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Reconstructing the Bankruptcy Power: An Originalist Approach

ABSTRACT. This Note responds to two distinct difficulties in the constitutional law of bankruptcy. First, many bankruptcy scholars and practitioners intuit that the Thirteenth Amendment places important limitations on the law of personal bankruptcy, but this intuition is difficult to cash out in a convincing legal argument. Second, modern bankruptcy law requires an expansive construction of the bankruptcy power, but such a construction is difficult to ground in the meaning of the Bankruptcy Clause in 1789. This Note resolves both difficulties by showing how the proper legal construction of the bankruptcy power changed during Reconstruction with the ratification of the Thirteenth Amendment in 1865. Before Reconstruction, the bankruptcy power was limited to the creation of collective-creditor remedies against merchants who committed acts of insolvency. The Thirteenth Amendment both granted Congress new powers to legislate against relations of economic domination, including relations between creditors and insolvent debtors, and altered the function that the bankruptcy power plays within the Constitution. These changes amounted to a reconstruction of the bankruptcy power, such that bankruptcy law now has as its primary purpose the provision of a "fresh start" to the honest unfortunate debtor. This argument helps ground the constitutionality of both voluntary bankruptcy and corporate bankruptcy, but its most important implications are for consumer bankruptcy law, particularly the status of the debtor's fresh start and the grounds on which it can be denied.

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INTRODUCTION

From the New Deal through the turn of the twenty-first century, congressional deliberations about bankruptcy reform followed a familiar pattern. Creditor lobbyists pushed for amendments requiring at least some debtors to complete multiyear partial repayment plans before receiving the debt-forgiving "bankruptcy discharge."[1] Bankruptcy professionals and progressive scholars countered that such requirements were "alien to our jurisprudence,"[2] akin to "involuntary servitude,"[3] and "inconsistent with the policy and traditions of a country which has abolished involuntary servitude by the Thirteenth Amendment."[4] Time after time, Congress sided with the latter, sometimes on explicitly constitutional grounds.[5]

Then came the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[6] Despite a moderately sized literature articulating the Thirteenth Amendment case against it,[7] Congress adopted a means-testing requirement: bankruptcies filed by debtors whose income fell above a certain threshold

1. *See generally* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 98-99, 154-57, 188-211 (2001) (narrating the push for means-testing from the New Deal onwards).

2. *Uniform System of Bankruptcy: Joint Hearings Before Subcomms. of H. and S. Judiciary Comms. on S. 3866*, 72d Cong. 502 (1932) (statement of Jacob M. Lashly, Chairman, Bankruptcy Committee, American Bar Association).

3. *Id.* at 622 (statement of Mr. Dryer, Referee in Bankruptcy); *see* U.S. CONST. amend. XIII, § 1.

4. *Bankruptcy Act Revision: Hearings Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 94th Cong. 1255, 1410 (1976) (statement of Vern Countryman, Professor, Harvard Law School); *see also Bankruptcy Reform Act of 1978 (Future Earnings): Hearing Before the Subcomm. on Cts. of the S. Comm. on the Judiciary*, 97th Cong. 141-42 (1981) (statement of Vern Countryman); *Bankruptcy Reform Act of 1999 (Part I): Hearing Before the Subcomm. on Com. & Admin. L. of the H. Comm. on the Judiciary*, 106th Cong. 125 (1999) (statement of Joe Lee, Bankruptcy Judge (quoting the now-deceased Countryman's congressional testimony from 1981 and 1982)).

5. *See, e.g.*, H.R. REP. NO. 95-595, at 120 (1977). The Supreme Court recognized these constitutional concerns as well, though without addressing them directly. Toibb v. Radloff, 501 U.S. 157, 166 (1991) (noting "Congress' concern about imposing involuntary servitude on a Chapter 13 debtor").

6. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C. (2018)).

7. *See, e.g.*, Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 827 (1983); Karen Gross, *Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 167 (1990); Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483, 492 (2005); John E. Matejkovic & Keith Rucinski, *Bankruptcy "Reform": The 21st Century's Debtors' Prison*, 12 AM. BANKR. INST. L. REV. 473, 483 (2004).

could be converted from Chapter 7 (immediate discharge) to Chapter 11 or 13 (conditional discharge, requiring completion of a repayment plan).[8] Debtors have occasionally argued that this conversion is unconstitutional, but courts are highly skeptical.[9]

The basic problem that courts have with debtors' constitutional arguments is that bankruptcy courts never actually compel any labor. Repayment plans are involuntary only in a conditional sense: the debtor must complete the repayment plan *if and only if* she is to receive a debt discharge.[10] As one bankruptcy court tersely explained, so long as "a party has no constitutional right to a discharge of its debts" then "[r]efusing to allow the [d]ebtor a discharge under Chapter 7 is not involuntary servitude."[11] And the Supreme Court rejected a constitutional right to a bankruptcy discharge in *United States v. Kras*, concluding that a bankruptcy discharge was "obviously . . . a legislatively created benefit."[12] Following the courts' reasoning, the Thirteenth Amendment no more prohibits conditioning the bankruptcy discharge on future labor than it prohibits conditioning unemployment benefits on a search for employment.[13] Or—the specific issue in

8. 11 U.S.C. § 707(b) (2018). Although the differences between Chapters 11 and 13 are important, they do not matter for the present argument, so I will mostly ignore them.

9. *See, e.g.*, *In re* Breland, 989 F.3d 919, 922 (11th Cir. 2021), *rev'g* 610 B.R. 389 (S.D. Ala. 2019) (reversing the district court, which had dismissed a debtor's Thirteenth Amendment argument for lack of standing, but describing it as "oh-so tempting" to reach the merits and dismiss that claim with prejudice); *In re* Parvin, 538 B.R. 96, 104 (Bankr. W.D. Wash. 2015), *aff'd*, 549 B.R. 268 (W.D. Wash. 2016); *In re* Gordon, 465 B.R. 683 (Bankr. N.D. Ga. 2012). *But see In re* Clemente, 409 B.R. 288, 295 (Bankr. D.N.J. 2009) (interpreting the Bankruptcy Code to avoid the constitutional issue by allowing debtors to withdraw their bankruptcy filing if their plan is converted from Chapter 7 to Chapter 11).

10. *See* Samuel L. Bufford & Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1, 27-36 (2008) (skeptically summarizing the Thirteenth Amendment argument against involuntary Chapter 11 cases). In almost all cases, the debtor files for bankruptcy voluntarily, making the argument against the presence of involuntary servitude particularly easy. In theory, a debtor could be forced into a repayment-plan bankruptcy involuntarily, but even in such a case, the imposition of a repayment plan would not itself be forced labor unless coercive legal processes were used to compel compliance. *See* Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191, 216-24 (arguing that bankruptcy courts can impose Chapter 11 repayment plans on involuntary debtors but cannot compel compliance with them).

11. *In re Gordon*, 465 B.R. at 700 (citing United States v. Kras, 409 U.S. 434, 446 (1973)).

12. *Kras*, 409 U.S. at 447.

13. Inventive academics have proposed using the Thirteenth Amendment to solve all sorts of social ills, but not, to my knowledge, the problem of unemployment-benefits work requirements. *See* Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733-34 (2012) ("It has been proposed . . . that the Thirteenth Amendment may be read to prohibit

Kras — conditioning access to bankruptcy on payment of filing fees. Or — as in the present Bankruptcy Code — conditioning discharge on completion of a financial literacy course[14] or prohibiting discharge of certain kinds of debt, such as student loans.[15]

But is it really "obvious[]"[16] that the bankruptcy discharge — what bankruptcy jurisprudence for well over a century has referred to as the "fresh start"[17] — is merely a legislative creation? Unlike many federal programs, bankruptcy law finds its constitutional grounding not in the Commerce Clause or the Spending Clause, but in a specially tailored congressional power "[t]o establish . . . uniform Laws on the subject of Bankruptcies."[18] Any law enacted under the authority of the Bankruptcy Clause must possess the features of a bankruptcy law, making it a constitutional question what those features are. The argument of this Note is that, ever since the Thirteenth Amendment, a law cannot be a bankruptcy law in the constitutional sense without making adequate provision for access to a fresh start by honest unfortunate debtors. This argument somewhat resembles that made by earlier commentators who intuited a kinship between denying a fresh start and imposing involuntary servitude. But its legal logic is quite different: it does not find in the Thirteenth Amendment an external constraint on bankruptcy law, but rather an essential alteration to it.

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not just slavery and involuntary servitude, but also racial profiling, felony disenfranchisement, hate speech, child labor, child abuse, anti-abortion laws, domestic violence, prostitution, sexual harassment, the use of police informants, anti-anti-discrimination laws, the denial of health care, the Confederate flag, the use of orcas at SeaWorld, and even laws *permitting* physician-assisted suicide." (footnotes omitted)). More importantly, courts have been highly reluctant to take these arguments seriously; indeed, the bankruptcy-related arguments have fared reasonably well compared to other arguments for expanding the reach of the Thirteenth Amendment. *Compare supra* note 5 (describing the willingness of Congress and the Supreme Court to cite Thirteenth Amendment arguments in the bankruptcy context), *with* Greene, *supra*, at 1735 ("[I]t is nearly self-evident that neither the current U.S. Supreme Court nor any presently imaginable U.S. Supreme Court is likely to accept any of the arguments just described.").

14. *See* 11 U.S.C. §§ 109(h), 727(a)(11) (2018).

15. *See id.* § 523(a)(8).

16. *Kras*, 409 U.S. at 447.

17. Traer v. Clews, 115 U.S. 528, 541 (1885).

18. U.S. CONST. art. I, § 8, cl. 4. Every congressional enactment of a new statutory scheme for bankruptcy has echoed the Bankruptcy Clause in its title: "An Act to Establish a Uniform System of Bankruptcies Throughout the United States." *See* Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843); Act of Mar. 2, 1867, ch. 176, 14 Stat. 517; Act of July 1, 1898, ch. 541, 30 Stat. 541; Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1501 (2018)).

To assert such an essential alteration may sound quixotic. If the bankruptcy power really had been "reconstructed" in this way by the Thirteenth Amendment, surely someone would have noticed. But while the Thirteenth Amendment connection is novel, commentators have long recognized that bankruptcy law changed dramatically in the final third of the nineteenth century.[19] In 1789, "the subject of Bankruptcies" encompassed only collective-creditor remedies against merchant debtors,[20] and the first federal bankruptcy law confined itself accordingly.[21] A century later, bankruptcy laws had begun to do much more.[22] By 1935, the Supreme Court was prepared to hold that the New Deal bankruptcy laws, "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."[23] In practice, the field seems to have no boundaries at all, with the scope of the bankruptcy power being determined entirely by the scope of Congress's desire to legislate.[24] The expanding-field theory

19. *See infra* notes 155-156 and accompanying text.

20. *See, e.g.*, Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6 (1995) ("The framers of the United States Constitution had the English bankruptcy system [of involuntary proceedings against merchant debtors] in mind when they included the [bankruptcy] power . . . ."). A minority view holds that the original meaning of the Clause was in fact expansive enough to allow for most of modern bankruptcy law because "bankruptcy" just means relations between insolvent debtors and their creditors. Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 532 (1996); Michael S. Schreiber, *Original Intent and the Bankruptcy Power: What Were They Thinking?*, 2 DEPAUL BUS. & COM. L.J. 165, 182-83 (2003). Parts I and II, *infra*, suggest, inter alia, my objections to this account.

21. *See infra* Section III.B.1.

22. *See infra* Section IV.B.2.

23. Cont'l Ill. Nat'l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 671 (1935).

24. *See, e.g.*, FRANK R. KENNEDY, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 64 (1973) (noting an alleged "continuing expansion of the meaning of the word 'bankruptcies' as used in the Constitution that has legitimated evolutions in bankruptcy law . . . since the time of the adoption of the Constitution"); Frank R. Kennedy, *Bankruptcy and the Constitution*, *in* BLESSINGS OF LIBERTY: THE CONSTITUTION AND THE PRACTICE OF LAW 131, 138 (A.L.I.-A.B.A. Comm. on Continuing Pro. Educ. ed., 1988) ("[T]he courts have indeed come close to permitting Congress complete freedom in formulating and enacting bankruptcy legislation."); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 635 (2008) ("[B]ankruptcy relief today goes beyond anything the Framers likely meant or imagined. . . . [W]e must make an exception . . . when it comes to the original meaning of the Bankruptcy Clause."); *see also* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RSRV. L. REV. 319, 383-84 (2013) (arguing that the bankruptcy power expanded to accommodate Congress's desire to regulate interstate commerce more thoroughly).

is convenient for legitimating congressional enactments, but useless for constraining its agenda when it has been coopted by private interests.[25] A return to the bankruptcy power of 1789, on the other hand, would require a radical rejection of much of the modern bankruptcy system. This Note offers an alternative preferable to both: it accounts for how the bankruptcy power has changed since 1789, while attributing that change to a constitutional amendment rather than Congress's imagination.

This Note proceeds in five Parts. Part I describes this Note's approach to constitutional interpretation, construction, and reconstruction. Part II identifies a narrow and a broad reading of "the subject of Bankruptcies," both of which were linguistically possible in 1789. Part III demonstrates that the narrow reading is the most plausible construction of the bankruptcy power under the original Constitution and tended to be recognized as the appropriate construction throughout the first half of the nineteenth century. Part IV argues that the Thirteenth Amendment's prohibition on involuntary servitude required a reconstruction of the bankruptcy power, such that bankruptcy law today is necessarily concerned with the servitude inherent in insolvency. And Part V surveys the implications of this reconstruction for bankruptcy law today. A brief Conclusion follows.

I. INTERPRETATION, CONSTRUCTION, RECONSTRUCTION

This Note begins with a problem: how can an interpreter give legal effect to the Bankruptcy Clause in a way that makes sense of modern bankruptcy law, while placing real limits on Congress's power to deny a fresh start? As a solution, it proposes identifying an inflection point in the history of bankruptcy law coinciding with the ratification of the Thirteenth Amendment. Accordingly, this Note should be of interest to anyone interested in the scope of the bankruptcy power, and willing to entertain the possibility that its history might be a resource

25. *See generally* SKEEL, *supra* note 1 (arguing that since the end of the nineteenth century, bankruptcy law has been primarily shaped by creditor lobbyists and associations of bankruptcy attorneys).

for delimiting it. Neither requires a general methodological commitment to original intent,[26] original public meaning,[27] or original law.[28] Alternatively, or additionally, such interest might be motivated by concern about interest-group capture[29] and such willingness by a recognition that the Bankruptcy Clause is not one of the Constitution's "majestic generalities,"[30] but rather a grant of power regarding an esoteric procedure mostly of little interest to those who have not yet found themselves caught up in it.[31]

Again, my start and end points do not require any deep familiarity with originalist theory. The route I chart between them, however, does make use of originalist methods. While originalists may be able to adopt its argument wholesale, nonoriginalists may find its angle of approach alien and its terminology off-putting. This need not prevent them from adapting its argument to their own framework, but it does pose difficulties. In this Part, I seek to alleviate these difficulties somewhat by describing this Note's originalist methodology. I begin with a distinction increasingly (though not universally)[32] accepted among originalists: that between *interpretation* and *construction*.

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26. *See generally* Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683 (2012) (arguing for the use of original intent as a guide to constitutional interpretation); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) (same).

27. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 101-02 (2010) (comparing public-meaning originalism to other forms of constitutional interpretation); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378-82 (2013) (comparing public-meaning originalism to originalism based on the Framers' intent).

28. *See generally* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) (articulating a version of originalism based on the law at the time of the Founding); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838-881(2015) (describing original-law originalism and its relation to legal change).

29. *See supra* note 25 and accompanying text.

30. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

31. *See* SKEEL, *supra* note 1, at 5 ("In the popular imagination, bankruptcy laws seem hopelessly complex and arcane.").

32. Some originalist theorists view construction as illegitimate. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 772-80 (2009). In my view, these theorists overcorrect for the "living originalists" who hold that any legal argument should be admissible when it is in the so-called "construction zone." *See* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71 , 80 (2016). But construction need not look like this; construction can take place lawfully. *See infra* note 35 and accompanying text. Further, though McGinnis and Rappaport describe their "original methods originalism" as opposed to construction, this seems misguided. "Original methods originalism" avoids construction only if legal effect and semantic meaning entirely coincide; if some principles for determining legal

According to the exponents of this distinction, all constitutional theories—not just originalism—engage in both interpretation and construction. In Lawrence B. Solum's influential formulation, interpretation "recognizes or discovers the linguistic meaning or semantic content of the legal text," while construction "gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text)."[33] For interpretation to be originalist, it must be an empirical exercise in historical linguistics. Such an exercise can usually clarify which meaning of an ambiguous word is relevant to a legal text, but little more. Construction, meanwhile, is required to resolve vagueness within a provision or conflicts or gaps between two provisions.[34] For construction to be originalist, it must construct a provision's legal effect by applying a background law of construction that was itself constructed according to originalist principles. Much recent originalist theory, particularly that of William Baude and Stephen E. Sachs, has been dedicated to showing what this construction looks like.[35] I would summarize their work as follows: interpretation identifies the affordances of a constitutional provision, that is, what *could be done* with it, by looking to original semantic content; construction determines what our Constitution *actually does* with it, by use of legal arguments that would have made sense at the time of enactment. Thus, construction calls for an inquiry that is not empirical. Rather, construction is fundamentally a matter of weighing legal arguments.

The interpretation/construction distinction is complicated by the phenomenon of constitutional amendment, which a skeptic might argue makes any historical argument concerning construction irrelevant; all that we should care about is how one would best construct the legal effect of the Constitution when it was last amended in 1992. This skeptical difficulty can be resolved through the introduction of a third concept, that of *reconstruction*. This reconstruction is distinct from Reconstruction, the period in American history immediately following the Civil War, lending its name to the Reconstruction Amendments.[36] Lowercase-*r* reconstruction refers to the process by which we alter our construction

effect are not in fact grammatical rules of legalese, then they are rules of construction. *See* Solum, *supra* note 27, at 105 n.21, 106 n.24.

33. Solum, *supra* note 27, at 96.

34. *Id.* at 106-07.

35. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1085 (2017) ("The law of interpretation can . . . identify the proper scope of an activity like construction, grounding it firmly in valid legal rules, while at the same time preventing it from turning into a blank check for policymaking."); *see* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107. GEO. L.J. 1, 32-36 (2018) (describing an originalist theory of construction as bounded by good faith).

