freudenberg v. Harvey, 364 F. Supp. 1087 (E.D. Pa. 1973).

[360] *See, e.g.*, Brock v. Hutto, 617 F. Supp. 623 (M.D. Ala. 1985). There is no minimum dollar amount to file. *See* 28 U.S.C. § 1337.

federal court, they are entitled to trial by a federal judge appointed for life under Article III, and they may also be entitled to a jury trial. Only when the defendant is insolvent—when it has insufficient assets available to pay all of the claimants, as well as its other creditors—should the defendant be entitled to resolve those claims in a summary proceeding in a bankruptcy court.[361]

When other solvent debtors have filed for bankruptcy to obtain the benefits of the special rules of bankruptcy law,[362] courts have dismissed those filings on the grounds of bad faith.[363] In *Krystal*, however, the debtor was

---

[361]*See, e.g., In re* A.H. Robins Co., 89 B.R. 555, 557-58 (E.D. Va. 1988) (filing of Chapter 11 petition in 1985 after settling 9,238 tort claims for approximately $530,000,000 and while facing 5,000 pending cases in state and federal court, and after effort for certification of national class action to have tort claims adjudicated in one forum had been denied in 1982 in *In re Northern Dist. Of Ca., Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982)); *In re* Johns-Manville Corp., 36 B.R. 727, 734 (Bankr. S.D.N.Y. 1984) (denying motions to dismiss, on grounds of bad faith, the bankruptcy petition by representatives of individuals who had contracted asbestos-related diseases). In *Johns-Manville*, the company estimated that it faced tort claims for damages related to its manufacturing and selling asbestos in the amount of $1.9 billion. *See id.* at 734-35. By May 1987, those with asbestos related health claims filed approximately 11,850 proofs of claims for $32.4 billion in damages. *See* Harvey J. Kesner, *Future Asbestos Related Litigants as Holders of Statutory Claims Under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization*, 62 AM. BANKR. L.J. 69, 73 & n.14 (1988) (taken from company filings with the Securities and Exchange Commission).

[362]*See In re* WE Financial, No. 92-01861-TUC-LO (Bankr. D. Ariz. filed June 11, 1992). In this case, the partners of a solvent special purpose general partnership caused the corporation to file for bankruptcy for the sole purpose of accelerating the payment of the principal amount of thirty five high interest rate loans totaling approximately $125 million that by agreement were not otherwise prepayable. After the acceleration, the partnership could sell the underlying collateral—Government National Mortgage Association mortgage pass-through certificates that had appreciated in value to an amount greater than their face amount because of a decline in interest rates—and use the proceeds to pay off the loans and retain a profit of about $11,000,000. After strenuous objection by the lender, including a claim of bad faith filing, this case was settled with a reinstatement of all but two of the loans. *See* Findings of Fact and Conclusions of Law at 2-4, *In re* WE Financial Co. No. 92-01861-TUC-LO (Bankr. D. Ariz. filed June 11, 1992); Amended Disclosure Statement of WE Financial Co., GWS, and WE 7, Inc. Dated January 11, 1993, as Modified, at 10-21, *In re* We Financial Co. No. 92-01861-TUC-LO (Bankr. D. Ariz. filed June 11, 1992); Settlement Agreement Dated as of September 1, 1992, at 1-3, *In re* We Financial Co. No. 92-01861-TUC-LO (Bankr. D. Ariz. filed June 11, 1992); *Bankruptcy Case Tests Builder Bonds*, 7 MORTGAGE-BACKED SECURITIES LETTER, Aug. 10, 1992, at 1, 9, *available in* 1992 WL 2747060; Ernie Heltsley, *Estes Unit, in Chapter 11, Seeks Control of Bonds*, ARIZ. DAILY STAR, June 17, 1992, at 5B, *available in* 1992 WL 7629436 (containing some inaccuracy in describing the structure of the transaction); Ernie Heltsley, *Estes Firm's Chapter 11 Dispute Called Threat to Bond Payments*, ARIZ. DAILY STAR, June 18, 1992, at 5B, *available in* 1992 WL 7629465; Ernie Heltsley, *Bondholders to Receive Timely Payoff*, ARIZ. DAILY STAR, July 1, 1992, at 9B, *available in* 1992 WL 7629824 (referring to interim payment of interest on the funding agreements); *Fitch Puts Amer Southwest Fincl AAA CMOs on Alert Neg.*, DOW JONES NEWS SERVICE, June 19, 1992; *American Southwest Financial 'AAA' CMOs on Fitch Alert Negative*, PR NEWS WIRE, June 19, 1992; *American Southwest Financial Ends Dispute with WE Financial Co.*, ARIZ. DAILY STAR, March 15, 1993, at 6D, *available in* 1993 WL 5743065; Abby Schultz, *American Southwest Bondhldrs Safe After Court Okays Plan*, DOW JONES NEWS SERVICE, March 11, 1993; *S&P Affirms Amer Southwest CMO Ratings; Off Watch*, DOW JONES NEWS SERVICE, March 25, 1993.

