March 31, 2011

Stigma, PRESTIGE AND THE CULTURAL CONTEXT OF DEBT: A CRITICAL ANALYSIS OF THE BANKRUPTCY JUDGE’S NON-ARTICLE III STATUS

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STIGMA, PRESTIGE AND THE CULTURAL CONTEXT OF DEBT: A CRITICAL ANALYSIS OF THE BANKRUPTCY JUDGE’S NON-ARTICLE III STATUS

Linda Coco*

The decision of the U.S. Congress to establish and maintain the Bankruptcy Court as a non-Article III tribunal is an arbitrary decision manifesting the legal field’s professional hierarchy. This hierarchy reserves the coveted federal judicial power “to say what the law is” for Article III judges and assigns bankruptcy judges to an adjunct role in the district court. Socio-cultural theory reveals this legal field decision results from bias and prejudice against bankruptcy law and legal practitioners, due to pervasiveness of Protestant values and ethos in the legal world. Both Jewish practitioners and bankruptcy clients were excluded as illegitimate social actors, because of the social stigma emanating from Puritanical notions of debt as sin. Collectively-held cultural beliefs about the nature of financial failure and the debtor permeate the legal field and influence the perceptions of legal actors. These perceptions paired with the history of bankruptcy practice diminish the status and power of the Bankruptcy Court.

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* Assistant Professor of Law, Barry University. The author thanks G. Ray Warner, Laura Nader, Loïc J. D. Wacquant, Dean Leticia Diaz, Elizabeth Megale, Carlo Pedrioli, Marc Edelman, Anthony G. Mattriciani, M. Mattriciani. Bankruptcy Judge Joe Lee, Bankruptcy Judge Randall J. Newsome, Louis Rosen, and Sarah Buquid. The idea for this Article results from four years of qualitative ethnographic fieldwork in the bankruptcy legal field.

Dedicated to Bankruptcy Judge James F. Schneider, with the deepest gratitude.
“Thank you for inviting me to this conference, because most CEOs do not want to be seen with me.”

—Harvey R. Miller’s opening remark to JP Morgan’s 2009 corporate leadership summit

“The bankruptcy courts in the past twenty years have become the commercial courts of the United States. We write more law dealing with business than any other court.”

—Bankruptcy Judge David Houston

INTRODUCTION

In 1978, Congress proposed a bill that would have granted Article III powers to the U.S. Bankruptcy Court. Supreme Court Chief Justice Warren Burger’s response was hostile. After a Senate-House deal was struck creating the unified bill, Burger swung into action. He called former Senator DeConcini and yelled: “I’m going to go to the President

4. A court with “Article III” power is one fully vested within the definition of the judiciary as provided by Article III of the Constitution. It must be totally independent; thus, the judges must enjoy, among other things, lifetime tenure and protection against salary diminution. See Wendy Lynn Turgman, The Bankruptcy Act of 1984: Marathon Revisited, 3 YALE L. & POL’Y REV. 231, 234 (1985).
and get him to veto this.” A member of the House Judiciary Committee, Representative Harold Volkmer (D-MO), wrote to Burger reminding him of the doctrine of separation of powers and suggested that if he wanted to participate in the legislative process he could resign from the Supreme Court and join Congress. In response, Burger drafted a three page letter to President Carter urging a veto and stating that the bill was only an attempt by “adjunct aides to district court judges to achieve a higher status, with virtually all but the status of ‘life tenure’ judges.”

This appeal to President Carter failed and the bill became law in 1978, providing a single forum with pervasive jurisdiction and granting bankruptcy judges the judicial power to hold trials, issue contempt orders, and hear and decide matters between private parties. However, this grant of all the powers of courts of equity, law and admiralty to an Article I bench was later held unconstitutional. In 1982, the Supreme Court in *Northern Pipeline Construction v. Marathon Pipe Line Co.* struck down the 1978 Bankruptcy Reform Act’s pervasive grant of judicial power to untenured judges, forcing Congress to re-address the question of how to create and empower the bankruptcy courts.

From 1982 to 1984, the battle between the bankruptcy bar and Article III judges raged while Congress continued to decline the opportunity to create another Article III court to exercise the judicial power of the United States in bankruptcy matters. Instead, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”), which bifurcates the jurisdiction of the bankruptcy court into “core” proceedings, in which a bankruptcy judge enters a final order,

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6. *Id.* at 181.
7. *Id.*
10. U.S. Const. art. I, § 8, cl. 4 (vesting Congress with the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”); U.S. Const. art. I, § 8, cl. 18 (vesting Congress with the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof”); see *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828). This power of Congress is identified as part of the powers of Congress to legislate similar to the power of Congress to tax and to create tax courts. An “Article I” court is one that is created by Congress to address specific situations through its legislative powers as defined according to one of it enumerated powers.
11. *N. Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57–87 (1982) (holding that section 1471’s broad grant of jurisdiction to bankruptcy judges violates Article III and that the judicial power of the United States must be exercised by judges who have the life tenure and protection against salary diminution specified by Article III).
and “non-core” proceedings, in which the bankruptcy judge submits findings of fact and conclusions of law to the district court judge for entry of a final order. This two-tiered jurisdictional system has been said to arbitrarily and unjustifiably limit the jurisdiction of the bankruptcy court and the power of bankruptcy judges by rendering the bankruptcy court a dependent “unit” of the district court. Today, this system operates as the National Bankruptcy Review Commission Report described in 1997: “[s]imilar to Ginger Rogers dancing with Fred Astaire: these [bankruptcy] courts have to do everything the [district] courts do, only backwards and in high heels.”

Following the will of Article III federal judges, Congress has never taken advantage of its opportunities to create an autonomous and fully empowered bankruptcy court. This arbitrary denial of jurisdiction to exercise the full judicial power of the United States under Article III is unrelated to actual contemporary court activities. Instead, the denial directly relates to the cultural context of debt and the history of bankruptcy legal practice in America. Several legal arguments have been offered to explain the continued subordinate status of the bankruptcy court: 1) bankruptcy is a specialized and narrow area of law that does not need courts with full Article III powers and protections; and 2) appellate review by an Article III tribunal sufficiently checks the power exercised by the bankruptcy court. These arguments are contested by referencing the non-specialized substance of bankruptcy cases and the infrequency of appeals. These dominant arguments mask the arbitrary nature of the


17. Susan Block-Lieb, The Costs of a Non-Article III Bankruptcy Court System, 72 Am. Bankr. L.J. 529, 554 (1998) (noting that “[m]uch of the Bankruptcy Code is interstitial, however, permitting many of the substantive rights of debtors and creditors to be determined by state, not federal, law—state laws of contract, property, tort, secured transactions, landlord-tenant, and state laws identifying property exempt from the reaches of creditors and subject to avoidance by creditors’)); McKenzie, supra note 16, at 751 (stating that bankruptcy may be a “specialized process with its own rhythms that differ from litigation in other forums,” but the actual “substance of bankruptcy cases is not specialized” and that bankruptcy “cases generate very few appeals.”).
continued subordination of the bankruptcy court vis-à-vis Article III tribunals in the American legal field.\(^\text{18}\)

A comprehensive way to understand the non-Article III status of bankruptcy courts and judges is to place them within the context of American society,\(^\text{19}\) culture,\(^\text{20}\) and the larger legal field. Applying an anthropological perspective, Professor Laura Nader explains that law and legal processes are constituted by social and cultural beliefs, values, behaviors, and practices.\(^\text{21}\) Nader argues that social forces shape the substance of law and most aspects of legal practice. Applying this idea to the denial of Article III decision-making authority for the bankruptcy court, this article argues that the subordinate position of the bankruptcy court vis-à-vis Article III courts is traceable to: 1) a lack of prestige due to the stigma\(^\text{22}\) attached to debt, financial failure, and bankruptcy in non-legal social and cultural discourses;\(^\text{23}\) and 2) the insider approach and corrupt customs of

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18. Pierre Bourdieu & Loic J.D. Wacquant, \textit{An Invitation to Reflexive Sociology} 96–97 (1992). Bourdieu identifies the “legal field” as the “juridical field.” In this Article, the author uses “legal field” to indicate the legal social space in America. A field is a theoretical concept that provides a tool for describing the positions of legal agents—both institutions and legal actors—in relation and opposition to each other and to other fields and their places in the larger social world.

19. The author uses the terms “society” and “social” to discuss the structures that arrange human interactions. This lens originates from British social anthropology. See, e.g., Felix M. Keesing, \textit{Cultural Anthropology: The Science of Custom} 30 (Kinehart & Co. 1960) noting that “[p]ut simply, ‘culture’ puts the focus on the customs of a people; ‘society’ puts it upon the people who are practicing the customs . . . the British social anthropologist [uses] . . . society as a central term.”.

20. The author employs the terms “culture” and “cultural” to denote notions, beliefs, values, and other organizing concepts that shape human behavior and practices. This lens originates from American cultural anthropology. See generally Keesing, \textit{supra} note 19.

21. Laura Nader, \textit{Law in Culture and Society} 1–10 (Univ. of Cal. Press 1969). The authors within this text disagree with scholars who view law as separate from social processes, experiences, and meanings. Anthropologists, Nader explains, are trained to place all human created institutions within the culture from which they emerge.

22. The Compact Edition of the Oxford English Dictionary 3051 (Oxford Univ. Press 1971) [hereinafter OED]. The intended meanings of “stigma” and “stigmatized” in this Article are: “Stigma. . . . 2. a mark of disgrace or infamy; a distinguishing mark or characteristic . . . [A] stain or reproach, as on one’s reputation.” \textit{Id}. The stigma is a symbolic, socially agreed-upon belief about this particular area of legal practice. See, e.g., Orlando Patterson, \textit{Slavery and Social Death: A Comparative Study} 247 (1982) (describing the invisible stigma that socially marks the free slave in civil society.)

23. Stuart Hall, \textit{Foucault: Power, Knowledge and Discourse, in Discourse Theory and Practice: A Reader} 72 (Margaret Wetherell, Stephanie Taylor, & Simeon Yates eds., 2001). The meaning of the word “discourse” is adopted from Michel Foucault, who used it to mean “a group of statements which provide a language for talking about—a way of representing the knowledge about—a particular topic at a particular historical moment. Discourse is about the production of knowledge through language. But since all social practices entail meaning, and meaning shape and influence what we do—our conduct—all practices have discursive aspects. . . . It is about language and practice. . . .” Discourse, Foucault argues, “constructs the topic. It defines and produces the objects of our
bankruptcy professionals and courts that existed for decades before enactment of the Bankruptcy Reform Act of 1978. 24

This article contends that bankruptcy law and practice are neither isolated from the larger social world, as legal formalists argue, nor solely determined by the social world, as some legal realists argue. Bankruptcy law and practice, as leading French sociologist and theorist Pierre Bourdieu explains in \textit{The Force of Law: Toward A Sociology of the Juridical Field}, do indeed inhabit a separate and distinct social space, but that distinct social space is located within the larger social world. 25 The best way to understand the subordinate position of the bankruptcy court, therefore, is to analyze it within the context of both the social world and the legal field.

This article considers the taint of bankruptcy law and the history of bankruptcy practice in an attempt to take a wide-angle view of the continued denial of Article III status for bankruptcy judges and the court. 26 The first section of this article discusses the structure of the legal field and the place of bankruptcy law within it. The second section explains the replication of this structure using the example of the struggle for an Article III bankruptcy court. The third section analyzes the subordinate position of bankruptcy law by locating it in social discourses and tracing the history of bankruptcy practice and the court. The last section briefly discusses the constitutional challenges and practical difficulties of the continued two-tiered jurisdictional structure, explaining that the current inefficient jurisdictional structure undermines the system and threatens the two principles of bankruptcy: maximum recovery for creditors and a fresh start for the debtor. Finally, this article argues that the denial of Article III power and prestige to the bankruptcy court is the result of an arbitrary hierarchy of power and prestige having a vested interest in exclusive control of the right to exercise the judicial power of the United

\textit{Michigan Journal of Race & Law} [Vol. 16:folio]


26. The author argues from an anthropological perspective that is slightly different from the dominant legal scholarship on the issue of the continued denial of Article III status. The ideas and theories found in the study of law in culture and society are used to analyze interviews, oral histories, and legislative sources. This case study of the place of bankruptcy law and process in the social and the legal worlds is an illustration of how law is in society and culture.
States, at the expense of effective laws and practices that would serve the millions of litigants who appear daily in the bankruptcy court.\textsuperscript{27}

\section*{I. The Professional Field\textsuperscript{28} of American Law and the Role of Bankruptcy Law Within Its Structure\textsuperscript{29}}

This section lays the groundwork for subsequent analysis by outlining the sociocultural structure of the American legal field generally and the place of bankruptcy law and practice within that structure. It concludes that the response of the American legal field to non-legal cultural discourses about debt, failure, and bankruptcy reflects their social stigma, generating a unique set of legal practices, dispositions, and behaviors for legal actors based on the field’s internal logic and structure.

\subsection*{A. The Nomos\textsuperscript{30} of American Law}

Bourdieu writes that each professional field has a \textit{nomos}, or thesis, that generates its “constitution.”\textsuperscript{31} The constitution of a professional field creates an implicit ordering and structure of interaction for the actors and institutions operating within the field. The field thesis presupposes an arbitrary “principle vision” of that professional world.\textsuperscript{32} That principal vision of the professional world then generates competition for power and resources.

\textsuperscript{27} In 2009, approximately 1.4 million debtors filed petitions in bankruptcy courts across the United States. The asset total in these cases exceeds $200 million, and the liabilities exceeded $300 million. \textit{See} Admin. Office of the U.S. Courts, U.S. Bankruptcy Courts Debtor Assets and Liabilities Table, U.S. Crs. 32, \url{http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2009/Table1X.pdf} (last visited February 7, 1011).

\textsuperscript{28} \textit{Bourdieu} \& \textit{Wacquant, supra} note 18, at 97. The concept of “field” is used to explain the forces at work in the professional legal field that locate bankruptcy law in a subordinate position in the implicit field hierarchy.