36. *E.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010) (describing the Thirteenth, Fourteenth, and Fifteenth Amendments as the Reconstruction Amendments).

of a constitutional provision due to an alteration elsewhere in the text. The pun is not unwelcome, for the Reconstruction Amendments were reconstructive amendments par excellence. The phrase "reconstruction" reminds us that amendments change the Constitution, but they do not entirely replace it. When giving a provision legal effect after the enactment of a perhaps-relevant amendment, we must begin by interpreting the original linguistic meaning of the relevant provision—after all, reconstruction has no more power than construction to make a clause bear a meaning it could not bear when it was enacted.[37] Second, as there should be a rebuttable presumption that amendments do not require the reconstruction of earlier provisions,[38] we should construct the provision's legal effects as they stood before the amendment in question. Finally, we should ask whether the amendment in question overcomes this presumption and requires a reconstruction.

Reconstructive arguments must, that is, identify some way in which the later amendment renders an already possible construction of the early provision newly plausible. For example, the ratifiers of the amendment might have assumed (incorrectly) that the earlier provision had already received the alternative construction, in a way that justifies treating the amendment as implicitly ratifying that unstated assumption.[39] The historical circumstances surrounding the amendment's ratification might offer additional reasons to prefer the alternative construction.[40] The constitutional purpose behind the amendment might implicitly contradict the logic of the construction that had originally been more

37. An entertaining consequence of this rule is that there may be circumstances under which it would be desirable to amend the Constitution by striking a piece of text and replacing it with the same text. While this may seem absurd, it should not. A sequence of letters written in 1787 may only appear to be the same word as the same sequence of letters written in 2021.

38. It is an interesting question how much evidence is required for rebuttal. Barnett and Bernick argue that reconstruction requires "affirmative evidence" that the amendment was "designed" to alter the earlier provision. Barnett & Bernick, *supra* note 35, at 17 n.75. This seems to me too strong; in my view, all that is needed is evidence that the new structure of the Constitution requires a different construction.

39. *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1088-89 (1995) (arguing that the first half of the nineteenth century saw the gradual acceptance of an antiestablishment principle, such that, while in 1791 the Establishment Clause served a federalist purpose, by 1868 it was understood to protect an individual right and was intended to be incorporated against the states accordingly).

40. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 88-94 (2012) (arguing, without adhering to an interpretation/construction distinction, that the Army and Navy Clause must be read in light of the Union Army's role in the Civil War, such that "understandings" of the military's role in the Constitution most plausible in 1789 "should ultimately give way to a later principle").

plausible.[41] Finally, the amendment might have a structural effect on the Constitution that made a reconsideration of earlier understandings inevitable.[42] The strongest candidates for reconstruction are those for which the background beliefs of the ratifiers, the historical circumstances surrounding ratification, the amendment's constitutional purpose, and its effects on the Constitution's structure all indicate a need to revisit the provision's original construction.

The following three Parts lay out a reconstructive argument concerning the bankruptcy power. Part II identifies two possible interpretations of the Bankruptcy Clause in 1789. Part III examines the legal considerations shaping the original construction of the bankruptcy power and concludes that a narrow construction was obligatory. Part IV then considers the ratification of the Thirteenth Amendment in 1865 and suggests several reasons—involving background belief, ratification history, constitutional purpose, and structural effects—why it should be understood to require a broader reconstruction of the bankruptcy power.

II. INTERPRETING "THE SUBJECT OF BANKRUPTCIES"

This Part identifies the semantic content of "the subject of Bankruptcies" in 1789 which was as ambiguous then as it is today. On the one hand, in common usage, "bankrupt," "bankruptcy," and "bankruptcies" were, and are, nearly interchangeable with "insolvent," "insolvency," and "insolvencies," such that "the subject of Bankruptcies" would mean "the subject of inabilities to pay debts owed."[43] On the other hand, these terms had, and have, a technical legal meaning—but that technical legal meaning has changed dramatically over the last 232 years. Today, "bankruptcy" refers to a statutory procedure reorganizing and liquidating an insolvent debtor's debts.[44] But in the eighteenth century, a "bankrupt" was "a

41. *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 70 (2011) (arguing that the Nineteenth Amendment's extension to women of the right to vote implicitly "excised Section Two [of the Fourteenth Amendment]'s implication that women could justifiably—and constitutionally—be denied equal rights," and so, in effect, requires the word "male" in the Fourteenth Amendment to be construed as an inkblot).

42. *See, e.g.*, Joshua D. Hawley, *The Transformative Twelfth Amendment*, 55 WM. & MARY L. REV. 1501, 1507-09 (2014) (arguing that the Twelfth Amendment "transform[ed] the presidency from an apolitical office into a robustly political one" and so required an expanded reconstruction of the Article II "executive power").

43. *Compare Bankrupt*, adj., SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755) ("In debt beyond the power of payment."), *with Bankrupt*, adj., def. 1, OXFORD ENGLISH DICTIONARY (3d ed. 2015) ("Of a person, company, etc.: unable to pay outstanding debts . . . .").

44. *Bankruptcy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A statutory procedure by which a (usu[ally] insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors . . . .").

trader, who secretes himself, or does certain other acts, tending to defraud his creditors," and "bankruptcies" were the wrongful acts in question.[45] In this Part, I explore the legal (Section I.A) and colloquial (Section I.B) meanings of the "subject of Bankruptcies." I conclude that both meanings are plausible, making the Bankruptcy Clause one of the unusual cases[46] in which linguistic ambiguities cannot be resolved by interpretation alone.

A. Legal Meaning: "Bankruptcy" as Merchant Fraud

To identify the legal meaning of "bankruptcy" in 1789, we cannot look only to how the word was used in 1789. Legal meaning builds up over time; as Justice Frankfurter observed, when a word is "transplanted from another legal source," it "brings the old soil with it."[47] A legal instrument that uses a distinctively legal term makes previous legal uses of that term relevant to its interpretation, whether they were from five minutes, five years, or five centuries earlier.[48] So although this Section quickly moves on to the eighteenth century, it begins with the first introduction of "bankruptcy" into English law in 1542.

The word entered English law as a verb, in the title of a statute "against such persons as do make bankrupts."[49] The statute's scope seems to have been implicitly limited to merchants, just as the word "bankrupt" seems to have derived from the act of breaking or absconding with the table on which a merchant does business.[50] In any case, by 1571, the bankruptcy laws created a collective-creditor

45. 2 WILLIAM BLACKSTONE, COMMENTARIES *471; 4 JAMES MADISON, THE WRITINGS OF JAMES MADISON: 1787: THE JOURNAL OF THE CONSTITUTIONAL CONVENTION 356-57 (Gaillard Hunt ed., 1903) ("Mr. Sherman observed that Bankruptcies were in some cases punishable with death by the laws of England . . . .").

46. *See* Solum, *supra* note 27, at 102 (explaining that constitutional ambiguity can characteristically "be resolved by interpretation that relies on the publicly available context of the constitutional provision at issue").

47. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

48. *See, e.g.*, Louisiana v. Ramos, 140 S. Ct. 1390, 1395 (2020) (beginning its inquiry into the meaning of trial "by an impartial jury" in the fourteenth century).

49. 1542-43, 34 & 35 Hen. 8 c. 4.

50. 2 WILLIAM BLACKSTONE, COMMENTARIES *472 ("The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather ch[oo]se to adopt the word *route*, which in French signifies a trace or track, and tell us that a bankrupt is one who hath removed his *banque*, leaving but a trace behind. And it is observable that the title of the first English statute concerning this offence . . . is a literal translation of the French idiom, *qui font banque route*." (citations omitted)).

remedy only against "merchants" who committed "acts of bankruptcy."[51] These would remain defining features of English bankruptcy law for the next 250 years[52]: only a creditor could initiate a bankruptcy proceeding, and only against a merchant.

That these features endured does not mean that bankruptcy law did not change radically over this period. Bankruptcy law's original premise was that merchants, whose assets were fungible, scattered, and easy to hide, were particularly well-positioned to defraud their creditors, and so a special law was needed to remedy their mischief.[53] But this premise was destabilized by a 1604 statute recognizing new "acts of bankruptcy" which did not involve fraudulent conduct, only persistent failure to pay one's debts.[54] These acts were intended as proxies for fraud but effectively ensured that many innocent debtors found themselves in bankruptcy court. Responding to this reality a century later, Parliament rewrote the bankruptcy laws to distinguish debtors suffering "unavoidable misfortunes" from debtors with an "intent to defraud and hinder their creditors."[55] The cooperation of the former was to be incentivized by offering them a debt discharge,[56] conditioned on a majority vote by creditors.[57] The wrongdoing of

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51. 1570, 13 Eliz. c. 7. To be precise, the statute authorizes proceedings against any "merchant or other person using or exercising the trade of merchandize by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or by retail, . . . or seeking his or her trade of living by buying and selling." *Id.* Later statutes include similar catalogs. But, as bankruptcy scholars have long recognized, the content of these catalogs can be summed up in the phrase "trader or merchant" or, to be even more concise, in the single word "merchant." *See, e.g.*, Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 21, 25 (1986).

52. Execution Act 1844, 7 & 8 Vict. c. 96 (permitting voluntary bankruptcy petitions by merchants); Bankruptcy & Insolvency Act 1861, 24 & 25 Vict. c. 134, § 69 (permitting bankruptcy petitions by nonmerchants). Plank, *supra* note 20, at 507-13, portrays these two requirements as slowly fading away over the course of the eighteenth century. But this is incorrect: while Parliament struggled to ensure both requirements were preserved, it did not abandon either of them until the mid-nineteenth century.

53. *See* Ian P.H. Duffy, *English Bankrupts, 1571-1861*, 24 AM. J. LEGAL HIST. 283, 284 (1980) (describing the motivations behind the targeting of merchants); Tabb, *supra* note 20, at 8 ("Relief was not *for* debtors, but *from* debtors.").

54. 1604, 1 Jac. c. 15, § 2.

55. 1705, 4 Ann. c. 17, § 1 (noting that "many persons have and do daily become bankrupt, not so much by reasons of losses and unavoidable misfortunes, as to the intent to defraud and hinder their creditors of their just debts and duties").

56. *Id.* §§ 7, 19.

57. 1796, 5 Ann. c. 22, §§ 2, 7 (requiring the consent of eighty percent of creditors, measured both by number and by value).

the latter was to be deterred through the imposition of the death penalty on the uncooperative.[58]

From this fateful choice sprang the curious moral ambivalence of bankruptcy law. Bankruptcy laws had previously aimed to force merchants into bankruptcy proceedings for the benefit of creditors. Now they focused on keeping the wrong kind of debtors out of bankruptcy, given that the prospect of a debt discharge had created an incentive to find one's way into it. Some reforms sought to ensure that it was really creditors, not debtors, who initiated bankruptcy proceedings,[59] on the grounds that only a dishonest debtor, the kind not to be rewarded with a debt discharge, would voluntarily assert their inability to pay their debts.[60] Others sought to ensure that only merchants were allowed into bankruptcy,[61] because mercantile activity was thought particularly risky and so required special protections to keep credit markets liquid.[62] In a world that had not yet developed the modern business corporation, the availability of bankruptcy functioned as a form of limited liability.[63] It allowed failed merchants to start afresh—as long as their creditors were willing to initiate bankruptcy proceedings, approve their discharge, and so welcome them back into what was effectively a microrepublic of creditors.[64]

Importantly, the legal term "bankruptcy" named an *alternative* to the usual way of dealing with defaulting nonmerchant debtors. Remedies against such defaulting debtors have their own fascinating history. Beginning in the thirteenth century, the remedy of last resort had been debtor's prison, understood as a

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58. *Id.* §§ 1, 18 ("Whereas [the previous year's Statute of 4 Anne, chapter 17] . . . hath not answered the good intent thereof; but on the contrary, many notorious frauds and abuses have been committed . . . ."); *see also* Tabb, *supra* note 20, at 10-12 (describing the carrot-and-stick approach).

59. *E.g.*, 1751, 24 Geo. 2 c. 57, § 9 (punishing persons pretending to be creditors in order to vote to approve a debt discharge); 1732, 5 Geo. 2 c. 30, § 29 (punishing persons falsely claiming to be creditors in order to initiate a bankruptcy proceeding).

60. Weisberg, *supra* note 51, at 31.

61. *E.g.*, 1732, 5 Geo. 2 c. 30, § 39 (including bankers, brokers, and financiers in the definition of merchant); 1662, 13 & 14 Car. 2 c. 24 (excluding investors in certain chartered corporations from the definition of merchant); *see* Lawrence M. Friedman & Thadeus F. Niemira, *The Concept of the "Trader" in Early Bankruptcy Law*, 5 ST. LOUIS U. L.J. 223, 235-48 (1958) (describing different tests for merchant status developed by English courts—some looking to occupation, some to activity, and some to social class).

62. Weisberg, *supra* note 51, at 32; *see* 2 WILLIAM BLACKSTONE, COMMENTARIES *473-74.

63. *See* Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 160-62 (1982).

64. I use the phrase "microrepublic of creditors" rather than "creditor democracy" to emphasize that the bankrupt's creditors (organized into an upper and lower chamber) stood in as representatives of the creditor class as a whole.

means to coerce debtors into liquidating assets that could not otherwise be reached by legal process.[65] The pointless cruelty of imprisoning debtors with no assets eventually led Parliament to begin passing periodic insolvency acts.[66] These allowed debtors currently imprisoned to be released—but not to have their debts discharged—in exchange for turning over all nonexempt assets.[67] That is, insolvency acts offered relief to debtors, not creditors; retrospectively, not prospectively; and without impairing the debt contract itself, which could still be enforced against after-acquired tangible property but no longer against the debtor's body.[68]

Legal developments in the mid-eighteenth century, in both England and the American colonies, began to call these characteristics of insolvency laws into question. These changes did not, however, alter the legal meaning of the word "bankruptcy." In England, a 1759 Act deviated from the usual outlines by creating

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65. Cohen, *supra* note 63, at 154-55; Duffy, *supra* note 53, at 285. In many ways, debtor's prison resembled imprisonment for contempt. *See* 18 U.S.C. § 401(3) (2018) (stating that the contempt power can be used against "[d]isobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command").

66. The first such Act was passed during the Interregnum Parliament. *See* An Act for Discharging from Imprisonment Poor Prisoners Unable to Satisfy Their Creditors, (1649), 2 ACTS & ORDS. INTERREGNUM 321 (Eng.); Cohen, *supra* note 63, at 158. Beginning twenty years later, and continuing for over a century, one such act was passed on average every four and a half years. 1670, 22 & 23 Car. 2 c. 20; 1678, 30 Car. 2 c. 4; 1690, 2 W. & M. Sess. 2 c. 15; 1702, 1 Ann. c. 19; 1703, 2 & 3 Ann. c. 10; 1711, 10 Ann. c. 29; 1719, 6 Geo. 1 c. 22; 1724, 11 Geo. 1 c. 21; 1728, 2 Geo. 2 c. 20, 22; 1729, 3 Geo. 2 c. 27; 1736, 10 Geo. 2 c. 26; 1737, 11 Geo. 2 c. 9; 1742, 16 Geo. 2 c. 17; 1747, 21 Geo. 2 c. 31, 33; 1755, 28 Geo. 2 c. 13; 1756, 29 Geo. 2 c. 18; 1760, 1 Geo. 3 c. 17; 1765, 5 Geo. 3 c. 41; 1769, 9 Geo. 3 c. 26; 1772, 12 Geo. 3 c. 23; 1774, 14 Geo. 3 c. 77; 1776, 16 Geo. 3 c. 38; 1778, 18 Geo. 3 c. 52; 1781, 21 Geo. 3 c. 63. Early insolvency acts were limited to debtors owing less than £50 (more than an unskilled laborer's yearly wages). Even this limit was repeatedly raised. *See* Plank, *supra* note 20, at 514. For the relative value, see *Purchasing Power of British Pounds from 1270 to Present*, MEASURINGWORTH, https://www.measuringworth.com/calculators/ppoweruk [https://perma.cc/5UHC-UFZ2] (enter "1700" as Initial Year, "50" as Initial Amount, "2021" as Desired Year, then click "Calculate"), which can calculate the 2021 equivalent in labor earnings of £50 in 1700.

67. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *484 (defining an insolvency act as "an occasional act, frequently passed by the legislature: whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or, not being in a mercantile state of life, are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath"); Plank, *supra* note 20, at 513-15.

68. Plank, *supra* note 20, at 513-15. Some downplay the importance of this distinction, *see, e.g.*, *id.* at 516 ("The perpetual release from prison effected for many a virtual discharge of the debts themselves."), and as a practical matter they are not entirely wrong. But the distinction never lost its legal significance.

a new creditor remedy resembling that available in bankruptcy.[69] This Act has been described as the moment when "the English bankruptcy acts and the English insolvency acts began to converge."[70] There is some truth to this remark. Indeed, the principal difference remaining was that only merchant debtors were offered the carrot of a debt discharge. Notably, however, the 1759 Act did not include the word "bankruptcy" or any variation of it, and Blackstone's merchant-only definition of bankruptcy was written after the 1759 statute was promulgated. A similar evolution was occurring in the American colonies. As the colonies were not subject to English debt legislation,[71] they made their own, experimenting with a wide variety of approaches.[72] While commentators often describe these laws as blurring the line between bankruptcy and insolvency,[73] they for the most part did not use the word "bankruptcy,"[74] and available evidence suggests that this word's distinctive legal meaning was widely understood and respected in the years leading up to the Constitution's ratification.[75]

In sum, functional lines may have been blurred, but the distinctive meaning of "bankruptcy" had not been erased. "[T]he subject of Bankruptcies" in 1789 likely meant the subject of creditor-initiated proceedings against merchants, whether unfortunate or fraudulent, who could not pay their debts.

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69. 1759, 32 Geo. 2 c. 28, §§ 16-17 (offering retrospective relief to imprisoned debtors, but also giving creditors a permanent remedy by allowing them to compel recalcitrant nonmerchant debtors to turn over assets or face transportation and seven years' indentured servitude); *see* Plank, *supra* note 20, at 516.

70. Plank, *supra* note 20, at 516.

71. *Id.* at 518 n.159.

72. *See generally* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1999) (surveying state insolvency and bankruptcy laws).

73. *See, e.g.*, Lubben, *supra* note 24, at 337 (summarizing colonial debt legislation as "a hodgepodge of general bankruptcy laws, often not titled as such"); Plank, *supra* note 20, at 526 (recognizing the terminological distinction but arguing that what matters are the essential features shared by insolvency and bankruptcy laws); Schreiber, *supra* note 20, at 169-76 (surveying state insolvency laws and mistakenly describing them as bankruptcy laws).

74. For example, Coleman describes New York as "enacting a general bankruptcy statute" in April of 1784. COLEMAN, *supra* note 72, at 123. But the statute he cites concerns "the relief of insolvent debtors within this State," and does not mention "bankrupt" or "bankruptcy." An Act for the Relief of Insolvent Debtors Within this State, ch. 34, 1784 N.Y. Laws 649.