[363]*See, e.g.*, Shell Oil Co. v. Waldron (*In re* Waldron), 785 F.2d 936 (11th Cir. 1986) (dismissing a Chapter 13 bankruptcy petition filed by solvent debtors for the sole purpose of rejecting an option

not acting in bad faith. It was creatively taking advantage of the law as it is written to solve a serious and legitimate problem. It was not trying to avoid paying the labor claims. Under the Bankruptcy Code it could not avoid paying those claims in full because it was solvent.[364] It was simply trying to accelerate the resolution of those claims.

Nevertheless, the bankruptcy proceeding should have been dismissed. Had the claimants or the judge in *Krystal* focused on either the limits of the Bankruptcy Clause or the reach of the "judicial Power" under Article III, the case might have been dismissed. Indeed the latter objection, that non-Article III judges should not resolve legal disputes under circumstances that otherwise call for adjudication by Article III judges, may be more readily apparent to lawyers involved in similar future litigation. Accordingly, the current status of bankruptcy judges reinforces one key constitutional boundary to Congress's power under the Bankruptcy Clause—the requirement for the insolvency of the debtor.

Other solvent debtors have filed for bankruptcy to thwart enforcement of state court judgments. Most of these debtors have not been successful. For example, in *Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc. (In re Dixie Broadcasting, Inc.)*,[365] a debtor who was not financially distressed filed a Chapter 11 bankruptcy petition to evade an impending specific performance order of a state court to consummate an agreed sale of its property. The court of appeals affirmed the bankruptcy court's order lifting the automatic stay for "cause" under 11 U.S.C. § 362(d)(1) to allow the continuation of the proceedings seeking specific performance in the state court.[366] Because

---

purchase agreement); *In re* Bandini, 165 B.R. 317 (Bankr. S.D. Fla. 1994) (dismissing the petition of a solvent debtor who filed a Chapter 13 petition for the purpose of modifying a marital settlement agreement with his previous wife); *In re* Moog, 159 B.R. 357 (S.D. Fla. 1993) (dismissing on the grounds of bad faith a chapter 11 petition to modify a divorce settlement agreement which required him to pay $8.5 million dollars to his former wife); *In re* Noco, Inc., 76 B.R. 839 (Bankr. N.D. Fla. 1987) (dismissing the Chapter 11 petition of a solvent debtor filed for the purpose of rejecting a franchise agreement that contained a covenant not to compete).

[364]*See* 11 U.S.C. § 1129(a)(7)-(8) (1994) (for confirmation of reorganization plan, creditors must either not be impaired or must accept plan, and impaired creditors must receive at least what they would have received in a Chapter 7 liquidation).

[365]871 F.2d 1023 (11th Cir. 1989).

