VOLUNTARY BANKRUPTCY FOR THE SOLVENT DEBTOR: A CONSTITUTIONAL DEFENSE

by

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In 2025, more than 200,000 Americans chose chapter 13 bankruptcy because they could *pay their debts, not because they couldn't. They used it to cure mortgage defaults and address obligations that could not be discharged in any other proceeding. If a recent dissent from the Fourth Circuit is correct, every one of those cases was unconstitutional.*

This article examines the dissent's claim and rejects it. The article looks at the meaning of the Bankruptcy Clause of the Constitution ("Bankruptcy Clause") and concludes it authorizes Congress to enact bankruptcy laws that may be used by solvent debtors.[1] First, the article considers the history of the Bankruptcy Clause and its application to federal bankruptcy laws from 1800 to 1978 with respect to a solvent debtor. In particular, the article focuses on individual debtors and the development of chapter 13, an option designed for solvent individuals. Next, the article provides a review of the statutory developments culminating in chapter 13. Also, the article surveys important Supreme Court interpretations of the Bankruptcy Clause with an eye to whether bankruptcy laws open to solvent individuals are constitutional. Finally, the article defends the current structure of the Bankruptcy Code allowing a choice for solvent individual debtors.

The article clarifies the original meaning of the Bankruptcy Clause by looking to the words of its drafters, The Federalist Papers, the commentaries of Justice Joseph Story, and the expressions of the Supreme Court. The article warns that if the Bankruptcy Clause is a limitation on Congress's authority to draft laws on the subject of bankruptcies to be used by solvent persons, then

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[1] U.S. CONST. art. I, § 8, cl. 4. The article does not explore the appropriate test for solvency or the definition of insolvency, nor does the article examine the propriety of a solvent corporation using bankruptcy as a tool to limit and then avoid tort liability. The article explores whether federal bankruptcy law is constitutional if it does not require insolvency hence the argument does not turn on whether insolvency is defined as the inability to pay debts as they come due or as having an upside balance sheet with liabilities exceeding assets.

chapter 13 (and, by extension, individual chapter 11 provisions) are unconstitutional.

Introduction

In the chapter 11 case *Bestwall LLC v. Official Committee of Asbestos Claimants of Bestwall LLC* ("*Bestwall*"), the United States Court of Appeals for the Fourth Circuit issued a ruling in which the panel divided over the pivotal question of whether a federal bankruptcy court has subject matter jurisdiction over a solvent debtor.[2] More specifically, the question was whether the subject of bankruptcies means the subject of persons who are unable to pay their debts.[3] Judge Quattlebaum wrote the majority opinion (concluding the court had subject matter jurisdiction based on federal question statutory application), Judge King wrote a dissenting opinion (concluding the Bankruptcy Clause limits federal bankruptcy jurisdiction to debtors who are balance sheet insolvent), and Judge Agee wrote a concurring opinion contradicting the dissent. The panel's three opinions illustrate the ongoing challenges and debates over voluntary bankruptcy. Is federal law allowing voluntary bankruptcy by a solvent debtor constitutional? Should bankruptcy under federal law be limited to those who cannot pay their debts? How "voluntary" should it be? These inquiries explore the boundaries of Congressional power as well as tricky policy questions. This article is about these questions, chiefly addressing Judge King's arguments in his *Bestwall* dissent. The article refutes the contention that federal bankruptcy law is constitutionally limited to debtors who are not solvent.

In his dissent, Judge King concluded the Bankruptcy Clause permits Congress to draft bankruptcy laws only for insolvent debtors.[4] If true, his

[2] *Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC*, 148 F.4th 233, 254 (4th Cir. 2025), *cert. denied sub nom.* Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

[3] As Judge Quattlebaum put it when writing for the majority, "[D]o federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations?" *Id.* at 239.

[4] *See Bestwall*, 148 F.4th at 255–56. In his dissent, Judge King made the leap that because the term "bankruptcies" in the Bankruptcy Clause was understood to apply to insolvent persons, the bankruptcy court therefore does not have subject matter jurisdiction over solvent debtors. This conclusion was rejected by the majority. But the more fundamental question of the meaning of the Bankruptcy Clause appears unsettled.

conclusion must inevitably mean that the eligibility provisions for chapter 13 exceed Congress's authority and, more bluntly, are unconstitutional.[5]

Chapter 13 allows individuals with regular income under certain debt limits to pay creditors without surrendering their property (indicating solvency). Chapter 11 also allows individuals to pay creditors and retain property (also indicating solvency). Both chapters allow a debtor the option to pay creditors and retain property while under the protection of bankruptcy law. But chapter 13 is the most vulnerable to Judge King's constitutional argument because eligibility for chapter 13 requires ability to pay debts.[6] A focus on chapter 13 is essential to appreciate the consequences of Judge King's conclusion. This article will do that.

Judge King is not the first to question the meaning of the term "bankruptcy" in the Bankruptcy Clause and its application to federal law. Judge King's statements, and the arguments of the Official Committee of Asbestos Claimants of Bestwall, LLC (the "Committee"), mirror much of the debate over the past two centuries regarding the constitutionality and the propriety of laws to facilitate voluntary bankruptcy and debtor-initiated relief. The survey of the development of our federal bankruptcy laws contained in this article illustrates our long struggle with these questions. This article concludes that the Bankruptcy Clause provides Congress the broad power to enact bankruptcy laws, even when those laws allow voluntary proceedings by a solvent debtor. Whether lack of solvency is a prerequisite to bankruptcy relief is a matter of policy, not constitutional jurisprudence.

Part I of this article examines the constitutional text, drafting history, and early interpretations of the Bankruptcy Clause, demonstrating that it was designed to address state legislative mischief, not to restrict Congress from enacting laws for solvent debtors. Part II traces the development of federal bankruptcy law from 1800 to 1978, showing that bankruptcy—including for those who could pay their debts—has been a feature of federal bankruptcy law since the nineteenth century. Additionally, Part II discusses how allowing bankruptcy as a means to voluntarily pay debt has been repeatedly upheld as within the Bankruptcy Clause. Part III reviews and critiques Judge King's

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[5] Eligibility for chapter 13 is restricted to individuals "whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title." 11 U.S.C. § 101(30); *see also* 11 U.S.C. § 109(e). More than that, confirmation of a chapter 13 plan requires the court to find that the debtor "will be able to make all payments under the plan." 11 U.S.C. § 1325(a)(6). In this way, chapter 13 is statutorily open to individuals who are able to pay their debts as they come due, or in other words, individuals who may be solvent.

[6] *See* 11 U.S.C. §§ 101(30), 1325(a)(6).

conclusions about the Bankruptcy Clause, and Part IV posits that solvency restrictions would diminish creditor recovery and individual rehabilitation. A solvency restriction would disproportionately harm individual debtors, who would lose the option to use chapter 13 or possibly chapter 11.

I. Does the Bankruptcy Clause Grant Congress Power to Enact Bankruptcy Laws for Solvent Debtors?

A. What is the Bankruptcy Clause?

Article I of the Constitution directs: "All legislative powers herein granted shall be vested in a Congress of the United States."[7] Shortly thereafter, § 8 of Article I enumerates the specific legislative powers "herein granted" to Congress.[8] Among the enumerated powers granted in § 8 is the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[9] This phrase, found in Article I, § 8, Clause 4 of the Constitution, is known as the "Bankruptcy Clause." The phrase containing the Bankruptcy Clause is not isolated. Clause 4 in its entirety combines the powers to draft "[a] uniform Rule of Naturalization, *and* uniform Laws on the subject of Bankruptcies."[10] The Bankruptcy Clause should be read within this framework.

A look at some original contextual sources offers guidance for understanding the meaning, and the consequences, of the Bankruptcy Clause. James Madison's *Notes of Debates in the Federal Convention of 1787* ("*Notes*"), Madison's words in *Federalist No. 42*, Supreme Court interpretations of the Bankruptcy Clause, plus Justice Joseph Story's *Commentaries on the Constitution* from the early nineteenth century, all point to the conclusion that the Bankruptcy Clause is a broad power applicable to laws affecting debtors and creditors, and that the power is intended to facilitate interstate commerce and resolve state hostilities.[11] Indeed, these sources also show that the broad power to enact laws on the subject of bankruptcies was understood at the time to include laws regarding voluntary requests for relief by a debtor as well as laws addressing debtors who intentionally did not pay

[7] U.S. CONST. art. I, § 1.
[8] U.S. CONST., art. I, § 8, cl. 4.
[9] *Id.*
[10] *Id*. (emphasis added).
[11] *See infra* Parts I.B, I.C, I.D, I.E.

their debts.[12] Hence, the Bankruptcy Clause was understood to grant to Congress the power to enact laws on the subject of bankruptcies, including for persons who were *able to pay* their debts.[13]

B. The Constitutional Convention

During the Constitutional Convention, the delegates spent days debating, discussing, and deliberating on a constitution for the new republic. The new republic would replace the existing confederation of states crafted by the Articles of Confederation. During these long days, the delegates spent precious little time discussing the Bankruptcy Clause contained in the proposed constitution.[14] Madison's *Notes* show that the delegates discussed the Bankruptcy Clause within the context of other topics that generated more lengthy discussion: the need to prevent barriers to interstate commerce and the need for state judgments to have full faith and credit.[15] Madison's *Notes* reflect the following exchange on Wednesday, August 29, 1787, in the Convention,

> Mr. Wilson and Docr. Johnson supposed the meaning [of the Article] to be that Judgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included, for the sake of Acts of insolvency &c.
> Mr. Pinkney moved to commit Art XVI with the following proposition "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."
> Mr. Ghorum was for agreeing to the article, and committing the proposition.

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[12] *See infra* Parts I.B, I.C, I.D, I.E.

[13] The debtor who could pay his debts but avoided doing so was called the "fraudulent" debtor. As defined, a fraudulent debtor delayed or ignored the debt, despite having property from which the debt may be satisfied. Bankruptcy was the creditor remedy for this rebuff. Laws on the subject of bankruptcies addressed the consequence of nonpayment, whether the debtor had the ability to pay but refused to do so, or simply did not have the ability to pay even if he intended to do so.

[14] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1097–110, at 501–06 (Lonang Institute 2005) (1833).

[15] 4 THE WRITINGS OF JAMES MADISON 324–25 (1787) (Gaillard Hunt ed., 1903) [hereinafter *Writings*].

> Mr. Madison was for committing both. He wished the Legislature might be authorized to provide for the *execution* of Judgments in other States, under such regulations as might be expedient. He thought that this might be safely done, and was justified by the nature of the Union.
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> Mr. Randolph said there was no instance of one nation executing judgments of the Courts of another nation. He moved the following proposition:
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> "Whenever the Act of any State, whether Legislative, Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done."[16]

After this exchange and solicitation among the delegates, a drafting committee was appointed.[17] Obviously absent from the above discussion is any reference to debtor inability to pay as a limitation for bankruptcy laws.

On September 1, 1787, the drafting committee presented their suggestion to the convention.[18] As Madison wrote in his *Notes*,

> Mr. Rutlidge from the Committee to whom were referred sundry propositions (see Aug: 29), together with art: XVI reported that the following additions be made . . . .
>
> After the word "States" . . . add "to establish uniform laws on the subject of Bankruptcies."
>
> And insert the following as Art: XVI viz
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> "Full faith and credit ought to be given in each State to the public acts, records, and Judicial

[16] *Id.* (emphasis in original).
[17] *Id.* at 325; *see also* STORY, *supra* note 14.
[18] *Writings*, *supra* note 15, at 354–55.

> proceedings of every other State, and the Legislature shall, by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which Judgments obtained in one State, shall have in another."[19]

The Convention recessed and returned the following Monday.[20] When the delegates returned, they spent most of their time discussing the meaning of the clause providing full faith and credit to the state judgments.[21] Then they turned to the Bankruptcy Clause:

> The clause in the Report "To establish uniform laws on the subject of Bankruptcies" being taken up.
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> Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England, & He did not chuse to grant a power by which that might be done here.
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> Mr. Govr. Morris said this was an extensive & delicate subject. He would agree to it because he saw no danger of abuse of the power by the Legislature of the U. S.[22]

With no further comment, the delegates voted with all but one agreeing to the Bankruptcy Clause.[23] The brevity of the deliberation is telling. The Bankruptcy Clause generated minimal debate compared to other enumerated powers, naturally suggesting the Founders viewed it as a noncontroversial grant of authority to solve a recognized problem: competing state bankruptcy laws that impeded commerce. Given Roger Sherman's concerns about criminal penalties, if the delegates intended to restrict bankruptcy to insolvent debtors only, it is likely there would have been at least some discussion of this limitation.

On Wednesday, September 12, 1787, William Johnson, who was chairman of the Committee of Style tasked with drafting the final version of the Constitution, read the final version of the Constitution containing in Article I, § 8, the Bankruptcy Clause as: "§ 8. The Congress . . . shall have power . . .

[19] *Id.*

[20] *Id.* at 355.