\textsuperscript{29} \textit{See generally, Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PennLaw, \url{http://www.law.upenn.edu/bll/archives/bankruptcy/digicoll/oralhistories.html}.}

\textsuperscript{30} \textit{Pierre Bourdieu, Pascalian Meditations} 97 (Richard Nice trans., Stanford Univ. Press 2000) (explaining that “[a]rbitrariness is also the basis of all fields . . . . Each of them has its “fundamental law”, its \textit{nomos} (a word normally translated as ‘law’ and would be better rendered as ‘constitution’, a term which better recalls the arbitrary act of institution, or as ‘principle of vision and division’, which is closer to the etymology.

\textsuperscript{31} \textit{Id.; see also Bourdieu, supra} note 25.

\textsuperscript{32} Bourdieu, \textit{supra} note 25, at 812 (using this phrase to describe “the structured ways different social groups differentiate between rich and poor, elite and mass, ‘pure’ and ‘vulgar,’ ‘insider’ and ‘outsider,’ ultimately between what they value positively and what negatively, between the good and the bad. Division . . . of society’s rewards then proceeds along the lines of the principles established.”).
In the American legal field, the principle vision is a professional ranking system locating actors and institutions within an implicit hierarchy. This hierarchy is characterized by a differentiation of legal actors and institutions. It ranks actors and institutions according to professional prestige and power, their particular legal specialties, the approaches of the particular practice area, and the positions the professionals occupy during battles for power in the legal field. This structure orders competitive struggles for power between legal actors: battles play out according to hierarchical rules and, in turn, recreate the structures of the field order.

The legal power that actors seek in the professional field of law is the “power to say what the law is.” Bourdieu explains that the struggle for the “power to define the law” is the main form of “juridical capital” or sought-after recognition in the legal world. Due to their positions, some legal actors have more power to impart the meaning of legal texts and thus to define and shape the law. In the case of judges, the power to shape the law is defined by the jurisdiction given to the court. In most instances, the jurisdiction given to a court is based on the importance, breadth, and depth of the issues that the court must address. A court’s own vision of the law and a case before it are accepted as the correct and legitimate perspective because of its jurisdiction. The court’s power is operationalized through enforcement of its orders.

Within this setting, Article III judges are superior legal actors because the federal judiciary holds the most power and greatest legitimacy. Concerning power, federal judges exercise the “judicial power of the United States,” which under the U.S. Constitution is the power to say what the law is in particular cases and controversies and therefore to render dispositive judgments. Article III judges exercise that judicial power

33. Id. at 808.
34. Id.
35. Id. This notion of the “power to say what the law is” is discussed in Marbury v. Madison, 5 U.S. 137, 177 (1908), and Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1994).
36. Bourdieu, supra note 25, at 808.
38. Bourdieu, supra note 25, at 838 (“[T]he judgment of a court, which decides conflicts or negotiations concerning persons or things by publicly proclaiming the truth about them, belongs in the final analysis to the class of acts of naming or of instituting. The Judgement represents the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone. These performative utterances . . . are magical acts which succeed because they have the power to make themselves universally recognized.”). See also J.L. Austin, How To Do Things With Words (J.O. Urmson & Marina Sbisa eds., 2d ed. 1962).
40. See U.S. Const. art. III, § 1 (declaring that “[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress
by interpreting the laws of the United States and rendering binding decisions that affect legal and extra-legal world processes.\textsuperscript{41, 42} Concerning legitimacy, federal judges are considered insulated from majoritarian pressures because they have life tenure\textsuperscript{43} and undiminished salary, unlike state court judges. This gives rise to the appearance of impartiality and objectivity, key attributes for the exercise of legitimate pronouncement of law.\textsuperscript{44} Thus, the exercise of the highest legal power is reserved for those legal field actors with the greatest legitimacy and prestige.

B. Bankruptcy Law Within the Structure of the American Legal Field

In the professional legal field, bankruptcy law, actors, and institutions occupy a subordinate professional position compared with other areas of law. The profession of bankruptcy is accorded low prestige and power because of the subject matter and the clientele. With the history of debtors’ prisons in American culture, debtors comprise an illegitimate and stigmatized social category.\textsuperscript{45} Within the field of law, non-bankruptcy legal actors

\textsuperscript{41}. See Marbury v. Madison, 5 U.S. 137, 177 (1908); see also Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1994)(stating that “Article III establishes a “judicial department” with the “province and duty . . . to say what the law is” in particular cases and controversies) (citing Marbury, 5 U.S. at 177). History indicates that the Framers understood Article III to give the federal judiciary power not merely to rule on cases but also to decide them, subject to review only by superior courts. See Plaut, id. (observing that “‘a judgment conclusively resolves the case’ because ‘a judicial Power is one to render dispositive judgments.’”) (quoting Gregg Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990)).

\textsuperscript{42}. Bourdieu, supra note 25, at 838–39 (stating that “the judgment of a court, which decides conflicts or negotiations concerning persons or things by publicly pronouncing the truth about them, belongs in the final analysis to the class of acts of naming or of instituting. The judgment represents the quintessential form of authorized, public, official speech . . . . [it] is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates law”).

\textsuperscript{43}. See, e.g., O’Donoghue v. United States, 289 U.S. 516, 529–30 (1933) (asserting “Good Behavior” in Article III of the Constitution to mean tenure for life, with removal only according to impeachment standards founds in Article II, § 4); Ex Parte Bakelite Corp., 279 U.S. 438 (1929) (deeming a federal court to be an Article I court if the judges are denied lifetime tenure and do not receive a salary that cannot be reduced).

\textsuperscript{44}. See N. Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50, 60 n.10 (1982) (noting that the independence from political forces for federal judges “helps to promote public confidence in judicial determinations[,]” that in turn creates legitimacy. Further, the guarantee of life tenure “insulates the individual judge from improper influences not only by other branches.”).

\textsuperscript{45}. See generally S. Laurence Shaiman, The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law, 4 Am. J. Legal Hist. 205, 209 (1960) (discussing the negative impacts of imprisonment on the individual, the
have similarly illegitimatized the role of bankruptcy legal actors and law addressing financial failure. Due to stigmatization, bankruptcy legal professionals and institutions are traditionally limited in the positions they occupy during battles for power “to say what the law is” in the legal field.\textsuperscript{46} The struggle over the jurisdiction and power of the bankruptcy court and judges reveals their position.

Article III judges have often perceived bankruptcy law and the legal actors who practice bankruptcy as illegitimate and subordinate. They think bankruptcy court is not an appropriate arena for the articulation and demonstration of the judicial power of the United States; rather, they assume that the bankruptcy court is an arena for the expression of an “inferior form of justice.”\textsuperscript{47} Bankruptcy courts are subordinate to the Article III courts because Article III judges view them as “little brother[s] of the district court system.”\textsuperscript{48} As a manifestation of their desire to exclude those who they perceive as low-ranking judicial officers from exercising the powers of the federal courts, over the last forty years Article III judges have worked to deny bankruptcy judges the same status and power as they themselves have, as represented by the imprimaturs of life tenure and court independence.\textsuperscript{49}

Bankruptcy Judge Judith Fitzgerald explains the hierarchy of the legal field and the position of the bankruptcy court in that hierarchy as follows: “We’re not Article III judges, we’re not appointed to a lifetime position. . . . [I]n terms of the status of things, it’s the Supreme Court, and then it’s the Courts of Appeal, and then it’s the District Courts, and then it’s us. It’s just a pecking order, and that’s the way it is. We are an arm of the District Court—we’re not the District Court.”\textsuperscript{50}

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\textsuperscript{46} Bourdieu, \textit{supra} note 25, at 808 (discussing the notion of the “power to say what the law is” discussed in \textit{Marbury}, 5 U.S. at 177 and \textit{Plant}, 514 U.S. at 218–19).

\textsuperscript{47} David Skeel, \textit{Debt’s Dominion: A History of Bankruptcy Law in America} 136 (2001) (noting in particular that “[e]veryone suffered from the poor reputation of bankruptcy—the perception that bankruptcy courts, in George Treister’s phrase, ‘dispensed an inferior brand of justice.”).


\textsuperscript{50} Interview by Susan Imwiler with Judith Fitzgerald, Bankruptcy Judge (Bankr. W.D. Pa.) (Oct. 12, 2004), \textit{Digitized Bankruptcy Oral History Collections, 1993–
The bankruptcy court remains officially defined as an adjunct to Article III courts. Jurisdictionally, the bankruptcy court is a division of the district court. The district court is vested with original and exclusive jurisdiction over all bankruptcy matters, matters that are then referred to the bankruptcy court. Bankruptcy judges do not have life tenure during good behavior. They are appointed by a federal circuit court to 14-year terms and are paid 92% of a district court judge’s salary. As mentioned above, the bankruptcy judge’s power is limited by a two-tiered jurisdictional structure into “core” proceedings, in which a bankruptcy judge enters a final order, and “non-core” proceedings, in which the bankruptcy judge submits findings of fact and conclusions of law to the district court judge to enter a final order.

This current two-tiered jurisdictional structure in the bankruptcy court creates jurisdictional challenges and constitutional uncertainty that are not simply of academic interest; they result in practical problems for litigants. In undermining the principal objective of the Bankruptcy Reform Act of 1978 to create an independent court with pervasive jurisdiction, the current bifurcated jurisdictional structure reflects the hierarchy in the legal field that dictates that only the district court judge and not the bankruptcy judge has the right to exercise the full judicial power of the United States. In short, the existing bankruptcy court structure reflects the larger legal field’s principle vision of who has the power to “say what the law is” in federal courts.

II. Article III Judicial Power and the Bankruptcy Court

The implicit hierarchical order in the legal field discussed in Section I, supra, is most apparent in the forty-year battle fought between legal actors over two issues: 1) whether Congress should grant Article III status and power to the bankruptcy court; and 2) how much autonomy Congress should give that court. This struggle was most contentious during three historical periods: during the 1970 Bankruptcy Commission.
investigation on overhauling the Bankruptcy Act of 1898; during the post-Marathon years leading to the passage of the Bankruptcy Act of 1984; and during the investigations and drafting of recommendations by the 1993 National Bankruptcy Review Commission. According to leading bankruptcy professionals, during each period, Article III judges fought to prevent bankruptcy judges from acquiring Article III status and to perpetuate their subordination. The bankruptcy court and its judges were denied full Article III status and powers at each of these crucial moments—an outcome that can only be explained, as discussed in Section III, by an understanding of the sociocultural stigma attached to debt, failure, and bankruptcy in American society and the exploitation of that stigma by entrenched power actors in the American legal field.

A. The Bankruptcy Commission of 1970

The first battle in the war over whether Congress should grant Article III status and power to the bankruptcy court was fought after the 1970 Commission, established to study the nation’s bankruptcy laws, issued its report in 1973. The report concluded that the bankruptcy court was hindered by divided jurisdiction under the Bankruptcy Act of 1898 and, as a result, the bankruptcy system was inefficient and costly. The final document states as follows:


57. See H.R. Rep. No. 95-595, at 16–18, reprinted in 1978 U.S.C.C.A.N. 5963, 5978–79 (noting that “[t]he Judicial Conference’s own actions[,]” including exclusion of bankruptcy judges from the commission on bankruptcy laws and opposition to the salary Congress authorized for bankruptcy judges, “have reflected the low regard that other judges have of bankruptcy judges.”).

58. See Interview by Judge Randall J. Newson with Lawrence King, Professor of Law, New York University (Oct. 13, 1993), Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PENN LAW, http://www.law.upenn.edu/bll/archives/bankruptcy/digicoll/oralhistories.html. Professor King asserted that the District Court judges wanted to “keep [the bankruptcy judges] down.” Id. King offered as evidence a statement by Wesley Brown, a bankruptcy judge turned federal district court judge, who testified before Congress around 1977. On the issue of whether bankruptcy judges should be allowed to have a law clerk, Judge Brown answered “No, that is why the federal district court judges have the bankruptcy judges. They are there for us.” King stated that he was “absolutely dumbfounded” when he heard that. Id.

59. Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979) (declaring that summary jurisdiction existed (1) if the proceeding involved property in the actual or constructive possession of the court, (2) if the third party consented to the exercise of summary jurisdiction by the court, or (3) over a counterclaim asserted by the third party; all other actions were plenary.).
A comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy case would greatly diminish the basis for litigation of jurisdictional issues which consumes too much time, money and energy of the bankruptcy system and of those involved in the administration of debtors’ affairs. It would foster the development of a more uniform, cohesive body of substantive and procedural law which would be applicable to the administration of estates under the Bankruptcy Act. The withdrawal from state and federal district courts of jurisdiction of the so-called plenary proceedings, when coupled with the establishment of uniform federal standards and rules, as proposed by the Commission . . . should eliminate a source of uncertainty and division of authority which has characterized bankruptcy law.60

The Commission, relying on the opinions of constitutional law experts, believed it necessary to establish an independent bankruptcy court with pervasive jurisdiction over all matters related to the bankruptcy case, as well as to create judgeships with Article III protections.61 Guided by proposals from members of the National Bankruptcy Conference (“NBC”)62 and National Conference of Bankruptcy Judges (“NCBJ”),63 the Commission proposed an independent bankruptcy court that would be relieved of its former administrative functions and serve a broadened judicial function.64 The administrative functions would be assigned to a


61. The 1970 Commission on Bankruptcy Laws of the United States was directed to “study, analyze, evaluate, and recommend changes” to the existing bankruptcy laws. Act of July 24, 1970, supra note 56. The notion that bankruptcy courts should have pervasive jurisdiction may have arisen from the problematic existing presumption that Article III judges had considerable oversight over bankruptcy judges. See Frank F. Kennedy, The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction, 55 Am. Bankr. L.J. 63, 64 (1981) (noting that, historically, federal court judges were assumed to “exercise a supervisory role” over registers and referees handling bankruptcy cases, though the federal judges were vested with express jurisdiction over those cases).

62. See King interview, supra note 58 (explaining that the National Bankruptcy Conference was started at a time when a group of lawyers were called upon to help Congress to draft the Chandler Amendments to the 1898 Bankruptcy Act). See also Our Mission, Nat’l Bankr. Conf., http://www.nationalbankruptcyconference.org/mission.cfm.

63. See Our Purpose, Nat’s Conference of Bankr. Judges, http://www.ncbj.org/our_purpose.html (stating that the National Conference of Bankruptcy Judges is a voluntary association of bankruptcy judges whose goal is to “secure a greater degree of quality and uniformity in the administration of the Bankruptcy system and to improve the practice of law in the Bankruptcy Courts of the United States.”).

uniform trustee system. The purpose of these structural reforms was to create a functionally independent court vested with complete and original jurisdiction over all bankruptcy cases and civil cases related to bankruptcy.