75. Of the examples Plank amasses to demonstrate that the distinctive legal meaning of "bankruptcy" had been left behind, Plank, *supra* note 20, at 530-32, only two actually conflate bankruptcy and insolvency, and one comes not from the Founding Era but from 1820, on which see *infra* Section III.B.2. One stray misapplication of a word does not erase its generally recognized legal meaning. The rest of Plank's examples are either instances of the colloquial meaning of the term, on which see *infra* Section II.B, or examples of bankruptcy being contrasted with solvency, which makes perfect sense in context; these passages concern a specific variety of merchant fraud, namely, a wrongful concealment of the fact of insolvency.

B. Colloquial Meaning: "Bankruptcy" as Insolvency

That "bankruptcy" had a distinctive legal meaning does not, however, imply that this was its only meaning. Technical legal terms that nonlawyers find evocative often enter into colloquial speech and are transformed along the way. One day an insolvent debtor is compared, metaphorically, to a merchant who defrauds his creditors, in order to freight his inability to pay his debts with moral culpability; the next, the word "bankrupt" has acquired a secondary meaning, that is, insolvent.[76] Shakespeare, for example, applied "bankrupt" to persons who ran out of political and intellectual resources.[77] Already in the sixteenth century, "bankrupt" had both a legal and a colloquial meaning;[78] by the early eighteenth century, at the latest, the same held true of "bankruptcy."[79] These colloquial meanings did not in any sense displace the legal meanings of the words. Rather, the two coexisted, and continue to coexist, although the legal meaning has changed as the law has changed.

So "the subject of Bankruptcies" in 1789 could also have meant, quite simply, "the subject of insolvencies." Indeed, a small minority of contemporary readers, mostly anti-Federalists, do seem to have interpreted the Bankruptcy Clause along these lines.[80] While this fact supports the claim that the broad interpretation of the Clause was linguistically possible, the broad interpretation is less plausible than the narrow interpretation based on the term's legal meaning for three reasons. First, the Constitution is a legal document, making it more likely to use dry legal terminology than evocative metaphor.[81] Second, the Clause

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76. *See, e.g.*, GUY DEUTSCHER, THE UNFOLDING OF LANGUAGE: AN EVOLUTIONARY TOUR OF MANKIND'S GREATEST INVENTION 118 (2005) (describing ordinary language as a "reef of dead metaphors"); GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980) (discussing the role metaphors play in human cognition).

77. *E.g.*, WILLIAM SHAKESPEARE, RICHARD II act 2, sc. 1, l. 948 ("The king's grown bankrupt, like a broken man."); WILLIAM SHAKESPEARE, TWO GENTLEMEN OF VERONA act 2, sc. 4, l. 33 ("[I]f you spend word for word with me, I shall make your wit bankrupt.").

78. *Compare Bankrupt*, n., def. 1.a, OXFORD ENGLISH DICTIONARY, *supra* note 43 (defining a bankrupt as "[a] person who defrauds his or her creditors" and instancing this usage in 1533), *with Bankrupt*, n., def. 1.b, OXFORD ENGLISH DICTIONARY, *supra* note 43 (defining a bankrupt as "[a] person who is unable to pay his or her debts" and instancing this usage in 1563).

79. *Bankruptcy*, n., def. 1, OXFORD ENGLISH DICTIONARY, *supra* note 43 (instancing the legal meaning of "bankruptcy" in 1634 and the colloquial meaning in 1712).

80. *See* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 187-88 (2003) (quoting various anti-Federalist authors who thought of bankruptcy and insolvency as synonymous).

81. *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1327 (2018) ("[T]he language of the law often provides a more precise answer when ordinary language would not provide a clear one.").

could have used the word "insolvencies," but it did not, and the choice of a rarer and more technical word rather than a word more common and less technical has significance.[82] Third, the very awkwardness of the phrase "Laws on the subject of Bankruptcies" suggests an attempt to delineate its subject matter as a distinctive legal domain. Why not the simpler "Laws concerning Bankruptcies," or even "Laws concerning Insolvencies"?[83]

These considerations lead to a strong presumption that the Clause's legal meaning should govern the bankruptcy power's construction—a presumption that, as the next Part shows, is borne out by the place of the Bankruptcy Clause within the constitutional system. The interpretive evidence does not, however, rule out the broad interpretation of the Bankruptcy Clause entirely. If, given its constitutional context, the broad interpretation allows for more coherent law, then it should be used. As will be seen in Part IV, this has been the situation since the ratification of the Thirteenth Amendment.

III. CONSTRUCTING THE BANKRUPTCY POWER

Having clarified the two possible interpretations of "the subject of Bankruptcies" and their relative probability, I now turn to constructing Congress's bankruptcy power. This Part demonstrates that a narrow construction best fits into the design of the Constitution and helps to illuminate several aspects of federalism as it was originally constituted.[84] The Bankruptcy Clause's allocation of power between state and federal governments has been obscured by a series of Supreme Court decisions that gestured at a different approach to the Bankruptcy Clause. But that allocation is clearly visible in the actual bankruptcy legislation enacted during the first seventy-eight years of the Republic.

A. The Bankruptcy Power Within the Design of the Constitution

The original Constitution does not allocate to either the state or federal government exclusive authority over the problem of insolvency. Rather, it leaves regulation of most debtor-creditor relations up to the states, while allocating to Congress those relations that pose coordination problems and threaten interstate

82. William Blackstone, for example, offered a technical definition for "bankrupt," *see* 2 WILLIAM BLACKSTONE, COMMENTARIES *471, but not for "insolvent."

83. *Contra* U.S. CONST. art. I, § 8, cl. 4.

84. That bankruptcy raises federalism issues is well-recognized. *See generally* Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1089-95 (2002) (examining the limited extent to which the Bankruptcy Clause authorizes federal abrogation of state law property and contract rights). But the purpose served by the Clause's allocation of power between state and federal governments has not been sufficiently explained.

races to the bottom. As this Section shows, this design requires a bankruptcy power confined to providing creditor remedies against merchant fraud. Indeed, a broad construction of the bankruptcy power would wreak havoc with other provisions in Article I, particularly the prohibition on states "impairing the Obligation of Contracts"[85] and the grants of power to Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and to "establish an uniform Rule of Naturalization."[86] A narrow construction, in contrast, harmonizes well with all three.

1. "The Obligations of Contract" and Bankruptcy as a Creditor Remedy

The Contract Clause has generally been understood as a response to the state experimentation with debt-relief legislation mentioned in the preceding Part.[87] Specifically, the Clause meant to rule out of bounds at least those laws that not only released debtors currently in debtor's prison, but also discharged their preexisting debts.[88] Such retrospective alteration of contractual rights was thought to violate the rule of law in much the same way as did the prohibited "Bill[s] of Attainder" and "ex post facto Law[s]."[89] But this generally accepted account raises a puzzle: given the close affinity between bills of attainder, ex post facto laws, and contract-impairing laws, why were only the first two prohibited to the federal government as well as the states?[90]

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85. U.S. CONST. art. I, § 10, cl. 1.

86. *Id.* art. I, § 8, cls. 3-4.

87. *See supra* notes 71-72 and accompanying text.

88. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 533 (1987) ("[T]here is little doubt that such legislation was one of the major evils that the Clause was designed to eradicate.").

89. U.S. CONST. art. I, § 9, cl. 3; Kmiec & McGinnis, *supra* note 88, at 527 (describing all three of these prohibitions as rooted in a conception of the rule of law as requiring laws to be "general, prospective, and relatively stable"). Current doctrine holds that the Contract Clause prohibits only retrospective impairments of contract. *See, e.g.*, Sveen v. Melin, 138 S. Ct. 1815, 1822 (2018) (holding that a state law does not impair the obligations of contract because it "does not substantially impair pre-existing contractual arrangements"). A rival interpretation, embraced by nineteenth-century luminaries of constitutional law including Chief Justice Marshall, Justice Story, and Daniel Webster, but today only by libertarians such as Richard Epstein, holds that it prohibits certain prospective laws as well. *See* Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 725 (1984).

90. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed [by Congress]."). A federal contract clause was considered at the Constitutional Convention, but not adopted. 4 MADISON, *supra* note 45, at 458 ("Mr. Gerry, . . . alledging that Congress ought to be laid under the like prohibitions, . . . made a motion to that effect. He was not seconded.").

The most natural answer is that a prohibition on congressional impairments of contractual obligations was thought to be unnecessary. But such a prohibition could be unnecessary for only two reasons: either Congress had no power to enact such laws or congressional impairments were somehow significantly less objectionable than impairments imposed by the states.

Under a broad construction of the bankruptcy power, neither of these explanations makes sense. A grant of power to regulate all relations between creditors and insolvent debtors would necessarily include the power to impair contractual obligations.[91] Nor is there reason to expect federal contract-impairing laws to be any less objectionable than similar state laws. Although James Madison did argue, without specifically mentioning bankruptcy, that large republics were less likely than small republics to oppress the rights of minorities such as creditors,[92] this theory was not particularly influential at the Constitutional Convention or during Ratification.[93] And it explains too much: it could just as easily be made regarding bills of attainder or ex post facto laws, which the Constitution did prohibit. At no point did Madison directly argue that Congress could be trusted not to abuse its bankruptcy power.

Neither, it seems, did anyone else. At the Constitutional Convention and during Ratification, the Bankruptcy Clause was hardly discussed, making it unlikely that the Clause had the drastic effect of federalizing all debt-relief regulation.[94] The Contract Clause, in contrast, was immediately recognized for what it was — a restriction on state debt-relief legislation — and vigorously denounced by anti-Federalists.[95] If the absence of a congressional contract clause meant that

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91. The only word that comes close to excluding such laws is "uniform", but a requirement of uniformity — that is, a prohibition on variation across persons and places — cannot plausibly prohibit variation across time. After all, any bankruptcy law must be capable of being amended.

92. THE FEDERALIST NO. 10, at 61 (James Madison) (Belknap Press 2009) ("A rage for . . . an abolition of debts . . . will be less apt to pervade the whole body of the Union than a particular member of it . . . ."); *see* Kmiec & McGinnis, *supra* note 88, at 528.

93. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 43-44 (2005).

94. *See, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1105, at 47 (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891) ("The brevity with which this subject is treated by the Federalist is quite remarkable."); MANN, *supra* note 80, at 169 ("This seeming nonchalance toward federalizing bankruptcy stands in sharp contrast to how large the issue of debt loomed in the 1780s."). As noted earlier, a handful of anti-Federalists did attack the Bankruptcy Clause for granting Congress excessive power, but to my knowledge none directly addressed the way in which it would give Congress the power to impair the obligations of contract. *See supra* note 80 and accompanying text.

95. *See, e.g.*, Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland* (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 19, 65 (Herbert J. Storing ed., 1981) ("This government proposed, I apprehend, so far from removing, will greatly increase

the federal government now wielded untrammeled power to grant retrospective debt relief, one would expect someone, somewhere, to point this out. The staggering silence on this topic is strong evidence that the design of the Constitution did not envision a broad bankruptcy power.

A narrow bankruptcy power, on the other hand, explains both the omission of a congressional contract clause and the failure of any commentator to make note of it. The Framers did not imagine that bankruptcy laws might impair contractual obligations because such laws granted remedies to creditors rather than relief to debtors. Admittedly, individual creditors could have their contracts impaired against their will if they cast a losing vote against granting a discharge. But while such discharges impaired individual contracts, they respected the contract rights of creditors as a class and were necessary for bankruptcy to provide an effective collective-creditor remedy.

2. *"Commerce," "Uniform Laws," and Bankruptcy's Jurisdictional Requirements*

That the bankruptcy power authorized only creditor-initiated proceedings suggests that it was also limited to merchant debtors, insofar as it supports use of the technical legal meaning of "bankruptcy." Further support for merchant status as a bankruptcy jurisdictional requirement can be found in the Commerce and Naturalization Clauses.[96] The analogies between these three clauses suggest that the bankruptcy power brought merchant bankruptcies under federal jurisdiction because such bankruptcies raised two distinct federalism concerns: a coordination problem and a race to the bottom. Consider the sole passage in *The Federalist* to discuss Congress's bankruptcy power:

> 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.[97]

In this passage, Madison not only confirms that bankruptcy legislation deals with fraud, but also explains its connection to commerce, and so, implicitly, to

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those complaints, . . . [consigning the people] to indigence and distress, without their [state] governments having a power to give them a moment's indulgence, however necessary it might be, and however desirous to grant them aid." (emphasis omitted)).

96. U.S. CONST. art. I, § 8, cls. 3-4.

97. THE FEDERALIST NO. 42, *supra* note 92, at 280 (James Madison); *see also* THE FEDERALIST NO. 30, *supra* note 92, at 188 (Alexander Hamilton) (mentioning, but not discussing, "bankrupt and fraudulent debtors").

merchants and traders.[98] These are the kinds of persons who are likely to have their persons and property scattered across many jurisdictions and take advantage of frictions between different states' legal systems.[99] The bankruptcy power, like the commerce power, seems to have been designed to subject these sources of interstate problems to federal jurisdiction.[100]

Further—like the commerce power—the bankruptcy power had built-in jurisdictional limitations. Just as the scope of the commerce power was limited by the five-word phrase "amongst and between the States," the bankruptcy power was limited by the literal meaning of the word "bankruptcies," the first four letters of which refer to the table on which a merchant or trader does business.[101] These limitations served to alleviate concerns that the national government would meddle in local affairs—and, in particular, local debt legislation—in the same way Parliament had before it.[102] To be sure, both jurisdictional hooks raise difficult line-drawing questions. Indeed, Parliament's struggles to distinguish merchants from nonmerchants prefigured the Supreme Court's more recent and better-known attempts to find a workable line between interstate commerce and its absence.[103] But neither line-drawing problem calls into question the presence of a jurisdictional requirement.

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98. My argument does not hinge on reading the Commerce Clause to be restricted to mercantile activities. It is entirely compatible with the broader understanding of "commerce" as "intercourse." *E.g.*, AMAR, *supra* note 93, at 107-08; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5-6 (2010). My point is only that this passage from *The Federalist* focuses on debt and credit, and so on commerce in its commercial sense.

99. *Cf.* AMAR, *supra* note 93, at 108 ("Under a broad reading [of 'Commerce'], if a given problem genuinely spilled across state or national lines, Congress could act."); Balkin, *supra* note 98, at 6 (arguing that the Commerce Clause serves "to give Congress power to legislate in all cases where states are separately incompetent or where the interests of the nation might be undermined by unilateral or conflicting state action").

100. *See* MANN, *supra* note 80, at 185 ("[T]he idea that bankruptcy raised issues that were better addressed on a national level rather than through the mechanisms of interstate comity seems to have taken at least tentative root during the convention.").

101. *See supra* note 50 and accompanying text.

102. CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA 152 (2021) (describing "the vast differences in local preferences on the issue of creditors' remedies" and "hostility toward federal government policies that might have imposed a uniform regime reminiscent of [Parliament's] Debt Recovery Act" as important influences on the federal system).

103. *Compare* Friedman & Niemira, *supra* note 61, at 233-48 (discussing Parliament's efforts to distinguish between economic groups engaged in commerce), *with* United States v. Morrison, 529 U.S. 598, 608-09 (2000) (identifying three categories of activity subject to Congress's commerce power), *and* United States v. Lopez, 514 U.S. 549, 559-63 (1995) (discussing a test for determining the applicability of Congress's commerce power).

Finally, the bankruptcy power also includes a requirement that the laws created with it be "uniform."[104] *The Federalist* does not address uniformity in the bankruptcy context, but it does explicate the word's presence in the parallel clause granting power over rules of naturalization. Absent uniformity, Madison writes, "very serious embarrassments"—in effect, a race to the bottom—would result from some states having lower naturalization standards than others, thereby serving as naturalization mills that admitted excessive numbers of immigrants and then foisted them off onto other states that had no choice but to recognize their citizenship.[105] Though Madison does not offer the same analysis in his brief discussion of the Bankruptcy Clause (the entirety of which is quoted above), this seems to have been mostly a matter of tact. By explicating "uniform" in the context of naturalization, where the relevant harms, as he takes care to emphasize, were purely speculative,[106] Madison could avoid doing so in the context of bankruptcy, where the relevant harms were far from speculative. Forum shopping around debt was a long-standing issue,[107] and any direct discussion might have seemed like an attack on those states whose laws were most skewed towards either debtor or creditor.[108]

The risk of a race to the bottom would have been far greater for bankruptcy laws creating remedies against merchants than for insolvency laws offering relief to ordinary debtors. States could not easily become insolvency mills, given that debtors could not forum shop while incarcerated. Merchant debtors, however,

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104. U.S. CONST. art. I, § 8, cl. 4.

105. THE FEDERALIST NO. 42, *supra* note 92, at 279 (James Madison).

106. *Id.* (noting that the problems described "have been hitherto escaped").

107. A striking early instance can be found in the Middle Ages, when creditors turned from the civil to the ecclesiastical courts in pursuit of efficacious debt enforcement. *See* Walter Pakter, *The Origins of Bankruptcy in Medieval Canon and Roman Law*, *in* PROCEEDINGS OF THE SEVENTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 485, 493 (Peter Linehan ed., 1984).

108. Once the Constitution had been enacted and tact was no longer necessary, such race-to-the-bottom explanations for the Bankruptcy Clause became prevalent. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 274 (1827) (Johnson, J., concurring) ("Another object [of the Bankruptcy Clause] . . . may have been that of exercising a salutary control over the power of the states whenever that power should be exercised without due regard to the fair exercise of distributive justice."); 2 STORY, *supra* note 94, § 1107, at 49 ("[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.").

were a different story. Bankruptcy laws played a similar role to present-day corporation laws,[109] and states had incentives to compete over bankruptcy laws then just as they compete over corporation laws now.[110]

Whether such competition is a race to the top or a race to the bottom has been the subject of some debate.[111] Without taking a side on this question, I note that, if my interpretation of the Bankruptcy Clause is correct, the original plan of the Constitution anticipated at least a risk of a race to the bottom. What it did not anticipate was the shift from merchants transacting in their own names and limiting their liability through bankruptcy proceedings to them doing so through limited liability corporations.[112] This shift is of great historical interest, but it provides no basis for reading "bankruptcy" to extend beyond those capable of committing *banca route*.

B. No Liquidation Through Practice

The previous Section argued that the best construction of the bankruptcy power gives "Bankruptcies" the narrow, technical meaning it had in the law of England and colonial America. The argument is not, admittedly, so secure that it would overcome a consistent historical practice to the contrary, one which "liquidated" its meaning.[113] But no such practice emerged until after the Civil War; to the contrary, the early history of bankruptcy law confirms the narrow construction. In this Section, I consider three key episodes: the old-fashioned Bankruptcy Act of 1800; Chief Justice Marshall's half-successful attempt to impose an expansive construction on the Bankruptcy and Contract Clauses; and the newfangled Bankruptcy Act of 1841.