[21] *Id.* at 355–60.

[22] *Id.* at 356–57.

[23] *Writings*, *supra* note 15, at 357 ("On the question to agree to the clause N. H. ay. Mas. ay. Ct no. N. J. ay. Pa ay. Md ay. Va ay. N. C. ay. S. C. ay. Geo. ay.").

[t]o establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."[24]

On Monday, September 17, 1787, the delegates voted in favor of adoption.[25] As Madison wrote, "The Constitution being signed by all the members except Mr. Randolph, Mr. Mason and Mr. Gerry, who declined giving it the sanction of their names, the Convention dissolved itself by an Adjournment sine die."[26] All that was left was for the thirteen states to ratify the Constitution.

C. The Federalist Papers

To persuade the states to support ratification of the proposed constitution, James Madison, Alexander Hamilton, and John Jay drafted *The Federalist Papers*. These were powerful and effective essays explaining and defending the Constitution, its language, and its structure. Of these, *Federalist No. 42* mentions the Bankruptcy Clause.[27]

In *Federalist No. 42*, written in January 1788, Madison outlines the need for a federal legislature to have certain classes of powers.[28] After the "*second* class of powers," Madison explains, "the powers included in the *third* class are those which provide for the harmony and proper intercourse among the States."[29] After his statement about the "harmony and proper intercourse among the States[,]" he then remarks,

> I shall confine myself to a cursory review of the remaining powers comprehended under this third description, to wit: to regulate commerce among the several States and the Indian tribes; to coin money, regulate the value thereof and of foreign coin; to provide for the punishment of counterfeiting the current coin and securities of the United States; to fix the standard of weights and measures; to establish a uniform rule of naturalization, and uniform laws of bankruptcy; to prescribe the manner in which the public acts,

[24] *Id.* at 427.
[25] *Id.* at 472–83.
[26] *Id*. at 483.
[27] THE FEDERALIST NO. 42, at 267 (James Madison) (Clinton Rossiter ed., 1961).
[28] *Id.*
[29] *Id.* at 264–67 (emphasis in original).

> records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States; and to establish post offices and post roads.[30]

Madison observed unequivocally that the power granted to Congress to draft uniform laws regarding bankruptcy is necessary to facilitate unrestricted commerce between the states. He stated,

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.[31]

The words granting to Congress the power to draft uniform laws regarding bankruptcies are contained within the clause granting to Congress the power over naturalization laws.[32] The power is "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."[33] Madison wrote in *Federalist No. 42* that the "dissimilarity in the rules of naturalization has long been remarked as a fault in our system" requiring as a remedy, "authorizing the general government to establish a uniform rule of naturalization throughout the United States."[34] Alexander Hamilton, in *Federalist No. 32*, echoed the need for uniform laws regarding naturalization to avoid dissimilarities among procedures for naturalization of citizens of the United States.[35] In *Federalist No. 42*, Madison ties the discussion of the need for uniform laws regarding naturalization with the similar need regarding bankruptcy.[36] He explains the need for a federal government to have authority to draft laws regarding bankruptcy to provide harmony and proper intercourse among the states.[37] Stated differently, if the federal government drafted such laws on bankruptcy and the laws had uniform effect, it would prevent disharmony and barriers to intercourse among the states.

[30] *Id.* at 267.
[31] *Id.* at 271.
[32] U.S. CONST. art. I, § 8, cl. 4.
[33] *Id.*
[34] THE FEDERALIST NO. 42, at 269–71.
[35] *See* THE FEDERALIST NO. 32, at 199 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[36] *See* THE FEDERALIST NO. 42, at 269–70.
[37] *See id.* at 271.

Later sources provide more context and meat to Madison's statements. In his 1833 *Commentaries on the Constitution*, Justice Joseph Story wrote that the "propriety of confiding power to establish an uniform rule of naturalization to the national government seems not to have occasioned any doubt or controversy in the [constitutional] convention."[38] The "dissimilarity of the system [of naturalization] in different states was generally admitted, as a prominent defect."[39] Story noted, "In effect every state possessed the power of naturalizing aliens in every other state; a power as mischievous in its nature, as it was indiscreet in its actual exercise."[40] Consequently, there was "great wisdom" in "confiding to the national government the power to establish a uniform rule of naturalization throughout the United States."[41]

Story observed the same "prominent defect" from state disunity applies to bankruptcies, and the Bankruptcy Clause is the remedy to this defect.[42] He explained:

> It is obvious, that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its own local interests, and pursuits. Under such circumstances no uniformity of system or operations can be expected. . . . [D]iversities of almost infinite variety and object may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighboring states. What is here stated, is not purely speculative. It has occurred among the American states in the most offensive forms, without any apparent reluctance or compunction on the part of the offending state. . . . There can be no other adequate remedy, than giving a power to the general government, to introduce and perpetuate a uniform system.[43]

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[38] *See* STORY, *supra* note 14, § 1098, at 501.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* § 1102, at 502–03.

Although Story was writing after the ratification of the Constitution, his reference to the feuds among the states reflected the reality for the states under the Articles of Confederation. His point was that the Bankruptcy Clause was the remedy to what he described as states' mischief.

Story expanded upon the defect of disunity. He notes "no state can introduce any system, which shall extend beyond its own territorial limits, and the persons, who are subject to its jurisdiction. Creditors residing in other states cannot be bound by its laws; and debts contracted in other states are beyond the reach of its legislation."[44] Having surrendered his property and obtained a discharge in a bankruptcy in one state, the debtor "will be harassed by new suits, and new litigations, as often as he moves out of the state boundaries."[45] What makes the state rejection of another state's discharge order all the more concerning is the adverse impact upon commerce and opportunity for the expanding United States citizenry.

> Among a people, whose general and commercial intercourse must be so great, and so constantly increasing, as in the United States, this alone would be a most enormous evil, and bear with peculiar severity upon all the commercial states. Very few persons engaged in active business will be without debtors or creditors in many states in the Union. The evil is incapable of being redressed by the states. It can be adequately redressed only by the power of the [federal government].[46]

Story's *Commentaries* are among the most respected sources explaining the meaning of the Bankruptcy Clause as it was understood at the time of ratification. On top of that, the Supreme Court rulings applying the Bankruptcy Clause further our understanding of the power granted to Congress by the Bankruptcy Clause.

D. Preventing Mischief: Supreme Court Observations on the Bankruptcy Clause

As recently as 2020, the United States Supreme Court highlighted the purpose of the Bankruptcy Clause. The words of Justice Kagan and Justice

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[44] *Id.* § 1103, at 503.
[45] *Id.*
[46] *Id.*

Stevens mirror the words of Madison and Story. When writing about the Bankruptcy Clause in *Allen v. Cooper* (a case about state sovereign immunity), Justice Kagan pointed out that it "emerged from a felt need to curb the States' authority."[47] She referenced the Court's earlier opinion (also about state sovereign immunity but in the context of a bankruptcy case) in *Central Virginia Community College v. Katz*.[48] In *Katz*, Justice Stevens wrote that at the time of the Founding, "the American Colonies, and later the several States, had wildly divergent schemes for discharging debtors and their debts" and often "[refused] to respect one another's discharge orders."[49] A primary goal of the Bankruptcy Clause was to prevent competing claims of state sovereignty over discharging debtors and their debts.[50]

It can hardly be more obvious from the text of the Constitution, notes from the Constitutional Convention, *The Federalist Papers*, the words of contemporary commentaries, and the statements from the Supreme Court justices, that the Constitution granted to Congress the power to establish uniform laws regarding bankruptcy to check the actions by the states who competed in establishing vindictive bankruptcy laws and refused to honor each other's orders.

E. The Original Meaning of the Text "Laws on the subject of Bankruptcies"

In the early nineteenth century, not long after ratification of the Constitution, the United States Supreme Court first interpreted the text of the Bankruptcy Clause. The Court confronted the application of the meaning of the word "bankruptcies" in the Bankruptcy Clause. In *Sturges v. Crowninshield*, Chief Justice John Marshall considered a New York law, enacted in 1811 and labeled as an "insolvency law," that permitted discharge of the person and the property from a contract.[51] The law addressed contracts that had been made before its enactment. A decade previous, in 1800, Congress enacted the first

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[47] 589 U.S. 248, 258 (2020) (citing Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) and its discussion of the primary goal of the Bankruptcy Clause).

[48] 546 U.S. 356 (2006).

[49] *Id.* at 365, 377.

[50] *See id.* at 365, 377.

[51] 17 U.S. (4 Wheat.) 122, 123 (1819).

federal bankruptcy law.[52] Shortly thereafter, in 1803, Congress repealed it. And so, when New York enacted its law, no federal bankruptcy law was in effect.[53]

In his opinion, Chief Justice Marshall confronted three questions.[54] First, did the Bankruptcy Clause usurp the states' power to enact any laws on the subject of bankruptcies even when Congress had not exercised its power to do so?[55] Second, is a state "insolvency law" in which a debtor may petition for relief from personal liability (voluntary request for discharge of the person) a law on the subject of bankruptcies?[56] Finally, did the state insolvency law impair a contract created in another state and so violate Article I of the Constitution?[57]

1. May states enact laws on the subject of bankruptcies?

States, of course, had the power to enact laws on the subject of bankruptcies at the time the Constitution was ratified.[58] They also had the power to enact what were commonly called "insolvency acts" or laws on the subject of "insolvencies."[59] But what remained unclear was whether the states retained the authority to draft these laws (on the subject of bankruptcies and on the subject of insolvencies) after having ratified the Constitution and giving the federal government the power to enact "uniform laws on the subject of bankruptcies."

2. Insolvency versus bankruptcy

At the time of the Founding, state laws labeled as "insolvency acts" (or insolvency laws) were separate from laws labeled as "bankruptcy laws."[60] Although the distinctions between these two laws ranged, the fundamental differences were that insolvency laws permitted a debtor to initiate a request for

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[52] Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

[53] *See Crowninshield*, 17 U.S. (4 Wheat.) at 123.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See Crowninshield*, 17 U.S. (4 Wheat.) at 181.

[59] *See id.* at 145–46.

[60] *See* STORY, *supra* note 14, § 1101, at 502; Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1082 (2002); *see also* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 ABI L. REV. 5, 9, 12. (1995).

relief, but bankruptcy proceedings were initiated at the request of a creditor.[61] Insolvency laws (usually) permitted a discharge of the person from imprisonment for debt, but bankruptcy permitted a discharge of the debt once the creditor admitted satisfaction or otherwise consented to discharge the obligation.[62] The former was a voluntary request for relief made by the debtor, while the latter was a process against the debtor by which his property may be seized for the benefit of his creditors. Whereas the former was generally a plea for forgiveness, the latter was a punishment. In some ways, the concept of what were called insolvency laws reflects what is today's voluntary bankruptcy, and the concept of what were then called bankruptcy laws reflects (for the most part) what is today's involuntary bankruptcy.

When Chief Justice Marshall considered whether the New York law violated the Constitution, he began by discussing the extent to which states may enact bankruptcy laws, which required him to discuss the subject of insolvency laws as distinct from bankruptcy laws.

> This *establishment* of *uniformity* is, perhaps, incompatible with State legislation, on that part of the subject to which the acts of Congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract, are bankrupt laws. But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, not a bankrupt act; and, therefore, unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance

[61] *See* STORY, *supra* note 14, § 1101, at 502; Plank, *supra* note 60.
[62] *See* STORY, *supra* note 14, § 1101, at 502; Plank, *supra* note 60.

> of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a Court would scarcely be warranted in saying, that the law was unconstitutional, and the commission a nullity.[63]

The Chief Justice noted frankly that the distinctions within bankruptcy and insolvency laws are necessarily questions on which the legislature may exercise discretion.[64] Indeed "who must be excluded from, or may be included within," the description of an insolvency law distinct from a bankruptcy law (whether to limit the eligibility to only a merchant or trader, for example) is up to the legislature.[65] Through the opinion, Chief Justice Marshall explains that the question of eligibility for bankruptcy is within the power of the legislature, and the constitutional grant of power on the subject of bankruptcies is not limited by definitions of eligibility.

If, however, Chief Justice Marshall is incorrect, and Congress is without power to draft laws under which a solvent debtor is eligible to file bankruptcy, then the power to do so remains with the states. Hence, states may enact laws on the subject of solvent debtors for the purpose of reorganization or debt relief. The upshot would create the dissimilarity the Founders meant to remedy.[66]

3. The subject of bankruptcies includes laws for persons who can pay their debts

Chief Justice Marshall noted that when Congress enacted its first Bankruptcy Act of 1800, it made the law applicable to state insolvency laws (that is, laws initiated by a debtor seeking relief).[67] He observed that Congress

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[63] *Crowninshield*, 17 U.S. (4 Wheat.) at 194 (emphasis in original).

[64] *See id.* at 195 (reflecting that it is "like every other part of the subject, one on which the legislature may exercise an extensive discretion").