Adopting the recommendations of the Commission, the House judiciary committee drafted bill H.R. 8200 which gave bankruptcy judges the same status and jurisdictional power as district court judges. The President, with the advice and consent of the Senate, would appoint bankruptcy judges who would serve during good behavior, being subject to removal only for cause, and the bankruptcy court would be responsible for the judicial resolution of every case under the bankruptcy code, with no jurisdiction reserved for the district court and most of the bankruptcy court’s administrative duties eliminated. Most of the administrative functions in the bankruptcy process—holding the meeting of creditors, collecting assets of the debtor, distributing assets to the creditors, and generally managing the bankruptcy case—were assigned to the Department of Justice’s separate office of the United States Trustee.

Opposing the grant of Article III status and power to the bankruptcy court, the Judicial Conference of the United States, led by chairman and Supreme Court Chief Justice Warren Burger, engaged in activities to police the boundary between Article III judges and bankruptcy judges. Judicial Conference members argued that giving bankruptcy judges Article III powers and privileges would dilute the stature and status of the federal judiciary. Justice Burger believed that bankruptcy law was an in-

65. Id.
66. Id.
67. H. R. 8200 was a compromise between the bill proposed in the House by the Congressional Commission (H.R. 31) and the bill proposed by the National Conference of Bankruptcy Judges (H.R. 32). This compromise was reached after thirty-five days of hearings in the House and a meeting in Atlanta, GA, between the National Bankruptcy Conference members and the members of the National Conference of Bankruptcy Judges. See Kenneth Klee, The Legislative History of the New Bankruptcy Law, 28 DePaul L. Rev. 941, 944 (1979); McNutt, supra note 48, at 69.
70. See Troy A. McKenzie, Judicial Independence, Autonomy, and the Bankruptcy Courts, 62 Stan. L. Rev. 747, 753 (2010) (“There is also a long history of concern by the Supreme Court and scholars who study the federal courts that the proliferation of non-Article III adjudicators threatens to erode the independence of the federal courts. For that reason, both the Supreme Court and scholars have attempted to police the boundary between the exercise of the ‘judicial Power of the United States’ reserved for the Article III courts and the appropriate resolution of disputes by non-Article III tribunals.”) (footnotes omitted). See also Mund, supra note 5, at 80–182.
71. In his interview with Judge Newsome, Professor King noted that there was long-standing antagonism between federal district court judges and bankruptcy court
fier form of legal practice, and that bankruptcy judges, because they were drawn from the ranks of bankruptcy attorneys, were low-caliber legal professionals. Burger wanted to maintain a clear demarcation between “his” federal judiciary and the implicitly inferior bankruptcy judges. He believed that “bankruptcy was a type of practice that no one liked, and it should be hidden in a corner.” In 1977, the battle was so embittered that in the Southern District of New York the district court judges refused to allow bankruptcy judicial officers to use the title “judge,” wear robes, or ride the judges’ elevator in the courthouse.

To protect their superior position and power, Burger and other Article III judges directly challenged the legislative proposals put forward by the House. Rejecting any attempt to put bankruptcy judges on equal footing with district court judges, Burger sought to retain the existing statutory structure of the bankruptcy court with its limited jurisdiction and the relegation of bankruptcy judges to the role of aides to district court judges. He argued that excessive costs prevented bankruptcy court independence, and that district court judges should continue to select and

See King interview, supra note 58. See also Lawrence P. King, Bankruptcy Code - Specialized Court Supported, 52 Am. Bankr. L.J. 193, 195 (1978).
72. See Peter Rodino & Alan A. Parker, Claim and Opinion: The Simplest Solution, 7 Bankr. Dev. J. 329, 334 (1990) (stating that H.R. 8200 originally included the creation of an Article III bankruptcy court, but the Senate repeatedly hesitated to enact such a court in the face of considerable opposition by Chief Justice Burger and the Judicial Conference). See also Interview by Susan Imswiler with George Paine, Bankruptcy Judge (Oct. 11, 2004), Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PennLaw, http://www.law.upenn.edu/bll/archives/bankruptcy/digicoll/oralhistories.html (noting that “[t]he ring leader of that was Chief Justice [Warren] Burger who couldn’t stand the fact that Congress was tampering with his judiciary. And now I understand better why he felt like he did, but it was a new reality that he had to deal with, and he took every opportunity to denigrate us and reduce our power and prestige. But fortunately he was called home.”).
73. See Mund, supra note 5, at 182 (citing an interview with Ruggero Aldisert).
74. The title “judicial officer” is used in this Article to include two possible titles: referee or judge. The pre-1973 Bankruptcy Rules identified the judicial officer as “referee,” and the 1973 Rules identified the officer as “judge.” See Klee, supra note 67, at 943, n.24.
75. See King interview, supra note 58 (stating that King was so upset about these prohibitions in the Federal Court for the Southern District of New York that he and a friend considered suing the Southern District of New York on the basis that its local order prohibiting bankruptcy judges from certain actions violated the 1973 Bankruptcy Rules).
76. See Houston interview, supra note 2 (stating that Houston knew Burger had “gone very far in opposing the 1978 act, by actually asking President Carter to veto the bill [giving bankruptcy judges Article III powers] after it had been passed by the Congress.”).
appoint bankruptcy judges. Contrary to the opinions of constitutional scholars, the Conference and Burger argued that Article III status was not required for the bankruptcy court even if Congress expanded its jurisdiction.

Accepting the arguments of Article III judges, Senate Bill 2266 maintained the bankruptcy court as a division of the district court. S. 2266 vested expanded jurisdictional and decision-making power in the district court, power which the district court would automatically delegate to the bankruptcy court. The Senate determined that expansive jurisdiction could be granted to a non-Article III court without violating the Constitution and that Article III tenured judges were unnecessary. Under S. 2266, a federal circuit court panel would appoint each bankruptcy judge to a 12-year term at a salary much lower than that of a district court judge.

During compromise negotiations between the House and Senate, Article III status for the bankruptcy judge was considered “not politically practical” even though it was a constitutionally sound approach. The Senate and House approved H.R. 8200, revised to include the status and structural provisions of S. 2266. The bankruptcy judge would not have Article III lifetime tenure. Rather, the presidential appointee would preside as a bankruptcy judge for 14 years and be subject to removal for good cause. The bankruptcy court would remain a division of the feder-

78. See Aldisert, supra note 49, at 229.
80. See S. Rep. No. 95–989, at 18, reprinted in 1978 U.S.C.C.A.N. 5787, 5804 (vesting jurisdiction in “bankruptcy cases and in civil actions and proceedings arising under and related to bankruptcy cases” in the district courts, which in turn delegate jurisdiction over trial proceedings to bankruptcy judges).
81. McNutt, supra note 48, at 72.
83. See Mund, supra note 5, at 185.
87. Id.
al circuit courts, but it would operate as a separate court with its own facilities and staff. The most important change was that the enrolled H.R. 8200, by means of automatic delegation from the district court, vested bankruptcy courts with original and exclusive jurisdiction over bankruptcy cases and shared jurisdiction over civil proceedings arising under or related to the bankruptcy case.\footnote{14}

After news that the enrolled bill H.R. 8200 had reached the White House, Burger called Senator DeConcini and threatened to request a presidential veto. Exceeding his authority as chairman of the Judicial Conference of the United States\footnote{15} and violating the doctrine of separation of powers, Burger wrote a letter on behalf of the Judicial Conference to President Carter urging a veto.\footnote{16} (The letter from Justice Burger to President Carter marked the first occasion on which the judicial branch requested a presidential veto.)\footnote{17} Attempting to maintain the boundary between Article III judges and the bankruptcy “aides,” Burger wrote:

To put it bluntly, [the creation of bankruptcy judgeships] stems from the desire of those officers who were initially appointed to office as bankruptcy referees and who serve as adjunct aides to District Judges to achieve a higher status, with virtually all but the status of “life tenure” judges—almost like promoting all the Army’s Sergeants to Captain rank!\footnote{18}

Under the enrolled bill, bankruptcy judges were given the same decision-making powers as a fully qualified Article III district court judge without “earning such a status increase.”\footnote{19} Masking his desire to maintain superior status with a fiscal argument, Burger concluded: “I have written you in complete candor, for without candor we all ‘fly blind’ . . . . I feel an obligation to inform you fully on the needs and problems of the judicial branch, apart from the obligation to . . . control inflation.”\footnote{20}

In response, President Carter’s counselors Robert Lipshutz and Stuart Eizenstat met with bankruptcy scholars, lawyers, judges, and other

\footnote{88}{Id.}
\footnote{90}{28 U.S.C. § 331 (1976) (authorizing the Chief Justice to transmit to Congress recommendations of the conference for legislation). However, there is no express authorization for the Judicial Conference to transmit recommendations for legislation to the President. See Klee, supra note 67, at 956 n.136.}
\footnote{91}{Burger, supra note 8.}
\footnote{92}{See Klee, supra note 67, at 957; Mund, supra note 5, at 183.}
\footnote{93}{Burger, supra note 8.}
\footnote{94}{Id.}
\footnote{95}{Id.}
supporters of H.R. 8200 to draft a response to the letter. Lipshutz wrote: “It is rare that I express myself as being indignant about something, but I must. . . . It is appalling to note that the Chief Justice, the highest officer in the judicial branch . . . has grossly distorted the facts to you, in an attempt to persuade you to make a political judgment in this matter [of expanded jurisdiction for the bankruptcy court in H.R. 8200] [as to] which he has some very strong feelings.” Just before the running of time for a pocket veto, President Carter signed the bill into law.

B. Northern Pipeline Construction v. Marathon Pipe Line Co.

The granting of expansive jurisdiction, essentially all the powers of an Article III judge, to a non-tenured bankruptcy bench might have ended the jurisdictional battle in 1978, but the war over Article III status and power for the bankruptcy court and judges continued. In 1982, the Supreme Court found the jurisdictional structure of the new bankruptcy act unconstitutional in Northern Pipeline Construction v. Marathon Pipe Line Co. The Court stated that “the Act vests all ‘essential attributes’ of the judicial power of the United States in the ‘adjunct’ bankruptcy court,” a grant of broad power to a non-Article III court that the high court found impermissible. This is the same sentiment Chief Justice Burger communicated to President Carter when he wrote that the new law would allow “adjunct aides to District Judges to achieve a higher status, with virtually all but the status of ‘life tenure’ judges—almost like promoting all the Army’s Sergeants to Captain rank.”

96. See Mund, supra note 5, at 186–87 (noting that other supporters included the American Bar Association, labor organizations, four banker associations, and a consumer affairs group).

97. Memorandum to the President (October 31, 1978) (on file at Jimmy Carter Presidential Library, Staff Offices, Office of the Staff Secretary—Presidential Handwriting File, “10/31/78 [2],” Box 108).

98. See Mund, supra note 5, at 193.

99. See N. Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (finding 28 U.S.C. § 1471, as enacted by 241(a) of the Bankruptcy Act of 1978, unconstitutional). Section 1471 (a) vested the district court with original and exclusive jurisdiction over all cases under title 11, (b) vested the district court with original but not exclusive jurisdiction over proceedings arising under title 11 or related to a case under title 11, and (c) provided that jurisdiction under (a) and (b) “shall” be exercised by the bankruptcy court. The court explained that Section 1471 impermissibly removed most, if not all, of the essential attributes of the judicial power from the Article III district court and vested those attributes in a non-Article III adjunct.

100. Id. at 84–85.

101. Burger, supra note 8. Chief Justice Burger dissented in Marathon because he deferred such decisions to Congressional judgment, and he believed that Congress did have the power to create such an Article I court. Marathon, 458 U.S. at 118. Burger still believed that to add “several hundred specialists may substantially change, whether for
precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication." In other words, the bankruptcy court must be an Article III court for it to exercise all the powers of a district court.

The Marathon decision left Congress with three possible options: 1) grant bankruptcy jurisdiction to the district court; 2) tenure bankruptcy judges to confer on them full federal judicial power; or 3) divide bankruptcy jurisdiction between the district court and the bankruptcy court. Inevitably, the struggle between Article III judges and bankruptcy judges was reignited. Again, Article III judges argued against Article III status for bankruptcy judges, and again the bankruptcy professionals argued that tenured judges were constitutionally required. In response to Marathon, Congress continued sidestepping the issue by enacting amendments to the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) that bifurcated bankruptcy jurisdiction. The bankruptcy court would hear and determine matters the amendments label as "core," and the bankruptcy judge would continue to hear, but not decide, "non-core" matters.

With the two-tiered system, the BAFJA eliminated the 1978 reforms that consolidated bankruptcy jurisdiction in one court and regressed to the pre-1978 Code days of divided jurisdiction between summary matters decided by the bankruptcy court and plenary matters decided by the district court. Litigants in bankruptcy court were again

good or bad, the character of the federal bench." Id. All this said, Burger’s key concern was the character of the bench with ability to exercise the full judicial power of the United States.

102. Marathon, 458 U.S. at 86 n.39.


105. 28 U.S.C. § 157(b)(1) (2006) (stating, “[b]ankruptcy 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”); id. § 157(c)(1) (stating, “[a] bankruptcy judge may hear a proceeding that is not a core proceeding but 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”).
forced to move between the bankruptcy court and district court to achieve a final order on a bankruptcy-related matter. Congressional representatives supporting Article III status for the bankruptcy court accurately predicted that the BAFJA’s divided jurisdiction would resurrect pre-1978 problems and create new constitutional problems.

Throughout the 1984 debates over granting the bankruptcy court Article III status and powers, supporters of a tenured bankruptcy bench were careful to assure Article III judges and key legislative representatives that bankruptcy judges would not be elevated to the same level as district court judges. Representative Don Edwards explained that bankruptcy judges were going to be doing “just bankruptcy work,” that they would neither “be paid the same as district court judges,” nor “have the same jurisdiction,” and that they “could not be assigned to other federal district courts as district court judges can be.” Furthermore, he explained that bankruptcy judges would not have the same “personnel and facilities” as the district court judges. Edwards assured federal district and circuit court judges that “they would still have the status that they are entitled to and that they are guarding so carefully.”