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109. *See supra* note 63 and accompanying text.

110. On interstate corporate law competition, see generally Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 710-17 (1987), which surveys descriptive and normative theories of jurisdictional competition in corporate charter provision.

111. *Id.* at 709.

112. On the rise of limited liability corporations, see generally JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 13-57 (1970), which describes the shift of commerce into the corporate form that took place over the nineteenth century.

113. THE FEDERALIST NO. 37, *supra* note 92, at 231-32 (James Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); *see* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13 (2019) (identifying three criteria for a constitutional liquidation: "indeterminacy, a course of deliberate practice, and settlement"). Constitutional liquidation of meaning should not be confused with bankruptcy liquidation of the debtor's estate.

1. The Unpopular, Old-Fashioned, Constitutional Bankruptcy Act of 1800

For the first two decades after Ratification, the insolvency/bankruptcy distinction was taken for granted. Between 1789 and 1800, Congress repeatedly considered a bankruptcy law creating a creditor remedy against merchants who committed acts of bankruptcy.[114] Such a law was finally enacted in 1800, the final full year of John Adams's presidency.[115] Its scope was limited not only to merchants, but specifically to the wealthiest merchants: those owing debts of one thousand dollars or more (around $700,000 in today's dollars).[116] The law proved unpopular and was repealed three years later by a Republican Congress.[117] Its ultimate legacy was as "a last expression of a dying Federalist order."[118]

For purposes of this Note, what matters is that both advocates and opponents of the law accepted both its constitutional legitimacy and the illegitimacy of a bankruptcy law not taking the traditional form. The law's opponents objected to "the principle of the present bankrupt system . . . inasmuch as it favored one class of citizens, the merchants, at the expense of all other classes," but they believed that this problem would afflict "any other bankrupt system that could be devised."[119] Advocates similarly took for granted a narrow meaning of "bankruptcy," and premised their defense on the well-understood differences between bankruptcy laws and insolvency laws.[120] Around this same time, an influential American edition of Blackstone's *Commentaries* noted that it "would be utterly inconsistent with those maxims of policy, which limit laws to their proper objects, only," to apply bankruptcy laws, defined as involuntary proceedings that

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114. COLEMAN, *supra* note 72, at 18.

115. An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 19, 2 Stat. 19 (1800), *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

116. § 2, 2 Stat. at 21. See *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1790 to Present*, MEASURINGWORTH, https://www.measuringworth.com/calculators/uscompare [https://perma.cc/62EK-DNSD] (enter "1800" as Initial Year, "1000" as Initial Amount, "2021" as Desired Year, then click "Calculate") for the 2021 equivalent of $1000 in 1800, measured by relative income, which shows the economic "prestige value" of a given quantity of wealth.

117. 2 Stat. 248.

118. MANN, *supra* note 80, at 258.

119. 13 ANNALS OF CONG. 617 (1803).

120. *Id.* at 621 (summary of debate in the House, contrasting debtor-initiated insolvency proceedings with creditor-initiated bankruptcy proceedings).

could force liquidation of the debtor's assets, to farmers as well as merchants.[121] This is not a "policy" argument in the modern sense, but rather a claim about what a law must take as its object to be a proper bankruptcy law at all.

2. *Chief Justice Marshall in Dicta and Dissent*

The bankruptcy power began to receive a different legal construction with Chief Justice Marshall's opinion in *Sturges v. Crowninshield*.[122] This case's holding concerned not the Bankruptcy Clause, but the Contract Clause. A debtor had used a New York insolvency law to discharge a debt incurred before the law was enacted, and a Massachusetts creditor had challenged this retroactive application as impairing the obligations of contract.[123] Marshall, writing for a unanimous Court, agreed.[124] This holding did not require that the Court reach a second constitutional question, but Chief Justice Marshall nevertheless took up in dicta the creditor's further argument that the entirety of New York's insolvency law had been preempted by the Bankruptcy Clause. Still writing for the Court, Chief Justice Marshall disagreed, saying that state law could be preempted only by an enacted federal bankruptcy law, not the mere possibility of one.[125] He further took the opportunity to lay out his theory of the Bankruptcy Clause. Although he was aware of the traditional definition of bankruptcy laws as operating "at the instance of a creditor" and "applicable solely to traders," Chief Justice Marshall believed that Congress could "exercise an extensive discretion" on the subject, and that courts would be unwarranted in holding laws unconstitutional for abandoning either constraint.[126] In other words, he directly controverted the narrow construction.

This controversion is, however, less significant than it may appear. To begin with, it was unnecessary dicta. Further, that dicta fit awkwardly at best into the actual reasoning of the opinion. The *Crowninshield* Court interpreted the Contract Clause as a limitation on retroactive lawmaking, but the bankruptcy-related dicta explained the relationship between the Contract and Bankruptcy Clauses not in terms of the rule of law, but in terms of federalism. This awkwardness has

121. ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. at 260 (Rothman Reprints, Inc. & Augustus M. Kelley Publishers 1969) (1803).

122. 17 U.S. (4 Wheat.) 122 (1819). For a survey of circuit and state supreme court decisions leading up to *Sturges v. Crowninshield*, see Lubben, *supra* note 24, at 349-52.

123. *Crowninshield*, 17 U.S. (4 Wheat.) at 122-23.

124. *Id.* at 207-08.

125. *Id.* at 196.

126. *Id.* at 194-95.

been responsible for considerable confusion about the decision's reasoning, both in the years following *Crowninshield*[127] and in the present day.[128] As would emerge when the Court revisited the Contract Clause, the awkward fit arose from Marshall's inability to muster a majority for his position, resulting in an unsatisfactory compromise.[129] We cannot, therefore, understand the significance of *Crowninshield*, whether for the Contract or the Bankruptcy Clause, without considering how it was reshaped eight years later by *Ogden v. Saunders*.

Saunders resembled *Crowninshield* except for one detail: the state law had been enacted before the debts at issue had been incurred, and so it was not retroactive.[130] Chief Justice Marshall would have held the law unconstitutional nevertheless, on the grounds that a state impairs the obligations of contract when it purports to make a debt unenforceable in other states.[131] For him, the Contract Clause tolerates debt discharges within a jurisdiction, since these only deny the remedy without impairing the obligation,[132] but it forbids such discharges from controlling *in other jurisdictions* even when the laws providing the discharge were enacted prior to the contracts being formed.[133] Chief Justice Marshall's Contract Clause is not primarily a rule-of-law provision, but a conflict-of-laws provision, the conflict being that between the public-law statute and the private-law contract.[134] If Marshall's position had prevailed, Contract Clause jurisprudence would have taken a very different path. But *Saunders* would be the only decision of the Marshall Court in which the Chief Justice found himself in dissent on a

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127. For an account of the confusion among circuit and state supreme court decisions following *Sturges v. Crowninshield*, see Lubben, *supra* note 24, at 355-56.

128. *See, e.g.*, Kmiec & McGinnis, *supra* note 88, at 538 (suggesting that Marshall's dissent was proto-Lochnerian); Clyde Ray, *John Marshall,* Ogden v. Saunders*, and the Character of Neo-Republican Liberty*, 5 CONST. STUD. 31, 42-45 (2019) (characterizing Marshall's dissent as a defense of individual liberty, with no reference to the federalism issues that were its core concern).

129. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 272-73 (1827) (opinion of Johnson, J.) ("The Court was, in [*Sturges v. Crowninshield*], greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise, as of a legal adjudication. The minority thought it better to yield something than risk the whole.").

130. *Id.* at 271.

131. *Id.* at 332 (opinion of Marshall, C.J.).

132. *Id.* at 351 ("[The Constitution] prohibits the States from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts.").

133. *Id.* ("If the debtor should come within the jurisdiction of any Court of another State, the remedy would be immediately applied, and the inherent obligation of the contract enforced.").

134. *Id.* at 334 (admitting that the Contract Clause prohibits retroactive laws but insisting that its larger purpose is to deal with problems caused by the "obliterat[ion]" of lines between the states). As Justice Johnson emphasizes in his concurrence, foreign debt discharges need not bind in the United States. *Id.* at 360-61 (opinion of Johnson, J.).

constitutional question. The majority on that question rejected his conflict-of-laws Contract Clause, interpreting it instead as solely a rule-of-law provision, prohibiting only retrospective impairments and so posing no obstacle to New York's prospective insolvency law.[135]

In short, the decision in *Saunders* rejected Chief Justice Marshall's Contract Clause and so, implicitly, whatever dicta in *Crowninshield* had gone to support it. The confusion surrounding the Contract Clause was not entirely cleared up—Justice Johnson switched sides on a second question, whether the law could be enforced against citizens of other states,[136] in a way that left unclear the extent to which state insolvency laws would be permitted.[137] But the Contract Clause was not a conflict-of-laws provision, and in the years since it has almost never been interpreted as such. And without Chief Justice Marshall's conflict-of-laws Contract Clause, there is little to recommend his expansive Bankruptcy Clause. The purpose of Chief Justice Marshall's *Crowninshield* dicta about bankruptcy had been to allow Congress to legislate regarding nonmerchant debtors. Given his version of the Contract Clause, if Congress could not offer debt discharges to nonmerchant debtors, no one could—an intolerable result.[138] Conversely, without his version of the Contract Clause, federal intervention into insolvency law was not required, and there was little reason to think it permitted.

3. The Unpopular, Newfangled, Unconstitutional Bankruptcy Act of 1841

Although Chief Justice Marshall's theory of the Contract and Bankruptcy Clauses fell to the wayside, his elision (in dicta) of the bankruptcy/insolvency distinction did not. Whig legislators in the 1820s repeatedly introduced federal bankruptcy bills that would allow creditor-initiated proceedings only against merchants, but debtor-initiated proceedings for all debtors.[139] These attempts

135. *Id.* at 256 (opinion of Washington, J.).

136. *Id.* at 359 (ascribing the resolution of the case to "*conflictus legum*" (Latin for "conflict of laws")); *see also* Cook v. Moffat, 46 U.S. (5 How.) 295, 308 (1847) ("It is true, that as between the several States of this Union, their respective bankrupt laws, like those of foreign States, can have no effect in any forum beyond their respective limits, unless by comity.").

137. On the confusion resulting from *Ogden v. Saunders*, see Lubben, *supra* note 24, at 358-60. The gap between Justice Johnson's and Chief Justice Marshall's opinions is in a sense quite small and could be described as an issue of severability: could the Court construe New York's law so as not to require unconstitutional extraterritorial application? But Chief Justice Marshall was unwilling to construe it so in part because doing so would confuse the distinction between withholding remedy and discharge.

138. *Saunders*, 25 U.S. (12 Wheat.) at 280 (opinion of Johnson, J.) ("[I]t is impossible to suppose, that the framers of the constitution could have regarded the exercise of this power as an evil in the abstract, else they would hardly have engrafted it upon that instrument . . . .").

139. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 39-45 (1935).

were revived after the Panic of 1837 and finally succeeded in 1841.[140] Like the 1800 Act, the 1841 Act faced immediate opposition—this time, however, on constitutional as well as policy grounds. The law was declared unconstitutional by multiple district courts, all on the grounds that a true bankruptcy law allowed only "a proceeding by creditors against debtors, who are traders."[141] One such decision was reversed on appeal by Justice Catron riding circuit,[142] but the constitutionality of the Act was never considered by the Supreme Court. Indeed, the Supreme Court held, over Justice Catron's dissent, that it had no jurisdiction to consider an appeal raising the question.[143] The 1841 Act was repealed after eighteen months, following a change in control of Congress,[144] and the opportunity never arose again.

This repeal was premised in part on constitutional arguments. Senator Thomas Hart Benton, who introduced the repeal in the Senate, accused the Act of being "unconstitutional at six different points."[145] He laid the most stress on the "attempt to confound insolvency and bankruptcy, and to make Congress supreme over both," which he framed as "the most daring attack on the Constitution, on the State laws, on the rights of property, and on public morals, which the history of Europe or America exhibited."[146] He compared the 1841 Act to the Alien and Sedition Acts and called for "the people to rise against it"—for judges to declare it unconstitutional, for state courts to ignore the bankruptcy courts' certificates of discharge, and for both to resign rather than obey Supreme Court dictates to the contrary.[147] While Senator Benton's nullification argument was

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140. *See id.*; Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. Whigs involved in this Act's passage included Daniel Webster, Henry Clay, and, curiously, Justice Story, who reportedly helped draft it. Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 297 (1994).

141. *In re* Klein, 14 F. Cas. 719, 721 (D. Mo. 1843) (No. 7,866), *rev'd*, 14 F. Cas. 716 (C.C.D. Mo. 1843) (No. 7,865); *see also* Wattles v. Lalor, 3 W.L.J. 315, 323 (C.C. Ill. 1843) (case reported in 1846) (sustaining a demurrer on the ground that the voluntary part of the 1841 Act violated the Constitution), *rev'd*, 8 Ill. (3 Gilm.) 225 (1846).

142. *In re Klein*, 14 F. Cas. 719.

143. Nelson v. Carland, 42 U.S. 265, 265-66 (1843); *id.* at 266 (Catron, J., dissenting).

144. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. On the campaign leading up to repeal, see EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 119-24 (2001).

145. CONG. GLOBE, 27th Cong., 3d Sess. 69 (1842) (statement of Sen. Benton); *see id.* at 148 (introducing the repeal). Apart from the bankruptcy/insolvency distinction, Benton's chief constitutional argument was that the 1841 Act had been retrospective rather than merely prospective—an erroneous argument, given the absence of a federal contract clause. *See supra* note 90 and accompanying text.

146. CONG. GLOBE, 27th Cong., 3d Sess. 69 (1842) (statement of Sen. Benton).

147. *Id.*

extreme, he was far from the only congressman to think the 1841 Act unconstitutional and vote as he did on that basis.[148]

To be clear, the fact that the 1841 Act was repealed in part for constitutional reasons does not prove that it *was* unconstitutional. After all, Congress is far from an infallible constitutional interpreter. But the repeal *does* make it difficult to see the 1841 Act as embodying the kind of consistent historical practice that can liquidate a constitutional provision.[149] Neither is it plausible to say that Justice Catron's circuit opinion "definitely decided that the extent of the power of Congress was not limited to the principle upon which the English bankruptcy system was founded," as the Supreme Court suggested in the 1930s.[150] Nor, finally, does it matter that by the 1840s few saw an old-fashioned bankruptcy law as a viable option.[151] This change in policy views did not entail a lack of support for a narrow construction of the bankruptcy power.

In sum, the view that the 1841 Act represented a phase shift in the constitutional law of bankruptcy is untenable. A better account of the bankruptcy power's early history would be the following. In 1800, Hamiltonians and Jeffersonians agreed on a narrow construction while disagreeing on the desirability of a bankruptcy law. By 1840, following the confusion surrounding Chief Justice Marshall's Contract Clause decisions, the former question had also become politically polarized. Whigs advocated for a broad construction of the bankruptcy power, but Democrats successfully opposed them and destroyed the Whig party in the process.[152] If, as I have argued, the bankruptcy power had a narrow scope in 1789, its scope remained narrow on the eve of the Civil War.

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148. *See, e.g.*, *id.* at 67 (statement of Rep. Gordon); *id.* at 109 (statement of Rep. Ferris); *id.* at 116 (statement of Rep. Pickens); *id.* at 133 (statement of Sen. Wright); *id.* at 347 (statement of Sen. Woodbury); *id.* at 349 (statement of Sen. Smith).

149. By way of analogy, suppose, counterfactually, that instead of a Supreme Court decision upholding the constitutionality of the Affordable Care Act's individual mandate, *see Nat'l Fed. of Ind. Bus. v. Sebelius*, 567 U.S. 519 (2012), the mandate had been upheld by a circuit court and then repealed by a hostile Congress. The repeal certainly would not demonstrate the unconstitutionality of the mandate, but neither would this sequence of events, ending in a repeal that mooted Supreme Court review, plausibly demonstrate its constitutionality.

150. Cont'l Ill. Nat'l Bank & Tr. Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 669 (1935); *see* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186-87 (1902).

151. SKEEL, *supra* note 1, at 29. There were three main camps, represented by the Democrat John Calhoun and the Whigs Henry Clay and Daniel Webster. Calhoun wanted no federal debt legislation at all; Clay, a federal insolvency law; Webster, a bankruptcy law in the broad modern sense. *Id.* at 28-32 (arguing that support for the 1841 law collapsed due to preference cycling between these three options).

152. CONG. GLOBE, 39th Cong., 1st Sess. 846 (1866) (remarks of Rep. Stevens) ("I think the most unpopular law the Congress of the United States ever passed was the last bankrupt bill. It killed a party . . . .").

IV. RECONSTRUCTING THE BANKRUPTCY POWER

The Whig view eventually won out, a decade after the Whig Party formally dissolved. The Reconstruction-era Congress, dominated by the Republican political descendants of the Northern Whigs, enacted the Bankruptcy Act of 1867, which remained in force for twice as long as the two previous bankruptcy acts combined.[153] This Act was an even greater departure from the English model than the reviled act of a quarter-century earlier: it abolished the merchant/nonmerchant distinction entirely; allowed not only debtor-initiated proceedings, but also debt discharges without creditor approval; and introduced bankruptcy proceedings for corporations. But rather than being hotly contested, the Act's constitutionality was mostly taken for granted.[154]

Given the analysis in Parts II and III, these circumstances ought to be puzzling. If they are not, it is only because the 1867 Act has been unhelpfully lumped together with the Acts of 1841 and 1800 as precursors to the more permanent Act of 1898.[155] Such a categorization may make sense when considering the history of American bankruptcy law, but it makes nonsense of the history of Congress's bankruptcy power. Once the puzzle is correctly recognized—that the proper construction of the bankruptcy power seems to have changed sometime between 1841 and 1867—the solution becomes obvious.[156] A constitutional-law sea

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153. An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 176, 14 Stat. 517 (1867), *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

154. CONG. GLOBE, 39th Cong., 2d Sess. 981 (1867) (statement of Sen. Davis) (doubting "whether the framers of the Constitution intended to allow any other class of bankruptcy than involuntary bankruptcy" but acknowledging that the Act of 1841 established a different principle); *see id.* at 986 (statement of Sen. Johnson) (pointing out that the British Parliament had abandoned the traditional limitations of bankruptcy laws); CONG. GLOBE, 39th Cong., 1st Sess. 1687-89 (1866) (statement of Rep. Paine) (arguing that the Act is constitutional but announcing an intention to vote against it on policy grounds); SKEEL, *supra* note 1, at 27 ("By 1867, it was evident that Congress could enact both voluntary and involuntary laws, and that its powers were not limited to traders.").