[65] *See id.*

[66] Much of the recent hue and cry over the constitutionality of bankruptcy by a solvent debtor has been lodged against businesses that use state laws to segregate tort debt liability through strategies unfavorable to the tort claimants (the "Texas two-step") and then address the tort liability through chapter 11 bankruptcy. *See* Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 148 F.4th 233, 247 (4th Cir. 2025), *cert. denied sub nom.* Comm. of Asbestos Claimants v. Bestwall LLC, No. 25-1013, 2026 WL 1513280; *see also* Ralph Brubaker, *Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy (Part III): The Constitutional Limits of the Bankruptcy Power*, 44 BANKR. L. LETTER NO. 10, at 2–3 (2024). Restricting the business from the bankruptcy forum will not preclude states from enacting these tools—it may invite more of them.

[67] *See Crowninshield*, 17 U.S. (4 Wheat.) at 181–82.

was of the opinion that insolvency laws "might be considered a branch of the bankrupt system."[68] His reflection speaks to today's question of whether federal bankruptcy law used by solvent debtors to reorganize (a voluntary request initiated by a debtor who can pay his debts) is within "a branch of the bankrupt system." Chief Justice Marshall said bluntly that the subject of "fraudulent" debtors was within the subject of bankruptcies.[69] In short, the subject of bankruptcies must include debtors who had the ability to pay their debts (but were "fraudulent" because they delayed their creditors).[70]

Chief Justice Marshall acknowledged the futility of differentiating between laws regarding voluntary requests for forgiveness by a debtor and laws providing a remedy to creditors. The logical conclusion of his observations is simply that the Bankruptcy Clause places these topics in the hands of Congress to address, or decline to address, through the legislative process.

As it turns out, Chief Justice Marshall decided that it was unnecessary to answer the question of whether the New York law, called an insolvency law, was actually a law on the subject of bankruptcies.[71] Because the New York law was enacted when no federal bankruptcy law was in effect, the Supreme Court held that it did not violate the Bankruptcy Clause.[72] Recognizing that

> [i]f the right of the States to pass a bankrupt law is not taken away by the mere grant of power to Congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States; but it removes a disability to its exercise, which was created by the act of Congress.[73]

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[68] *Id.* at 201.

[69] *Id.* at 202 (discussing that state insolvency laws and "other laws which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property" were on "the mind of the Convention").

[70] If at the time the Constitution was adopted "insolvency" meant "balance sheet insolvency" (having no assets from which to repay debts), then the Founders would not have needed to discuss "fraudulent debtors" who had assets from which to pay debts but absconded with them and avoided their creditors.

[71] *Crowninshield*, 17 U.S. (4 Wheat.) at 197.

[72] *Id.* at 196.

[73] *Id.* The Bankruptcy Clause does not provide *exclusive* power to Congress on the subject of bankruptcy. Although they are found in the same clause for the same remedy (against state mischief), the Bankruptcy Clause contrasts from the Naturalization Clause in this manner. The Bankruptcy Clause does not eliminate the power of state legislatures to draft laws on the subject

In the end, the Supreme Court found that the New York statute, applicable to contracts made in a different state and before the New York law was in effect, was a law "impairing the obligation of contracts," violating Article I, Clause 10, and concluded the law was unconstitutional.[74]

Over the next two centuries after Chief Justice Marshall mused over the Bankruptcy Clause, Congress explored, tested, and embraced varying laws for creditor recovery and debtor relief. The next section of this article surveys the development of those laws, specifically the development of chapter 13. Because Congress enacted chapter 13 bankruptcy law for individuals who are able to pay their debts, these provisions are the most obvious example of Congress exercising its power under the Bankruptcy Clause to enact bankruptcy laws for solvent debtors. The foregoing history demonstrates the lengthy and careful process culminating in modern chapter 13 laws.

II. The Development of Federal Voluntary Bankruptcy Law in America

A. Voluntary Bankruptcy's Slow Acceptance in the Nineteenth Century

A critical observation by Chief Justice Marshall in *Crowninshield*, although not central to his ruling, is that insolvency law "might be considered as a branch of the bankrupt system."[75] One reason this is noteworthy is, as described above, because insolvency laws were initiated at the request of the debtor when bankruptcy laws were initiated at the request of the creditor.[76] In other words, insolvency laws were the roots of modern voluntary bankruptcy proceedings. Chief Justice Marshall's observation is an indication that voluntary bankruptcy is not only constitutional but is a policy matter for legislators. How Congress then addressed these policy matters through bankruptcy legislation over the subsequent two centuries produced a fascinating result. In the nineteenth and twentieth centuries, Congress expanded voluntary bankruptcy options and reduced the penal involuntary aspects of bankruptcy law. These changes to enhance nonpunitive voluntary bankruptcy were largely embraced because not only did they provide compassionate relief

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of bankruptcies, but the Naturalization Clause does eliminate the power of state legislatures to draft laws on the subject of naturalizations (or citizenship). *See id.* at 196–97.

[74] *Crowninshield*, 17 U.S. (4 Wheat.) at 208.

[75] *Id.* at 201.

[76] *See supra* Part I.E.2.

to a debtor, but they were also a means to yield greater recoveries to creditors than the penal involuntary process.[77]

A survey of the progression of voluntary bankruptcy law in America follows. Remarkably, the early federal laws on the subject of bankruptcy were criticized as a burden upon creditors, but as the laws changed to provide incentives for voluntary bankruptcy options for debtors, especially the option for debtors to pay their creditors through a court-approved plan, the result was praised for its greater benefit to creditors.[78] Perhaps it is the dual benefit to debtors and creditors once bankruptcy laws opened the door to debtors with the means to pay their debts that has led to the enduring federal bankruptcy law system since 1898. Once federal bankruptcy law welcomed solvent debtors with the option to voluntarily use the bankruptcy system to pay creditors, federal bankruptcy law became more stable.

B. Bankruptcy Act of 1800[79]

The Bankruptcy Act of 1800 ("1800 Act") was the first federal bankruptcy law enacted in America.[80] The 1800 Act provided that (among other things):

> [A]ny merchant or other person residing within the United States, actually using the trade of merchandise, . . . or as a banker, broker, factor, underwriter or marine insurer, shall, with intent unlawfully to delay or defraud his or her creditors, depart from the State in which such person usually resides, or remain absent therefrom, or conceal him or herself therein, or keep his or her house, so that he or she cannot be taken, or served with process, or willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution . . . or being arrested for debt, or having

[77] *See infra* Parts II.I, II.J, III.

[78] *See infra* notes 203, 205, 211.

[79] Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

[80] *Id.*; *see also* Tabb, *supra* note 60, at 14.

> surrendered him or herself in discharge of bail, shall remain in prison two months or more, or escape therefrom, or whose lands or effects being attached by process . . . shall not, within two months after written notice thereof, enter special bail and dissolve the same, . . . every such person shall be deemed and adjudged a bankrupt . . . .[81]

The 1800 Act's eligibility provisions thus directly contradict the claim that bankruptcy was historically limited to insolvent debtors. A person was "deemed and adjudged a bankrupt" if he departed the state, remained absent, concealed himself, kept house so he could not be served with process, procured his arrest, or remained in prison for two months—all "with intent unlawfully to delay or defraud" creditors. The statute required only intent to delay or defraud, not inability to pay. A wealthy merchant who fled to another state to delay his creditors was subject to bankruptcy proceedings. This demonstrates that early American bankruptcy law, enacted by the same generation that ratified the Constitution, applied to those who could pay their debts.

Under the 1800 Act, creditors (not the debtor) petitioned for bankruptcy.[82] After the "creditors petitioning shall make affidavit or solemn affirmation before the said judge of the truth of his, her or their debts, and give bond, to be taken by the said judge, in the name and for the benefit of the said party so charged as a bankrupt," then the judge would appoint "such good and substantial persons . . . as such judge shall deem proper, not exceeding three, to be commissioners of the said bankrupt."[83] The commissioners then "as soon as may be" must conduct an examination and ultimately "upon due examination, and sufficient cause appearing against the party charged, shall and may declare him or her to be a bankrupt."[84] The proceeding was *against* the debtor to be "charged as a bankrupt."[85] The debtor was "adjudged a bankrupt" if he delayed his creditors or defrauded them. Notably the proceeding did not require a showing that the debtor *could not* pay his debts—only that he *had not*.

If the debtor "shall refuse to be examined, or to answer fully, . . . it shall be lawful for the commissioners to commit the offender to close imprisonment, until he or she shall conform him or herself."[86] As if that was not bad enough,

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[81] Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 [hereinafter *1800 Act*].
[82] *Id.* § 2.
[83] *Id.*
[84] *Id.* § 3.
[85] *Id.*
[86] *Id.* § 21.

if the person was adjudicated a bankrupt, the commissioners "shall have power forthwith, . . . to cause to be apprehended, by warrant under their hands and seals, the body of such bankrupt, wheresoever to be found, within the United States . . . and . . . shall have power to cause the doors of the dwelling-house of such bankrupt to be broken, or the doors of any other house in which he or she shall be found."[87] Not only that, but the 1800 Act also authorized commissioners to take "all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled . . . (his or her necessary wearing apparel, and the necessary wearing apparel of the wife and children, and necessary beds and bedding of such bankrupt only excepted)."[88] The 1800 Act required the debtor to surrender himself and his property and execute

> [an] assignment of his or her estate, whatsoever and wheresoever, as shall be devised and directed by the commissioners, to vest the same in the assignees, their heirs, executors, administrators, and assigns forever, in trust, for the use of all and every [of] the creditors of such bankrupt, who shall come in and prove their debts under the commission; and deliver up unto the commissioners all such part of his or her the said bankrupt's goods, wares, merchandises, money, effects and estate, and all books, papers and writing thereunto relating, as at the time of such examination shall be in his or her possession, custody or power . . . .[89]

The debtor had no option to retain his assets. Failure to submit to examination and failure to disclose his assets and assign the same to his creditors, if willful, resulted in the debtor being "adjudged a fraudulent bankrupt" and put in prison for up to ten years (but for no less than twelve months).[90] What is more, the 1800 Act stated it "shall be lawful" to "break open . . . the houses, chambers, shops, warehouses, doors, trunks or chests of the bankrupt . . . and to take possession of the goods, money and other estate, deeds, books of account or writings of such bankrupt."[91]

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[87] *1800 Act*, *supra* note 81, § 4.
[88] *Id.* § 5.
[89] *Id.* § 18.
[90] *Id.*
[91] *Id.* § 20.

After the commissioners had declared the person a bankrupt, they "forthwith" shall set "some convenient time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects; at which meeting the said commissioners shall admit the creditors of such bankrupt to prove their debts."[92] At the meeting, creditors voted and ultimately,

> the said commissioners shall assign . . . all . . . the said bankrupt's estate . . . to such person or persons as the major part in value of such creditors, according to the several debts then proved, shall choose as aforesaid: [p]rovided always, that in such choice, no vote shall be given by, or in behalf of, any creditor whose debt shall not amount to two hundred dollars.[93]

Ultimately the burden on creditors to appear "to prove" their debt to commissioners or a judge was onerous enough that Congress repealed the law in 1803.[94] The challenges of transportation imposed too great a burden on creditors.[95] The impetus to repeal the law was its negative impact on creditors.[96]

C. Bankruptcy Act of 1841[97]

The Bankruptcy Act of 1841 ("1841 Act") is among the most significant because it formally introduced voluntary bankruptcy to federal law.[98] Under the 1841 Act, a proceeding began by either a petition filed "by any bankrupt" or "by a creditor against any bankrupt;" or, in other words, the 1841 Act allowed voluntary and involuntary petitions.[99] The 1841 Act did not require imprisonment but did require surrender of property and compliance with all

[92] *Id.* § 6.

[93] *1800 Act*, *supra* note 81 § 6.

[94] *See* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Rule, Power, and Jurisdiction of Today's United States Bankruptcy Court and its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 170–71 (2000).

[95] Kennedy, *supra* note 94, at 171.

[96] *Id*.

[97] Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

[98] Kennedy, *supra* note 94, at 171; *see also* Tabb, *supra* note 60, at 16–17; Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 363 (2013).

[99] Act of Dec. 19, 1803, ch. 6, § 7, 2 Stat. 248.

orders of the court.[100] Like the 1800 Act, the debtor surrendered all of his property.[101] After that (and after notice and opportunity for creditors to object over a period of seventy days), "every bankrupt, who shall bona fide surrender all his property, and rights of property . . . for the benefit of his creditors, and shall fully comply with and obey all [court orders and directions] and shall otherwise conform to all the requisitions of this act, shall . . . be entitled to a full discharge" from his debts unless a majority in number and value of his creditors who have proved their debts disapprove, or unless the bankrupt was not eligible to discharge his debts (if he had not "kept proper books of account" or did not "conform to" the "requisites of this act" among other apparently bad acts).[102] This opportunity for a personal discharge in return for voluntary surrender of property was groundbreaking and controversial.