[366]The debtor, Dixie Broadcasting, agreed to sell an FM radio station to WBHP for $925,000, but refused to consummate the sale when it received a $1,250,000 bid from Colonial Broadcasting Company. WBHP sought specific performance of the sale agreement. After two and one half years of state court litigation, and after the trial court announced that it was prepared to rule in favor of WBHP, Dixie Broadcasting filed a Chapter 11 bankruptcy petition during last minute settlement negotiations. WBHP sought to have the petition dismissed for lack of good faith or in the alternative to have the automatic stay lifted for cause under 11 U.S.C. § 362(d)(1). The bankruptcy court lifted the automatic stay for cause on the grounds that the filing was in bad faith. *Id.* at 1026. The district court upheld the order to lift the automatic stay and also remanded to the bankruptcy court to determine if the debtor's bad faith warranted dismissing the petition. *Id.* On further appeal, the court of appeals held that the bankruptcy court was correct in lifting the automatic stay for bad faith, citing several factors including the fact that the debtor

the debtor was solvent, the debtor should not have been allowed to file the bankruptcy petition either under the Bankruptcy Clause or Article III.

Similarly, the Court of Appeals for the Fourth Circuit, in *Claughton v. Mixson*,[367] affirmed a bankruptcy court's decision that the debtor's solvency was sufficient cause for lifting the automatic stay under 11 U.S.C. § 362(d)(1). The debtor had filed a Chapter 11 petition to prevent the enforcement of a state court decree regarding the distribution of the marital assets. The bankruptcy court found that, after payment of the distribution to the debtor's former wife of almost $4 million, the debtor's assets were sufficient to pay all of his creditors in full.[368] Again, this matter does not belong in bankruptcy or before a bankruptcy judge.[369]

The jurisdictional requirement of the insolvency of the debtor has other implications for Congress's power. Because insolvency is a jurisdictional requirement, the Bankruptcy Clause does not extend to the general regulation of debtors and creditors. The Bankruptcy Clause, for example, does not authorize Congress to enact a federal credit regulatory or debt collection statute prescribing how creditors may extend credit to debtors or how creditors may collect debts from their debtors generally. The commerce clause perhaps

---

was not in any financial distress. *Id.* at 1026-27. It also noted that a decision to lift the automatic stay for bad faith did not automatically warrant dismissing a petition for bad faith. It dismissed the debtor's appeal of the district court's remand order because it was not a final, appealable order. *Id.* at 1028-29.

[367]33 F.3d 4 (4th Cir. 1994).

[368]In April 1991, after sixteen years of litigation following a divorce, a Florida state court entered an order valuing and distributing the marital assets of Edward Claughton, the debtor, and his former wife Beverly Mixson. In July 1991, however, the former wife moved for an amendment of the order because of the debtor's fraudulent concealment of evidence regarding the value of certain marital property. Before the state court could act, the debtor filed a Chapter 11 bankruptcy petition. The parties agreed to allow the state court to enter an amended order, and the court awarded Mixson $3,976,465. Mixson then sought relief from the automatic stay to receive immediate distribution of the marital assets. The bankruptcy court found that the debtor had sufficient assets (over $6 million) to pay Mixson her $4 million and all of his other creditors (owed about $700,000) and that therefore the debtor's solvency was sufficient cause for lifting the automatic stay. *Id.* at 5-6.

[369]*See also* Bregman v. Meehan (*In re* Meehan), 59 B.R. 380 (E.D.N.Y. 1986), in which a solvent debtor had filed a Chapter 13 petition to avoid a state court judgment ordering specific performance of a contract to sell her house. The district court affirmed a bankruptcy court's refusal to reject the contract under the "business judgment test" for rejection under 11 U.S.C. § 365. The bankruptcy court had found that, because the debtor's assets would have been sufficient to pay all her creditors, rejection would not have benefitted her unsecured creditors. *Id.* at 385. Accordingly, it refused to approve the rejection of the contract, and, upon the motion of the buyers, the bankruptcy court lifted the automatic stay to allow the enforcement of the state court's judgment for specific performance. *Id.* at 385-86; *see also In re* Ofty Corp., 44 B.R. 479 (Bankr. D. Del. 1984) (dismissing a Chapter 11 petition for bad faith because the officers and majority shareholders of a solvent debtor caused the debtor to file solely to stop a state court ordered liquidation of its corporate assets).