Repeatedly ignoring the opinion of experts and factual data on the enormous workload of bankruptcy judges and the broad cross-section of federal and state matters that daily appear on the docket of the bankruptcy court, Congress appeased Article III judges by maintaining a clear demarcation between Article III judges and bankruptcy judges. Ultimately, under the 1984 Act, the bankruptcy court’s form does not reflect its actual judicial function. Rather, the jurisdiction of the bankruptcy court reflects its position and rank in the legal field’s professional hierarchy.

106. 130 Cong. Rec. H7490 (daily ed. June 29, 1984)(statement of Rep. Edwards). Representative Edwards stated: “The conference report [Act of July 10, 1984, Pub. L 98-353] before us today turns back the clock, and it does so more than just 6 years, by diminishing the status of bankruptcy judges and their power from where they were before the 1978 legislation. Under this report, bankruptcy judges are stripped of their powers. In addition, the bill limits the bankruptcy court’s jurisdiction substantially because of the unwillingness to grant the bankruptcy judges adequate status in the federal system to enable them to exercise complete jurisdiction. These limitations on jurisdiction result in construction of a jurisdiction maze that gives up to six different options for where any particular dispute is to be tried.”

108. Id.
109. Id.
110. 130 Cong. Rec. H7489 (daily ed. June 29, 1984)(statement of Rep. Edwards). Representative Edwards remarked that the 1984 Act was “regrettable, at best. It ignores over a decade of study on this issue and creates a maze for debtors, creditors, and their lawyers who participate in the bankruptcy process. . . . The years of study that lead to the passage of the 1978 bankruptcy law made clear that the two major failings of the prior bankruptcy referee system were the lack of simplicity in determining jurisdiction of the bankruptcy court and the low status and lack of power of the bankruptcy judges which resulted in disrespect for their position and inability to attract the best caliber judges.”
C. The National Bankruptcy Review Commission of 1993

In 1993, the National Bankruptcy Review Commission empanelled by Congress and President Clinton investigated the form and function of the bankruptcy court. The Commission considered the increasing number of bankruptcy filings, the large number of existing cases, and the total amount of assets and liabilities at issue in bankruptcy cases. The Commission’s Report again recommended to Congress that the bankruptcy court be established under Article III of the Constitution, explaining that “the procedural morass of the bankruptcy judicial system is extraordinary, costly and inefficient.”  

Notwithstanding the expansive research and documentation supporting the proposal to establish the bankruptcy court under Article III of the Constitution, Congress did little to address the Commission’s jurisdictional concerns. Instead, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). BAPCPA reflected a distrust of bankruptcy courts by including “provisions intended to ‘reduce the discretion’ of bankruptcy judges”—a limit that was “the self-proclaimed backbone of BAPCPA.” Rather than increasing the powers of the bankruptcy judge, the new amendments decreased them.

When confronted with forty years of Congressional research and reports indicating that the constitutional and most practical solution is fully vesting the bankruptcy court with independent Article III powers, one must question why Article III judges continue to lobby Congress to deny such powers to the bankruptcy court. The desire to resist Article III status for bankruptcy is not founded on evidence and reason. The decision to deny Article III powers and status to bankruptcy judges is only comprehensible when analyzed within the contexts of the professional legal field and American culture generally.

III. The Subordination of Bankruptcy Law and Legal Practice

Leading bankruptcy practitioners and judges attribute the diminished power and status of the bankruptcy court among prominent members of the mainstream legal field to several features. They explain that the bankruptcy law and court was and is placed in a subordinate position in the legal field due to former features of the bankruptcy system.

that were antithetical to the legal field’s legitimacy, including the stigma\textsuperscript{114} associated with the subject area of bankruptcy and the debtor client, the ethnicity of bankruptcy legal professionals, and the historic corruption and “insider” practices found in the bankruptcy system. This section will consider these features and the role they play in creating the perception that the bankruptcy court is a forum for the expression of “an inferior form of justice.”\textsuperscript{115}

A. The Dominant Discourse\textsuperscript{116} of Debt and Financial Failure

Bourdieu posits that “[legal professionals] are . . . divided into different groups . . . depending upon their position in the internal hierarchy of the [professional] body [of the field] which also corresponds rather closely to the position of their clients in the social hierarchy.”\textsuperscript{117} With this approach, the debtor, much like the criminal and the welfare recipient, occupies a reviled and immoral social status, and therefore bankruptcy law, practice, and professionals were often reviled and denigrated in the legal field.\textsuperscript{118} To fully understand the impact of social and cultural perceptions on bankruptcy law, it is important to consider the influences of religion and morality on collective perceptions of debt and the debtor, and the impact these perceptions have on bankruptcy practice.

In American society and culture, debt, financial failure, and bankruptcy is looked down on by most members of society.\textsuperscript{119} Collective beliefs associate debt, financial failure, and bankruptcy with sin.\textsuperscript{120} In a capitalist society, this view of debt and failure is constructed historically by the Puritan ethic of “economic virtue” described in Max Weber’s discus-

\textsuperscript{114.} See discussion of “stigma”, supra note 22; see also Scott C. Sandage, Born Losers: A History of Failure in America 46 (2005) (noting Ralph Waldo Emerson’s idea that “[t]he merchant evidently believes the State street proverb that nobody fails who ought not to fail. There is always a reason, in the man, for his good or bad fortune, and so in making money.”).

\textsuperscript{115.} Skeel, supra note 47, at 136.

\textsuperscript{116.} See discussion supra note 23 (discussing meaning of discourse as understood by Foucault).

\textsuperscript{117.} Bourdieu, supra note 25, at 821–22.


\textsuperscript{119.} Sandage, supra note 114, at 1–21.

\textsuperscript{120.} See discussion supra note 23 (discussing meaning of discourse as understood by Foucault).
sions of the spirit of capitalism. Calvinist values of self-sufficiency, frugality, and hard work regulate individual behavior. Individuals who work hard and accumulate wealth are lauded. Wealth is associated with salvation, whereas financial failure is historically associated with lack of self-restraint and self-indulgence—traits associated with sin. Owing a debt has been connected to the concept of sin in Western Judeo-Christian societies. In fact, “in Aramaic, the Semitic language that was spoken by Jesus, the word for ‘debt’ and the word for ‘sin’ are the same.” Although debt is required in the capitalist structure, the overburdened debtor is considered a moral and economic failure.

This view, which is reflected in early American cultural discourse, focused on debt as an individual moral obligation. Insolvency, an article published in 1842 in the Hartford Daily Courant, poignantly expresses this concept of debt as a moral duty, rather than a legal duty, by asking, “Why is a man obligated to pay his debts? It is hoped that but few persons will reply, ‘Because the Law compels him.’ Why, then? Because the moral law requires it.” The discourse posits a duty beyond “the law” requiring the repayment of a financial obligation: morality requires repayment.

In the context of the discourse of religious and moral obligation to repay debt, bankruptcy law loses legitimacy. Insolvency illustrates the collision between the forces of moral and economic order: “does the legal discharge exempt [a man] from the obligation to pay [the debt]? No, for this reason—that the legal discharge was not a moral discharge. The duty to pay was not founded primarily on the law.” By positing that a bankruptcy discharge does not relinquish any moral obligation to repay a debt, the author rejected the Federal Bankruptcy Act of 1841 allowing the “voluntary” debtor to legally obtain a discharge of his debts. Although clearly passed to address the economic panic of 1838, marketplace logic

122. Id. at 53.
123. Sandage, supra note 114, at 50 (The reason for a man’s failure can be found in his extravagance).
125. Id. at 45 (discussing the role and place of debt in American culture). Atwood explains that the designation of debt as sin originates from the notions of balance in social relationships. Debt is about social relationship; it is about a kind of balance in relationships between social actors. When money is lent it creates an imbalance that requires payback or retribution to right the balance. Debt is the situation where one owes something to someone or some other entity and the relationship is out of balance. She explains that, when the borrower becomes unable to pay the credit, the borrower is often viewed as having sinned against the creditor, and more importantly against moral society.
127. Id. (emphasis added).
and the Constitutional right to bankruptcy relief are ignored in favor of moral and religious mandates.

During the eighteenth and nineteenth centuries, the legal discharge of debts was considered wicked immoral theft. Opponents of the 1898 Bankruptcy Act encouraged men to avoid measuring their moral obligations by their legal obligations. \(^{128}\) Thus, even if the debtor was able to legally obtain a discharge of his debts, his moral obligation was not relinquished. \(^{129}\) Due to this moral ideation of debt, debtors experienced a social death when they could not meet their financial obligations. Members of society shunned, insulted, and ridiculed debtors by calling them “deadbeats.” \(^{130}, 131\) Society believed the debtor’s moral compass was skewed and that the debtor lacked the ability to differentiate between right and wrong. \(^{132}\) Some states even endorsed debtors’ prisons and indentured servitude as a remedy for lenders to recover funds they loaned. \(^{133}\)

American society has always stigmatized debt and debtors even though debt is necessary for the social and economic development of the individual and society. Despite the hatred toward and isolation of the debtor, “debt was an inescapable fact of life in early America,” and it “cut across regional, class, and occupational divides.” \(^{134}\) Before independence in 1776, the former colonies owed millions of dollars to the British, and, at the end of the Revolutionary War, the new republic owed $77 million to France and Holland. Every institution of the early republic—businesses, schools, towns, and local governments—was indebted. \(^{135}\)

Throughout history, the primary discourse of debt, based on moral and religious principles, has conflicted with rational and practical discourses based on marketplace risk-taking principles. \(^{136}\) The appeal to morality creates a religious imperative to avoid debt, but debt is necessary


\(^{129}\) *Insolvency*, supra note 126.

\(^{130}\) *Doctors and Dead-Beats*, N.Y. Times, July 1, 1888, at 6.


\(^{132}\) Robert Bain, *Borrowers*, N.Y. Times, June 30, 1899, at 6. Bain published a poem entitled “Borrowers”: ‘Man wants but little here below/Nor wants that little long./Yet, some there be, it seems to me,/That know not right from wrong—/And hence ‘tis mine to quite despise/The meanness of the man/Who, when he borrows ‘anything,’/Will keep it if he can.’


\(^{134}\) Daniels, supra note 133, at 256.

\(^{135}\) *Under Obligations*, Hartford Daily Courant, Nov. 24, 1874, at 2 (stating “[e]verything is borrowing and almost everybody is or has been ready to lend. School districts, towns, counties, cities, states and the general government all have their debts, while those incorporations for business purpose are indeed few which have no bonds and do not depend more or less upon borrowed money.”).

for economic development. Throughout this discursive struggle there has been a moral-religious overshadowing that led Mann to conclude: “in one sense, the solution to the struggle over the [legitimate] place of failure in the [society and economy of the] early republic was to deny it had any place at all.” 137 This denial of a legitimate place for debt, fiscal failure, and bankruptcy was firmly rooted in the early republic and it survived for decades. 138

Into the 21st Century, the dominant discourses concerning debtors and the right to bankruptcy are in tension over individual responsibility, sin and merchant capitalism. Financial failure and bankruptcy law are denied a legitimate place in the normal (or healthy) economic and social world. Yet, the development of capitalism over the last hundred years is thoroughly grounded on intricate and vast debt relations. As a result, contemporary debates are marred by the same historical tension concerning the use of bankruptcy law. Margaret Atwood explicates the cultural dissonance:

If you borrow, you’ll be spending money that isn’t yours and you haven’t earned, rather than managing within your income. Good advice, Polonius! Strange that so few people follow it. Or possibly strange that anyone at all still follows it, since we are constantly told that borrowing is actually laudable because it turns the wheels of “the system,” and that spending lots of consumer money keeps some large, abstract, blimpish thing called “the economy” afloat. 139

The moral discourses of debt and financial failure include notions that borrowing money (i.e., owing a debt) is wrong. 140 On the one hand, the individual is told not to borrow and to live within his means. On the other hand, the individual is encouraged to consume “products” like a car, an education, and a home, using borrowed money. America’s economic foundations were established by debt. 141 Institutional and individual debt has traditionally been necessary for the development of the capitalist marketplace, 142 and the marketplace would fail if its actors were unable to borrow money. It is this tension between debt as sin and debt as necessity that creates and perpetuates the struggle for legitimization of the bankruptcy law and legal practice.