155. *See, e.g.*, SKEEL, *supra* note 1, at 23 ("Prior to 1898, Congress passed a series of bankruptcy laws, each of which quickly unraveled and led inexorably to repeal."); Lipson, *supra* note 24, at 630 (asking why Congress could "not enact a durable law under [the bankruptcy power] until 1898").

156. To my knowledge, the only account recognizing this puzzle and offering an alternative explanation is that of Stephen J. Lubben, who focuses on the Fourteenth Amendment rather than the Thirteenth. Lubben, *supra* note 24, at 384. Although the Fourteenth Amendment was not ratified until 1868, this is not fatal to Lubben's theory: the Fourteenth Amendment has generally been understood to ratify (in a principal-agent sense) earlier acts of the Reconstruction Congress that were on uncertain constitutional footing. The deeper problem with the Fourteenth Amendment theory is that nothing in the Amendment bears any clear relation to bankruptcy legislation. The closest it comes is in the Due Process Clause, which, as Lubben points

change, fundamentally transforming the balance of state and federal power, took place when the Thirteenth Amendment was ratified in 1865.[157] The first Section of this Part describes the effects of this change on economic relations, and in particular on debtor-creditor relations. The second shows how this change amounted to a reconstruction of the bankruptcy power, how the Bankruptcy Act of 1867 took for granted bankruptcy law's new focus on fundamental problems of domination and subjugation in the debtor-creditor relationship, and how early courts implicitly acknowledged this shift in their articulation of bankruptcy's fresh-start policy.

A. "Involuntary Servitude" and Debtor-Creditor Relations

The Thirteenth Amendment is experiencing an academic revival,[158] including renewed attention to the intellectual, cultural, and legal background of the phrase "neither slavery nor involuntary servitude." This Section draws on that work to describe how the phrase amounted to an economic bill of rights, prohibiting various methods of enforcing economic subordination by means of legal coercion. It then focuses on the provision's effect on debtor-creditor relations in particular, showing how it addressed the oppression inherent in insolvency.

1. The Northwest Ordinance and the Free Labor Movement

The Thirteenth Amendment borrowed the phrase "neither slavery nor involuntary servitude" from the Northwest Ordinance of 1787.[159] Understanding its legal effect in the Thirteenth Amendment, therefore, requires understanding the effect it was understood to have had in the territory of the Old Northwest.[160]

That effect was not fully anticipated in 1787. After all, chattel slavery had only recently been prohibited in most Northern states,[161] and the master-slave relationship remained in the law books as only the most extreme of a menagerie of

out, some Gilded Age theorists held to limit state insolvency laws. As we will see, the Thirteenth Amendment has its own due process provision, one that ties more directly into bankruptcy. *See infra* text accompanying notes 247-248.

157. AMAR, *supra* note 93, at 351-63 (describing the origins of the Thirteenth Amendment and its effect on federal power).

158. *See supra* note 13.

159. Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 53 n.(a).

160. David R. Upham, *The Understanding of "Neither Slavery nor Involuntary Servitude Shall Exist" Before the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 137, 138 (2017); *see supra* note .

161. SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 31-32 (2018) (describing the post-Revolutionary trend in the North toward gradual emancipation).

legally recognized hierarchical relationships. A single legal treatise in 1816 considered, in turn, "baron and femme" (i.e., husband and wife); "parent and child"; "guardian and ward"; "master and servant," including "slave," "apprentice," "menial servant," "day laborer," and contractual "agent"; and, finally, relationships between equal contractual parties insofar as they involved specific performance rather than monetary damages.[162] The first three relationships in the master-servant category were considered familial; masters could inflict "moderate corporal correction" on slaves, apprentices, and menials; and masters whose servants were hired away could bring an action against both the servant and the new employer for enticement.[163] Nominally, the debtor-creditor relation was a contract between equals. But debtor's prison, a persistent reality even in the Northwest Territories,[164] belied this. Not only could a creditor cause an insolvent debtor to be imprisoned, he could use the threat of imprisonment to coerce the debtor in other ways.

This situation gradually changed as the prohibition on slavery lasted long enough to reveal its fruits. The removal of the bottom rung on the ladder of economic being had "raised the floor, and in turn altered the internal logic of the remaining structure."[165] A new "free labor" understanding of economic relationships had emerged in the states carved out of the Northwest Territories, one which arranged the menagerie not into a graduated hierarchy, but into three distinct, analogous spheres: the private sphere of family life, the civil sphere of free market contracts, and the public sphere of political allegiances.[166] Metaphors of slavery and freedom were applicable to all three spheres,[167] but the Northwest Ordinance's legal prohibition was only ever understood to apply to the second,

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162. Tapping Reeve, The Law of Baron and Femme; of Parent and Child; of Guardian and Ward; of Master and Servant; and of the Powers of Court of Chancery 339, 347, 379 (New Haven, Oliver Steele 1816); *see also* Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. Pa. L. Rev. 437, 441 (1989) (describing enslavement as the "bottom rung in a progression of distinct status positions"); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 Seattle U. L. Rev. 859, 862-65 (2016) (describing changes in labor relations in the first half of the nineteenth century).

163. Reeve, *supra* note 162, at 374, 377.

164. William Wirt Blume, *Civil Procedure on the American Frontier: A Study of the Records of a Court of Common Pleas of the Northwest and Indiana Territories (1796-1805)*, 56 Mich. L. Rev. 161, 197-201 (1957) (describing the persistence of debtor's prison in the Northwest Territories until the early years of the nineteenth century).

165. VanderVelde, *supra* note 162, at 441.

166. Amy Dru Stanley, From Bondage to Contract: Labor, Marriage, and the Market in the Age of Slave Emancipation 7-8 (1998) (describing how the ideology of contract shaped understandings of family, market, and state as three analogous but separate domains).

167. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 Colum. L. Rev. 1459, 1470 (2012) (identifying "family, market, and state" as three distinct domains within which descriptions of practices as "slavery" had rhetorical weight).

economic sphere.[168] Employment contracts were policed, not only for procedural freedom (Were they entered into freely?), but also for substantive freedom (Did their terms subjugate one party to the other?).[169] Even the relation between equal contracting parties had been altered by the abolition of debtor's prison, a fait accompli by the 1840s.[170] Crucially, these developments were understood to be connected to the ban on slavery and involuntary servitude, now embedded into state constitutions.[171]

By 1865, a guarantee that "neither slavery nor involuntary servitude . . . shall exist" amounted to an economic bill of rights[172] with two key provisions. First, no "property in man"[173] meant no chattel slavery; no enticement actions against third parties, insofar as these gave the employer a right in the employee's labor which is, in property-law fashion, "good 'against the world'";[174] and no selling

168. VanderVelde, *supra* note 162, at 454-59 (describing the conceptual division between market and household, and how the prohibition on involuntary servitude "split the labor relation from the family relation"); Upham, *supra* note 160, at 155-60 (describing how legal interpreters understood the prohibition on involuntary servitude to be consistent with public and familial duties). Around this same time the primary meaning of "economics" shifted from "[t]he science or art of household management" to "[t]he branch of knowledge . . . that deals with the production, distribution, consumption, and transfer of wealth." *Economics,* n., defs. 1 & 2, OXFORD ENGLISH DICTIONARY (3d ed. 2008).

169. *E.g.*, *In re* Clark, 1 Blackf. 122 (Ind. 1821); *see* ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, at 145 (1991) (describing the *Clark* case as "fundamentally redefining what constituted voluntary and involuntary service"); James W. Fox Jr., *The Law of Many Faces: Antebellum Contract Law Background of Reconstruction-Era Freedom of Contract*, 49 AM. J. LEGAL HIST. 61, 84-85 (2007) (analyzing the *Clark* case as concerning substantive rather than merely procedural freedom of contract).

170. Tabb, *supra* note 20, at 16.

171. *See generally* STEINFELD, *supra* note 169, at 141-50 (tracing how the Territories at first allowed indentures as a form of voluntary servitude but, over the early nineteenth century, shifted to considering such indentures to violate state constitutional prohibitions on involuntary servitude).

172. *Cf.* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 15 (2002) (describing the Thirteenth Amendment as central to "Labor's Freedom Constitution").

173. CONG. GLOBE, 38th Cong., 1st Sess. 1479 (1864) (statement of Sen. Sumner).

174. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780 (2001) (describing the long-standing distinction between property rights good against the world and contracts rights good against only those in contractual privity); Lea VanderVelde, *Servitude and Captivity in the Common Law of Master-Servant: Judicial Interpretations of the Thirteenth Amendment's Labor Vision Immediately After Its Enactment*, 27 WM. & MARY BILL RTS. J. 1079, 1095-96 (2019) (describing how Blackstone considered enticement actions to constitute property); *cf.* Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Noncompete Agreements as Thirteenth Amendment Violations*, 39 SEATTLE U. L. REV. 957, 978 (2016)

debtors into servitude to satisfy their debts. Second, no "involuntary servitude" meant no involuntariness in relationships such as employee-employer and debtor-creditor. These economic relations stood in opposition to domestic and political relations, an arrangement that excluded in-between categories like menials and (perhaps) apprentices.[175] Contractual bonds, unlike domestic and political bonds, had a new floor: a state could not enforce a contract considered involuntary under federal law, even if state law deemed it voluntary.[176] Further, contract remedies had a new ceiling: even when a contract was procedurally voluntary, a state could not coerce performance of it when that coercion would amount in substance to involuntary servitude.[177]

2. Peonage, Debtor's Prison, and Other Problematic Remedies

It is clear enough how a contract can be procedurally involuntary, but less clear how a remedy can be substantively involuntary. Then-Justice Hughes attempted to explain it in *Bailey v. Alabama*, one of the few Supreme Court cases ever to strike down a state law on Thirteenth Amendment grounds.[178] The law in question held laborers to their employment contracts on pain of imprisonment, amounting to a peonage system of the kind the Reconstruction Congress had deemed involuntary servitude.[179] Although the law purported to convict

(arguing for the unconstitutionality of noncompete agreements, though not clearly distinguishing slavery from involuntary servitude).

175. VanderVelde, *supra* note 162, at 456-57 (discussing the Amendment's framers' belief that it would eliminate most involuntary servitudes, but perhaps leave apprenticeships intact).

176. Courts have thus far not embraced the notion that the Thirteenth Amendment partially federalized the law of contract formation, but arguably they should. Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351, 352 (2001) (arguing that a contract-law understanding of coercion was transplanted into the Thirteenth Amendment context). An important question will be whether the federal floor applies only to the traditional bars on contracts formed through duress or fraud, or whether it also encompasses unconscionability more broadly. *See* Balkin & Levinson, *supra* note 167, at 1465-67 (alleging a tension within the Thirteenth Amendment between absolute freedom of contract and protections against unconscionable contracts).

177. Fox, *supra* note 169, at 84 (describing how antebellum courts in free states deemed specific personal performance to amount to involuntary servitude). On the relationship between coercive contract remedies and free labor thought, see STEINFELD, *supra* note 169, at 141-50.

178. 219 U.S. 219 (1911); *see* United States v. Reynolds, 235 U.S. 133 (1914) (similar).

179. *Bailey*, 219 U.S. at 240 ("The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited . . . [and any laws attempting] to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void." (quoting Act of Mar. 2, 1867, ch. 187, 14 Stat. 546)).

nonperforming laborers of fraud in order to fall within the Thirteenth Amendment's "punishment of a crime" exception, it was functionally equivalent to a remedy of specific personal performance.[180] Specific personal performance had long been disfavored at common law, and some state courts had held it unconstitutional on Thirteenth Amendment grounds.[181] Hughes reached the same result, reasoning as follows: the resulting servitude was involuntary, despite "the original agreement to work out the indebtedness," because a contract by its nature "exposes the debtor to liability for the loss due to the breach, but not to enforced labor."[182] In other words, the remedy of specific personal performance is unconstitutional.

The same reasoning might seem to apply to many other contract remedies—for example, imprisonment for debt. Although *Bailey*'s holding does not squarely address the unconstitutionality of debtor's prison, it is often assumed to imply it[183] and understandably so. Imagine "Debtor" who owes "Creditor" $1,000 but has only $10 in assets and $100 in annual income. If Debtor, who has no realistic hope of repaying Creditor, can be imprisoned at Creditor's request until she does so, Creditor can require Debtor to perform whatever labor Creditor desires, on pain of Debtor's imprisonment—the same Hobson's choice faced by the laborer in *Bailey*. Therefore, debtor's prison at least sometimes leads to involuntary servitude. This argument does not, however, lead directly to the conclusion that debtor's prison is always unconstitutional. The involuntary servitude in the scenario described does not result from debtor's prison alone, but from Creditor's abuse of debtor's prison to coerce labor. Imagine, instead, that Debtor has $10,000 in assets, kept in the form of buried treasure whose location only she knows. A law allowing that information to be subpoenaed, and silence to be punished with the contempt power, would not cross the line into involuntary servitude. Both scenarios would involve coercion, but the latter would not coerce labor, but only compliance with legal process—the original purpose of debtor's

180. *Id.* at 242.

181. H.W. Gossard Co. v. Crosby, 109 N.W. 483, 488-89 (Iowa 1906) (holding that specific personal performance amounts to "involuntary servitude, a condition utterly incompatible with our institutions, and the fundamental law of the land" (citing *In re* Clark, 1 Blackf. 122 (Ind. 1821))); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 387-88 (1993).

182. *Bailey*, 219 U.S. at 242. *But see* Huq, *supra* note 176, at 383 (arguing that these cases are in fact about the voluntariness of the initial transactions); Nathan B. Oman, *Specific Performance and the Thirteenth Amendment*, 93 MINN. L. REV. 2020, 2083 (2009) (arguing that the reasoning of *Bailey* is overbroad, and that specific personal performance is only unconstitutional when background laws and practices make the agreement itself coercive); Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87, 127-28 (1993) (arguing that the overbroad reasoning of *Bailey* harms employees by denying them freedom of contract).

183. *See* sources cited *supra* note 7.

prison.[184] If the Thirteenth Amendment prohibits not just creditor abuses of debtor's prison but the institution of debtor's prison itself, it is because the institution is such that frequent abuses are inevitable.

Other contract remedies can also be used to unconstitutionally coerce labor via threat, a possibility the Court has recognized despite its general reluctance to extend the Thirteenth Amendment prohibition beyond literal slavery.[185] Consider again the scenario where Debtor has only $10 in assets. If state law allowed it,[186] Creditor could coerce labor by threatening to seize all of these assets, or to garnish all of Debtor's $100 in income. These threats would amount to coercion, rather than mere persuasion, because they would threaten actual physical harm (such as starvation or exposure) at least as serious as the loss of liberty involved in debtor's prison. But, again, the presence of involuntary servitude turns not on the legal remedy alone, but on how Creditor abuses the remedy to take advantage of Debtor's insolvency. In the scenario where Debtor has $10,000 in assets, these remedies do not threaten involuntary servitude because Debtor always has the option simply to pay what she owes. If, unlike debtor's prison, attachment and garnishment are not themselves unconstitutional, it is because their legitimate uses outweigh their possible abuses.

But is debtor's prison really different in this respect? Though debtor's prison was often abused, it also, as seen above, had legitimate uses, and it is not too difficult to identify the line distinguishing them: debtor's prison should only be permitted when its purpose is to coerce transfer of assets known to exist but otherwise beyond the reach of legal process. In all three of these cases, what is called for is neither abolition of the remedy nor preservation of the status quo, but rather the provision of a limiting principle. The examples used suggest the most natural limiting principle: insolvency. The purpose of contract remedies is to coerce the obligee into fulfilling her contractual obligations. If the obligee is unable to do so—that is, if the obligee is insolvent—then the remedies have no legitimate use, and recourse to them is necessarily abusive.

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184. *See supra* text accompanying note 65. Notably, Debtor's reluctance to reveal this information need not be motivated by an absolute refusal to pay her debts; she might be concerned that an immediate liquidation would bring in substantially less than the assets' true value.

185. United States v. Kozminski, 487 U.S. 931, 944 (1988) (defining "involuntary servitude" as servitude "enforced by the use *or threatened use* of physical or *legal* coercion" (emphasis added)); *id.* at 955 (Brennan, J., concurring in the judgment) (arguing that the limitation to physical or legal coercion artificially restricts the category of involuntary servitude).

186. In fact, state laws generally prohibit these things, although this has not always been the case. *See infra* notes 187-188 and accompanying text.

B. The Merger of Bankruptcy and Insolvency

If contractual remedies pose involuntary-servitude problems only when the obligee is insolvent, then the Thirteenth Amendment can be understood to have introduced a new subject into federal constitutional law, that of the rights of insolvent persons. Multiple constitutional actors have shaped this law. First, state legislatures have avoided provoking the development of a constitutional law of insolvency by providing their own constraints on contract remedies: for example, exemptions of certain assets from attachment[187] and limitations on the portion of income that can be garnished.[188] But states will not always police themselves. Where states have failed, federal courts have occasionally stepped in. This approach, perhaps inevitably, has been clumsy; a legislator could, for example, have avoided the arguably undesirable outcome of abolishing specific personal performance by instead making the remedy less absolute.[189] The federal legislature has been best positioned to vindicate the Thirteenth Amendment in the contract-remedy context. For example, rather than policing the adequacy of state garnishment limitations in a series of as-applied challenges focused on whether involuntary servitude was present in the specific contractual relationship being enforced, Congress has simply provided a federal backstop to those limitations.[190]

The Thirteenth Amendment itself anticipates this need for legislative action when it grants Congress power to enforce the prohibition on involuntary servitude through "appropriate legislation."[191] This Section explores the implications of this grant for Congress's power to enact bankruptcy legislation. It argues, first, that the grant must be understood not just to supplement the bankruptcy power, but also to require that power's total reconstruction. It then turns to the Bankruptcy Act of 1867 for evidence that such a reconstruction was understood to have taken place. Finally, it looks at judicial interpretations of both the 1867 Act

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187. *E.g.*, CAL. CIV. PROC. CODE § 487.020 (West 2021) (exempting certain assets from attachment); TEX. PROP. CODE ANN. § 41.001 (West 2021) (exempting homesteads from seizure for the claims of creditors).

188. Steven L. Willborn, *Wage Garnishment: Efficiency, Fairness, and the Uniform Act*, 49 SETON HALL L. REV. 847, 861 (2019) (describing variation in state limitations on garnishment).

189. For example, courts could treat a right to specific personal performance as a residual claim on the obligee's nonexempt assets. An obligee who found herself in a specific personal performance contract would then have these three options: perform; sit in debtor's prison until the time for performance had passed; or declare bankruptcy and allow her entire estate to be liquidated, with the remainder going to the specific performance obligor. One can easily imagine wealthy persons electing debtor's prison for a few days rather than accepting the loss of all nonexempt assets.