Not surprisingly, the controversy over the 1841 Act was whether it exceeded Congress's authority under the Bankruptcy Clause. Two cases illustrate the dispute. In *Nelson v. Carland*, the district court scoffed at the 1841 Act, which, as the district judge put it, enabled debtors at their own election "to avoid their debts," and held it unconstitutional (because the law was apparently "opposed to the whole intent, spirit, and object of a bankrupt law").[103] The district court refused to grant a discharge to a debtor under the 1841 Act reasoning that the 1841 Act was "void" because the voluntary bankruptcy relief provisions were beyond what was contemplated by the framers of the Constitution who drafted the Bankruptcy Clause.[104] On appeal, the Supreme Court dismissed the case for lack of jurisdiction, but Justice Catron issued a lengthy dissent in which he expressed his view on the merits, explaining that the 1841 Act was constitutional.[105] The law was repealed before other appeals would reach the Supreme Court, but the Supreme Court reporter published as an attachment to the opinion of *Nelson v. Carland* a companion opinion, specifically incorporating it "as being of general interest."[106] The case was *In re Klein* and was written by Justice Catron when he was sitting on the Circuit Court of Appeals.[107]

[100] *Id.* §§ 3–4.
[101] *Id.* § 3.
[102] *Id.* § 4.
[103] 42 U.S. 265, 274 (1843).
[104] *See id*. at 268–69.
[105] *See id.* at 266–77.
[106] *See id.* at 277.
[107] *Id.*

In his opinion in *In re Klein*, like his dissent in *Nelson v. Carland*, Justice Catron explained why the Constitution granted Congress the power to draft uniform laws on the subject of bankruptcies, and why the Constitution prohibited states from enacting laws to impair contracts made outside that state.[108] Justice Catron then went on to pronounce,

> In considering the question before me, I have not pretended to give a definition; (but purposely avoided any attempt to define) the mere word, BANKRUPTCY. It is employed in the Constitution in the plural, and as part of an expression; "the subject of bankruptcies." The ideas attached to the word in this connection, are numerous and complicated; they form a subject, of extensive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is—To what limits is that jurisdiction restricted?
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> I hold, it extends to all cases where the law causes to be distributed, the property of the debtor among his creditors: this is its least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.
>
> With the policy of a law, letting in all classes, others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers.[109]

Justice Catron's comments bring home a critical point and refute the argument that bankruptcy jurisdiction is limited to insolvent debtors. Eligibility for federal bankruptcy laws, including whether eligibility permits voluntary filings for solvent debtors, is a legislative policy choice, not a constitutional restriction.

[108] *In re* Klein, 14 F. Cas. 716, 716–18 (C.C.D. Mo. 1843) (No. 7,865).
[109] *See id.* at 719.

The 1841 Act was rarely used and, like its predecessor, was short-lived.[110] The Act was repealed on March 3, 1843, after having been passed just eighteen months earlier on August 19, 1841.[111] The voluntary bankruptcy experiment was unpopular because the process did not lead to enough payment to creditors; it appeared to benefit the debtor without commensurate benefit to creditors.[112] The voluntary bankruptcy allowed disproportionately large amounts of debt to be forgiven for a relatively small amount of property to be surrendered.[113] "In the 18 months of [the Act granting a discharge to debtors who filed a voluntary petition in bankruptcy] more than 28,000 debtors had been relieved of nearly $445,000,000 of obligations by the surrender of less than $45,000,000 in property."[114]

D. Bankruptcy Act of 1867[115]

The Bankruptcy Act of 1867 ("1867 Act") reintroduced the option of a voluntary bankruptcy proceeding.[116] Once again, the option to file a voluntary bankruptcy allowed a debtor to obtain a discharge of debt in return for surrender of property.[117] Under the 1867 Act, a person residing within the jurisdiction of the United States whose provable debts exceeded $300 could apply by a petition in which he stated "his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors and his desire to obtain the benefit of this act."[118] The filing of the petition "shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt."[119] If a judge was satisfied that the petitioner had provable debts exceeding $300, the judge would issue a notice stating the following:

> First. That a warrant in bankruptcy has been issued against the estate of the debtor.

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[110] Kennedy, *supra* note 94, at 171; *see also* Lubben, *supra* note 98, at 364.

[111] Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

[112] *See* Kennedy, *supra* note 94, at 171; *see also* Lubben, *supra* note 98, at 364.

[113] *See* John Hanna, *Bankruptcy Amendments of 1933*, 2 MERCER BEASLEY L. REV. 113, 114 (1933).

[114] *Id.*

[115] Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

[116] *Id.* § 11.

[117] *Id.* §§ 11, 29.

[118] *Id.* § 11.

[119] *Id.*

> Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.
> Third. That a meeting of the creditors of the debtor . . . will be held at a court of bankruptcy . . . .[120]

In the bankruptcy proceeding, an assignee was appointed from one of the creditors (like the commissioners from the 1800 Act).[121] The assignee collected property of the debtor, sold property, accounted for it, and disbursed its proceeds, among other duties.[122] During the course of the proceeding, three meetings of creditors were convened[123] over a period of six months or longer, at which the assignee provided a report and accounting of the assets of the estate.[124] At these meetings, the creditors determined, by majority vote, whether and what portion of the proceeds should be divided among them (in what dividend amounts).[125] After having been adjudicated a bankrupt, and having cooperated with all orders of the court, the bankrupt may apply for a discharge.[126] As described by one scholar, "under the Bankruptcy Act of 1867, it was not difficult to find a reason to force a debtor into bankruptcy, but it was exceedingly difficult for the debtor once adjudicated to obtain his discharge."[127] For example, simply having "lost any part thereof [his property] in gaming" at any time was grounds to deny a bankruptcy discharge, as was having made "in contemplation of becoming bankrupt" any transfer (directly or indirectly) "for the purpose of preferring any creditor or person having a claim against him."[128]

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[120] *Id.*

[121] Assignees were appointed under the 1841 Act as well. At the meeting of creditors, the assignee was selected by "the greater part in value and in number of the creditors who have proved their debts," but if no choice was made, the judge could appoint an assignee. If the assignee failed to accept the assignment timely, the "judge or registrar [would] fill the vacancy." *Id.* § 13.

[122] *See id.* §§ 13–17.

[123] "At the expiration of three months from the date of the adjudication of bankruptcy . . . the court, upon request of the assignee, shall call a general meeting of the creditors," and "the like proceedings shall be held at the expiration of the next three months, or earlier, . . . and a third meeting of creditors shall then be called by the court, and a final dividend then declared." *Id.* §§ 27–28.

[124] *Id.* § 27.

[125] *Id.*

[126] *Id.* § 29.

[127] Vincent L. Leibell, Jr., *The Chandler Act—Its Effect upon the Law of Bankruptcy*, 9 FORDHAM L. REV. 380, 384 (1940).

[128] Bankruptcy Act of 1867, ch. 176, § 29, 14 Stat. 517, *repealed by* Act of June 7, 1878,

As the name implies, the assignee became owner of all property interests of the debtor.[129] The assignee (not the debtor) could designate and set apart "necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt" as exempt from sale.[130]

Although the statute did not provide for the debtor to be imprisoned for debt defaults, the statute did not prevent arrest for debt if the civil action was for a debt or claim "from which his discharge in bankruptcy would not release him."[131]

Once more, the bankruptcy law provided limited options for a debtor. His sole choice was either to submit to a complete surrender of property now or hold out until an involuntary action was filed against him later (and surrender his property at that time). He relinquished any possibility of paying his creditors directly; instead, assignees took control of his property, liquidated what they could, and distributed the proceeds as they chose.

E. Bankruptcy Act of 1874 (The Amendatory Bankruptcy Act)[132]

The Bankruptcy Act of 1874 ("1874 Amendments") was initially intended as a total repeal of the 1867 Act.[133] As it happened, the 1874 Amendments did not repeal the 1867 Act—they simply amended the 1867 Act. The 1874 Amendments retained nearly all its provisions with adjustments. One adjustment was to the discharge provision. The 1874 Amendments provided in cases of voluntary bankruptcy, "no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, . . . without the assent of at least one-fourth of his creditors in number and one-third in value."[134] But in the case of an involuntary bankruptcy under the 1874 Amendments, the debtor could apply for a discharge regardless of the percentage paid to creditors or the requisite creditor consent (as contrasted with prior law).[135] Yet the most consequential aspect of the 1874 Amendments was

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ch. 160, 20 Stat. 99.

[129] *See id.* §§ 13–17.

[130] *Id.* § 30.

[131] *See id.* § 26.

[132] Act of June 22, 1874, ch. 390, 18 Stat. 178, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

[133] Kennedy & Clift, *supra* note 94, at 173.

[134] *See* Act of June 22, 1874, ch. 390, § 9, 18 Stat. 178, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

[135] *Id.* Under the 1800 Act, after surrender of property, if at least 50% had been paid to

the addition of § 17.[136] In this section, "compositions" were authorized, and this planted a seed for what would ultimately become bankruptcy reorganizations, or more specifically chapter 11, 12, and 13 options for debtors.[137]

The 1874 Amendments provided that unsecured creditors may consider a "composition proposed by the debtor" as satisfaction of their debts.[138] The composition was a settlement of the debt agreed upon with the creditor.[139] If accepted by a majority in number of creditors and those holding three-fourths in value of the debts, and subsequently confirmed by two-thirds in number and one-half in value of all the creditors of the debtor, the composition may be approved as a resolution by the court.[140] In such event, it "shall be binding on all the creditors" listed in the bankruptcy case.[141] In other words, nonconsenting creditors could be bound by the composition.

In short order, the composition provisions of the 1874 Amendments were challenged. In *Wilmot v. Mudge*, the Supreme Court considered the question of whether the "composition" (that permitted a debtor to voluntarily pay debts and retain property, both of which would be features of solvency) was within the subject of bankruptcies. [142] The specific question in the case was whether the debt owed to Mudge & Co. was excepted from the composition discharge.[143] The debt was apparently obtained by fraud and excepted from a bankruptcy discharge under the 1867 Act.[144] The debtor insisted the debt was discharged under the composition proceeding authorized under the 1874 Amendments, arguing that the composition was not a "bankruptcy."[145]

The Supreme Court disagreed. Justice Miller, writing for the Court, said because the composition could compel a nonconsenting creditor to release its

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creditors, the court may discharge the balance of the debt and permit the debtor to keep 5% of his estate. *See* Act of Apr. 4, 1800, ch. 19, §§ 34–35, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

[136] *See* Act of June 22, 1874, ch. 390, § 17, 18 Stat. 178, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

[137] *See id.*

[138] *Id.*

[139] *Id.* ("[T]he creditors of such alleged bankrupt may . . . resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor.").

[140] *Id.*

[141] *Id.*

[142] 103 U.S. 217, 217 (1880).

[143] *See id.* at 217–18.

[144] *See id.* at 219.

[145] *See id.* at 218.

debt, the composition proceeding was akin to a bankruptcy release rather than an accord and satisfaction.[146] Indeed the option could only occur once

> proceedings in bankruptcy have been commenced by [the debtor] or against [the debtor] under the bankrupt law. . . . The composition proceeding is, therefore, a part of the proceedings in bankruptcy, and one of the modes which the bankrupt law authorizes of releasing the debtor and securing to his creditors an equal share of his means.[147]

To emphasize the point even more, Justice Miller reiterated, "We are very clear, therefore, that the provision for composition is a proceeding in bankruptcy[.]"[148]

Complaints about the 1874 Amendments cited the excessive costs of administration causing the small bankruptcy estates to be "entirely absorbed in fees."[149] In other words, the disproportionate expenses of administration diminished the recovery for creditors, to their detriment. The complaints targeted liquidation cases controlled by creditor assignees.[150] Only four years later, in 1878, the Bankruptcy Act of 1867 and its amendments in 1874 were repealed.[151]

F. Bankruptcy Act of 1898[152]

The Bankruptcy Act of 1898 ("1898 Act") set forth a bankruptcy framework that would endure for eighty years.[153] The 1898 Act was followed

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146 *Id.* at 219.

147 *Id*.

148 *Id*.

149 *See In re* Oakland Lumber Co., 174 F. 634, 637 (2d Cir. 1909) (cautioning against hastily appointing a receiver in a bankruptcy case that may not proceed to administration and commenting "[n]othing contributed so much to bring about the repeal of the act of 1867 [amended in 1874] as the large expense of administration, the small estates being entirely absorbed in fees").

150 *See id*.

151 Hanna, *supra* note 113, at 115 (noting that dissatisfaction with the 1867 Act and its 1874 Amendments "became so great that in 1878 it was repealed by a vote of 38 to 6 in the Senate and 205 to 40 in the House").

152 Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

153 The Bankruptcy Act of 1898 was not repealed until 1978. *See* discussion *infra* Part II.J.

by various amendments, most of which expanded relief for debtors and produced administrative improvements to manage the growing caseload.[154] Notably, as the debtor relief provisions expanded, so too did creditor satisfaction. Ultimately most of the amendments opened the door to greater options for debtors and paved the way for the Bankruptcy Code in 1978 and its momentous shift to a comprehensive voluntary debt restructuring and debtor reorganization process through chapters 11 and 13.