137. Id. at 262.
138. Id. at 256.
139. Atwood, supra note 124, at 79.
140. Id.
142. Id. at 94–133.
B. Perceptions of Bankruptcy Law and Legal Practice

The Puritan ethic of “economic virtue” generates the dominant discourse of debt and financial failure as sin. This notion creates inaccurate beliefs, perceptions, and behaviors directed toward bankruptcy law and practice in the mainstream legal world.143 Because of the stigma associated with financial failure and debt, questions arise as to when the relief given by bankruptcy law should be invoked. Social actors inside and outside the legal field view the practice of bankruptcy with contempt and believe that it is an illegitimate practice area. Several early bankruptcy practitioners explain that bankruptcy practice has been considered “shabby” when compared with most other practice areas, including constitutional, corporate, and property law,144 and many legal field actors have discredited its importance in the legal field. George Treister,145 a prominent bankruptcy practitioner and member of the National Bankruptcy Conference, explains:

I knew about the substantive law of bankruptcy, and I thought that area of the law was interesting. So, I thought I would check about the bankruptcy practice. I went to see most of the federal district court judges in Los Angeles, having tried cases before them for a couple of years. I talked to most of them about the possibility of going into the bankruptcy practice and every one of them told me, “Don’t do it. It is a shabby practice.”146

The federal district court judges with whom Treister interacted all had a low opinion of bankruptcy law and practitioners. Treister explains that these judges felt disdain for debt, financial failure, and bankruptcy, and

145. Id.
146. Id.
that this view permeated mainstream legal professionals, infecting them with the notion that bankruptcy practice is not a legitimate area of law.\footnote{Id.}

For decades, mainstream legal professionals and their clients rejected bankruptcy law approaches as possible legal solutions for financial problems. Bankruptcy Judge Conrad Duberstein, who was a bankruptcy lawyer in New York City in the 1950’s and 1960’s, discusses the perception of bankruptcy practice by practitioners in the larger legal field:

[Before the 1980’s] the big firms were not in bankruptcy. The larger Manhattan banks along with their big legal firms refused to be involved with bankruptcy. Bankruptcy was considered a demeaning practice area. It was an area of law that the large firms looked down on. The white shoe firms, I think they were called.\footnote{Interview by Bankruptcy Judge Randall J. Newsome with Conrad Duberstein, Bankruptcy Judge (Bankr. E.D.N.Y.) in Brooklyn, NY (May 4, 1994), Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PennLaw, http://www.law.upenn.edu/bll/archives/bankruptcy/digicoll/oralhistories.html.}

Across the country, it was the same. In the 1960s, the big firms in Los Angeles did not practice bankruptcy law.\footnote{Interview by Bankruptcy Judge Randall J. Newsome with Ronald Trost, Partner, Sidley & Austin, in NYC, NY (May 2, 1994), Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PennLaw, http://www.law.upenn.edu/bll/archives/bankruptcy/digicoll/oralhistories.html.} Financial failure, debt, and bankruptcy were culturally and legally denigrated.\footnote{Sandage, supra note 114, at 4–6.} Many economically powerful clients (e.g., Manhattan banks and corporations) and legal professionals rejected bankruptcy as an illegitimate legal option. Before the 1980’s, the world of “big law” avoided bankruptcy.\footnote{See Treister interview, supra note 144.}
Harvey R. Miller, a leading bankruptcy attorney at Weil, Gotshal & Manges in New York, recounts the following story illustrating the perception of debt and bankruptcy both inside and outside the legal field:

Bankruptcy was not something that companies typically considered. A story I tell about this time [in bankruptcy history] is that an investment banker calls me up and says he has a very wealthy CEO and business owner as a client whom he thinks is in real serious trouble. The client, he says, needs your advice. I say, “Ok when are we going to meet.” The investment banker says, “He will not meet with you.” I reply, “What do you mean he will not meet with me?” The investment banker replies, “He absolutely will not get near you. He is scared to death of you.” I say “Well ok. I cannot help him then.” Two weeks later the phone rings. The investment banker calls and says, “He does not want to do this, but he has agreed to meet with you. The company is in Houston, Texas.” The investment banker explains, “But you cannot come to Houston. He is afraid that someone will see him talking with you. So the meeting is in Dallas. You two are going to meet in a private mansion on Turtle Creek.” The banker gives me the date and tells me that all the arrangements have been made. I was about to hang up, and the investment banker says, “by the way we have given you a different name. It is Mr. Jones.” I say, “Ok.” I take the last plane down on the designated day. I go to the hotel, and I forget my name. I get to the front desk, and I take a guess. I was right. The next morning, I meet with the guy. He was in the oil producing business. He was petrified of bankruptcy and me.

Harvey Miller’s account illustrates several important points about the beliefs and perceptions of debt in the social world and the place of bankruptcy in the legal field. Legal clients viewed bankruptcy protections with suspicion and did not believe they were legitimate solutions, either moral-

152. Harvey R. Miller’s recent chapter 11 cases include Lehman Brothers Holdings, Inc., et al.—Attorneys for Debtor; General Motors Corporation—Attorneys for Debtor; Pacific Gas & Electric, Inc.—Attorneys for Parent Holding Company; Texaco Inc.—Attorneys for Debtor. Further information concerning the legal work of Mr. Miller can be located on his firm biography page. Harvey R. Miller Chapter 11 Bankruptcy Attorney, Weil, Gotshal & Manges, http://www.weil.com/harveymiller/ (last visited Feb. 20, 2011).

153. Miller interview, supra note 1. A federal bankruptcy judge told the author of this paper a similar story. In an interview, this judge explained that early in the 1980s upon entering the CEO’s office of a large chemical company and stating his area of legal practice, he was told to leave the CEO’s office and the corporate offices immediately. Interview with a bankruptcy judge in the District of Maryland, United States Bankruptcy Court in Baltimore, Md. (May 19, 2006) (on file with author).
ly or legally, for resolving indebtedness. The moral discourse casts debt, the debtor, and bankruptcy as aberrations, and as a result, only marginalized groups of legal professionals practiced in the area.

C. Subordinate Legal Professionals: The Stigma of a “Jewish Practice”

Bankruptcy professionals traditionally came from marginalized groups of lawyers (i.e., non-Christian, Jewish, non-White, and female) who were excluded from large firms and mainstream legal practice. As many bankruptcy professionals and lawyers agree, the bankruptcy judicial officer was often drawn from this less prestigious professional group as well. For decades, the bankruptcy bar was primarily comprised of and

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154. OED, supra note 22, at 1848–49 (defining “moral, morality” as “proper behavior, a sense of behavioral conduct that differentiates intentions, decision, and actions between those that are good (or right) and bad (or wrong). A system of code for morality can originate from philosophy, religion and/or culture.”)

155. Id. at 1599 (defining “legal, legally” as “the law as the source for determining right and wrong conduct and attitudes”).

156. Michael Schwarz, From the Perspective of the Early 1960s, in Worthy of Remembrance: Personalities, Cases and Tales From the First 25 Years of the United States Bankruptcy Court for the District of Maryland 15–16 (Chief Judge James F. Schneider ed., 2004) (“Bankruptcy practice, especially, came to be the domain of many Jewish lawyers of the day [1960s]. Few, however, would call themselves bankruptcy practitioners. Bankruptcy practice was something one did as an extension of a creditor collections practice, the politically correct term for which was then a “commercial” practice. . . . The bench and the bar did not hold bankruptcy practice or bankruptcy cases in particularly high esteem. To a young Jewish lawyer with an accounting background, looking for clients and trying to build a new solo practice, debtor bankruptcy representation . . . seemed to hold promise.”). See also Paine interview, supra note 72. In this interview George Paine explained that some segments of the population were excluded from legal practice in larger Christian firms.

George Paine: Strangely enough, bankruptcy law in the ’70s and before, was kind of low-end stuff—it was bottom-feeder stuff—meaning, in a pond, the fish that are bottom feeders. I’ll try to reduce my “Southern-ness.”

Susan Imswiler: I understood bottom feeders.

GP: Okay. So at the time bankruptcy started becoming big business, people had started hiring women in their law firms, and they gave them the bankruptcy work, because it was bottom-feeder stuff—this is my theory. So we had a lot of women who got their start in bankruptcy law, where it was much harder to break into trial work and corporate work. And they, like me, lucked into a job, they also lucked into something that became very lucrative for their firms, and were able to gain some power they would have never had otherwise—and far more power than they would have had if they had stayed in litigation or corporate stuff. It’s a much more level playing field. We also tended to get Black judges disproportionately with other benches.
dominated by Jewish attorneys. This close pairing of bankruptcy law and Jewish attorneys is a result of a double stigmatization. As mentioned above, the large firms in the legal field rejected bankruptcy law and practice as undesirable, and these firms simply excluded the practice area. Until the 1980's, Jewish attorneys were also excluded from this mainstream legal practice. Upon graduating, and even well into their careers, many Jewish attorneys could not obtain work in large firms. Harvey Miller's career path reflects this stigmatization of the Jewish attorney.

In 1959, Harvey Miller graduated from Columbia University School of Law. He was unable to find legal work through the traditional channels provided by his law school. After several rejections by federal agencies and large firms, he put an ad in the New York Law Journal stating, “law graduate interested in employment.” Harvey Miller received interest from small firms. After a few interviews, he got his first job with Ballon, Stoll, and Itzler, which practiced insolvency work for the New York garment industry. He explained that the job was with a small Jewish firm that served a predominantly Jewish industry:

Jews were excluded from major law firms. Jews were forced into serving Jewish businesses. The garment center was a Jewish

157. Skeel, supra note 47, at 75–76 (“[A]n important demographic characteristic of the early bankruptcy bar. In the Northeast especially, many bankruptcy lawyers were Jewish. Shut out of the most high-profile firms in New York, Philadelphia, and Boston, Jewish lawyers were forced to carve out niches outside the elite firm practice, in areas such as bankruptcy practice.”).

158. Jerome Hornblass, The Jewish Lawyer, 14 Cardozo L. Rev. 1639, 1641 (1993) (“In the United States, some of us remember the day, not too long ago, when Wall Street firms practicing corporate, patent, and maritime law were the exclusive domains of White Christian males. . . . To the Wall Street lawyers, the Jewish lawyer possessed every negative stereotyped characteristic that elitism and Jew-hatred had produced over the centuries. Before World War I, “[t]he entry of Jews into the legal profession was prolonged and painful, strewn with obstacles of exclusion and discrimination set by law schools and law firms.’ . . . Felix Frankfurter, at the head of his class and with glowing recommendations from the Dean of Harvard Law School, ‘finally was hired by a New York firm that had never before employed a Jew. . . . It was only in exceptional cases that men of Jewish faith were appointed to committees of the New York City Bar Association.’ New York State Appellate Judge Joseph Proskauer remembered that ‘the doors of most New York law offices . . . were closed, with rare exceptions, to a young Jewish lawyer.’”) (footnotes omitted).

159. See Wald, supra note 143, at 1811 (“Nativism, combined with anti-Semitism and cultural snobbery, appears to provide a straightforward explanation for the inconsistency between the a-religious theory of the large firm and the reality of the large firms divided along religious lines. . . . By the 1960’s, the New York City bar was roughly sixty percent Jewish, and the pool of elite law school graduates expanded dramatically to include the sons of immigrants with lower socioeconomic pedigrees, who were often Jewish, and these ‘aspirants’ began to rank at the top of their classes. Yet the large WASP law firms remained very much WASP firms, failing to reflect the growing heterogeneity of the New York City bar.”).

160. See Miller interview, supra note 1.

161. Id.
business. That continued through the 1950s and 1960s. There were some Jewish firms. But remember the line of demarcation was very sharp. There were Jewish firms that did litigation downtown. But to get into a [Shearman &] Sterling or a [Sullivan &] Cromwell, it was impossible for a Jew.\textsuperscript{162}

This exclusion of Jewish attorneys was common practice across the country at all levels of experience regardless of work history. On the west coast, Ronald Trost, a leading bankruptcy attorney and member of the National Bankruptcy Conference, had a similar experience attempting to obtain work with a large firm. During an interview, he describes his exclusion from the big law firms in Los Angeles:

When I went back to San Francisco my qualifications were impeccable. Anybody should have taken me in any law firm. I was trained in the Department of Justice, rave reviews, everything you could want. No large firm would take me. I went to Brobeck, Phleger and Harrison. I wanted to see Moses Laskey. He was a famous anti-trust lawyer. Moses Laskey was still an associate there when he was 55 years old. I’ll never forget it. I met this guy Richard Haas who was a partner at the firm, and he said, “Ron, I’ve got to tell you the way it is here.” I said, “You’ve got to be kidding.” I could not get a serious interview in any major law firm in San Francisco, and it was the same in New York.\textsuperscript{163}

Harvey Miller explained that when Jewish attorneys were unable to find work in the “white shoe” Christian law firms, they either opened their own practices or worked for small Jewish firms.\textsuperscript{164} These small boutique firms were forced to practice in areas that Christian firms rejected (i.e., insolvency, bankruptcy, or personal injury). Professor Lawrence King explains the legal practice environment of the time:

Bankruptcy was viewed as a seedy practice. It was a step above collection work, divorce work, and personal injury work. [The belief] was that Jewish people could not do anything else. The reason for the low opinions and lack of respect for the bankruptcy bar was a result of the fact that the people in the bankruptcy world came from the small Jewish firms.\textsuperscript{165}

\begin{footnotes}
\item[162] \textit{Id}.\textsuperscript{162}

\item[163] Trost interview, \textit{supra} note 149.

\item[164] See Treister interview, \textit{supra} note 144. Treister spoke of his early years and trying to find a job in California as a young Jewish lawyer. “In those days the big law firms were fairly segregated. They were either big Jewish law firms or [non-Jewish firms].” \textit{Id}.\textsuperscript{164}

\item[165] King interview, \textit{supra} note 58.
\end{footnotes}
The small Jewish firms referred to by King provided the majority of New York’s bankruptcy and insolvency practice from the 1950’s into the 1970’s. These small Jewish firms grew as a result of the support from the Jewish business clients and other Jewish clients. The divide between the Jewish firms and non-Jewish firms began to change as the large firms experienced a paradigm shift.

In the late 1980’s and 1990’s, the anti-Semitism and elitism began to give way to a “law as business” model for the composition of the large firms. After the passage of the Bankruptcy Code in 1978, the large firms began to consider bankruptcy law as a potentially powerful tool for their corporate clients and a powerful moneymaker for the firms. New York bankruptcy attorney, Josh Angel at Herrick, Feinstein LLP describes this transition:

Back in the early 1980’s, large law firms—always looking for sources of revenue—said, “look at those fellows [Jewish boutique bankruptcy law firms] doing this case and that case.” We had to publish fess in the newspaper in those days, and the fees were six and sometimes seven figures. The writing was on the wall. The economy of administration went out with introduction of the bankruptcy code. The large firms began to gobble up the mom and pop shops here in New York.

When large money clients sought bankruptcy legal advice, the large firms began to seek those professionals with those skills. The large firms then began to look to the small Jewish boutique firms to start their bankruptcy departments. Slowly, as small Jewish firms merged with large firms, the bankruptcy departments in most large firms began to bring in the enormous revenue, and today, most bankruptcy departments in large firms are the most lucrative for the partners.

166. Id.
167. See Wald, supra note 143, at 1851.
169. Interview by Bankruptcy Judge Randall J. Newsome with Edward Ryan, Bankruptcy Judge (Bankr. S.D.N.Y.) (Apr. 22, 1996), Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PennLaw, http://www.law.upenn.edu/bll/archives/bankruptcy/digicoll/oralhistories.html. The trajectory of Harvey Miller’s career, for example, illustrates the transformation of the Jewish bankruptcy profession in the larger legal field in the United States. Mr. Miller started at a small Jewish firm, and then, in the late 1970s, he moved to Weil, Gotshal, a large non-Jewish firm. Mr. Miller played a central role in the bankruptcy field. He was a critical figure in the news when General Motors, Chrysler and Lehman Brothers teetered on the edge of financial disaster. Judge Ryan noted that, when Mr. Miller appeared before him in court, he seemed like “Alexander the Great [who] had conquered the world when he was 33.” Id.
D. Pre-1978 Bankruptcy Court: An Insider Practice

The insider nature of bankruptcy practice created and reinforced its subordinate position vis-à-vis other areas of law in the mainstream legal world. In the years following the passage of the Bankruptcy Act of 1898, bankruptcy practice took on a distinct and isolated legal culture and character in each region of the country due to the existence of bankruptcy “rings” in many regions; the limited number of legal professionals who would practice bankruptcy law; the unwritten nature of bankruptcy procedure in the bankruptcy courts; the informal processes for the selection of the bankruptcy judicial officer; and the lack of experience of the judicial officer. Each of these features was both a symptom and cause of the continuing denigrated status of bankruptcy that worked to replicate the subordinate position of bankruptcy practitioners, judicial officers, and the court.