But see In re Quarter Moon Livestock Co., 116 B.R. 775, 782 (Bankr. D. Idaho 1990) (declining to dismiss on the grounds of bad faith a bankruptcy petition by a solvent corporation designed to thwart a state liquidation proceeding brought by fifty percent of the shareholders).

could authorize such a statute,[370] but Congress could not authorize non-Article III judges to adjudicate disputes that arise under such a statute.

Furthermore, because the subject of bankruptcy is limited to the insolvent debtor-creditor relationship, a bankruptcy law may not create direct entitlements or liabilities for parties other than debtors and their creditors.[371] It should neither benefit third parties at the expense of debtors and creditors nor harm third parties for the benefit of debtors and creditors. Unfortunately, Congress has exceeded these limits in a few instances.[372] For example, the Bankruptcy Code authorizes the sale by a bankruptcy trustee of property free of a spouse's rights as a tenant by the entireties under certain circumstances[373] and absolutely free of a spouse's rights of dower and

---

[370]In 1968, Congress relied on both the Commerce Clause and the Bankruptcy Clause in enacting two titles of the Consumer Credit Protection Act directed at the broader debtor-creditor relationship which were not limited to insolvent debtors. Title II of the Act made loan sharking a federal crime. Consumer Credit Protection Act, Pub. L. No. 90-321, § 202, 82 Stat. 146, 159-67 (codified at 18 U.S.C. §§ 891-896 (1994)). The Supreme Court held that Congress's Commerce Clause power authorized the statute. Perez v. United States, 402 U.S. 146 (1971). Title III of the Consumer Credit Protection Act imposed a federal limit on the amount of an employee's wages that a creditor can garnish. Consumer Credit Protection Act, Pub. L. No. 90-321, §§ 301-307, 82 Stat. 146, 163-64 (codified at 15 U.S.C. §§ 1671-1677 (1994)).

Congress's reliance on the Bankruptcy Clause for this legislation is wrong. *See generally* Plank, *supra* note 19, at 556-59. Several courts upheld challenges to Congress's authority to make loan sharking a federal crime under the Bankruptcy Clause. None of these provided any analysis of the Bankruptcy Clause. They merely recited Congress's findings. *See* United States v. Fiore, 434 F.2d 966 (1st Cir. 1970) (assuming that the victim of the loan shark was insolvent because he could not get conventional credit); United States v. Biancofiori, 422 F.2d 584, 586 (7th Cir. 1970); United States v. Keresty, 323 F. Supp. 230, 232 (W.D. Pa. 1971); United States v. Curcio, 310 F. Supp. 351, 355-56 (D. Conn. 1970); United States v. Calegro De Lutro, 309 F. Supp. 462, 464-65 (S.D.N.Y. 1970). The Court in *Perez* did not address Congress's authority under the Bankruptcy Clause.

[371]For purposes of this Article, I use the term "creditor" as it is defined in the Code. This definition is very broad. A "creditor" includes any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A) (1994). A "claim" includes a "right to payment, whether or not such right is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 101(5)(A). Thus, it includes not only consensual lenders of money but also parties to contracts, tort claimants, and anyone who has a potential right to payment as a result of the conduct or status of the debtor before the initiation of a bankruptcy case.

In distinguishing between creditors and third parties, we must bifurcate people according to their roles. Thus, to the extent that an individual has a prepetition debt, she is a creditor. If she also has some other right, such as a right under a lease to enjoy possession of personal property leased to her or the expectation of future wages, she in not a creditor in this capacity, even if the lease or her employment contract also makes her a creditor with respect to obligations owed to her by the debtor/lessor or debtor/employer.

[372]*See generally* Plank, *supra* note 19, at 564-87.

[373]11 U.S.C. § 363(h):

> Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if

curtesy.[374] These provisions exceed Congress's power under the Bankruptcy Clause.[375] If Congress wishes to limit or abolish tenancies by the entirety, dower, or curtesy, it should do so under an appropriate congressional power.