G. The Origin of Chapter 13

The 1898 Act embraced the feature of compositions and thereby made voluntary bankruptcy more attractive than the earlier attempts. Still, the 1898 Act retained limitations that curbed the voluntary bankruptcy option to those who could not pay their debts (reflecting what Judge King appears to favor as the only option for bankruptcy eligibility). For example, the 1898 Act required the debtor to first have "committed an act of bankruptcy" in order to proceed in the bankruptcy case.[155] The act of bankruptcy included having "admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."[156]

Unlike the forced liquidation of earlier bankruptcy law, under the 1898 Act, an individual could file a voluntary bankruptcy petition and propose a composition to satisfy his creditors.[157] If the terms of the composition were accepted in writing by a majority in number of creditors and majority in amount of claims, the application could then be filed in the court, and the consideration to be paid to the priority creditors under the composition along with all fees and costs deposited at that time with the court or such place as designated by the court.[158] The problem was that the individual had to declare in his bankruptcy petition that he was unable to pay his debts.[159] The composition was hardly a realistic or viable option for the individual who had declared his inability to pay his debts.[160] First, it would be challenging to obtain the written consent of the

[154] *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[155] Bankruptcy Act of 1898, ch. 541, § 3(b), 30 Stat. 544, *repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[156] *See id.* § 3(a)(5).

[157] *See id.* § 12.

[158] Generally, these amounts were paid with the application, and the other payments under the composition were paid at confirmation. *Id.* § 12(b).

[159] *Id.* § 12(b).

[160] *Id.* § 3(a).

majority of his creditors to his composition plan. More than that, because the individual had insufficient income with which to pay his debts, it was even more unlikely he could obtain sufficient funds to deposit with the court to pay the required composition amounts at the time the proposed composition was filed with the court.

The 1898 Act was much less punitive than prior acts, yet it did allow, in certain circumstances, a court to "issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination" and "keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail."[161]

The commissioners and assignees of prior law were replaced with bankruptcy trustees.[162] The trustee was vested with title to all property and interests of the debtor (unless the property was exempt) and, as with prior acts, would collect and liquidate property.[163] If a composition was confirmed, title to property revested in the debtor, and the case was dismissed.[164]

As noted, compositions were nearly impossible for the cash-strapped individual. But other than this form of composition or complete liquidation, the individual had no other alternative to relieve financial distress. If the individual had the ability to make payments, he had no option under federal bankruptcy law to remain in possession of property and simultaneously make payments over a term (rather than a lump sum under a composition). And he had no protection under the law if he attempted to do so because his wages were subject to garnishment.[165]

Yet again, challenges to the constitutionality of federal bankruptcy law surfaced. Like the argument of the Committee in *Bestwall*, the charge against the 1898 Act (allowing compositions and voluntary bankruptcy petitions by persons other than traders) was that it exceeded the constitutional authority of Congress to enact uniform laws regarding bankruptcy.

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[161] *Id.* § 9(b).

[162] *See id.* § 44(a).

[163] *See id.* §§ 47–49, 70.

[164] *Id.* §§ 12(e), 70(f). Under the prior bankruptcy acts, title to the property typically did not revest in the debtor but remained vested to the assignee until transferred by the assignee.

[165] Like prior bankruptcy acts, under the 1898 Act, the filing of a bankruptcy case in a federal court did not stay or "exempt [the bankrupt] from arrest upon civil process . . . [w]hen issued from a State court . . . upon a debt or claim from which his discharge in bankruptcy would not be a release." *Id.* § 9. Plus, only a "suit which [was] founded upon a claim from which a discharge would be a release, and which [was] pending against a person at the time of the filing of a petition against him" was stayed. *Id.* § 11(a).

In *Hanover National Bank v. Moyses*, the Supreme Court answered this constitutional question.[166] Specifically, the Court considered if the law that allowed a debtor who was not a merchant or trader to voluntarily petition for relief was a law on the "subject of bankruptcies."[167]

As to whether the eligibility provisions of the 1898 Act exceeded Congress's power, Chief Justice Fuller, writing for the Court, studied the Bankruptcy Clause, the words of the Founders who drafted it, Chief Justice Marshall who interpreted it, and Justice Story who wrote about it.[168] From there he noted prior rulings confirming the constitutionality of the prior federal bankruptcy acts without any contrary appellate holdings and observed that "[t]he conclusion that an Act of Congress establishing a uniform system of bankruptcy throughout the United States, is constitutional, although providing that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions, is really not open to discussion."[169] Chief Justice Fuller then emphasized that the Constitution granted the power to Congress to enact laws on the subject of bankruptcies and, at the same time, imposed a limit upon states from enacting laws that would impair an extraterritorial contract; as such, only federal law could both discharge a debtor and impair a contract.[170]

Chief Justice Fuller's opinion establishes two critical principles. First, the constitutionality of voluntary bankruptcy by non-traders is "really not open to discussion"—it is settled law. Second, and more importantly, the Bankruptcy Clause must be read broadly because only federal bankruptcy law can both discharge a debtor and impair contracts. If bankruptcy was limited only to liquidation of insolvent estates—something states could arguably handle—there would be no need for the federal power. The Bankruptcy Clause's function is to enable what states cannot: uniform discharge of contracts across state lines. This inherently includes voluntary proceedings and debt restructuring, not just involuntary liquidation.

In his dissent in *Bestwall*, Judge King made only a passing reference to *Moyses*.[171] Yet *Moyses* dealt with his key concern: whether Congress has the power to draft bankruptcy laws for those who would not have been eligible for bankruptcy in 1789. And Chief Justice Fuller settled it: yes.

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[166] 186 U.S. 181 (1902).

[167] *See id.* at 183–84.

[168] *See id.* at 184–87.

[169] *Id.* at 187.

[170] *See id*.

[171] Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 148 F.4th 233, 251 (4th Cir. 2025), *cert. denied sub nom.* Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

H. 1933 Amendments: Voluntary Choice for the Solvent Individual and the Introduction of Chapter 13

In 1933, in the wake of the Great Depression, Congress amended the Bankruptcy Act to open extensions and compositions to individuals.[172] The title of the amendment was "Provisions for the Relief of Debtors" ("1933 Amendments")[173] The aim of the bankruptcy legislation was to reduce some penal consequences for debt default and to provide an opportunity for individuals to pay their creditors under more favorable terms.[174] Under the 1898 Act, individuals could not realistically accomplish a composition because only individuals who *could not* pay their debts were eligible and permitted to try. Under the 1933 Amendments, individuals who *could* pay something to their creditors were eligible to try an extension or a composition.

An extension was a request to permit a longer time period in which to pay debts but not discharge the unpaid indebtedness.[175] Compositions, on the other hand, allowed for a discharge of debts (other than those agreed to be paid by the terms of the composition and those not affected by the discharge).[176] If an individual sought an extension, he was not adjudicated a bankrupt (so he did not have to declare his unwillingness and inability to pay his debts) and a trustee was not appointed until requested by creditors,[177] except that a custodian would be appointed to conduct a creditors' meeting or a receiver to administer the payments.[178]

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[172] Bankruptcy Amendments Act of 1933, ch. 204, §§ 73–74, 47 Stat. 1467 (1933).

[173] *See id.* § 73 ("In addition to the jurisdiction exercised in . . . proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in sections 74, 75, and 77 of this Act.").

[174] *See id.* §§ 73–74; *see also* Tabb, *supra* note 60, at 28; John Hanna, Bankruptcy Amendments of 1933, 2 MERCER BEASLEY L. REV. 113, 116 (1933).

[175] *See In re* Thompson, 51 F. Supp. 12, 13–14 (W.D. Va. 1943) (noting that in a "composition" the debtor settles his indebtedness in an agreed amount less than the amount owed, but in an "extension" he obtains an extension of time within which to pay the debts in full).

[176] *Id.*

[177] The trustee had the duty to collect and liquidate property, not to serve as disbursing agent under a wage earner plan. *See* Bankruptcy Act of 1898, ch. 541, § 47, 30 Stat. 544, *repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[178] *See* Bankruptcy Amendments Act of 1933, ch. 204, § 74(b)–(c), (d)(2), 47 Stat. 1467 (1933).

By contrast to the extension in which payments were made over time, to obtain confirmation of a composition, the individual was required to deposit with the court, in cash, payments required by the plan.[179] At confirmation, the payments were immediately disbursed.[180] After confirmation, the case was dismissed, and the court no longer had jurisdiction over his future earnings.[181] Consequently, the court could not approve a composition plan based on future earnings and could not enforce an extension plan that contemplated future payments.[182] Compounding this shortcoming was the fact that relief was conditional: the petition had to be approved before a stay would be imposed,[183] and the stay of collection by a secured creditor was optional.[184] Of course, neither a composition nor an extension could alter or restructure secured debt.[185]

Again, the federal bankruptcy law was challenged as exceeding Congress's authority under the Bankruptcy Clause. The 1898 Act permitted a bankruptcy court to approve a composition plan or extension plan by vote of a majority of creditors.[186] These provisions were questioned as beyond the authority of Congress to draft uniform laws on the subject of bankruptcies. In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island &*

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[179] *See id.* § 74(e).

[180] *See id.* § 74(j).

[181] *Id*. In an extension, the court could "dismiss the proceeding or retain jurisdiction of the debtor and his property during the period of the extension." *Id.*

[182] *See* Bankruptcy Amendments Act of 1933, ch. 204, § 74(e), 47 Stat. 1467 (1933); Leibell, *supra* note 127, at 404.

[183] "Upon the filing of such a petition or answer [to an involuntary proceeding] the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered [unless the debtor defaults on his obligations] . . . ." *See* Bankruptcy Amendments Act of 1933, ch. 204, § 74(a), 47 Stat. 1467 (1933). In other words, the court is "staying" the action for adjudication [bankruptcy liquidation], but in so doing, "the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and . . . the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate." *Id.*

[184] "In addition to the provisions of section 11 of this Act for the staying of pending suits, the court, on such notice and on such terms, if any, as it deems fair and equitable, *may* enjoin secured creditors who may be affected by the extension proposal from proceeding in any court for the enforcement of their claims until the extension has been confirmed or denied by the court." *Id.* § 74(n) (emphasis added).

[185] *Id.* § 74(i) ("[S]uch extension or composition shall not reduce the amount of or impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.").

[186] Bankruptcy Act of 1898, ch. 541, § 12(b)–(d), 30 Stat. 544, *repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

Pacific Railway Co.,[187] a case about § 77 of the 1933 Amendments involving a railroad, the Supreme Court addressed the question of whether composition and extension provisions were "on the subject of bankruptcies."[188]

In discussing the application of the Bankruptcy Clause, the Supreme Court observed that compositions first introduced under the 1874 Amendments were "judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution."[189] The Court then made this remarkable comment:

> Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.[190]

This observation that bankruptcy laws "have constituted extensions into a field whose boundaries may not yet be fully revealed" is a powerful statement of congressional deference. The Court recognized that the power of Congress under the Bankruptcy Clause is not static but has capacity to "meet new conditions" as business and society evolve. This adaptive understanding contradicts any argument that bankruptcy is frozen in an eighteenth 18th-century definition limited to insolvent traders subject to involuntary liquidation. The Court explicitly approved compositions and extensions—proceedings that contemplate debtors having income or assets to pay creditors—as within Congress's bankruptcy power.

As an aside, compositions under bankruptcy law bound creditors including those who did not vote to approve the composition. At first blush, it seemed to infringe the rights of minority creditors in opposition to the composition. But the 1898 Act required a court to approve the composition, thereby authorizing the court to deny approval of the plan despite sufficient votes.[191]

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[187] 294 U.S. 648 (1935).
[188] *Id.* at 667.
[189] *Id.* at 671.
[190] *Id*.
[191] *See* Bankruptcy Amendments Act of 1933, ch. 204, § 74(d)(2), (g), 47 Stat. 1467 (1933);

I. The Chandler Act:[192] The Wage Earner Plan of 1938

In 1938, Congress passed the Chandler Amendments to the Bankruptcy Act ("Chandler Act"). These amendments fixed some of the flaws from the 1933 Act and, as to individuals, introduced a "wage earner plan."[193]

For individuals, the primary attraction for this novel alternative was protection from wage garnishment and retention of property, even property that was not otherwise exempt from collection. As described by William McCarty, "[t]he single most important benefit . . . is that when he files his Chapter XIII petition the court will enjoin the continuation of any and all garnishment proceedings against him."[194] A stated purpose of the Chandler Act included "providing for wage earners' and real property arrangements."[195]

That an individual who was in default of his obligations to his creditors could obtain some form of protection from creditor collection activity and ultimately some debt forgiveness, without having to give up his property, was extraordinary (and propitious). Allowing an alternative to liquidation ("straight bankruptcy") permitted an opportunity for rehabilitation.[196] Unlike the measurements of the brief experiment in the 1841 Act, this time the voluntary option coupled with protection from creditor collection resulted in greater

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see also Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186–87 (1902); *Cont'l Ill. Nat'l Bank*, 294 U.S. at 672 (upholding the constitutionality of court approved compositions).