In his article The Force of Law, French sociologist Pierre Bourdieu explains that the key to the power of the American legal field is the perception that legal practice is ordered by sets of explicit legal pronouncements such as procedures, processes, codes, and rules. The mainstream legal field has a universalizing attitude and requires a uniform existence. Laws and legal processes must appear unbiased and impartial to maintain their unique position and power (i.e., legitimacy) in the social world. Early bankruptcy practice lacked such coherence and impartiality and therefore lacked the appearance of legitimacy. This undermined the bankruptcy court’s status and power in the legal field hierarchy.

1. Bankruptcy Rings

Bankruptcy rings were typical of bankruptcy practice throughout the country from the 1920’s to the 1970’s. A bankruptcy ring was a small group of professionals who consistently appointed and selected each

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170. Bankruptcy Judge Randall J. Newsome discusses the insider practice of bankruptcy pre-1978 Bankruptcy Code in each oral history document found in the National Bankruptcy Archives. See, e.g., Trost interview, supra note 149.

171. Before adoption of the 1973 Bankruptcy Rules and the passage of the Bankruptcy Code of 1978, bankruptcy “judges” were identified under the Bankruptcy Act of 1898 as “referees.” They were not identified as a “judge.” Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979). For this reason, the article will use the title “referee/judge” to discuss the bankruptcy official during the transition period from the 1960’s to the 1980’s.


173. Id.

174. See id. at 821.

other to perform the functions of the bankruptcy court process. The rings were characterized by consistent dealings over a period of many years among the same group of attorneys, trustees, and judicial officers. Professor Frank Kennedy remembers: “[T]hey got a very bad reputation because there was a lot of insider manipulation. There were people who exploited the insider position, and the insiders exploited the situation . . . [T]hey controlled and manipulated the whole process.” These insular practice groups were able to monopolize and control the bankruptcy process by selecting and appointing one another for key positions to ensure that they and their friends benefited from the statutory fee structure.

The statutory structure of the Bankruptcy Act of 1898 implicitly facilitated the emergence and functioning of the bankruptcy rings. First, the working relationship between the judicial officer, known as the bankruptcy referee, and the trustee who oversaw the distribution of estate assets was too close. The default position of the Act when creditors failed to appoint a trustee allowed the judicial officer to appoint the trustee. The judicial officer was then charged with the duty to supervise his


Judge Randall Newsome: What do you mean by a ring? You hear that word all the time, but what does that mean to you when you say “a ring”?

Judge Asa Hertzog: Very easy. You appoint me and I’ll appoint you. You elect me trustee, and I’ll appoint you receiver in the next case. Passing the buck from one to the other and then controlling these cases. They would gather up claims. There were no rules against soliciting claims. So they’d solicit claims, and they would file petitions, they’d file involuntarys, and they’d control the situation, and it was hard for anyone like me to get into it.

177. Skeel, supra note 47, at 76–77.


179. The term “judicial officer” will be used in place of either “referee” or “judge.” This is due to the fact that the title of the bankruptcy judicial officer changed with the adoption of the 1973 Bankruptcy Rules of Procedure, Rule 901(7), from “referee” to “judge.” Because this Article spans that time period, the correct use of either phrase depends on the exact point in time in question. The exact title will be used when the point in time is easily identified.

180. See Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544, 555 (“The offices of referee and trustee are hereby created.”).


182. Interview by Bradley Williams with Randall J. Newsome, Bankruptcy Judge (Bankr. N.D. Cal.) in Spokane, Wash. (July 20, 2005), Digitized Bankruptcy Oral History
appointee in the performance of his duties administering the case. This relationship between the judicial officer and the trustee led to ex parte communications. Ex parte communication between the referee and the trustee was so common in some regions that the practice of the trustee going into the referee’s chamber was described as: “chamber them.” This created numerous impartiality problems when disputes arose with third parties.

Second, the appearance of the judicial officer as an impartial arbiter was severely compromised by the Act’s blending of administrative and judicial functions in one office. The bankruptcy judicial officer oversaw the first meeting of creditors and any other examination or deposition of


Judge Randall J. Newsome: The [bankruptcy judge referee] supervised trustees. The referees appointed the trustees. The referee also set the trustee’s compensation. And it also wasn’t atypical to have ex-parte communications with them. And [because of this] the court developed a very bad reputation. It wasn’t anything that the referee was doing maliciously or that it was intentionally wrong. It’s just the way things were done in bankruptcy back then. You know, if a trustee had a question about how to handle a case, he just came right in and talked to referee Gartner. One of the first big changes was we judges didn’t do that anymore when I became [his successor]. And I was warned about the ex-parte communications before I went over there. So anyway, I was not exactly welcomed with open arms, as an outsider, which at that time, the district court thought was a good thing, because there was this perception of there being a bankruptcy ring . . . . But, you know, it was an adjustment for everybody.

184. Treister interview, supra note 144 (explaining that the private communications between the bankruptcy trustee, a party to the litigation in the bankruptcy court, and the referee, the judicial officer rendering decisions in the bankruptcy court, was described by the local vernacular in this manner). The other party to the litigation, the debtor, was excluded from these private sessions. Id.

Judge Randall J. Newsome: But they were still also holding a lot of ex-parte conferences?

George Treister: Oh yes. Oh yes.

RN: Was that just the way the business ran?

GT: Well, how else . . . I mean, they had the job of supervising the Trustees. And they were involved in things. Were you selling the property too cheap? Well, you have to talk to people to find out about that. And to this day with some of the old judges, you walk into their chambers and “chamber them”, as they call it. The new breed of bankruptcy judges would think that’s unethical and wouldn’t do it.

the debtor. In these non-judicial proceedings, the judicial officer would rule on the permissibility of questions and in the process hear inadmissible evidence. If a dispute or cause of action arose from these administrative proceedings, the judicial officer was required to perform a hearing and make a ruling. Often, the judicial officer was unable to discern whether the evidence used for the ruling was admitted at the meeting of creditors or at the hearing.

Along with selecting the trustees and overseeing the meeting of creditors, the judicial officer often made financial decisions concerning the failing debtor’s assets. These broad administrative referee powers were often abused. Referee Saul Seidman of the District of Connecticut Bankruptcy Court provides an example of the corruption, cronyism, and favoritism facilitated by the power of the referee’s position. Referee Seidman appointed his friends as the trustees to handle the cases that appeared before him. The trustees were paid a percentage of the money collected for the estate. Referee Seidman gave the most lucrative cases to his favorite trustee, Martin Hoffman.

The bankruptcy ring phenomenon in the bankruptcy court was not isolated to Hartford, Connecticut. From the East Coast to the West Coast, an inside group of bankruptcy practitioners controlled the bankruptcy process. Although each region had a distinct version of the insider group, the features of practice were similar and the negative impression in the mainstream legal field long lasting. Similar to the Connecticut Bankruptcy Court, “in the South, bankruptcy rings existed allowing some attorneys who were friendly with the referee to receive juicy appointments and trusteeships.” In Maryland, the insider group that received

186. Id.
187. Id.
188. Id.
189. Id.
190. Mund, supra note 5, at 179, 196.
191. Id. at 177.
192. Id.
193. Id.
194. Id.
195. Skeel, supra note 47 (“The bankruptcy ring phenomena in bankruptcy legal practice started at the beginning of the 20th Century, but it took the changes of the Bankruptcy Reform Act of 1978 to adequately address and substantially change the practice of the bankruptcy rings. The decades of corruption left a lasting impression on all legal practitioners.”).

Judge Randall Newsome: Do you think rings existed and/or do exist?
the best positions and results was referred to as the bankruptcy gang. In Ohio, like the rest of the country, the bankruptcy ring excluded non-members from the practice. In Northern California, the “cozy” group of bankruptcy practitioners lasted well into the 1970’s.

Jerome Kaplin: They did exist, yes. . . . The ring that they refer to was the fact that there were certain people who were intimate with bankruptcy judges who perhaps they practiced with a bankruptcy judge or judges for years and just coincidentally those were the very people who seemed to get all the juicy appointments, trusteeships, and so they wanted to cut that out, and I guess they have to at a certain point, but the reality is it’s those same people who still are handling the work and so there is no longer a formal bankruptcy ring but still the same people who are doing the bankruptcy work.


And the bankruptcy practice, as I recall—though I’ve had no first-hand knowledge of it in those days—was not the most desirable practice in the world. And the people that practiced the bankruptcy law were not the people that everybody looked up to, as they are today. Large firms didn’t do this. There were always a few bankruptcy lawyers. Some of it was described as the “bankruptcy gang.” And it had a bad reputation. Id.

198. Interview by Bankruptcy Judge Randall J. Newsome with Joseph Patchen, Bankruptcy Judge (Bankr. N.D. Ohio) (Nov. 18, 2004), Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PennLaw, http://www.law.upenn.edu/bll/archives/bankruptcy/digicoll/oralhistories.html. Judge Joseph Patchen explains: “Bankruptcy was looked upon as dirty business, it was shabby . . . . Bankruptcy was an insider kind of court. There were always a quandary of view that only those who knew each other would talk to each other, bankruptcy practice elbowed out people, yea, there was a ring, you could call them a ring, you can call them specialists, and there are all kinds of words for the word ring.”


Robert Hughes: [The referee/judge] drank. There were lots of attorneys down there who were willing to buy him drinks, and so most of his work was accomplished in the morning so he had to be very efficient. [This referee/judge] found one way of efficiency was to have one trustee, and he had a man named Jack Costello to serve as trustee. And Jack followed Bernie everywhere, and Jack basically did the work that needed to be done to keep the consumer bankruptcies going and he was sometimes elected trustee by the Board of Trade, and then he would hire the favored attorneys as his trustee attorney. The attorneys for his consumer cases I just don’t know who he hired other than Rothschild, yeah, I think he hired Rothschild for that. That was a very cozy arrangement that went on for a long, long time.

RN: What you’re talking about is the classic ring set up, isn’t it?
Unprofessional conduct characterized the daily practices of the bankruptcy rings around the country during this period of bankruptcy history. This conduct led many practitioners to state that the bankruptcy court was the only federal court in the country in which the judge was an interested party.\textsuperscript{200} Often left unacknowledged by contemporary bankruptcy judges, the impact of bankruptcy rings and the reputations of prior bankruptcy referees engaged in improper conduct damaged the reputation of the bankruptcy court, further subordinating the bankruptcy court within the mainstream legal field.

2. The “Small Town” of Bankruptcy Practice

The limited number of bankruptcy professionals in any region reinforced the perception and reality of bankruptcy as an insider practice. The bankruptcy bar was comprised of a small group of attorneys who tended to be well-acquainted with each other. George Treister describes the scale of the bankruptcy legal field in Los Angeles during the 1950's and 60's as “essentially Craig, Weller & Laugharn, us, and Gendel Raskoff and a few individual practitioners. And all together . . . I don't think there were 75 people in the bankruptcy practice even counting appraisers and trustees, I mean non-lawyers. . . . It had a small town feel.”\textsuperscript{201}

The same legal players worked together frequently on a range of cases, leading the bankruptcy process to resemble more of a collective settlement process as opposed to an adversarial system. Treister describes a legal practice in which he knew everyone—the local referees, the trustees, and the practitioners. Over the years, each of the small local bankruptcy bars, like that of Los Angeles, became a distinct and insular professional group within the legal mainstream.

\textsuperscript{201} Treister interview, supra note 144.
3. Lack of Uniform Bankruptcy Rules

As Bourdieu explains the key features necessary for creating legal legitimacy, authority, and power is procedural uniformity.202 Bankruptcy court practice lacked this key feature. Under the Bankruptcy Act of 1898 and before the adoption of the Bankruptcy Rules of Procedure in 1973, bankruptcy practice lacked nationally uniform rules, thus undermining the reliability and legitimacy of the process. The Supreme Court issued 48 general orders attempting to guide the bankruptcy court, but these orders were too broad, leaving too much control to local authority.203 In this mandate gap, each of the 84 judicial districts adopted different rules of procedure to suit the particular local practice.204 Local gangs of practicing bankruptcy judicial officers, trustees, and lawyers inevitably developed unique “folklore” practices to further fill the void. These practices and procedures were unwritten and unclear, specific to each court, and unknowable to outsiders. In an interview with Bankruptcy Judge Randall J. Newsome, George Treister commented on how lawyers learned to navigate the localized bankruptcy practices:

Bankruptcy Judge Randall J. Newsome: Bankruptcy practice had a reputation for being an insider’s game with no written rules. Was that largely true under the general orders [of the Supreme Court]?

George Treister: Yes. The general orders didn’t say anything. The general orders, if you look through those old general orders, you could throw them away and you wouldn’t have lost much.

R.N: How did you practice in a system like that?

202. Bourdieu, supra note 25, at 820–21. Bourdieu identifies rules of procedure as part of the universalizing attitude of the legal field defined as: “This attitude constitutes the entry ticket into the juridical field—accompanied, to be sure, by a minimal mastery of the legal resources amassed by successive generations, that is, the canon of texts and modes of thinking, of expression, and of action in which such a canon is reproduced and which reproduce it. This fundamental attitude claims to produce a specific form of judgment, completely distinct from the often wavering intuitions of the ordinary sense of fairness because it is based upon rigorous deduction from a body of internally coherent rules. It is also one of the bases of a uniformity which causes individual attitudes to converge and to sustain each other, and which, even in the competition for the same professional assets, unifies the body of those who live by the production and sale of legal goods and services.” Id.