190. Willborn, *supra* note 188, at 852 (describing federal garnishment restrictions).

191. U.S. CONST. amend. XIII, § 2.

and the later 1898 Act, showing how the postwar constitutional law of bankruptcy recognized the policy of federal bankruptcy law to be the granting to the honest unfortunate debtor a "fresh start."

1. Bankruptcy Laws Are "Appropriate Legislation" for the Problem of Insolvency

Legal commentators in 1865 would have recognized in the Thirteenth Amendment's phrase "appropriate legislation" an allusion not to the Necessary and Proper Clause itself, but to Chief Justice Marshall's expansive interpretation of it in *McCulloch v. Maryland*.[192] What the *McCulloch* standard permits is highly debatable, but at minimum it allows "[c]ategorical reasons" to "supplant the need to demonstrate a causal connection between any one instance" of a legislatively proscribed phenomenon and the constitutional prohibition.[193]

With this understanding of "appropriate legislation," it is not difficult to construct an argument for the constitutionality of modern bankruptcy law. Before 1865, Congress had no power to legislate for voluntary bankruptcy proceedings, nor to legislate for bankruptcy proceedings against nonmerchants.[194] But such legislation can be framed as categorically raising involuntary-servitude concerns: not every insolvent debtor is subject to involuntary servitude, but every insolvent debtor is at risk of being subject to involuntary servitude unless the remedies available to her creditors are kept within reasonable bounds.[195] Thus, the legislation can be grounded in Congress's power under section 2 of the Thirteenth Amendment. Further, it would be inappropriate for such legislation to be limited to merchants, since the problems raised by insolvency are not so limited. A requirement of involuntariness would be similarly inappropriate, since the insolvent debtor, not her creditors, is best positioned to recognize when a given case

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192. *See, e.g.*, Balkin, *supra* note 32, at 1806-07 (linking the Necessary and Proper Clause to *McCulloch*). *Compare* U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper"), *with* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."), *and* United States v. Rhodes, 27 F. Cas. 785, 792 (C.C.D. Ky. 1866) (No. 16,151) (noting that *McCulloch* demonstrates "the spirit in which the amendment is to be interpreted").

193. George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1577 (2012). *But see* Jennifer Mason McAward, McCulloch *and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1771, 1802 (2012) (arguing that Congress's section 2 power is "far less sweeping than the conventional view suggests," and that Congress's categorical definitions still require scrutiny from the courts).

194. *See supra* Section III.A.

195. *See supra* Section IV.A.2.

of insolvency is likely to give rise to involuntary servitude. Accordingly, this simple if counterintuitive argument implies that Congress has a section 2 power to enact modern bankruptcy legislation despite such legislation not being "on the subject of Bankruptcies" in the legal meaning of that phrase.

The most obvious problem with this theory is that it runs entirely contrary to how Congress, the Court, and academic commentators have almost uniformly assumed bankruptcy law to find its constitutional grounding.[196] This problem is not necessarily fatal: constitutional theories often imply that the true grounding for a congressional enactment, executive action, or judicial decision differs from that asserted by the relevant parties.[197] But it is better, when possible, to save the appearances. Here, appearance saving is eminently possible through a reconstruction of the bankruptcy power itself, whereby the power ceases to be constructed according to the *legal* meaning of "bankruptcy" in 1789, and is instead constructed according to the word's *ordinary* meaning at that time. Four pieces of evidence weigh in favor of such a reconstruction.

The first has to do with the background legal assumptions at the time of the Amendment's ratification.[198] The most natural term with which to describe insolvency-relief legislation, in the American English of 1865, would have been "bankruptcy." Although the 1841 Act had not been a valid exercise of the bankruptcy power under the original construction of that power, no one doubted that it was a bankruptcy law in the colloquial sense of having to do with insolvency. Further, the colloquial sense was increasingly displacing the legal sense. The English bankruptcy laws, for example, had been amended in 1844 and 1861 to allow voluntary and nonmerchant bankruptcies.[199] The Republicans who enacted the Thirteenth Amendment took this merger of bankruptcy and insolvency as a given, and the Amendment ratified their mistake.

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196. *See supra* note 18 and accompanying text.

197. To provide another example of this phenomenon in the context of the Thirteenth Amendment, many would prefer to ground the Civil Rights Act of 1964 (CRA) not in the Commerce Clause but in the section 2 power to legislate against "badges and incidents of slavery." Pope, *supra* note 172, at 4 (noting worries about the "'distorting' practice of grounding human rights statutes on a constitutional provision that was concerned with commercial matters" (quoting Edwards v. California, 314 U.S. 160, 177 (1941))). *But see* Alexander Tsesis, *A Civil Rights Approach: Achieving Revolutionary Abolitionism Through the Thirteenth Amendment*, 39 U.C. DAVIS L. REV. 1773, 1843 (2006) (advocating for a broader reading of the Thirteenth Amendment, but to complement – rather than replace – the Commerce Clause grounding of the CRA).

198. *Cf. supra* note 39 and accompanying text (discussing support for alternative constructions of constitutional provisions based on assumptions made by ratifiers of later amendments).

199. *See supra* note 52.

The second involves the circumstances surrounding ratification,[200] which called into question the restriction of bankruptcy to collective-creditor remedies. The point of such a restriction in 1789 had been to avoid giving Congress the dangerous power to impair obligations of contract, a power that was understood to threaten the rule of law unless carefully cabined.[201] But the ratification of the Thirteenth Amendment had the effect of freeing those enslaved or bound to involuntary servitude, and thus taking the property or impairing the contracts of their masters, despite the fact that doing so violated traditional conceptions of the rule of law.[202] Procedural protections for property and contract were not absolute, but could be set aside when substantive justice required it. Given the preceding decades of state-level experimentation with debt-discharging insolvency laws,[203] the application of this principle to insolvent debtors would by 1865 have been apparent.

The third piece of evidence concerns the Amendment's purpose.[204] Given the economic transformation the Thirteenth Amendment was understood to have augured, the jurisdictional requirement that bankruptcy involve merchants no longer made sense. In 1789 that restriction had served as a proxy for a restriction on interstate insolvencies.[205] But by 1865 the merchant/nonmerchant distinction, under pressure for two centuries, had all but collapsed. By prohibiting "slavery," and so reordering the entire economic hierarchy, the Thirteenth Amendment put the final nail in the coffin. Now all economic relations would be between equals in a free labor market—everyone was a merchant.[206] Total economic subjugation, tantamount to exile from the political community, could only be imposed "as a punishment for crime whereof the party shall have been duly convicted."[207]

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200. *Cf. supra* note 40 and accompanying text (discussing support for alternative constructions based on the historical circumstances surrounding later amendments' ratification).

201. *See supra* Section III.A.1.

202. Much argument about the Thirteenth Amendment concerned whether it was a taking without compensation. *E.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1479-83 (1864) (statement of Sen. Sumner) (arguing that the Thirteenth Amendment was not a taking without compensation because slave owners only purported to own human beings).

203. COLEMAN, *supra* note 72, 31-36.

204. *Cf. supra* note 41 and accompanying text (discussing support for alternative constructions based on the purposes underlying later amendments).

205. *See supra* Section III.A.2.

206. Weisberg, *supra* note 51, at 57 ("[T]he merchant became the model for all modern citizens.").

207. U.S. CONST. amend. XIII, § 1.

Finally, the Amendment's structural effects counsel against adhering to the traditional legal meaning of "bankruptcy."[208] The Thirteenth Amendment transformed the federal system by explicitly allocating to the federal government the task of protecting the individual against state-sanctioned oppression.[209] The narrow construction of the bankruptcy power made sense when the Bankruptcy Clause was one of a small number of powers allocated to Congress, all of which were aimed at problems arising from interstate coordination problems.[210] But that construction became incongruous when it resulted in a Thirteenth Amendment that granted Congress broad power to enact individual-rights legislation, including what everyone calls bankruptcy laws, while Congress retained a vestigial Article I power to regulate merchant fraud. Notably, one of the principal practical effects of federal bankruptcy law has been to offer additional protection to debtors in states with creditor-friendly lending and debt-collection laws,[211] just as we would expect if federal bankruptcy law aims not only at regulating merchant fraud, but also at preventing debtor oppression by creditors wielding state law.

A fair reading of this evidence suggests that the Thirteenth Amendment requires a reconstruction of the bankruptcy power. The Amendment's ratifiers would have expected the Bankruptcy Clause to sustain a broad construction of the bankruptcy power, and the history, structure, and purpose of the Amendment ensured that the strongest arguments for a narrow construction no longer worked. To be sure, it remains linguistically possible to ground Congress's power to enact bankruptcy legislation solely in section 2 of the Thirteenth Amendment. But rather than attribute to the Thirteenth Amendment such a peculiar result, it is more plausible to say that it effectively ratified the merger of fraud-deterring bankruptcy laws and freedom-enabling insolvency laws — a merger already accomplished in ordinary language. The advocates of the Thirteenth Amendment did not even notice its effect on the bankruptcy power because they had always sought to give that power a broad construction. Now, after they had won a Civil War and changed the Constitution, everyone else would, too.

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208. *Cf. supra* note 42 and accompanying text (discussing support for alternative constructions based on the later amendment's structural effects).

209. *See* AMAR, *supra* note 93, at 361-62.

210. *See supra* Section III.A.

211. *See* MARY ESCHELBACH HANSEN & BRADLEY A. HANSEN, BANKRUPT IN AMERICA: A HISTORY OF DEBTORS, THEIR CREDITORS, AND THE LAW IN THE TWENTIETH CENTURY 43-50 (2020).

2. The Antislavery Bankruptcy Act of 1867

If the previous Section's account of the bankruptcy power's reconstruction is at least plausible, subsequent practice should settle the matter.[212] Only two years after the Thirteenth Amendment's ratification, Congress enacted the Bankruptcy Act of 1867. Both the purpose behind the 1867 Act and its specific innovations in bankruptcy law confirm the hypothesis that the Thirteenth Amendment reconstructed the bankruptcy power.

The Bankruptcy Act of 1867 was understood by its proponents as a continuation of the project of the Thirteenth Amendment. The Act's supporters repeatedly compared the "slavery of debt" to chattel slavery and argued that Republicans should oppose the former just as they had recently abolished the latter.[213] Admittedly, the suggestion that the condition of insolvent debtors is pitiably close to the condition of slaves has a long and not particularly illustrious history; it was entirely compatible with support of slavery, and indeed a favorite rhetorical trope of southern planters in debt to northern merchants.[214] But advocates of the 1867 Act went further than this, suggesting that both bankruptcy and antislavery were matters of justice and legislative duty.[215] These arguments joined a distinct tradition of antislavery thought dating back to the late eighteenth century,[216] and directly tied the bankruptcy power to Congress's power to legislate against slavery and involuntary servitude.

The implicit antislavery ideas in the 1867 Act must be distinguished from the radicalism of the same year's Reconstruction Acts. The Bankruptcy Act did not aim at grand societal transformation but, rather, focused narrowly on removing a specific means of oppression. Debt slavery, like chattel slavery, involved direct state action—the enforcement of the debt contract. Forms of injustice not

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212. *See supra* note 113 and accompanying text.

213. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1698 (1866) (statement of Rep. Jenckes) ("The slavery of debt is worse than the slavery of personal service."); CONG. GLOBE, 39th Cong., 2d Sess. 981 (1867) (statement of Sen. Johnson) ("[C]an anyone imagine a slavery more absolute and more heart-rending . . . [than] the slavery of debt . . . ?"); *see* ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR 21 (2004) ("[A] driving force behind the 1867 legislation was the sentiment associated with freeing slaves.").

214. BALLEISEN, *supra* note 143, at 165-67; MANN, *supra* note 80, at 130-31.

215. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3150 (1866) (statement of Sen. Morgan) (arguing that it is not "any less our duty to relieve [insolvents] from pecuniary bondage" than to relieve slaves from chattel slavery).

216. MANN, *supra* note 80, at 139-46.

brought about through direct state action were not thought to require intervention.[217] Accordingly, while the Reconstruction Acts sought to punish Southern traitors and rearrange the social and economic hierarchy of the rebel states, the Bankruptcy Act did neither. Its benefits flowed, predictably, not to former slaves, but to the former slave owners rendered insolvent by the slaves' liberation.[218] Legislators excused this discrepancy by arguing that the Bankruptcy Act was "an economic measure and that punitive political policies did not apply."[219] But the Act, like its successors, did have an implicit politics: it furthered the interests of creditors, who desired orderly collection mechanisms, and of the commercial middle classes, who had sufficient credit to occasionally find themselves hopelessly in debt, but not those of the truly impoverished, who would have benefited far more from labor and welfare legislation.[220] None of this means that the Bankruptcy Act of 1867 was not linked to opposition to slavery; it shows, rather, that it was linked to a particular kind of antislavery, one whose preferred antidote to slavery was the free market.

This mercantile ideology lay behind the 1867 Act's two most important innovations. First, the Act made bankruptcy available to all individual debtors, drawing no distinction between merchants and nonmerchants.[221] In the eyes of the law, merchants were no longer a privileged caste. Second, the Act offered a debt discharge that in at least some circumstances was not subject to a vote of creditors.[222] If everyone was a merchant, it no longer made sense for a microrepublic of creditors to decide whether or not to forgive the debtor's debt and so

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217. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 67 (2011) (describing the laissez-faire assumptions of some reformers with the interventionist approach of the Radical Republicans).

218. THOMPSON, *supra* note 213, at 6-7.

219. *Id*. at 20.

220. *See* John Fabian Witt, *Narrating Bankruptcy / Narrating Risk*, 98 NW. U. L. REV. 303, 320 (2003) ("[B]ankrupts tend not to be from the ranks of the poor; nor are they disproportionally from marginal jobs. . . . [I]ndividuals with the class standing to take on substantial debts are precisely those who benefit most from the availability of bankruptcy.").

221. *Compare* Bankruptcy Act of 1867, ch. 176, §§ 11, 39, 14 Stat. 517, 521, 536 (allowing "any person" to voluntarily enter bankruptcy or be placed there involuntarily), *with* Bankruptcy Act of 1841, ch. 9, § 1, 5 Stat. 440, 441-42 (allowing voluntary bankruptcy to "[a]ll persons" but involuntary bankruptcy only against merchants and the like). Unlike many future bankruptcy acts, the 1867 Act allowed involuntary proceedings against all individual debtors as well. Everyone being a merchant cut both ways.

222. On paper, the 1867 Act allowed discharge without creditor approval so long as the debtor repaid at least half their debts. §§ 30-33, 14 Stat. at 532-33; *cf.* Bankruptcy Act of 1841 § 4, 5 Stat. at 443 (denying a discharge if a majority of creditors file written dissents). Even this dividend requirement was repeatedly postponed, weakened, and eventually abolished, such

admit him back into a selective merchant brotherhood. Readmission to the free republic of merchants, now understood to be coextensive with the Republic itself, could be conditioned only on an absence of fraud and full compliance with bankruptcy procedures.[223] These two features follow inevitably from the Thirteenth Amendment's ratification and the resulting reconstruction of the bankruptcy power. For all of the years since the Thirteenth Amendment during which there has been a federal bankruptcy law, these features have been a constant presence.[224]

One more feature of the 1867 Act, although superficially unrelated, also makes sense only in light of the Thirteenth Amendment: the Act extended to corporations as well.[225] Today corporate access to bankruptcy may seem common sense. But in 1867 it was the most constitutionally controversial of all the 1867 Act's innovations (though still nowhere near as controversial as the 1841 Act).[226] Without the reconstruction of the bankruptcy power, it would have been impossible. Under the old-fashioned merchant-fraud definition of bankruptcy, corporate bankruptcy was a head-scratcher: corporate criminal liability was still in its infancy, and did not encompass intentional wrongs like fraud, which only human beings could commit.[227] If a corporation could not commit an act of bankruptcy, it could not be haled into bankruptcy court. But given the broader understanding of bankruptcy, there was little difficulty: "a corporation also is a person who may become a bankrupt," that is, become insolvent.[228]

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that the vast majority of debtors under the 1867 Act could discharge debts with neither creditor approval nor a minimum dividend. Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 357 (1991).

223. *See* Weisberg, *supra* note 51, at 56 (describing the Federalist-Whig-Republican vision of a commercial republic as a "universal brotherhood of . . . [economic] vulnerability").

224. The 1867 Act was repealed in 1878. Attempts began almost immediately to enact a replacement, but they were not successful until 1898, with the passage of the "first permanent U.S. bankruptcy law." SKEEL, *supra* note 1, at 36-39.

225. § 37, 14 Stat. at 535.

226. *See* CONG. GLOBE, 39th Cong., 2d Sess. 987 (1867) (statement of Sen. Howard) (arguing that corporations were creatures of state law and should not be interfered with by federal legislation); Lubben, *supra* note 24, at 374 (identifying the extension of bankruptcy law to corporations as one of the 1867 Act's most significant departures from previous practice and theory).

227. Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 404 n.62 (1982) (noting that English law did not extend corporate criminal liability to mens rea offenses until the twentieth century); *id*. at 410-15 (same for America).

228. CONG. GLOBE, 39th Cong., 2d Sess. 987 (1867) (statement of Sen. Johnson).

3. The Spirit of the Bankruptcy System

As the extension to corporate bankruptcy demonstrates, that the Thirteenth Amendment changed the bankruptcy power does not mean that the Bankruptcy Clause became merely a restatement of the prohibition on involuntary servitude. The bankruptcy power remained a power having to do with bankruptcy, and for most constitutional questions about that power, this Note's argument does no more than establish that it indeed extends to the problem of insolvency, and not only that of merchant fraud. It is not entirely surprising, then, that the Court has never explicitly recognized the connection between bankruptcy and involuntary servitude. The Thirteenth Amendment's influence on the bankruptcy power is foundational, but rarely perspicuous.

The Thirteenth Amendment's influence can, however, be more directly observed in at least one aspect of bankruptcy jurisprudence: the fresh-start policy. Beginning almost immediately after the 1867 Act's adoption, the Court made a habit of appealing to "the liberal spirit which pervades the entire bankrupt system."[229] More concretely, it identified as the purpose of the debtor's discharge the "free[ing] [of] his faculties from the clog of his indebtedness,"[230] not the provision of a carrot to induce compliance with the bankruptcy process. In 1885, the Court articulated what it has ever since understood to be the primary "policy" of federal bankruptcy law: "[A]fter taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities, and enable him to take a fresh start. His subsequent earnings were his own."[231] When the Supreme Court again began to consider questions of bankruptcy after the reestablishment of a uniform federal system in 1898, appeals to the fresh-start policy immediately revived as well, in almost the exact same formulation: "It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed."[232]

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229. Neal v. Clark, 95 U.S. 704, 709 (1877); *see* Wilson v. City Bank of St. Paul, 84 U.S. (17 Wall.) 473, 487 (1873) (refusing a construction that would deny a debt discharge because it would require "imputing to the general scope of the Bankrupt Act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment").