[192] Chandler Act of 1938, ch. 575, 52 Stat. 840 (1938).

[193] *See* Frederick Woodbridge, *Wage Earners' Plans in the Federal Courts*, 26 MINN. L. REV. 775, 775–76 (1942) (remarking that the 1933 statute "did not meet with much success due principally to failure to give to the court jurisdiction over the future wages of the debtor and to provide for a discharge").

[194] William E. McCarty, *Wage Earners' Plan–Chapter XIII*, 45 MARQ. L. REV. 582, 598 (1962).

[195] *See* Leibell, *supra* note 127, at 386 (citing 8 C.J.S. 17 (Supp.)). The legislation reflected a departure from "a system of law conceived in the theory that bankruptcy is a crime to one where compositions and creditor control have risen to the point of paramount importance. Rehabilitation not wanton destruction, has become the keynote of bankruptcy legislation." Leibell, *supra* note 127, at 385.

[196] *See* Tabb, *supra* note 60, at 28 (describing the intent of the 1933–1938 amendments as measures intended to facilitate rehabilitation through bankruptcy). *But see* Donald L. Boren & August Ralston, *Chapter XIII Wage Earner Plans: An Analysis of Their Effectiveness*, 15 AM. BUS. L.J. 293 (1978) (concluding that rehabilitation under Chapter XIII is questionable and advocating the use of Chapter XIII remain voluntary and not unduly encouraged).

recovery for creditors.[197] Now it appeared that denying someone who is in default any alternative to liquidation resulted in *less* debt recovery.[198]

As described by then Solicitor General and U.S. District Judge Thomas D. Thacher in 1931, wage earners in need of protection from garnishment resorted to liquidation even though they had the desire to pay their debts—they simply could not do so when subject to garnishment. Worse, they resorted to loans with exceedingly high interest rates.[199] In his *Proposed Change to the Bankruptcy Act*, Solicitor General Thacher noted that the current system failed in providing sufficient debt recovery:

> In practice we have found that debtors usually have such meagre assets by the time they go into bankruptcy that it would make little difference whether these assets were paid preferentially to one creditor, or were distributed to all in fractional proportions, or (as is generally the case), were consumed in fees and expenses of administration.[200]

His report also noted that "the remnants finally brought into bankruptcy are largely consumed in the process of realization and liquidation and that so little is finally left for creditors that the Bankruptcy Act has virtually ceased to operate as a medium for distribution."[201] Then Solicitor General Thacher argued for statutory changes to allow and encourage debtors, "if wage earners,

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[197] *See infra* note 198.

[198] For example, the Report of the Judicial Conference of the United States from 1961 noted:

> The Committee called attention to the value of the proceedings under Chapter XIII as reflected in the amounts paid to creditors in Chapter XIII cases and in no-asset straight bankruptcy cases. During the fiscal year 1960, the *unpaid* liabilities scheduled in the 63,086 straight bankruptcy cases closed during the year were $469,865,567. During the same period the debts affected in the 5,920 Chapter XIII cases completed were $5,277,737, of which $5,168,251, or 98 percent, was paid to creditors.

ADMIN. OFF. OF THE U.S. COURTS, *Report of the Judicial Conference of the United States*, Sep. 20–21, 1961, at 91 (1961) (emphasis in original).

[199] Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come From and Where Should It Go?,* 10 AM. BANKR. INST. L. REV. 741, 743–45 (2002) (describing the nationwide study of bankruptcy proceedings performed under the direction of former U.S. District Judge Thacher).

[200] Thomas D. Thacher, *Proposed Change in Bankruptcy Act Submitted by Thomas D. Thacher*, 3 N.Y. ST. BAR ASS'N BULL. 532, 533–34 (1931).

[201] *Id*. at 535.

to have the aid of the court, with full relief from garnishments and other attachments, in providing for the amortization of debts out of earnings."[202] A proceeding under Chapter XIII was permissible even if the wage earner was solvent.[203]

To provide sufficient relief for individuals while operating under a wage earner plan, Chapter XIII permitted a court to stay the commencement as well as the continuation of suits by unsecured creditors and "upon notice and for cause shown" to stay suits filed by secured creditors.[204] Although not automatic, the imposition of a stay against future collection actions and the protection of postpetition income from garnishment was innovational. To provide opportunity for a debtor to have flexibility in his plan, Chapter XIII allowed debtors to reject executory contracts.[205]

Over the next decades, the wage earner plan proceeding was praised.[206] But it had shortcomings and practical hurdles.

The Chandler Act did not set parameters for the term period for the plan. Section 646 describes what terms may be (or must be) included in a plan yet is silent upon the plan length. Likewise, the confirmation requirements of § 656 do not refer to the minimum or maximum plan length. It was generally understood that since creditor consent was required to approve a composition, the amounts required under the composition plan to be paid were made contemporaneously with confirmation.[207] But under an extension, the debtor would propose, and carry out, a plan for whatever length needed to complete it.[208] That said, the statute did permit a debtor to apply for a discharge at the end of three years even if he had not completed his plan payments at that time, provided that the failure was due to circumstances for which he could not be

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[202] *Id.* at 545.

[203] Chandler Act of 1938, ch. 575, § 623, 52 Stat. 840 (1938). The 1933 Act likewise authorized a proceeding if the debtor was solvent but unable to pay his debts as they matured.

[204] *Id.* § 614.

[205] *Id.* § 613(1).

[206] *See* Comment, *Wage Earner Bankruptcy: A Neglected Remedy?*, 34 FORDHAM L. REV. 528 (1966) (noting among other things the availability of discharge within six years of a bankruptcy discharge); William Jefferson Giles, III, *The Overlooked Debtor's Remedy—Wage Earner Proceedings Under Chapter XIII of the Bankruptcy Act*, 15 S.D. L. REV. 273 (1970); Milton J. Morris, *The Wage Earner Plan—A Superior Alternative to Straight Bankruptcy*, 9 UTAH L. REV. 730 (1965) (noting greater recovery to creditors than under forced liquidation).

[207] The court shall confirm the plan if "the debtor shall have made the deposit required under this chapter and under the plan." Chandler Act of 1938, ch. 575, § 651, 52 Stat. 840 (1938).

[208] *See id*. §§ 660, 666.

justly held accountable.[209] But the Chandler Act permitted the court "during the period of extension" to increase, reduce, or extend the time for the installment payments, rendering some plans interminable.[210] All in all, without specific term lengths, a debtor had little certainty about when or whether he would receive closure.

J. The Bankruptcy Code

Use of the wage earner plan as an alternative to surrendering property grew over the next forty years and so did suggestions to improve it.[211] In 1978, Congress passed the Bankruptcy Code, replacing the Chapter XIII wage earner plan with chapter 13.[212]

The Bankruptcy Code removed the requirement for "acts of bankruptcy" as a condition of eligibility.[213] Now a person could voluntarily petition to use the bankruptcy system without having to declare his inability or unwillingness to pay debts.[214] The debtor could choose to use bankruptcy to pay debts.[215] Most significantly, an individual was not compelled to surrender property or forbidden from altering secured debt payment terms absent affirmative consent.[216] The aim of the bankruptcy law was relief for the debtor and effective administration for creditors.[217] The law now balanced the interests of both debtors and creditors.

The addition of chapter 13 in the Code in 1978 was momentous. No longer were debtors punished for their choices or their circumstances.[218]

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[209] *Id.* § 661 ("If at the expiration of three years after the confirmation of a plan the debtor has not completed his payments thereunder, the court may nevertheless, upon the application of the debtor and after hearing upon notice, if satisfied that the failure of the debtor to complete his payments was due to circumstances for which he could not be justly held accountable, enter an order discharging the debtor from all his debts and liabilities provided for by the plan . . . ."). This option was not available under the 1933 Act.

[210] *See id.* § 646(5).

[211] *See* James H. Johnson, *Nonassenting Secured Creditors to Chapter XIII Wage Earner Plans*, 47 TEX. L. REV. 302 (1969); Theodore J. Biagini, *Emergence of the Wage Earner's Plan*, 4 SANTA CLARA L. REV. 72 (1963); Sydney Krause, *Arrangements and Wage Earner Plans: Proceedings under Chapters XI and XIII*, 15 VAND. L. REV. 151 (1961).

[212] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[213] *See* 11 U.S.C. §§ 109, 301.

[214] *See id.*

[215] *See* 11 U.S.C. §§ 1129, 1325.

[216] *See* 11 U.S.C. §§ 363, 506, 522, 1129, 1141, 1306, 1325, 1327, 1328.

[217] *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (U.S. 2007).

[218] For example, the debtor did not forfeit a chapter 13 discharge if he failed to explain his

Debtors could remain in possession and control of their property, could draft their own plan to provide for their creditors' claims, and could elect to remain in bankruptcy or to convert to a different chapter of bankruptcy.[219] These were no small benefits. On top of that, debtors could cure defaults over time without creditor consent, reject contracts or leases, discharge postpetition debt, modify their plan if circumstances required, obtain a stay of collection actions against a co-signer who did not file bankruptcy, modify secured debt without consent of the secured creditor, use income from sources other than wages to fund a plan, separately classify debts, satisfy priority debts without interest, combine extension and composition options, not be denied a discharge for "bad acts," discharge debts that would be nondischargeable in chapter 7, retain the option to file a new bankruptcy after a prior case, and use the oversight of a court to manage resolutions with their creditors.[220] Although the statute has changed significantly after 1978, these benefits remain a feature of chapter 13 and are therefore available to individuals who have the ability and desire to pay their debts.[221] Since 1978, the Bankruptcy Code has also provided opportunities for individuals with the ability and desire to pay their debts to use chapter 11 and provide for creditor recovery under a confirmed plan.[222] Yet these debtor and creditor benefits would be lost if bankruptcy jurisdiction excludes solvent debtors.

This journey through the particulars of eighteenth and nineteenth century federal bankruptcy laws not only shows the painstaking lengthy progression to a stable federal bankruptcy structure but also the ways Congress has balanced policy interests of creditors and debtors. But has Congress stayed in its lane? Opening bankruptcy eligibility, and benefits, to solvent debtors is a policy choice. But is it constitutional? Or just dangerous policy? Part III of this article answers the present constitutional debate: does the meaning of the word "bankruptcies" informed by our history and tradition constrain Congress from enacting laws that grant jurisdiction to bankruptcy courts over solvent persons?

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losses or if he had lost part of his estate to gaming. *See* 11 U.S.C. § 1328. He could receive a chapter 13 discharge having completed a three-year plan without having to show he was unable to continue making payments. *See id.* §§ 1322, 1328(a).

[219] 11 U.S.C. §§ 1321–1327.

[220] *See* 11 U.S.C. §§ 348 (postpetition debt may be discharged in converted case), 1301, 1305 (postpetition debt may be discharged in a chapter 13 case), 1322, 1325, 1328, 1329.

[221] Chapter 13 is limited to individuals with regular income whose debts are under certain limits. 11 U.S.C. § 109(e).

[222] *See* 11 U.S.C. §§ 1122(a)(8), 1129(a)(7), (9), (11), (15).

III. Bankruptcy Jurisdiction over Solvent Debtors

A. *Bestwall*

By the early twenty-first century, it seemed well settled that the Bankruptcy Clause was a remedy to the disparate, chaotic state bankruptcy laws under the Articles of Confederation, necessary to facilitate commercial activity across state lines, and otherwise a noncontroversial power granted to the federal government. But then came *Bestwall*. In *Bestwall*, the Committee moved to dismiss the chapter 11 case.[223] The Committee argued that the bankruptcy court lacked subject matter jurisdiction over Bestwall because Bestwall "wasn't really bankrupt" (Bestwall intended to pay its claims and could pay its claims through a funding agreement with Georgia Pacific, who had transferred debt to Bestwall).[224] Bestwall proposed to use chapter 11 to confirm a chapter 11 plan establishing an asbestos trust (provided for under Bankruptcy Code § 524(g)) for claimants and potential future claimants.[225] Bestwall had the financial backing to provide sufficient funding to pay whatever amounts were necessary to obtain the approval of creditors or satisfy the creditors' claims through the trust.[226] According to the Committee, because Bestwall could pay its claims and was strategically created merely so it could use a bankruptcy asbestos trust, it was not "bankrupt" as that term was understood by the Founders who drafted the Bankruptcy Clause.[227] Since the power granted to Congress was to draft laws regarding bankruptcies, and because Bestwall was not "bankrupt" as that term was understood by the Founders, the laws regarding bankruptcies could not apply to Bestwall, per the Committee.[228]

The bankruptcy court disagreed.[229] The Committee appealed the bankruptcy court's denial of its motion directly to the Fourth Circuit.[230] The Fourth Circuit affirmed the bankruptcy court.[231] But the Fourth Circuit panel

[223] Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 148 F.4th 233, 238 (4th Cir. 2025), *cert. denied sub nom.* Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

[224] *Id.* at 237–38.