203. The Supreme Court, under the Bankruptcy Act, July 1, 1898, ch. 541, 30 Stat. 544, promulgated 38 General Orders by an order dated November 28, 1898, which provided in part: “[T]hat the following rules be adopted and established as general orders in bankruptcy, to take effect on the first Monday, being the second day, of January 1899.”

GT: Well, it was very uneven. I mean, you learned how they did it in a particular courtroom, or a particular courthouse if you were lucky, maybe. But everybody did it the same way—it was unwritten law. The process was called by a different name [depending on the area]. We called them Orders to Show Cause in Los Angeles. Some people called them Rules to Show Cause or Notices. There was no standardization at all . . . . Unless you did a lot of it, how were you ever going to keep up with things that you couldn’t find written anyplace? You just had to do it in order to know how it was done.205

This lack of procedural uniformity inured bankruptcy practice to penetration by attorneys in the mainstream legal field. Bankruptcy lawyers knew how to practice bankruptcy law because they were part of a small group who knew the procedures for their particular court. The structure of the Bankruptcy Act of 1898 and the Supreme Court’s general orders provided only limited guidance as to the manner in which the bankruptcy petition and process were to proceed.

4. The Selection of the Bankruptcy Judicial Officer206

Under the Bankruptcy Act of 1898

In contrast to Article III judges, who are selected pursuant to a uniform and transparent process, local district court judges selected bankruptcy judicial officers.207 As described by several former bankruptcy judicial officers, the selection process was extremely informal and ripe with cronyism and favoritism.208 The district court judge selected a candi-

205. Treister interview, supra note 144.
206. See discussion of the judicial officer’s title, supra note 179. The selection process for the bankruptcy official was not formalized until the Bankruptcy Amendments and Federal Judgeship Act of 1984.
207. John Adriance Bush, The National Bankruptcy Act of 1898 200 (1899) (“Courts of bankruptcy shall. . . appoint referees, each for a term of two years, and may, at their discretion, remove them.”).
208. The best example of judicial favoritism is found in the account of how Warren Moore became a bankruptcy judge in Los Angeles. His colleague, Bankruptcy Judge Robert Hughes, states: “Warren Moore was a friend of the judges so to speak. Warren Moore was a highway patrolman, and he was on the Bayshore Freeway [in Los Angeles] one day and he saw this young lady in distress; her car had broken down . . . . And I think it was a flat tire, and he pulled over and stopped and he helped her. She got his name and she gave that name to her Dad. Her daddy was Chief Judge Harris, District Court. And Judge Harris insisted Warren come in. Judge Harris took Warren to lunch, and then a relationship developed . . . . Warren had already been going to night law school. Warren eventually passed the bar and Judge Harris said, “Do you want to be a Bankruptcy Judge?” Warren said, “What’s that?” And he lived happily ever after.” Hughes interview, supra note 199.
date from a pool of attorneys with whom he was familiar. Before the 1978 Bankruptcy Act, the selection process was constructed as follows: an applicant who was pre-selected by a district court judge was notified of an open position; one applicant was interviewed once by a district court judge; an applicant’s actual knowledge of bankruptcy law was not a consideration; the district court judge’s recommended candidate was appointed by the other members of the district court bench; and no record or review of the selection process was kept. Moreover, no other branch of the federal government oversaw the selection process.

Initially, the potential candidate received inside information from the district court judge that the position was open. This candidate would likely be a favorite or a friend of a friend of the district court judge. For example, a district court judge would call a former law clerk or law partner inquiring about candidates to fill the open position. As one prominent practitioner explains the initial candidate selection process:

The District Judges did [appoint the bankruptcy judicial officer], but it was just as political. . . . In the same sense it was political in the bad sense of the term. . . . In the old days the person appointed as a referee in bankruptcy would normally be patronage, you know, someone you want to do a favor for.

The referred individual would then interview with one of the district court judges for an hour or two. The district court judge would recommend his selected candidate to his fellow district court judges. The rest of the district court judges would typically agree to hire the referred candidate. This process was done with few, if any, other candidates offered as possible choices. Bankruptcy Judge Randall J. Newsome explains this in his account of how his former boss, District Court Judge Carl B. Rubin, contacted him to determine whether he wanted a bankruptcy judge position in Ohio:

One day my old boss called and asked if I wanted to work as a bankruptcy judge. I thought, “Why not?” He couldn’t appoint me, but at that time, of course, the district court judges did the appointing, and he had to get the agreement of his colleagues.

209. See Interview conducted by author with Judge Randall J. Newsome in Oakland, Cal. (June 8, 2004) (noting that Judge Newsome received his judgeship when his “old boss called” while he was working for a firm and asked if he wanted to work as a Bankruptcy Judge). See also Hughes interview, supra note 199; Treister interview, supra note 144.

210. Id.


212. Hughes interview, supra note 199.

213. Treister interview, supra note 144.

214. See Hughes interview, supra note 199; Newsome interview, supra note 209; Mannes interview, supra note 197.
But of course you know it was his pick, and they weren’t really going to disagree with him, unless he got somebody really awful. So I got appointed to a six-year term.\textsuperscript{215}

Judge Newsome’s experience applying for and receiving his first bankruptcy judicial officer position is typical of many of those who initially occupied the position. Many candidates selected for the position were members of the local bar who had connections with the district court judges or had appeared before the district court judges in many cases. Many appointment stories indicate that the selection process was highly informal and internal.\textsuperscript{216} Ultimately, the selection process rendered the position of judicial officer undesirable because it reinforced the perception that bankruptcy courts were illegitimate.

Another reason for the low opinion of the officer selection process and bankruptcy practice more broadly is that the bankruptcy judicial officer usually did not have significant bankruptcy law experience before taking the bench.\textsuperscript{217} Many judicial officers lacked first-hand experience with bankruptcy law and practice—a fact known by district court judges. As demonstrated by Judge Newsome’s recounting of his experience, it was not uncommon for an appointed judicial officer to have never practiced bankruptcy law:

Randall J. Newsome: [When Judge Rubin said], “How would you like to be a bankruptcy judge?” I said, “I don’t know anything about bankruptcy.” He said, “Eh, none of ’em do. I don’t know why that should worry you.” (Laughter) So I said, “That’s really something.” I knew nothing about bankruptcy; I’d handled one insolvency case. So, I thought about it for a couple of days and I thought, “Why not? I can always come back to practice. This’ll be something new, and I can learn this, just like I’ve learned everything else.” So I said, “Yeah, okay, I’ll apply.”\textsuperscript{218}

When recounting their pre-bench professional histories, many former bankruptcy referees and current judges admit they lacked the requisite experience and knowledge for the position when they applied to be a bankruptcy judicial officer.\textsuperscript{219} This fact—now joked about among

\begin{itemize}
\item \textsuperscript{215}Newsome interview, \textit{supra} note 209.
\item \textsuperscript{216}Mannes interview, \textit{supra} note 197. \textit{See also} Paine interview, \textit{supra} note 72; Hughes interview, \textit{supra} note 199.
\item \textsuperscript{217}Id.
\item \textsuperscript{218}Mannes interview, \textit{supra} note 197.
\item \textsuperscript{219}Paine interview, \textit{supra} note 72 (“I wanted to leave the law firm. I didn’t want to make a public leaving, so being a lawyer and somewhat lazy, I was just waiting to leave gracefully. A bankruptcy judgeship came open in 1981. At that time, the district judges selected the bankruptcy judges. We had three district judges, one of whom was a former
bankruptcy judges and other legal professionals—eventually led to the contemporary adherence to the strict selection, appointment, and review processes for new bankruptcy judges. The transformation of the selection process is apparent when Bankruptcy Judge Robert D. Martin of the Western District of Wisconsin compares his initial interview, selection, and appointment experience as a bankruptcy referee candidate with his later experiences surrounding reappointment as a bankruptcy judge after the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984:

I would like to contrast the fact that the first time I was appointed, when it was by a district judge. I provided the district court judge with a two-and-a-half-page résumé and we had a forty-minute interview. I’d tried some cases before the judge, so he knew me, and I knew him. I had applied for a judicial clerkship with him in law school. So we knew each other a little bit, but that’s all it took.
When I was reappointed in 1988, by that time I was the co-author of a treatise; I had written 200 opinions, give or take; I had taught bankruptcy at the law school; I’d done just about everything anybody could to establish credentials. But this time I had to fill out a 65-page application and go sit with a committee of the Seventh Circuit—fifteen people in a room where they grilled me. I thought it was sort of ironic that the first time, when I was thirty-three years old, and nobody would have thought I would have been a potential candidate, it was a very easy appointment. And then after I’d had all the credentials anybody would expect to have, all of a sudden it became a hard appointment.²²²

The selection process before the 1984 Act was easy because it lacked oversight and formality. These early practices undermined the legitimacy of the bankruptcy court and created a perception that bankruptcy judicial officers were not qualified for their positions as decision makers. That perception was reinforced by their lack of actual experience in the bankruptcy field at the time they assumed their positions. Indeed, this dearth of experience and knowledge was known to Article III judges and figured prominently in the battle over bankruptcy judges’ Article III status.

E. Superior Courts and Inferior Practitioners

Bourdieu explains that it is universally noted that judges are typically drawn from members of the elite classes in several western societies.²²³ Judicial officers are often raised in the upper classes and are part of the cadre of well-educated legal professionals.²²⁴ These legal professionals are held in high regard because they exhibit a class- and education-based “judicial temperament.”²²⁵ Article III judges in particular, because of their extensive power and lofty position within the U.S. judicial system, must have the appropriate judicial temperament and ability to “think like a

²²³. Bourdieu, supra note 25, at 842.
²²⁴. WILLIAM E. NELSON, IN PURSUIT OF RIGHT AND JUSTICE: EDWARD WEINFIELD AS LAWYER AND JUDGE 113 (2004) (“By the time that he was named to the District Court in 1950, at the age of forty-nine, a widely shared consensus had formed among the New York City elites that Weinfeld would bring exceptional talent to the court and would make an outstanding judge.”). Weinfeld was responsible for keeping bankruptcy judges off the 1970 Commission.
²²⁵. Id. at 131–32 (discussing Weinfeld’s possession of “judicial” qualities prior to arriving on the bench).
Also, because of their position and training, federal judges are the legal professionals held in highest regard in the American legal field. However, bankruptcy judges are not held in high regard because they are drawn from bankruptcy legal practice. As Bankruptcy Judge Paul Mannes recalls, “[P]eople who practiced bankruptcy law were not the people that everybody [in the legal field] looked up to.”

Bankruptcy law and legal professionals occupy a subordinate position in the legal field due to the lack of prestige associated with representing the socially stigmatized debtor client and the corruption that existed in the bankruptcy courts for decades before the Bankruptcy Reform Act of 1978.228 Leading bankruptcy practitioners and judges attribute the diminished power and status of the bankruptcy court among prominent members of the mainstream legal field to these features. As Professor King explains, district court judges led the opposition to granting higher status to bankruptcy judges because they “did not have respect for the bankruptcy lawyers. The bankruptcy referees turned bankruptcy judges had risen up through the ranks of the bankruptcy bar. [The federal district court judges] did not have respect for the bankruptcy bar.”229 Based on this perception, Article III judges believe that bankruptcy judges lack the qualities necessary to “think like a judge”230 and therefore are not qualified to exercise the full Article III judicial power of the United States.231 This bias is unsupported by contemporary bankruptcy court judicial ability, expertise, and work ethic, yet this perception, because it is accepted, operates to demoralize and destabilize what is arguably one of the most vital and essential judicial forums in the United States today.

226. Id. at 199–202.
227. See Mannes interview, supra note 197.
229. King interview, supra note 58.
231. During the Judicial Conference of the United States’ debate to restructure the bankruptcy system, there were provisions that would have had two bankruptcy judge representatives on the Conference. Warren Burger and the other Article III judges opposed the proposal. The National Conference of Bankruptcy Judges has struggled to gain access; in 2004, the first non-voting bankruptcy judge representative began to participate on the Conference. To this day, the bankruptcy judges remain non-voting members of the Judicial Conference. 28 U.S.C. § 331 (2011). See also Houston interview, supra note 2; interview by Patrick Carlton with A. Thomas Small, Bankruptcy Judge (Bankr. E.D.N.C.) (Oct. 13, 2004), Digitized Bankruptcy Oral History Collections, 1993–2004, National Bankruptcy Archives, PennLaw, http://www.law.upenn.edu/bll/archives/bankruptcy/digitcoll/oralhistories.html.
IV. Two-Tier Jurisdiction and the Contemporary Bankruptcy Court

The jurisdiction over bankruptcy cases and proceedings is vested in the federal district courts for “all cases under title 11.” A district court judge can withdraw any proceeding from the bankruptcy court for cause, and must withdraw a proceeding if it involves Title 11 and another law of the United States affecting interstate commerce. The district court rarely exercises its discretionary authority to withdraw a case from the bankruptcy court, however. Instead, it refers cases under Title 11 to the bankruptcy court, and, in most districts, the referral is automatic by means of a local rule. This referral of jurisdiction is two-tiered depending on whether the proceeding is “core”—meaning one that arises under or arises in Title 11—or “non-core”—meaning a case involving a third party that is merely related to a case under Title 11. The bankruptcy judge may enter final orders in core proceedings but may only enter a final order in non-core proceedings when the parties expressly consent to the bankruptcy judge deciding the issue.