Allowing bankruptcy courts to adjudicate contract actions in which one of the parties was a debtor, as in *Marathon*, or preference or fraudulent conveyance actions in which the transferee has received a transfer of property of an insolvent debtor,[376] as in *Granfinanciera*, does not violate the prohibition against creating entitlements or liabilities for third parties in a bankruptcy law. It is appropriate to adjudicate, in a summary proceeding conducted by bankruptcy judges, issues of what is property of the estate with those who have dealt with the debtor, even though they may not be creditors. It is well settled that, if nonbankruptcy law creates a liability for a debtor in favor of a creditor, a bankruptcy court may adjudicate issues arising out of that liability with the creditor. Similarly, if nonbankruptcy law creates an entitlement—such as the rights of a joint tenant, a party to a contract, or a licensee under state or federal law—a bankruptcy court may adjudicate issues arising under

---

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

[374]*Id.* § 363(g).

[375]*See* Plank, *supra* note 19, at 571-73.

[376]Balance sheet insolvency is a precondition to a preference action. 11 U.S.C. § 547(b)(3), (f) (insolvency presumed for ninety days before the filing, but presumption is rebuttable). Actual intent to defraud a creditor or some form of insolvency is a prerequisite for a fraudulent conveyance action. *Id.* § 548:

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

that entitlement with third parties who have dealt with the debtor before bankruptcy. Notwithstanding *Marathon* and the implications of *Granfinanciera*, a broad view of the discretion of Congress over the initial adjudication of bankruptcy issues would allow this adjudication.

Because of the limits of Congress's power under the Bankruptcy Clause, the definition of "core proceedings" has one defect. The definition is not limiting, and the statute does not contain a principle for deciding what should be included. It also includes "other proceedings *affecting* the liquidation of the assets of the estate."[377] "Core proceedings" may not go beyond the matters or issues necessary for adjusting the relationship between an insolvent debtor and the creditors as that relationship is defined by nonbankruptcy law. These matters or issues include adjudicating the debtor's intangible property rights and the avoidance of prebankruptcy transfers by insolvent debtors, such as preferences and fraudulent conveyances. To the extent that "core proceedings" includes more matters or issues, then the statute attempts to confer more jurisdiction than either the Bankruptcy Clause or Article III permit.

On the other hand, the definition of core proceedings excludes the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under Title 11.[378] In my view this exception is not constitutionally mandated. In resolving the relationship between an insolvent debtor and its creditors, there is no difference between an unliquidated contract claim and an unliquidated personal injury claim.

Bankruptcy judges need not be Article III judges to adjudicate bankruptcy issues. Because they are not Article III judges, they may not adjudicate issues that are outside the scope of the Bankruptcy Clause. Their special status under the Constitution should focus attention on the limits of Congress's powers. Retaining this status, despite whatever disadvantages for efficiency this may have, will help maintain our consciousness of a federal government of limited powers.

CONCLUSION

The two recent Supreme Court decisions, *Marathon* and *Granfinanciera*, raise troublesome issues about the constitutionality of the current system of bankruptcy adjudication. Taken to one possible logical extreme, these cases

---

[377]28 U.S.C. § 157(b)(2)(O) (emphasis added).

[378]28 U.S.C. § 157(b)(5) states:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

could indicate that much of what bankruptcy judges and their predecessors since 1800 have been doing exceeds their constitutional power. If one is to reach such a conclusion, however, one must do a better analysis than the Court did in these two decisions. Such an analysis requires two things. One is a full exploration of the entire system of eighteenth-century bankruptcy adjudication under the English bankruptcy acts and, to a lesser extent, the English insolvency acts and the Pennsylvania bankruptcy act. Another is a better appreciation of the reasons why England adopted and operated a summary proceeding for adjusting the relationship between an insolvent debtor and his, her, or its creditors.

A summary bankruptcy proceeding makes as much sense today as it did in 1789. Typically, the debtor has few liquid assets and many creditors. The full adjudicatory procedures for resolving a dispute between two individual litigants is neither useful nor justified in bankruptcy matters. On the other hand, bankruptcy judges should not resolve matters that are not within the realm of bankruptcy. The best way to keep alive the idea of Congress's limited power to enact laws on the subject of bankruptcies is to retain the current system of bankruptcy adjudication of core proceedings by bankruptcy judges appointed by and removable by Article III judges.