230. New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 666 (1875), *aff'g* Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 53 N.Y. 123, 125 (1873).

231. Traer v. Clews, 115 U.S. 528, 541 (1885); *see* Sparhawk v. Yerkes, 142 U.S. 1, 14 (1891) (citing *Traer*).

232. Burlingham v. Crouse, 228 U.S. 459, 473 (1913); *see* Wetmore v. Markoe, 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of

Appeals to the fresh-start policy have often been understood as a form of purposivist statutory interpretation, an understanding increasingly inappropriate in the new age of textualism.[233] But the Court's understanding of the fresh-start policy arguably derived not from interpretation of the specific bankruptcy statute enacted by Congress, but from construction of the constitutional category of federal bankruptcy laws.[234] This derivation is suggested, first, by the circumstance previously mentioned: the Court's account of the 1898 Act's fresh-start policy used almost exactly the same language as its account of the 1868 Act's policy.[235] Further evidence comes from the way in which some cases identified the policy, not as the purpose of "*the* bankruptcy act" (although this was admittedly the usual formulation),[236] but rather as a result of how "[s]ystems of bankruptcy are designed."[237] To speak of "systems of bankruptcy" in general is to argue not from a dubious inference about congressional purpose, but rather from the proper object of Congress's bankruptcy power. It is to suggest that whatever bankruptcy law Congress enacted, it would *necessarily* have as one of its principal purposes the provision of a fresh start to honest unfortunate debtors.

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indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes."); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192 (1902) ("The determination of the *status* of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern . . . .").

233. *See, e.g.*, City of Chicago v. Fulton, 141 S. Ct. 585, 592-95 (2021) (Sotomayor, J., concurring) (noting that the result of the case "hardly comports with" the "principal purpose of the Bankruptcy Code," the granting of a fresh start to honest unfortunate debtors, but suggesting that "any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges"). The canon certainly has little textual grounding; the phrase "fresh start" did not appear in the 1867 Act, nor in the 1898 Bankruptcy Act that filled the void left by the earlier Act's 1878 repeal.

234. *Cf.* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 168 (2010) (arguing that substantive canons are neither textualist nor purposivist, but instead can be grounded in constitutional requirements).

235. *See supra* note 232 and accompanying text.

236. *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (calling the fresh start "[t]he principal purpose of *the* Bankruptcy Code" (emphasis added)); Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (identifying the "purpose of *the* act" as pro rata distribution and the debtor's fresh start (emphasis added)); Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554 (1915) (discussing "the purpose of *the* Bankrupt Act" (emphasis added)); Burlingham v. Crouse, 228 U.S. 459, 473 (1913) (identifying "the twofold purpose of *the* Bankruptcy Act" (emphasis added)).

237. *Wetmore*, 196 U.S. at 77.

Such an approach is akin to interpreting a criminal law in light of the principle that any criminal law should punish only wrongdoing that was to some degree intentional.[238] Unlike such an interpretation of a criminal law, however, an interpretation of the Bankruptcy Code grounded in the fresh-start policy cannot pretend to be a universal generalization about bankruptcy laws – after all, federal bankruptcy laws before 1868 were modeled on the English bankruptcy acts, which did not create bankruptcy procedures in order to ensure debtors a fresh start, but rather offered debtors a fresh start in order to ensure their compliance with bankruptcy procedures.[239] The fresh-start policy is not a universal feature of all bankruptcy law, but rather an attribute of the kind of bankruptcy laws that the United States has had since the Civil War. If these are the only kind of bankruptcy laws that the United States can have, it is because their "liberal spirit" and liberating purpose are a result of the Thirteenth Amendment's reconstruction of the bankruptcy power.

V. THE RIGHT TO A FRESH START

My argument thus far has been principally historical: that the modern bankruptcy power owes its contours to the ratification of the Thirteenth Amendment. This Part turns to the consequences of this claim for modern bankruptcy law. The first Section argues that the judicially recognized fresh-start policy should be understood to place real limitations on federal bankruptcy legislation, limitations which can fairly be characterized as guaranteeing a right to a fresh start. The second Section considers past and present provisions of bankruptcy law that will raise constitutional questions once we recognize the right to a fresh start.

A. The Fresh Start and Other Bankruptcy Policies

Though courts have consistently recognized the fresh-start policy, the relevance of that policy to specific issues of bankruptcy law has been limited. It has at most generated a "fresh start canon" for interpreting ambiguous bankruptcy statutes, and it has never been understood to prohibit Congress from denying

238. *See* Elonis v. United States, 575 U.S. 723, 734 (2015) (describing the principle that "an injury can amount to a crime only when inflicted by intention" as "universal" (citing Morissette v. United States, 342 U.S. 246, 250 (1952))).

239. *See supra* Section II.A.

an insolvent debtor a fresh start when the statute clearly and unequivocally requires this result.[240] To the contrary, the Court in *United States v. Kras* concluded—without mentioning the Thirteenth Amendment—that there is no positive right to a bankruptcy discharge.[241] However, taking the Thirteenth Amendment into account reveals this conclusion to be wrong.

The typical argument for treating the fresh-start policy as at most a substantive canon of statutory interpretation is that bankruptcy legislation pursues other policies that conflict with the fresh-start policy, and that legislatures, not courts, should weigh the relevant tradeoffs.[242] In making this argument the Court usually mentions two other policies in particular: first, that debtors who engage in misconduct, typically fraud, should be denied discharges; and second, that certain categories of debts should not be discharged, though what principle determines the debts not to be discharged is often unclear, and often little more is offered than a vague appeal to public policy.[243] Occasionally, another policy will make an appearance; in *Kras*, for example, the Court appealed to Congress's desire to make the bankruptcy system self-funding.[244] Notably, the Court tends not to appeal to bankruptcy's role as a debt-collection mechanism when arguing against applying the fresh-start policy, and rightly so. The fresh-start policy signifies a departure from the traditional notion that debt forgiveness was a means to the end of debt collection. The policy reverses this ordering, making debt collection subordinate to the end goal of debt forgiveness.[245]

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240. *See* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 117 (2017) (describing how the Supreme Court has tended to impose a clear-statement rule on denials of discharge while lower courts have tended to impose a rule of narrow construction on such denials, a distinction that is unimportant for present purposes aside from the point that there is effectively a "fresh start canon" in the interpretation of bankruptcy statutes).

241. 409 U.S. 434, 446 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy.").

242. *E.g.*, Grogan v. Garner, 498 U.S. 279, 287 (1991) (seeing "a fair balance between these conflicting interests"); Scott F. Norberg, *Fraudulent Transfers and the Fresh Start in Bankruptcy*, 93 AM. BANKR. L.J. 139, 167-70 (2019) (discussing the need to "balance" the fresh-start policy against the misconduct-sanctioning policy).

243. *Grogan*, 498 U.S. at 287 (identifying "a congressional decision to exclude from the general policy of discharge certain categories of debts—such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud"); Byington, *supra* note 240, at 117 ("Some of the exceptions to discharge are based on the debt's importance to society, such as taxes or domestic-support obligations. Other exceptions to discharge are based on reprehensible conduct by a debtor, such as embezzlement or fraud." (footnote omitted)).

244. *Kras*, 409 U.S. at 449.

245. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (describing the fresh-start policy as "[t]he principal purpose of the Bankruptcy Code"); Traer v. Clews, 115 U.S. 528, 541 (1885) (grammatically subordinating the debt-collection policy to the fresh-start policy); *see* Eric

Neither, however, should the two purposes to which the Court often appeals be understood to override the fresh-start policy. Not because they are not important, but because they are not separate from the fresh-start policy in the first place. The canonical statement of the fresh-start policy specifies that bankruptcy law aims "to relieve the *honest* debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon *business misfortunes*."[246] Debtors engaged in misconduct can be denied a debt discharge, not because an external policy of punishing miscreant debtors outweighs bankruptcy's fresh-start policy, but because that policy never applied to them in the first place—it applies only to honest debtors. Similarly, debts such as taxes and alimony can be exempted from discharge, not because the fresh-start policy is outweighed by vague public policy concerns, but because it never applied to these debts in the first place—it applies only to debts arising from economic activity. These limitations are not external limits on the fresh-start policy, but integral components of it.

Like the discharge itself, these limitations are constitutional in nature, springing from the source of the fresh-start policy, the Thirteenth Amendment. The limitation to honest debtors flows from the caveat that involuntary servitude can be imposed "as a punishment for crime whereof the party shall have been duly convicted."[247] While this provision has been of late much maligned,[248] it makes perfect sense in the bankruptcy context. It accommodates the long-standing principle that misbehaving debtors should not receive a discharge, while putting a due-process limitation on the principle's scope. The process due in bankruptcy will inevitably differ from that due in criminal cases, because the relationship of the judicial process to involuntary servitude is different. Bankruptcy courts do not directly impose involuntary servitude on those who are "duly convicted," but rather reallocate liabilities in order to forestall the threat that involuntary servitude will be imposed on those who have not been "duly convicted." But the determination that no such reallocation should take place because of the debtor's wrongdoing is still due some level of process.

Brunstad, The Three Faces of Bankruptcy Law 28-30 (Feb. 2014) (J.S.D. dissertation, Yale University), https://digitalcommons.law.yale.edu/ylsd/7 [https://perma.cc/PC9U-6VNJ] (summarizing the normative argument for subordinating debt collection to debt forgiveness).

246. Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554-55 (1915) (emphasis added) (citing Wetmore v. Markoe, 196 U.S. 68, 77 (1904)).

247. U.S. CONST. amend. XIII, § 1.

248. *See, e.g.*, Ifeoma Ajunwa & Angela Onwuachi-Willig, *Combating Discrimination Against the Formerly Incarcerated in the Labor Market*, 112 NW. U. L. REV. 1385, 1407-08 (2018) (arguing that the punishment exception creates conditions that "could amount to slavery" and that this is a bad thing).

The limitation of bankruptcy to debts arising from economic activity, similarly, can be derived from the distinctions implicit within the Thirteenth Amendment phrase "involuntary servitude."[249] The framework of the Thirteenth Amendment distinguishes market relations as contractual, and so normatively voluntary, such that involuntariness makes them illegitimate. In contrast, it does not treat political and domestic relations as voluntaristic in the same way.[250] This distinction carries over into bankruptcy. In *Wetmore v. Markoe*, for example, which contains the first clear statement of the fresh-start canon for the 1898 Act, alimony obligations were exempted from discharge because they are "not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife."[251] This economic/domestic distinction, too, is today much maligned, and not unreasonably; arguments can certainly be made that alimony payments enforced by the contempt power constitute involuntary servitude.[252] But until they are determined to be such, it remains appropriate not to allow the discharge of alimony debts in bankruptcy.

The availability of a discharge, its limitation to honest debtors, and its limitation to debts arising from economic activity are all essential elements of bankruptcy law in the age of the Thirteenth Amendment, when bankruptcy laws are tasked not simply with vindicating creditor rights, but also with relieving "the weight of oppressive indebtedness."[253] Admittedly, a total absence of bankruptcy

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249. U.S. CONST. amend. XIII, § 1.

250. *See supra* note 175 and accompanying text.

251. *Wetmore*, 196 U.S. at 73 (quoting Audubon v. Shufeldt, 181 U.S. 575, 577 (1901)). Notably, the *Kras* Court took the noncontractual nature of marriage to be evidence for an important difference between marriage and debt, but one pointing in the opposite direction as it did in *Wetmore*: Chief Justice Burger suggested that access to bankruptcy is less protected than access to divorce on the grounds that only the state can end a marriage, while the debtor can relieve her situation by negotiating with her creditors. *See* United States v. Kras, 409 U.S. 434, 445-46 (1973) ("However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. . . . Government's role with respect to the private commercial relationship is qualitatively and quantitatively different from its role in the establishment, enforcement, and dissolution of marriage."). Some commentators have noticed that bankruptcy courts cannot grant divorces, tying this to the *Erie* doctrine and the fact that marriage is governed by state, not federal, law. *See, e.g.*, Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 662-63 (2004).

252. *See, e.g.*, Aldred J. Sciarrino & Susan K. Duke, *Alimony: Peonage or Involuntary Servitude?*, 27 AM. J. TRIAL ADVOC. 67 (2003). On the relationship between the Thirteenth Amendment and family law, see Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359 (1992); and Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

253. Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554-55 (1915) (citing *Wetmore*, 196 U.S. at 77).

legislation would raise no constitutional question, at least not a justiciable one. But once Congress enacts bankruptcy legislation, it must be bankruptcy legislation in the constitutional sense: its principal policy must be to prevent economic oppression by relieving honest unfortunate debtors of their burdens and so allowing them to start again. Since a law's failure to be a proper bankruptcy law would be justiciable only insofar as its failure denied a debt discharge to a debtor who ought to have received one, the constitutional requirement can fairly be recharacterized as a positive right to a fresh start.

B. Vindicating the Fresh-Start Right

Creating a doctrinal scaffolding for a newly recognized constitutional right sounds intimidating, but recent circuit-court attempts to grapple with the individual right to bear arms suggest a way forward.[254] First, define the scope of the right—who is eligible, and for what.[255] Second, subject provisions that interfere with the right either to some level of means-end scrutiny,[256] or to an analogical inquiry beginning with traditionally recognized exceptions.[257] The first step requires specifying what it means for the fresh start to be guaranteed only to honest debtors owing economic debts. Congress likely has considerable leeway in defining these terms, but provisions categorizing entirely innocent behavior as dishonest, or categorizing debts resulting from business misfortune as noneconomic, may go too far. Provisions that go too far would not necessarily be unconstitutional, but would be subject to further means-end scrutiny or historical inquiry, just like any other abridgment of the fresh-start policy.

The following three Sections survey past and present bankruptcy-law provisions and their susceptibility to constitutional challenge. They are arranged according to the three constitutional questions just identified. First, when does the

254. Ezell v. City of Chicago, 651 F.3d 684, 700-04 (7th Cir. 2011); *see* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1446 (2009) (describing the need to grapple separately with scope and with the relationship between burden and justification).

255. *Compare Ezell*, 651 F.3d at 702-03 (explaining that some categories of speech do not fall within the scope of the First Amendment and that some federal gun laws regulate activity outside the scope of the Second Amendment), *with* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011) (explaining how obscenity statutes do not even impinge on the free speech right and so do not require any level of scrutiny, because obscenity is not protected speech in the first place).

256. *See Ezell*, 651 F.3d at 703, 708.

257. *See* Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[C]ourts are to assess [legislation possibly impinging on a newly recognized constitutional right] based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

fresh-start policy support denying a discharge on grounds of dishonesty? Second, when does it support exempting a debt from discharge on grounds of it being unrelated to business misfortune? Finally, what kind of analysis should be applied to limitations on the fresh-start policy? The survey attempted here is necessarily tentative, and is meant only to give an impression of what the world might look like if courts recognized the Thirteenth Amendment to have generated a thick constitutional law of bankruptcy, including a fresh-start right. That said, the results, I suggest, are reassuring: such a development will not throw bankruptcy law into disarray. It will, however, require a legislative or judicial solution to some of the most oppressive provisions in the Bankruptcy Code.

1. Dishonesty

The fresh-start policy extends the bankruptcy discharge only to honest debtors. So, when a discharge is denied because of a criminal conviction for fraudulent conduct—for example, for violating the Bankruptcy Criminal Code[258]—it is clear that this exclusion is consistent with the fresh-start policy. But often a discharge is denied when there is no such conviction in the picture. Such cases are not necessarily suspect—bankruptcy law has never required such a conviction, and we should not expect it to do so—but a question does arise about what else can justify excluding the debtor from the fresh-start policy's scope.

This question has two aspects: what counts as sufficient proof, and what counts as wrongful activity meriting a discharge denial. In both aspects something less than the full criminal process will be appropriate. The bankruptcy standard of proof for denying a discharge has always been lower than "beyond a reasonable doubt"; at times it has been "clear and convincing evidence," and today denial of discharge requires "preponderance of the evidence."[259] Even the lower of these two standards is plausibly justified. Since bankruptcy reallocates liabilities between private parties, and so any error in one party's favor is to another party's detriment, there is good reason to use a standard of proof that tilts

258. 18 U.S.C. §§ 151-158 (2018).

259. Grogan v. Garner, 498 U.S. 279, 282 (1991) (noting that the clear-and-convincing-evidence standard had been used when determining when a discharge should be denied under an earlier statutory regime); *id.* at 289 (holding that the current statutory regime requires a preponderance-of-the-evidence standard).

the scales in no direction, but treats all parties fairly.[260] But the "duly convicted"[261] language of the Thirteenth Amendment should serve as a reminder that a lower standard than preponderance of the evidence may go too far. Regarding what qualifies as wrongdoing, similarly, bankruptcy has never required actual criminal conduct. Instead, various provisions of the bankruptcy laws specify conditions under which a discharge will be denied.[262] In general, conditioning denial on merely civil offenses can be justified on the same grounds as the use of a civil rather than criminal standard of proof. However, more suspicion may be warranted when the denial does not even involve a finding of specific wrongdoing.

When a debtor has been denied a discharge without a finding, by at least a preponderance of the evidence, of some form of dishonesty, the denial should be understood to fall outside the fresh-start policy. Such denials occur frequently in the current Bankruptcy Code. For example, regarding burden of proof, the Code allows judges to deny a discharge because the debtor "has failed to explain satisfactorily" why her assets do not cover her debts.[263] This effectively denies discharge without a finding of wrongdoing, but only a suspicion of dishonesty. The Code fails to require a specific finding of misconduct in at least two distinct ways. First, it grants bankruptcy courts an open-ended power to deny certain debtors an immediate discharge upon a finding that allowing them a discharge would be "an abuse of the provisions of this chapter."[264] Such a finding is too abstract to comport with the due-process requirement, for it does not involve any identification of specific debtor misconduct, but only an unsupported judgment about whether the debtor is the kind of person deserving of bankruptcy relief. Second, the Code often denies a discharge based only on factual circumstances such as

260. *Id*. at 287 (arguing that it is unlikely that Congress would have favored "the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud"); *see* Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 565 (1991) (stating that the preponderance-of-the-evidence standard serves to distribute risks between parties roughly equally).

261. U.S. CONST. amend. XIII, § 1.

262. *See, e.g.*, 11 U.S.C. § 727(a)(2)-(4), (6)-(7) (2018). These provisions serve a similar role to those in traditional bankruptcy acts that defined "acts of bankruptcy"—except they no longer aim to force fraudulent debtors into bankruptcy, but to exclude fraudulent debtors from its benefits. *Compare id.*, *with supra* notes 51-58 and accompanying text.

263. 11 U.S.C. § 727(a)(5) (2018).