This two-tiered approach, similar to the divided jurisdiction under the Bankruptcy Act of 1898, results in significant delay and expense to the estate, creditors, and third party litigants. Disputes arise over what is a non-core issue because Congress did not provide a clear definition of “related-to” jurisdiction to be exercised by the district court. The ambiguity and uncertainty adds a second layer of litigation to the bank-

232. 28 U.S.C. § 1334(a) (2006) (conferring original and exclusive jurisdiction). See also id. § 1334(b) (conferring original jurisdiction on the district courts over “all civil proceedings arising under title 11, or arising in or related to cases under title 11”).
233. See id. § 157(a) (authorizing district court referrals to bankruptcy court).
236. See id. § 157(c)(1) (authorizing bankruptcy judges to hear non-core proceedings and submit proposed findings of fact and conclusions of law to the district court).
237. Id. § 157(b)(1), (c)(2).
238. Under the divided jurisdiction of the Bankruptcy Act of 1898, a lengthy litigation process developed when a third party was sued: (1) Suit filed in the bankruptcy court; (2) Timely objection to the summary jurisdiction of that court; (3) Decision by the bankruptcy judge; (4) Appeal to the district court; (5) Decision by the district court; (6) Appeal to the court of appeals; (7) Decision by the court of appeals; (8) Petition for certiorari; (9) Denial of petition for certiorari. Nat’l Bankr. Rev. Comm’n, supra note 14, at 725.
239. See, e.g., Benedor Corp. v. Conejo Enters., Inc., 96 F.3d 346, 349 (9th Cir. 1996) (replacing previous opinion based on error in distinction between core and non-core issues); Orion Pictures Corp. v. Showtime Networks, Inc., 4 F.3d 1095, 1102 (2d Cir. 1993) (attempting to determine the meaning of “core proceedings” that Congress intended).
ruptcy process. Such litigation over this non-substantive issue can last years, and resolution of substantive issues occurs only after the resolution of any jurisdictional issue.240 Litigants who have resources and more to lose on substantive issues often use jurisdictional ambiguities to their advantage.241 In some cases with uncomplicated facts, the issues are repeatedly litigated to delay the proceedings rather than address the substantive issues in the case.242

The dominant test for the outer limits of “related-to” bankruptcy jurisdiction in third-party disputes is the Pacor test.243 Scholars describe the Pacor test as “manifestly inadequate” because it fails to provide clear limits for “third-party ‘related-to’ bankruptcy jurisdiction.”244 As a result, numerous circuit court opinions apply the test to facts “with countless instances of identical factual and procedural postures producing diametrically disparate results” and creating jurisdictional determinations that are essentially arbitrary.245 Bankruptcy judges are often unsure about the exact boundaries of a “non-core” proceeding.

Further, the line of demarcation between what is “core” and “non-core” is similarly confusing. The statutory list in the jurisdictional provisions of BAFJA provides “core proceedings, include, but are not limited to” all “matters concerning the administration of the estate” such as the allowance and disallowance of claims against the estate; claims against persons filing proofs of claim against the estate; suits for the turn-over of property to the estate; avoidance of preferential transfers; fraudulent conveyances; confirmations of plans; and sale of property of the estate.246 This list is not exclusive; therefore, the bankruptcy judge must make difficult determinations as to whether other matters are part of “core” jurisdiction. One bankruptcy judge describes his experience by stating:

The biggest problem that the non-Article III position creates for a bankruptcy judge is not the lack of the status of being an Article III judge, but it has been with the lack of clear court jurisdiction. It is a grey line where the judge has to ask himself:

241. Id.
242. See Benedor Corp., 96 F.3d at 349. This Ninth Circuit case resulted in three different opinions on procedure that were based on two simple substantive claims: breach of contracts and proof of claim. Id.
243. Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (stating the test for relation to bankruptcy to be “whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy”). The Pacor test was recognized by the Supreme Court as adopted in several circuits and reaching the same results as other tests used. Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.6 (1995).
245. Id.
Is this core or non-core? Does this affect the property of the estate or not? If I hear this case, is it going to make any difference to creditors? On the one hand, it is nice to send things to the district court. “So sorry, I would have loved to hear this, but it is yours.” I do not miss the RICO cases and the state law cases. On the other hand, if the district court gets a piece of the case that is essential to the outcome of a Chapter 11, it is tough on the bankruptcy judge who has to look at the total case to confirm a plan or make a ruling.

Jurisdictional ambiguity also makes overseeing the Chapter 11 reorganization process for a corporate entity more difficult and time consuming. From the first determination as to whether a matter is “core” or “non-core” to the final disposition, the bankruptcy judge’s decisions are subject to appeal and review. This often causes bankruptcy judges to avoid particular legal issues as to which the categorization of jurisdiction as “core” or “non-core” is uncertain. In situations where the district court judge hears parts of a case and the bankruptcy court judge hears other parts of the case, the bankruptcy judge is left with an incomplete picture for viewing the Chapter 11 debtor’s disclosure statement and plan of reorganization. This split jurisdiction makes the bankruptcy judge’s job particularly challenging. Ultimately, the two-tiered jurisdiction undermines the efficiency and speedy disposition of a bankruptcy case, a chief concern for all parties involved in the bankruptcy process, and at times a great concern for our financial system.

Since the enactment of the BAFJA of 1984, moreover, bankruptcy legal scholars have argued that the bankruptcy judge exercises “essential attributes of the judicial power” in hearing and entering final orders in issues “core” to the bankruptcy process. With “core” jurisdiction, Congress granted the bankruptcy court comprehensive jurisdiction so that it could address all matters directly impacting the debtor and the bankrupt-

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247. Interview by author with Bankruptcy Judge, Research File: HJK, Baltimore, Md. (Fall 2004) (on file with author).

248. See Ex Parte Christy, 44 U.S. 292, 314–15 (1845) (“The manifest object of the [bankruptcy] act was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favour of or against the bankrupt’s estate, in the most expeditious manner, consistent with justice and equity, without being retarded or obstructed by formal proceedings, according to the general course of equity practice, which had nothing to do with the merits.”). See also Bailey v. Glover, 88 U.S. 342, 346 (1874) (“It is obviously one of the purposes of the Bankrupt law, that there should be a speedy disposition of the bankrupt’s assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay.”).

cy estate;\footnote{250} however, this grant of pervasive jurisdiction in “core” matters might be unconstitutional.\footnote{251}

In the 1995 \textit{Plaut v. Spendthrift Farm} decision, the Supreme Court considered the Securities Exchange Act of 1934 and addressed whether a particular provision constituted an exercise of “the judicial power of the United States” by a non-Article III judge.\footnote{252} The court articulated a clear standard for determining when another branch of the federal government unconstitutionally exercises the judicial power. Citing \textit{Marbury v. Madison}, the court ruled that the judicial power in Article III of the Constitution is the “province and duty... to say what the law is” by rendering “dispositive judgments” in particular cases and controversies.\footnote{253} Relying on the doctrine of separation of powers, the court stated that the judicial department is the only department of the federal government charged with that duty and the ability to enter final judgments. The Supreme Court reasoned that there is “a sharp necessity to separate the legislative from the judicial power.”\footnote{254} A non-Article III court, therefore, is denied the right to exercise the judicial power to hear and enter dispositive orders.

The question arises as to whether the exercise of “core” jurisdiction by the bankruptcy court is within a court-created exception to the rule that non-Article III courts cannot exercise the “judicial Power of the United States.” The exceptions allowing a non-Article III court to enter dispositive orders articulated by the \textit{Marathon} court include 1) proceedings in territorial courts; 2) proceedings in courts martial; and 3) proceedings by a legislative court to decide “public rights.” The only exception within which a “core” proceeding could fall is the narrow public rights exception. The \textit{Marathon} court first limited the application of the public rights exception to those proceedings involving the United States as a party. In \textit{Thomas v. Union Carbide Agricultural Products}, the Supreme Court expanded the application of the private rights exception to include private parties when the private right is incorporated “within a public regulatory scheme.”\footnote{255}

Within the bankruptcy court’s “core” jurisdiction, the public vs. private rights question arose in dicta in \textit{Granfinanciera v. Nordberg}, in

\begin{itemize}
  \item \textit{Granfinanciera v. Nordberg}, 492 U.S. 33, 54 (1989) (noting that the government “need not be a party” in order for the \textit{case} to involve public rights, focusing instead on integration into the public regulatory scheme).
\end{itemize}
connection with the issue whether an action by the bankruptcy trustee against a private party to recover a preferential transfer or a fraudulent conveyance under the Bankruptcy Code fell within the expanded public rights exception. The court concluded that it did not, stating that “[a]lthough the issue admits of some debate, a bankruptcy trustee’s right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions.” On this approach, if a core proceeding, such as an action to recover a fraudulent conveyance or a preferential transfer, is an action involving a private right, then the non-Article III bankruptcy court, when it enters a final order in such a “core” proceeding, is exercising the judicial power of the United States in a non-excepted context.

The Supreme Court has left open the question of the constitutionality of the non-Article III bankruptcy court hearing and deciding a listed “core” issue involving an action against a third party not directly connected the bankruptcy process. It seems unwilling to state outright that the statutory characterization of a proceeding as “core” ensures the constitutionality of the action of the bankruptcy court in hearing and entering a final order. Rather, the Court in Marathon seems to imply that the bankruptcy process may fall within the “public rights” exception to the general rule, but it remains unclear.

This novel constitutional challenge within the two-tiered jurisdictional structure ensures the Supreme Court will return to the issue of the U.S. Bankruptcy Court’s structure and power. As Professor Richard Lieb states, “[i]n view of the serious doubt as to the constitutionality of the grant of full adjudicatory power over ‘core’ proceedings to non-Article III judges, the time is ripe for Congress to create an Article III bankruptcy court.”

CONCLUSION

The decision by Congress to maintain and establish the U.S. Bankruptcy Court as a non-Article III tribunal is arbitrary. In 2009, 1,402,816

257. See id. at § 157(b)(2)(H) (including disputes over fraudulent conveyances within core proceedings).
258. Granfinanciera, 492 U.S. at 55.
261. See Lieb, supra note 249, at 7.
bankruptcy petitions were filed, representing over $200 million in personal and real property assets and over $300 million in liabilities. These filings resulted in cases that touch upon a broad cross-section of state and federal laws, including those relating to commercial, tax, contracts, torts, estates and trusts, real estate, landlord tenant, labor, family, and federal regulations matters. Due to this enforcement of “laws of national applicability,” the U.S. Bankruptcy Court needs to be an Article III court, yet it continues as a non-Article III court.

The subordinate position of bankruptcy law and the bankruptcy court is legally indefensible and ultimately detrimental to the market needs of the American economy. The U.S. Bankruptcy Court should be a fully vested Article III court with jurisdiction over bankruptcy matters unified in the bankruptcy court and not divided between the bankruptcy court judge and the district court judge. The bankruptcy judge is far more qualified than the district court judge to preside over bankruptcy matters, and judicial economy and effectiveness demand that the bankruptcy judge preside over the entire bankruptcy case to make informed and appropriate final determinations. Furthermore, district court judges have repeatedly expressed a lack of interest in deciding bankruptcy law issues, thus reinforcing the point that the jurisdictional battle is fueled by a preoccupation with status rather than substance.

Maintaining the current two-tier jurisdictional structure is legally unsupported. Divided jurisdiction causes a confusion of process for the bankruptcy judge. From the initial determination of whether an issue is core or non-core to the final determination of the substance of the matter, the bankruptcy judge consistently second-guesses decisions and worries about being reversed. This uncertainty ultimately delays the bankruptcy process. Also, the exercise of core jurisdiction by the bankruptcy court might still be an unconstitutional exercise of the “judicial powers of the United States” because a bankruptcy proceeding does not involve the exercise of a “public right.” Rather, it involves numerous matters between


264. See McKenzie, supra note 16.

private parties. Finally, there is no Supreme Court grounding for the current bifurcated system. 266

Perhaps the bankruptcy court's jurisdictional limitations were appropriate in earlier times, but contemporary economic structures require an independent court upon which Congress confers Article III judicial power. Market forces are incredibly influential in contemporary American society. Because of the power and influence of market forces, our volatile economy needs an independent bankruptcy judiciary that is not subject to extra-legal field forces. This point was illustrated during the 2008 financial crisis. 267 The bankruptcy court occupied a central place in the economic turnaround of the American economy. 268 Bankruptcy judges were called upon to address the failure of large financial institutions and corporations, 269 as well as the consumer mortgage crisis. 270 These judges need to be independent and authorized to make difficult decisions that impact the nation. As clearly stated in legislative history from the 1978 Bankruptcy Reform Act, the market needs a bankruptcy court form and function that match the market's changes in law affecting credit, banking, and commercial practices.

The next step in the 40-year battle over the authority of non-Article III bankruptcy judges is on the horizon. 272 The constitutionality of the bankruptcy judges' authority to hear and decide claims is again questioned. In the current case, the Supreme Court is asked to decide whether

266. The limitations of “core” jurisdiction are again being tested in a current case which addresses the authority of non-Article III bankruptcy judges to hear compulsory counterclaims as not precluded by Article III when it is clear that the Article III judiciary controls the bankruptcy court. See Stern v. Marshall, 600 F.3d 1037 (9th Cir. 2010), cert. granted, 131 S. Ct. 63 (2010). The Court may narrowly decide this case on the well-established grounds of “core” verses “non-core.” Otherwise, the Court may directly address the bankruptcy jurisdictional structure established in Northern Pipeline.


268. See Kenneth Ayotte & David A. Skeel, Jr., Bankruptcy or Bailouts?, 35 J. CORP. L. 469, 470 (2010) (Authors’ article supports the use of bankruptcy law and legal processes to address the economic crisis.)


270. One such failed corporation was General Motors. See Dan Strumpf, General Motors Corp. Files for Bankruptcy Protection, CRAIN'S DETROIT BUSINESS, June 1, 2009, available at http://www.crainstretoit.com/article/20090601/FREE/906019987/general-motors-corp-files-for-bankruptcy- protection.

271. Alexandra P. Everhart Sickler, Mitigating the Foreclosure Crisis with Bankruptcy Mortgage Modifications, 9 U.C. DAVIS BUS. L.J. 85, 98 (2008) (discussing the consumer mortgage crisis and the manner by which a Chapter 13 bankruptcy filing could assist the consumer).

272. McNutt, supra note 48, at 63.
bankruptcy judges can hear and decide compulsory counter-claims by creditors. On these facts, the Supreme Court is again called upon to decide whether the present system with the Article III judiciary controlling and deciding what proceedings will be adjudicated by the bankruptcy court is in compliance with Article III. The Court may limit its inquiry to fine tuning the boundaries of “core” and “non-core”, or it may broadly construe the question to address the validity of the jurisdictional structure established after Marathon Pipe Line Co.

In conclusion, this article argues that the Court should reconsider the current jurisdictional structure of the bankruptcy system. In light of the recent mortgage crisis, the Court needs to recognize that the bankruptcy laws and court are essential to the maintenance of the American economy and social structure. An anthropological analysis of the bankruptcy legal field reveals that the legal field hierarchy denying bankruptcy courts Article III powers and status is based on cultural discourses founded, in large part, on the Protestant ethic.