GUIDELINES FOR MANUSCRIPTS SUBMITTED TO THE AMERICAN BANKRUPTCY LAW JOURNAL[1]

The American Bankruptcy Law Journal has a long-standing tradition of publishing fine quality academic writing in bankruptcy law. The articles published in *The Journal* are edited by one of three bankruptcy judges, either the Editor-in Chief or one of the Associate Editors, and sometimes by all three. Editorial standards are rigorous. *The Journal* publishes four issues per year. At times, an issue focuses on a central theme; at other times, an issue covers a range of subjects on bankruptcy law. Several different issues may be in process at one time.

Generally, the following guidelines apply:

1. Authors should submit two hard copies and one disc of their articles formatted in WordPerfect, preferably 6.1 version, but lesser versions of WordPerfect and ASCII, Microsoft Word or WordStar formats are acceptable; manuscripts, excluding footnotes, should be double spaced; citation forms should comply with A Uniform System of Citation 16th ed. 1996, copyright by Columbia, Harvard, and University of Pennsylvania Law Reviews and the Yale Law Journal. Authors should keep their own hard copy and an original disc of the article as submitted.

2. All articles submitted for publication are reviewed by the Editor-in-Chief and are sometimes reviewed by the Associate Editors or other members of the Editorial Board before being accepted. We try to make a decision with respect to acceptance or rejection within 30 days of the date the article is received by the Editor-in-Chief. We reserve the right not to publish an article, even one that has been solicited.

3. When an article is first accepted for publication it is assigned to either the Editor-in-Chief or an Associate Editor for editing. This principal editor works closely with the author in preparation of the manuscript for publication. All articles are then submitted for final editorial review to the Editor-in-Chief who may require further editorial changes.

4. *The Journal* maintains high standards for publication. The extent of editorial changes that may be suggested will differ from article to article. All articles are edited for substance, style, conformance with Journal format, and clarity. Footnotes are checked for accuracy and compliance with A Uniform System of Citation 16th ed. 1996. The author generally receives a revised version of the article, with suggestions for changes. The editors attempt to make constructive suggestions for change and the process is collaborative.

---

[1]Superseding the Revised Guidelines For Manuscripts Submitted to The American Bankruptcy Law Journal, 65 AM. BANKR. L.J. 768 (1991); 70 AM. BANKR. L.J. 575-76 (1996); 71 AM. BANKR. L.J. 587-88 (1997).

5. Typically an author is advised of the issue and the approximate publication date for the article. However, we may need to delay or advance publication depending on *The Journal's* needs at the time. *The Journal*, however, has a deserved reputation for publishing in a very timely fashion.

6. The first version of the printed article is a first page proof. A copy of this proof is submitted to the author for review and revision. Changes at this stage should be kept to a minimum. Substantive alterations that the author wishes to make should be made before the article is first reviewed for delivery to the printer. Corrections for technical inaccuracies or substantive changes required by developments in the law are appropriate at first page proof stage. The editors review the page proofs at the same time that the author reviews them. Authors are asked to return their page proofs as expeditiously as possible so as to avoid publication delays.

7. After the first page proofs are returned to the printer, the article is paginated and a second set of page proofs is sent to the Editor-in-Chief. This proof is not submitted to the author for review.

8. *The Journal* provides fifty reprints of each article at its own expense to each contributor. Co-authors share the fifty reprints. Additional copies may be purchased by authors who must communicate their desire for additional reprints to the Editor-in-Chief immediately after the article is accepted for publication and in no event after the article is submitted to the printer for the first time.

9. *The Journal* licenses its articles for electronic distribution through Westlaw, Lexis, and other on-line services. *The Journal* retains any royalties (which are extremely small) from these distributions, and from any reprints.

10. If the author wishes to retain a copyright to an article, the author should so indicate on the article at the time that it is submitted for publication consideration. In that case, the article will so note in printing and requests for reprints or distribution other than those mentioned above will be conveyed directly to the author.