[225] *Id.*

[226] *Id.*

[227] *Id.* at 239–40.

[228] *Id.* at 240.

[229] *See Bestwall*, 148 F.4th at 240–43; *see also In re* Bestwall LLC, 605 B.R. 43, 49–50 (Bankr. W.D.N.C. 2019).

[230] *Bestwall*, 148 F.4th at 239.

[231] *Id*. at 243.

was divided.[232] After that, the Committee requested en banc review.[233] Although en banc review was denied, the Circuit was divided with six members of the Circuit approving en banc review, suggesting the Committee's view may be gaining traction.[234]

B. Is "Bankruptcy" Synonymous with "Insolvency"?

In his dissent in *Bestwall*, Judge King attempts to rely upon history and tradition as he challenges the meaning of the term "bankruptcies" in the Bankruptcy Clause. He wrote that the term "bankruptcy" was "tightly bound with the condition of insolvency or the debtor's inability to pay his debts" at the time the Constitution was drafted.[235] His comments reflect similar arguments voiced two decades earlier by scholar Thomas Plank.[236] Professor Plank wrote that bankruptcy was synonymous with insolvency at the time the Constitution was adopted.[237] He described insolvency as the inability to pay one's debts.[238] Professor Plank applied this understanding to the Bankruptcy Clause. As he explained, "Because the word 'bankruptcy' was synonymous with 'insolvency,' and the eighteenth century bankruptcy legislation only adjusted the previously established relationship between the insolvent debtor and his or her creditors, I conclude the 'subject of Bankruptcies' in the Bankruptcy Clause is limited to the adjustment of the relationship between an insolvent debtor and the debtor's creditors."[239]

Judge King in his dissent, and Professor Plank in his writings, fail to acknowledge one key reason why in the late eighteenth century, "bankruptcy" and "insolvency" were not synonymous.[240] Bankruptcy was a creditor remedy applied against those who *did not* pay their debts, not merely those who could

[232] *Id.* at 246–58 (King, J., dissenting).

[233] Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 157 F.4th 579 (4th Cir. 2025), *cert. denied sub nom.* Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

[234] *Id.* Judge King issued a dissenting opinion in opposition to the order denying en banc review. Although five other members of the Fourth Circuit voted to grant en banc review, they did not join the dissenting opinion. *Id*.

[235] Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 148 F.4th 233, 254 (4th Cir. 2025), *cert. denied sub nom.* Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

[236] *See* Plank, *supra* note 60, at 1082.

[237] *Id*. at 1077–89.

[238] *See id*.

[239] *Id.* at 1089.

[240] *See supra* Part I.E.2.

not pay their debts.[241] Because bankruptcy could be imposed on "fraudulent" debtors who had the means to pay debts but refused to do so, it was not limited to persons who could not pay.[242] Consequently, in the late eighteenth century, bankruptcy was broader than the term "insolvency."[243] The drafters of the Constitution and the delegates to the constitutional convention knew this—after all, fraudulent debtors were on "the mind of the Convention."[244] The drafters and delegates agreed on the need for all states to honor the bankruptcy discharge whether the bankruptcy was for a person who could not pay his debts or a person who could. They drafted the Bankruptcy Clause deliberately giving Congress power to draft laws on the subject of bankruptcies so that the resulting bankruptcy discharge was recognized by all states.

The distinction goes further. The "insolvency laws" during the Founding were not creditor remedies, did not address creditors' rights, and were applicable whether or not the debtor had been declared a bankrupt.[245] Insolvency laws were a debtor remedy.[246] The laws allowed a voluntary request for relief by a debtor. When Chief Justice Marshall said that insolvency laws are included within laws on the subject of bankruptcies, he was referring to the laws allowing a voluntary petition for relief by a debtor as included within the power of Congress under the Bankruptcy Clause, not a label to constrain Congress from enacting laws that may be used by debtors who can pay their debts. To ignore the meaning of the term "insolvency laws" as it was understood at the Founding in order to twist the meaning of the phrase "subject of bankruptcies" is a misuse of our history. Not only that, but it also does what it purports not to do: uses a modern understanding for what it claims to be an original understanding.

C. Bankruptcy Jurisdiction over the Solvent Debtor

In his dissent to the order denying en banc review, Judge King observed that bankruptcy court jurisdiction must be limited to balance sheet insolvency.[247] Judge King again reflected the writings from Professor Plank,

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[241] *See* discussion *supra* Sections I–II.
[242] *Id.*
[243] *Id.*
[244] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).
[245] *See* STORY, *supra* note 14, § 1101, at 502; *see generally* Tabb, *supra* note 60, at 12.
[246] *See* STORY, *supra* note 14, § 1101, at 502.
[247] *See* Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 157 F.4th 579, 579–86 (4th Cir. 2025) (King, J., dissenting), *cert. denied sub nom.* Off. Comm. of

this time primarily from a 1986 law review article.[248] Professor Plank argued that bankruptcy court jurisdiction should be based on balance sheet insolvency because it would create an objective test, applied uniformly, to address abuse of bankruptcy laws by solvent debtors.[249] Professor Plank insisted that the Bankruptcy Clause grants to Congress only the power to draft bankruptcy laws for persons who cannot pay their debts and therefore limits Congress's authority to draft bankruptcy laws for solvent persons.[250] Professor Plank cited examples of laws in existence in the Colonies and in England that expressly proscribed remedies for creditors when their debtors were unable to pay the debt.[251] Noting that the "Framers of the Constitution were no doubt familiar with this great variety of legislation," he postulates that because examples of contemporary legislation address the "problem" of "what is the best form of relief for the creditors and their debtor when the debtor has insufficient assets to repay her creditors," he concludes '[t]his question is 'the subject of Bankruptcies.'"[252]

Professor Plank makes important points, yet his writing appears to miss the most important one: that the federal structure under the Bankruptcy Clause was meant to remedy the problem of competing retaliatory state laws on the topic of bankruptcy—not whether federal law is best suited to handle creditor remedies. Professor Plank looks to examples of bankruptcy laws in existence in the eighteenth century to conclude that the delegates to the Constitutional Convention and the drafters of the Bankruptcy Clause must have meant to give Congress the power to draft these particular provisions (and no more).[253] In other words, the drafters of the Constitution meant to give Congress the power to draft coercive laws to be applied to merchants and traders who were unable to pay their debts because those were some of the common bankruptcy laws in existence when the Constitution was ratified. While it is helpful to consider the laws in existence when the Founders drafted the Constitution, it is the words of those Founders, especially James Madison, plus the interpretation by Chief Justice Marshall, and the commentaries of Justice Story that should have more bearing on the analysis. These primary sources do not require analogy or supposition. These primary sources show in direct terms that federalism, not

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Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

[248] Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487 (1996).

[249] *See id.* at 548–49.

[250] *See* Plank, *supra* note 60, at 1088.

[251] *See* Plank, *supra* note 248, at 500–26; *see also* Plank, *supra* note 60, at 1078–89.

[252] *See* Plank, *supra* note 60, at 1088.

[253] *See* Plank, *supra* note 60, at 1076–89.

the particulars of legislation or a particular outcome, was the intention of the Clause.

In another writing, Professor Plank argued that in "almost all" eighteenth century bankruptcy legislation, insolvency was a jurisdictional requirement and reasoned that jurisdiction over contemporary bankruptcy cases should require insolvency.[254] He cited as support that eighteenth century bankruptcy laws, and nineteenth century bankruptcy acts in this country, required certain "acts of bankruptcy" for the petitioner to be declared a bankrupt.[255] Or in other words, the statutory eligibility criteria establish federal court jurisdiction. This argument conflates statutory eligibility provisions with federal question jurisdiction.[256] And this is the flaw. The federal court will have jurisdiction over the case arising under federal law. If the federal law contains eligibility criteria, the court will have jurisdiction over the case to decide if the eligibility criteria are met (and if not, will dismiss the case). Simply because that process does not work to weed out all solvent debtors (or specifically all solvent tortfeasors), does not render the process (or the statute) unconstitutional.

Missing in this bankruptcy jurisdiction argument is any recognition of the Supreme Court precedent over the last two centuries. Justice Catron wrote that Congress has power to determine who may come in voluntarily. Justice Miller was "very clear" that a composition (debtor voluntarily paying creditors) is within the Bankruptcy Clause. And Chief Justice Fuller tersely disposed of the notion that eligibility must track eighteenth century practices ("not open to discussion"). Simply put, the Supreme Court has knocked down the jurisdiction argument every time it has been raised.

Perhaps the more troubling weakness in the argument that bankruptcy jurisdiction requires something not in the statute is that it naturally requires the judiciary to fill the role of the legislature. If the statute does not require insolvency for bankruptcy eligibility, but bankruptcy court jurisdiction does require insolvency or a finding that the debtor is "really bankrupt," the judge will have to fill in the obvious gap by applying his own judgment to determine if he has jurisdiction over the case of the eligible debtor. The conundrum is illustrated by Judge King's claims that the bankruptcy court does not have jurisdiction over a person who is "not really bankrupt" even though the person

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[254] *Id.* at 1089–95.

[255] *Id.* at 1094.

[256] *See* Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 148 F.4th 233, 239–40 (4th Cir. 2025), *cert. denied sub nom.* Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

meets the eligibility requirements of the statute. This means a bankruptcy judge must decide if a person is "really bankrupt" without the benefit of the words of the legislature, and despite the words of the legislature to the contrary. And if that were not hard enough, the same judge will have to sort out who is "really bankrupt" from who is only "mostly bankrupt" or "barely bankrupt." The result inevitably will be subjective disunity. The better understanding of the Bankruptcy Clause is that it places these questions in the hands of Congress, not the judges. This is not merely to solve a practical problem; it is to avoid a constitutional one. When courts derive jurisdiction from statute, they cannot disclaim it on extra-statutory grounds without effectively acting in the role of the legislature.

At bottom, the real argument is over bankruptcy policy. Professor Plank expressed various concerns about the extent federal bankruptcy law can or should alter state law creditor rights, and qualms about the power of Article I judges.[257] He advocated for establishing insolvency (in particular balance sheet insolvency) as an eligibility criterion.[258] Judge King expressed deep concerns over solvent tortfeasors using bankruptcy to profit to the detriment of tort victims.[259] These are all valid policy concerns. And they are the valid responsibility of Congress to address. And even if current federal bankruptcy law comes up short in addressing these policy concerns, it is not immune to them.[260] All in all, applying a strained distortion of the Bankruptcy Clause to supersede the power of the legislature is unnecessary.

IV. Voluntary Bankruptcy Choice for the Solvent Debtor is Good Policy

A. Solvent Debtors Using Assets and Income to Pay Creditors under a Court-Approved Plan Results in Greater Recovery for Creditors

Exercising its power under the Bankruptcy Clause, Congress enacted bankruptcy laws in the twentieth and twenty-first centuries that blend incentives

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[257] *See generally* Plank, *supra* note 60; Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567 (1998).

[258] *See* Plank, *supra* note 248.

[259] *See Bestwall*, 148 F.4th at 246–58 (King, J., dissenting); Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 157 F.4th 579, 579–86 (4th Cir. 2025) (King, J., dissenting), *cert. denied sub nom.* Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC, No. 25-1013, 2026 WL 1513280 (U.S. June 1, 2026).

[260] *See* 11 U.S.C. §§ 1112(b) (dismissal for cause), 1125 (disclosure requirements), 1126 (voting power), 1129 (confirmation requirements).

with requirements to pay debts, and blend broad relief with conditions, thereby balancing debtors' and creditors' interests. The byproduct was more relief for individual debtors and better recoveries for creditors than the punitive and coercive methods in the nineteenth century. Chapter 13 offers a useful case study.

The chapter 13 (and Chapter XIII) option has resulted in greater recovery for creditors than under liquidation as shown in the following data. For example, in 1960, chapter 7 ("straight bankruptcy") had $469 million liabilities discharged without payment, but only 2% of the liabilities in Chapter XIII were discharged without payment.[261] Although the case numbers have fluctuated, the recovery for creditors has consistently been higher under the Code in chapter 13 than in chapter 7. This is in part contemplated by the statute. One requirement for confirmation of a plan under chapter 13 is that unsecured creditors will receive no less than they would if the estate had been liquidated under chapter 7 as of the effective date of the plan, or in other words, *more* than in a forced liquidation.