264. *Id.* § 707(b)(1) (requiring that a filing found abusive be dismissed or converted into Chapter 11 or 13). These chapters allow an immediate discharge only if the debtor has mostly commercial or business debts and so is eligible for Chapter 11 subchapter V. *Id.* § 1182(1)(A). The limitation to consumer debt also impinges on the fresh-start policy's limitation to business misfortune, on which see *infra* note 273 and accompanying text.

the debtor having recently availed herself of bankruptcy,[265] or the debtor having income above a statutory threshold.[266] These predicates for denial of discharge suffer from the opposite problem, being too concrete: factual circumstances may be proxies for dishonesty, but they do not themselves constitute dishonesty, which necessarily involves an intentional element.

That the provisions just surveyed do not actually target dishonest debtors, and so do not implement the fresh-start policy, does not mean that they are unconstitutional. Bankruptcy law pursues multiple legitimate purposes simultaneously. However, the fresh-start policy is bankruptcy's primary purpose, and by preventing debtors from having their debts discharged, these provisions interfere with that purpose. Accordingly, they require some form of further analysis, as we will see in Section V.B.3.

2. Nonbusiness Misfortune

Even when a debtor receives a debt discharge, certain debts are sometimes excluded from it because they are unrelated to the economic subordination bankruptcy law aims to remedy, and so fall outside the fresh-start right entirely. Many of these exclusions are straightforward. For example, debts resulting from fraud,[267] or other wrongful conduct,[268] arise not from misfortune but from wrongdoing. Similarly, the exclusion from discharge of certain tax liabilities[269] could be defended based on the distinction drawn in Section V.A between economic and political obligations.[270] The Code excludes domestic support debts from discharge,[271] which is controversial but consistent with the distinction drawn between economic and domestic obligations.[272] Two further categories of debt, both of which sit on this economic/domestic interface, warrant further discussion.

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265. 11 U.S.C. § 727(a)(8)-(9) (2018); *see* Note, *Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy*, 97 HARV. L. REV. 759, 776-77 (1984) (arguing that Congress has been unable to adequately justify the six-year bar).

266. 11 U.S.C. § 707(b)(2) (2018) (requiring that such debtors' Chapter 7 filings be considered per se abusive).

267. *Id.* § 523(a)(2), (4), (11), (19).

268. *Id.* § 523(a)(1), (6), (7), (9), (12), (13).

269. *Id.* § 523(a)(1), (14).

270. *See, e.g.*, Butler v. Perry, 240 U.S. 328, 333 (1916) (holding that the Thirteenth Amendment "introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc.").

271. 11 U.S.C. § 523(a)(5), (15) (2018).

272. *See supra* notes 250–252 and accompanying text (describing the economic/domestic divide).

First, since 1984, the Bankruptcy Code has allowed bankruptcy courts to deny an immediate discharge if the debtor's debts are "primarily consumer."[273] The statutory definition makes clear that this category was designed to fall on the domestic side of the economic/domestic line: "The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose."[274] The 1984 amendment resulted from a half century of efforts to limit the discharge in consumer bankruptcy,[275] which had been an aim of creditor groups ever since the unexpected adoption of bankruptcy by unemployed laborers with consumer debt, rather than the failed business owners for whom it was first envisioned.[276] However, the amendment arguably misunderstood the economic/domestic line it attempted to track. That line does not lie between debts incurred by businessmen and debts incurred by ordinary laborers; such a distinction would contradict the merchant-citizen paradigm implicit in the reconstructed bankruptcy power.[277] Rather, the line lies between debts incurred in the market and duties arising among household members. Only the former are properly discharged when the debtor's business misfortunes prevent him from fulfilling his business-related obligations. But the former include all such market obligations, and it is entirely proper for the availability of bankruptcy to expand along with the expansion of the credit market.

Second, the Bankruptcy Code excludes educational-loan debt from discharge absent special circumstances.[278] Educational loans are roughly analogous to nineteenth-century apprenticeships, in that both are ways to finance the devel-

273. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 355 (codified at 11 U.S.C. § 707(b)(1) (2018)). This provision also requires the bankruptcy court to find abuse, and so impinges on the fresh-start policy's limitation to honest debtors. *See supra* note 264 and accompanying text.

274. 11 U.S.C. § 101(8) (2018).

275. SKEEL, *supra* note 1, at 98-99, 133, 154, 190-97 (describing the introduction of delayed-discharge plans for wage-earner debtors in the 1930s, and later efforts by creditor lobbyists to make them mandatory).

276. HANSEN & HANSEN, *supra* note 211, at 39-40 (describing the use of bankruptcy by nonbusiness owners despite the original intention for bankruptcy to be for businessmen).

277. *See supra* note 206 and accompanying text. Put differently, there is only a class divide, and no constitutionally relevant distinction, between a laborer borrowing money to support himself while looking for work and an entrepreneur borrowing money to support himself while developing a business.

278. 11 U.S.C. § 523(a)(8) (2018).

opment of human capital by borrowing against future labor. Both sit on the border between the economic and domestic spheres,[279] making their constitutional status tricky. If educational loans are economic in the relevant sense, this Note's Thirteenth Amendment argument implies that they must be dischargeable in bankruptcy. But even if they are not economic, and so their discharge in bankruptcy can be limited, there is a good argument for subjecting any no-discharge period to traditional restrictions on the terms of apprenticeships, which were usually limited to no more than seven years.[280] While a term of seven years may seem arbitrary, it finds support in a venerable tradition.[281] Before 2005, the educational-loan exception from discharge was compatible with such a limited-term requirement, lasting for only five years, but BAPCPA made the exception from discharge perpetual.[282] An act proposed in the current Congress contemplates limiting the discharge exception to ten years,[283] which would certainly be a step in the right direction.

It is not, admittedly, entirely impossible to discharge educational loans, although it is quite difficult. The Bankruptcy Code leaves open an escape hatch for when an exception of educational loans from discharge "would impose an undue hardship."[284] But this escape hatch is probably not constitutionally sufficient. If it were, then it could be imposed on all debts, which seems unlikely—access to bankruptcy does not mean access to bankruptcy for those who can demonstrate hardship. The problem is not simply that "undue hardship" is overly vague and leaves far too much to the discretion of the bankruptcy court, though it does.[285] More fundamentally, "undue hardship" misconceives the purpose of bankruptcy

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279. VanderVelde, *supra* note 162, at 458-59 (discussing the constitutionality of apprenticeships due to their unclear status as economic or domestic relations). The ambiguous status of apprenticeship contracts has the same source as the ambiguous status of educational loans: the common law doctrine of in loco parentis. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *453.

280. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *427 (describing rights conferred after a seven-year apprenticeship); 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 289 (Edward Gibbon Wakefield ed., London, Charles Knight & Co. 1843) ("Seven years seem anciently to have been, all over Europe, the usual term established for the duration of apprenticeships in the greater part of incorporated trades.").

281. *Deuteronomy* 15:1 (King James) ("At the end of every seven years thou shalt make a release.").

282. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591, *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified at 11 U.S.C. § 523(a)(8) (2018)).

283. FRESH START Through Bankruptcy Act, S. 2598, 117th Cong. § 2 (2021).

284. 11 U.S.C. § 523(a)(8) (2018).

285. G. Michael Bedinger VI, Note, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1839 (2014) ("Courts continue to struggle with applying a consistent standard to student debtors under § 523(a)(8).").

law, which aims not to alleviate "hardship," but to prevent "oppressi[on]," meaning market unfreedom due to relations of economic subordination.[286] A law that discharged the debts only of debtors proving "undue hardship" would, in a constitutional sense, not be a bankruptcy law at all.

The constitutional question for both consumer debt and educational-loan debt ought to be simply this: do these categories of debt count as "obligations and responsibilities consequent upon business misfortunes"?[287] If so, their exemption from discharge cannot be justified as an implementation of the fresh-start policy, although this would not itself result in their unconstitutionality. It would only require further inquiry, to which we now turn.

3. Bankruptcy Scrutiny

How should courts determine when other purposes should be allowed to override the fresh-start policy? Constitutional law provides two popular paradigms for such inquiries. On the one hand, courts could adopt a system of tiered scrutiny, which would, for example, apply intermediate scrutiny to burdens on access to the fresh start and strict scrutiny to provisions entirely denying access.[288] On the other hand, courts could avoid the conceptual morass of tiered scrutiny and instead ask whether such provisions are sufficiently analogous to traditionally recognized exceptions. Given the relatively recent genesis of the fresh-start policy, limited historical material is available. However, it remains possible to ask whether a particular rule has been present in some form since the 1868 Act or is of a more recent vintage. This Note cannot resolve the dispute between these approaches but will suggest that in practice they often converge.

I first consider provisions impinging on the fresh start in order to improve the bankruptcy process. Many of these simply provide procedural rules without which no bankruptcy system could function, such as those requiring dismissal of petitions for unreasonable delay, nonpayment of fees not waived, or failure to file forms timely.[289] Even if the specific fee amounts and deadlines are to a large extent arbitrary, there is no reason to subject them to constitutional scrutiny unless they render certain debtors entirely incapable of availing themselves of bankruptcy.

Sometimes, however, they do. Bankruptcy courts today are open to filings in forma pauperis, but prior to the 2005 reforms, people could be priced out of

286. *See supra* note 246 and accompanying text.

287. *See supra* text accompanying note 246.

288. *See, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 703-04 (7th Cir. 2011) (applying a similar tiered approach in the realm of Second Amendment rights).

289. 11 U.S.C. § 707(a)(1)-(3) (2018).

bankruptcy by filing fees.[290] The *Kras* Court upheld these fees when it held (without reference to the Thirteenth Amendment) that there was no right to a debt discharge.[291] If there is such a right, then a filing fee requirement would likely be unconstitutional. In the means-end scrutiny framework, the requirement would receive intermediate scrutiny, since its purpose is not to deny access to bankruptcy but rather to defray court costs. But it would likely fail intermediate scrutiny, since a debtor who cannot even afford to file for bankruptcy is among the debtors most in need of access to bankruptcy. The requirement's transience—it was only in force for twenty-seven years—supports this conclusion.

Another no-longer-extant process-oriented limitation on access to bankruptcy is a minimum-debt requirement. The 1867 Act, for example, allowed voluntary bankruptcy petitions to be filed only by debtors owing over $300 (roughly $80,000 in today's dollars).[292] Under the means-end scrutiny framework, such a requirement would receive intermediate scrutiny. But so long as the minimums are not set excessively high, this requirement seems likely to withstand such scrutiny; after all, the cases they keep out of court are those least likely to involve actually oppressive levels of debt. Further, the purpose of the minimum-debt requirement was to ensure that bankruptcy courts could appropriately focus their time and resources, given that the bankruptcy process, in 1867 far more than today, was costly and highly wasteful. The requirement thus kept out of bankruptcy only those who would benefit least from it.

We should also return to the satisfactory disclosure requirement.[293] As already noted, this requirement's failure to further the fresh-start policy does not make it unconstitutional. In fact, it can likely be justified as necessary and proper to ensure the proper functioning of a key step in the bankruptcy process, that is, distribution of assets to creditors; the requirement prevents debtors from hiding assets through convenient lapses in memory.[294] Given that it achieves this goal

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290. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 418, 119 Stat. 23, 108-09 (codified at 28 U.S.C. § 1930(f) (2018)).

291. United States v. Kras, 409 U.S. 434, 446 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy.").

292. Bankruptcy Act of 1867, ch. 176, § 11, 14 Stat. 517, 521. See *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1790 to Present*, MEASURINGWORTH, https://www.measuringworth.com/calculators/uscompare [https://perma.cc/Q8J9-4KBG] (enter "1867" as Initial Year, "300" as Initial Amount, "2021" as Desired Year, then click "Calculate") for the 2021 equivalent of $300 in 1867, measured by relative income, which shows the economic "prestige value" of a given quantity of wealth.

293. *See supra* note 263 and accompanying text.

294. In this role, it resembles in some ways a beefed-up contempt power and serves as a vastly better-tailored and less coercive form of debtor's prison. *Cf. supra* note 65 and accompanying text (describing the coercive nature of debtor's prison).

by directly interfering with the granting of a fresh start to honest debtors (forgetfulness is not dishonesty), strict scrutiny would be called for. But the requirement would likely survive strict scrutiny, since without some coercive tool bankruptcy fraud would be almost impossible to prevent.

A different set of provisions interfere with the fresh-start policy for more amorphous reasons perhaps best characterized as ensuring that debtors can successfully reintegrate into well-functioning credit markets. As a simple example, consider the requirement, introduced by BAPCPA, that debtors complete a financial-literacy course before receiving a discharge.[295] This rule probably would not survive means-end scrutiny. It is comparable to similarly questionable laws requiring persons seeking a marriage license to jump through financial-counseling hoops.[296] Encouraging financial literacy is certainly a worthwhile goal, but it seems unlikely that requiring people to jump through additional hoops before availing themselves of constitutional rights is narrowly tailored to achieve it.

Consider also the measure denying an immediate discharge to consumer debtors whose filings are found abusive,[297] and the rule that filings by high-income debtors are per se abusive.[298] These provisions do not really prevent dishonesty. Rather, they serve to ensure that those capable of repaying a portion of their debts do so, rather than having the entirety immediately discharged. This goal, while subordinate to the fresh-start policy, is legitimate. There is no Thirteenth Amendment reason to discharge more debt than necessary to bring the debtor out of insolvency, and avoiding unnecessary debt discharges lowers the cost of credit, benefiting everyone. But the specific provisions in question here are highly suspect on both means-end and historical grounds. The discretion to deny petitions for abuse has been in place since the 1930s, but its history is not illustrious; in the not-too-distant past, apparently systemic abuse of this discretion disproportionally affected racial minorities.[299] And the income threshold, which has only been in place since BAPCPA, has the real-world effect not of forcing high-income debtors to make larger payments, but of imposing a substantial

295. 11 U.S.C. §§ 109(h)(1), 727(a)(11) (2018). The statute exempts debtors from this requirement if they can prove "exigent circumstances that merit a waiver." *Id.* § 109(h)(3)(A). But an exigency exception does not cure the constitutional ill, which is that there is insufficient reason to require any debtor to complete the course.

296. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (discussing a statute that required persons who failed to pay their child-support obligations to obtain financial counseling before receiving a marriage license).

297. *See supra* note 264 and accompanying text.

298. *See supra* note 266 and accompanying text.

299. *See* HANSEN & HANSEN, *supra* note 211, at 88 (discussing racial trends in chapter use and the influence of referee discretion on disproportionate chapter use).

administrative burden on all debtors.[300] Further, these policies are not narrowly tailored, since the goal of discharging only excessive debt can be achieved without denying an immediate discharge of the excess. The new Chapter 11 small-business subchapter, for example, requires debtors to agree to periodic payments amounting to at least the sum of their projected disposable income over the repayment period,[301] but it discharges the portion of their debts exceeding their total projected payments immediately.[302] That such an approach is used in subchapter V makes the failure of Chapters 11 and 13 to adopt it even more suspect.

Finally, what of the exemption from discharge of educational-loan debt? As this provision directly denies a discharge, it should receive strict scrutiny. A case can be made that a limited bar on immediate discharge serves a compelling interest, that of keeping the student-loan market functional. After all, if recent graduates could simply slough off their student debts before stepping out into the marketplace, creditors might be unwilling to lend in the first place. Narrow tailoring would, however, almost certainly rule out BAPCPA's extension of the bar from five years to the life of the debtor. That extension is not plausibly necessary to ensure functioning student-debt markets, given that such markets functioned adequately before the 2005 reforms were adopted. Here, means-end scrutiny leads to a result roughly coinciding with the historical approach, which would emphasize the apprenticeship analogy.[303] Further, just as the apprenticeship analogy does not necessarily secure the constitutionality of even a time-limited exemption from discharge,[304] neither does means-end scrutiny. While ensuring the affordability of higher education is certainly a compelling interest, facilitating the student-loan market is merely a means to that end, and one that

300. U.S. Gov't Accountability Off., GAO-08-697, Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, at 21 (2008) (finding that costs to bankruptcy filers have increased since the 2005 reforms); Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 Am. Bankr. L.J. 349, 353 (2008) ("[I]nstead of functioning like a sieve, carefully sorting the high-income abusers from those in true need, the amendments' means test functioned more like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual income circumstances.").

301. 11 U.S.C. § 1191(c)(2)(B) (2018). This subchapter was recently added to the Bankruptcy Code by the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079.

302. 11 U.S.C. § 1181(a)-(c) (2018) (making section 1141(d)(5), which prohibits granting a discharge to an individual debtor until she completes all plan payments, inapplicable to small business debtors).

303. *See supra* notes 279-281 and accompanying text.

304. *See supra* note 175 and accompanying text (noting controversy over the constitutionality of compulsory apprenticeships).

may not be narrowly tailored, given that higher education could be funded in a way that did not require abrogation of the fresh-start policy.

CONCLUSION

Recognizing a constitutional "right to a fresh start" may sound like a radical departure from existing law. I suggest, however, that it in fact synthesizes several aspects of bankruptcy law and history that are otherwise puzzling. First, such a right must exist if the bankruptcy power has a designated purpose: the alleviation of economic oppression through the provision of a bankruptcy discharge. As discussed, this is the best construction of the bankruptcy power—not as it was originally in 1789—but as it has been since the ratification of the Thirteenth Amendment in 1865. Second, this argument helps to explain the existence of the fresh-start policy, which is otherwise difficult to ground in accepted principles of statutory interpretation. Finally, it not only explains, but justifies the tendency of scholars to invoke the Thirteenth Amendment when discussing potential restrictions on bankruptcy.

Positing an oppression-alleviating purpose, and so a fresh-start right, does not require that this be the *only* purpose that the bankruptcy power serve. It clearly serves many others, including allowing for the efficient winding up of the affairs of insolvent enterprises, and the restructuring of the debts of both enterprises and individuals who do not need their debts forgiven, only adjusted. But if the bankruptcy power does have the fresh-start purpose as well, then Congress's exercise of the bankruptcy power at least cannot *undermine* this purpose. So, provisions that deny access to bankruptcy, deny a bankruptcy discharge to honest debtors, or exempt business debts from discharge, may not necessarily be unconstitutional, but should at least be subject to constitutional scrutiny.

Courts have been reluctant to accept Thirteenth Amendment arguments on other subjects,[305] and may be similarly unlikely to ground modern bankruptcy law in the Thirteenth Amendment. But courts are not the only interpreters of the Constitution—both Congress and the People play a role in our constitutional order as well.[306] So this Note's argument should also matter to legislators considering the future of bankruptcy law, and in particular legislative proposals to

305. *See* Balkin & Levinson, *supra* note 167, at 1470.

306. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004); KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 29-30 (2007).

undo the mistakes of BAPCPA.[307] Finally, it should matter to anyone seeking to identify and vindicate their own and others' economic rights.

307. *See supra* note 283 and accompanying text.