Annual disbursements to creditors in chapter 13 far exceed annual disbursements to creditors in chapter 7 cases. Data are publicly available for all trustees within the United States Trustee programs.[262] A review of the audited trustee final reports as recently as 2023 shows that the annual disbursements to creditors in chapter 13 cases ($3,772,735,189)[263] far exceed the annual disbursements to creditors in chapter 7 cases ($140,402,233)[264] based on the audited trustee final report data.[265] This trend is consistent. For example, the data from each preceding decade reveals extraordinary disparities in the creditor recoveries. In 2013, chapter 13 trustees disbursed $6,567,654,009 to creditors and reported that 4.7% of their receipts were paid to administrative

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[261] *See supra* note 198.

[262] Data on trustee disbursements for trustees who are not within the United States Trustee program (*i.e.*, those in Alabama and North Carolina) are not publicly available.

[263] U.S. TRUSTEE PROGRAM, *Chapter 13 Trustee Data and Statistics: FY-2023 Chapter 13 Trustee Audited Annual Reports* (Apr. 4, 2024), https://www.justice.gov/ust/media/1346761/dl?inline.

[264] U.S. TRUSTEE PROGRAM, *Chapter 7 Trustee Final Reports: Calendar Year 2023—Chapter 7 Asset Cases Closed* (2023), https://www.justice.gov/ust/media/1375071/dl.

[265] *See supra* notes 263–64. In addition to lower amounts of gross disbursements, administrative costs in liquidation cases further reduce creditor recoveries. The administrative costs amount to 36.9% of the receipts in the chapter 7 trustee data. The administrative costs average 7.9% of the receipts in the chapter 13 trustee data. The data is based on audited annual reports for fiscal year 2023 for trustees within the United States Trustee Program (excluding Alabama and North Carolina).

expenses.[266] By comparison, in 2013, chapter 7 trustees disbursed $1,619,799,886 to creditors and reported that 38.8% of their receipts were paid to administrative expenses.[267] In 2003, chapter 13 trustees disbursed $3,969,365,107 to creditors and reported that 5.5% of their receipts were paid to administrative expenses.[268] The same year, chapter 7 trustees disbursed $909,180,492 to creditors and reported 34.7% of receipts were paid to administrative expenses.[269] The data for chapter 7 trustees are not available for the years following 2023 but are available for chapter 13 trustees and show that chapter 13 trustees disbursed $4,030,331,261[270] to creditors in 2024 and $4,207,344,184 to creditors in 2025.[271] The creditor recoveries in chapter 13 are the product of an individual's voluntary choice to use the bankruptcy system to facilitate payments to his creditors. The option is not for everyone; the individual choice to file chapter 13 is, and should be, voluntary.[272]

B. Individual Debtors Benefit from Voluntary Choice

The individual's choice to file chapter 13 is not simply for the benefit of creditors. Individuals may enjoy benefits under chapter 13 that are lacking in chapter 7, including the ability to modify secured debts, discharge debts they cannot under chapter 7, protect co-signers, and voluntarily dismiss their case.[273]

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[266] U.S. TRUSTEE PROGRAM, *Chapter 13 Trustee Data and Statistics: FY-2013 Chapter 13 Trustee Audited Annual Reports* (Nov. 9, 2017), https://www.justice.gov/ust/file/ch13ar13-aarpt.xlsx.

[267] U.S. TRUSTEE PROGRAM, *Chapter 7 Trustee Final Reports: Calendar Year 2013—Chapter 7 Asset Cases Closed* (2013), https://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2013.pdf.

[268] U.S. TRUSTEE PROGRAM, *Chapter 13 Trustee Data and Statistics: FY-2003 Chapter 13 Trustee Audited Annual Reports* (Nov. 24, 2004), https://www.justice.gov/ust/eo/private_trustee/library/chapter13/docs/ch13ar03-AARpt-Revised.pdf.

[269] U.S. TRUSTEE PROGRAM, *Chapter 7 Trustee Final Reports: Calendar Year 2003—Chapter 7 Asset Cases Closed* (2003), https://www.justice.gov/ust/eo/public_affairs/data_files/ch7_asset/docs/Ch7CY2003.pdf.

[270] U.S. TRUSTEE PROGRAM, *Chapter 13 Trustee Data and Statistics: FY-2024 Chapter 13 Trustee Audited Annual Reports* (Mar. 14, 2025), https://www.justice.gov/ust/media/1393136/dl?inline.

[271] U.S. TRUSTEE PROGRAM, *Chapter 13 Trustee Data and Statistics: FY-2025 Chapter 13 Trustee Audited Annual Reports* (Mar. 3, 2026), https://www.justice.gov/ust/media/1429616/dl?inline.

[272] The chapter 13 debtor may voluntarily dismiss his case without notice and hearing. *See* 11 U.S.C. § 1307(b). An individual may convert to chapter 13 voluntarily if he is eligible for chapter 13. *See* 11 U.S.C. §§ 706, 1112(d)(1).

[273] *See* 11 U.S.C. §§ 1301, 1307, 1322, 1328. Plus, unlike chapter 7, under chapter 13, a

What is more, the individual may cure defaults without the consent of the secured creditor or lessee.[274] These options permit individuals to strategically address their unique family and personal circumstances while also providing remuneration to their creditors.

Under the current law, a debtor in chapter 7 may not obtain a discharge for particular debts that may be discharged under chapter 13.[275] Hence, a debtor who has some ability to pay her debts may find relief for herself and her dependents that she could not under a chapter 7 case. For example, because chapter 13 is the only option for a debtor to discharge debts from a divorce (other than a domestic support obligation), it may be the only means to provide relief for victims from an abusive relationship who may need to discharge debts of a prior marriage coerced upon the victim to obtain a divorce.[276] Because chapter 13 is the only option for individuals to discharge certain debts for property damage, it may be the only opportunity for a former tenant to discharge a dubious debt for property damage.[277] Additionally, chapter 13 may help individuals with blended families who need to protect cosigners.[278] These are among some examples of the enhanced benefit provided to individuals with regular income who choose to proceed under chapter 13. In another way, if a chapter 13 debtor is not granted a discharge under § 1328, he will remain eligible to discharge those debts in a future case. By contrast, if a chapter 7 debtor is denied a discharge under § 727(a)(2)–(7), he is not eligible to discharge those debts in a future chapter 7 or chapter 11 case, ever.[279] These examples show that chapter choice will meet different needs. They also illustrate some of the different ways that Congress combined less punitive

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debtor may modify interest rates, modify payment terms, and modify the principal of many secured debts if the collateral is worth less than the amount of the debt. *See* 11 U.S.C. §§ 506, 1322, 1325.

[274] 11 U.S.C. §§ 1322(b)(3), (5), (7).

[275] Under the current law, a debtor in chapter 7 may not obtain a discharge for certain debts under 11 U.S.C. § 523(a)(1), (6), (7), (9), (10), (11), (12), (13), (14), (14A), (14B), (15), (16), (17), (18), (19), (20), or (b), or may be denied a discharge under § 727. The debtor may obtain a discharge of all those debts in chapter 13 and cannot be denied a general discharge.

[276] *Compare* 11 U.S.C. § 523(a)(15), *with id.* § 1328(a)(2) (contrasting chapter 7 nondischargeability of certain divorce or separation debts with their omission from the exceptions to a chapter 13 discharge).

[277] *Compare* 11 U.S.C. § 523(a)(6), *with id.* § 1328(a)(2), (4) (contrasting chapter 7's broad exception for willful and malicious injury with chapter 13's narrower exception for willful or malicious injury causing personal injury or death).

[278] 11 U.S.C. § 1301.

[279] 11 U.S.C. § 523(a)(10).

results with more generous incentives for those individuals who use bankruptcy to pay their debts.

The voluntary choice to file chapter 13 by an individual who has the ability to pay his debts is distinct from the question of whether that same individual should be permitted to use bankruptcy to avoid paying debts altogether. Ultimately, the concern over the constitutionality of bankruptcy laws that permit a solvent debtor to obtain the benefits of bankruptcy is at its core the question of whether bankruptcy policy should restrict bankruptcy relief to only those who cannot pay their debts. This policy question is squarely within the power of Congress, as the Constitution contemplates.

Congress responded to this fundamental policy question when it exercised its power to draft laws on the subject of bankruptcies over the previous two centuries. Under the prior bankruptcy acts, Congress restricted *filing* to those who could not pay their debts.[280] Under the Code, rather than restricting access, Congress created incentives for those who could pay to elect an option under bankruptcy to do so, but Congress also imposed restrictions upon the *benefits* of bankruptcy for those individuals who can pay their debts. A notable example is the amendment to the Bankruptcy Code in 2005 when Congress added a means test for most individuals to screen from chapter 7 discharge those who could pay amounts to their unsecured creditors. [281] The means test is an objective test to detect if certain individuals can pay some amount to their creditors. [282] For those individuals, the granting of a chapter 7 discharge (a discharge without repayment of debts) is presumed an abuse. In addition, the individual who has excess income from which to pay his debts may not obtain confirmation of a chapter 13 plan unless he commits all of his projected disposable income[283] to payments to his unsecured creditors or pays those creditors in full.[284] With these checks, Congress has, to some degree, addressed concerns regarding solvent individual debtors.[285] Congress chose not

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[280] *See supra* Part II.

[281] Professor Plank's writings were published prior to the enactment of the 2005 reforms. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

[282] The test applies only to individuals with primarily consumer debts and whose household income (calculated from a six month "look back period") is over the state median. *See* 11 U.S.C. §§ 101(10A), 707(b)(1).

[283] For debtors with higher than their state median household income, the disposable income is calculated using an objective test. *See* 11 U.S.C. § 1325(b)(2)–(3).

[284] *See* 11 U.S.C. § 1325(b)(1).

[285] A court has other tools under the Code to address potential abuse of bankruptcy laws by a debtor who has not demonstrated good faith. These include the power to dismiss a case for cause, to deny confirmation of a plan, or to grant relief from stay for cause. 11 U.S.C. §§

to exclude them from access and instead imposed criteria that facilitate payment of some amounts to creditors. Whether Congress got it right, or still needs to improve it, this bankruptcy policy is the natural consequence of the constitutional structure that places in the hands of Congress the power to draft laws on the subject of debt relief even for debtors who can pay their debts.

After the means test was imposed in 2005, the number of bankruptcy cases filed by individuals decreased.[286] Yet, individuals continue to file bankruptcy in significant numbers. Perhaps most significant is the number of individuals who file chapter 13 annually. In 2025, of the 574,314 total bankruptcy cases filed, 207,889 were filed under chapter 13.[287]

If bankruptcy courts do not (or should not) have jurisdiction over cases filed by persons who have the ability and desire to pay their debts, the necessary consequence is the elimination of chapter 13 and potentially chapter 11 (for reorganizations and for individuals). Bankruptcy options would be limited to those who cannot pay or are unwilling to pay their debts, in the same way bankruptcy was limited under earlier bankruptcy acts. The fallout would necessarily be less recovery for creditors and no opportunity for rehabilitation or debt restructuring. Indeed, Professor Plank's approach would eliminate the federal bankruptcy option that provides the highest creditor recovery.

Despite the claims of Professor Plank and Judge King, the Bankruptcy Clause is not a restriction—it is a power. As illustrated by justices from John Marshall to Elena Kagan, it is within the power of Congress to address the subject of bankruptcy law but a matter of policy on how the subject is addressed.

Conclusion

Chief Justice Fuller put it plainly over a century ago: the constitutionality of voluntary bankruptcy is "really not open to discussion." Yet debates over the appropriate use of the bankruptcy system by solvent debtors

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362(d)(1), 707(a), 1112(b), 1307(c), 1325(a)(3), (7).

[286] CONG. RSCH. SERV., RS20777, CONSUMER BANKRUPTCY AND HOUSEHOLD DEBT 1–2 (Dec. 12, 2011), https://www.congress.gov/crs_external_products/RS/PDF/RS20777/RS20777.39.pdf; *see also* Admin. Off. of the U.S. Courts, *Just the Facts: Consumer Bankruptcy Filings, 2006–2017* (Mar. 7, 2018), https://www.uscourts.gov/data-news/judiciary-news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017.

[287] AM. BANKR. INST., *Total Bankruptcy Filings Increase 11 Percent in Calendar Year 2025* (Jan. 6, 2026), https://www.abi.org/node/1001621.

continue. While these debates should continue, careful consideration must be given to the historical record exposing the defects of solvency barriers in bankruptcy. The consequence of imposing solvency restrictions is, inevitably, removing the option for a solvent person to restructure his debts under a court-approved plan. We should remain mindful that imposing criteria to filter and exclude a solvent person from using bankruptcy law may appear attractive as a matter of policy and may appear favorable to creditors, but our previous experience has shown the opposite. Limitations on voluntary bankruptcy, such as requiring only those who could not pay their debts to use bankruptcy and allowing only creditors to manage the case administration, led to less recovery and greater burden for creditors, plus merciless treatment of individuals. If history is our guide, the problems from the nineteenth-century bankruptcy acts will repeat themselves if we attempt to bar solvent debtors from bankruptcy. Solvency restrictions will not benefit creditors or debtors. They will harm them. That is not a prediction; it is what the record shows.

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