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Bankruptcy and politics: a framework for bankruptcy policymaking in the united states congress and courts

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BANKRUPTCY AND POLITICS: A FRAMEWORK FOR BANKRUPTCY POLICYMAKING IN THE UNITED STATES CONGRESS AND COURTS

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DEDICATION

This dissertation is dedicated to
my wife, Krispen, who made it,
and everything else, possible.

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CHAPTER ONE: INTRODUCTION AND OVERVIEW OF BANKRUPTCY LAW

A. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") was approved by Congress and signed into law by President George W. Bush in 2005. With its passage fueled by the filing of new consumer cases that had grown to well over one million per year by the mid-1990s, supporters and opponents alike characterized the legislation as a major change in the direction of U.S. bankruptcy law. Whereas prior policy embodied principles of generosity and forgiveness of consumer filers, BAPCPA (commonly pronounced "Bap-C-Pa") placed significant restrictions on their ability to re-start their lives free of the burden of their indebtedness. Before 2005, most consumer debtors sought relief under Chapter 7 of the Code, which in most instances resulted in the fairly simple and expeditious discharge of their financial obligations, in most cases without any recovery by their creditors.

The major changes made by the new law were intended to require more debtors to file cases under Chapter 13 of the Bankruptcy Code, which conditions relief on the repayment of some or all of their debts over time. The amendments introduced means tests to the Bankruptcy Code, which in essence required debtors to qualify for the simpler relief afforded in Chapter 7. The new law also expanded the class of cases subject to dismissal for undefined "abuse," and required prospective debtors to undergo debt relief counseling before filing their bankruptcy cases.[1] Until the BAPCPA changes, American bankruptcy policy was broadly forgiving not only to filers who were the victims of misfortunes like job loss, serious illness, or divorce, but also those who had mismanaged their personal finances. In a marked departure, the new law conditioned relief on notions of personal responsibility.

In an era of growing congressional acrimony, the legislation had broad bipartisan support, gaining the votes of all of the House and Senate's Republican members and significant percentages of both chambers' Democrats. However, in passing the legislation, Congress rejected the advice not only of its own specially appointed commission but the opinion of many bankruptcy law specialists (Warren 1999; Jacoby 2004).

What was responsible for this shift in long-standing congressional policy? The explanation most commonly proffered in both the academic literature and in popular accounts was that legislative support for BAPCPA was heavily influenced by the credit card industry's lobbying effort and campaign contributions (Chapter 5; *see also* Warren 1999 and Bartlett and Steele 2000).

To be sure, the credit card industry, and more broadly the financial sector, spends enormous amounts of money on lobbying expenses and campaign contributions, including expenditures on bankruptcy legislation. However, as explained in Chapter 5, financial contributions at best provide only a portion of a satisfactory explanation. Even though BAPCPA enjoyed broad bipartisan support, its path to enactment was far from certain. In fact, 2005 was the fifth time its

[1] A brief overview of American bankruptcy law is contained in Part D of this chapter. Descriptions of the changes made by BAPCPA are in Chapter Five.

supporters tried to get it enacted into law. From 1997 until 2004, the legislation passed the House by wide margins, only to have its passage stalled by various procedural hurdles in the Senate or in conference committee, and once by presidential veto. One might assume that if the overwhelming resources of the financial industry were sufficient to influence BAPCPA's approval, its supporters would have required fewer than five chances to do so. In fact, empirical studies do not indicate a significant correlation between campaign contributions from the financial industry and roll call votes favoring bankruptcy reform legislation (Chapter Five; Nunez and Rosenthal 2004).

This study takes the view that the long but ultimately successful path leading to BAPCPA's enactment in 2005 can only be fully understood in the fuller examination of all bankruptcy policymaking since the 1930s. This study examines bankruptcy policymaking over a seventy-three year period beginning in 1932 and continuing to 2005. This period is long enough to take in not only BAPCPA's adoption, but the enactment of the two major bankruptcy bills of the twentieth century: the Chandler Act of 1938 (Chapter Three) and the Bankruptcy Code of 1978 (Chapter Four). Examination of this longer period indicates that BAPCPA's passage was a marked departure from bankruptcy policymaking in the previous sixty years, when Congress deferred on such matters to the recommendation of a small group of attorneys, judges, and scholars described here as the bankruptcy policy community.

Two general themes stand out in an expanded analysis of bankruptcy policymaking and implementation over the whole of the twentieth century. The first theme derives from the observation that bankruptcy judges engage in policymaking in two capacities, both in their traditional juridical roles, and as active legislative advocates. Therefore, a comprehensive explanation of bankruptcy policymaking must include the courts and account for both activities. This study draws on the political jurisprudence and interbranch perspective literature from the public law field, and on work in the policy implementation field, to develop in Chapters Two and Five an integrated explanation of the roles of courts and judges in bankruptcy policymaking.

The second theme derives from the structural features of bankruptcy policymaking. The bankruptcy policy community dominated bankruptcy policymaking for more than sixty years. The group's influence ended abruptly in the 1990s when Congress actively engaged in debates over bankruptcy policy. Throughout the entire period, the courts persistently modified and extended formal policy through their interpretation and application of the statutes. The existence of multiple real and potential policy venues and the shifts of relative authority between them point to the agenda setting literature for explanation. Contrary to the interest group model, which focuses entirely on resources, or public choice models, which emphasize the relative incentives of policy participants, agenda setting models see the scope of conflict around an issue as the critical factor influencing policy outcomes (Schattschneider 1960). Advocates may seek to mobilize support, limit participation in policymaking processes, or move a dispute to another decisive venue, as suits their particular purposes. Their primary conflict management tool is the effective definition and redefinition of problems and issues (Baumgartner and Jones 1993).

B. Bankruptcy Policymaking Framework Overview; Plan of the Dissertation

The dissertation establishes a comprehensive framework of American bankruptcy policymaking that includes Congress, the courts, and interest groups. The framework follows the agenda setting literature and identifies conflict levels as the most important variables affecting venue choice in bankruptcy policymaking. Chapter Three describes how a small group of attorneys, judges, and academics gained control of bankruptcy policymaking from Congress in the 1930s, largely by emphasizing the complex and technical nature of the law. Chapter Four explains how the successors of that group remade bankruptcy policy in the 1970s consistent with their core belief that the law should afford financially unfortunate individuals the maximum opportunity possible for a fresh start, and made that belief the policy's dominant image. Chapter Five describes how proponents of pro-creditor reforms redefined bankruptcy policy by attacking both its image and the policy community's technical competence, resulting in a more politicized policymaking process. The persistent influence of the courts on bankruptcy policy and the ways in which that activity relates to legislative policymaking are described in Chapters Two and Six.

Building on these analyses, an integrated framework of bankruptcy policymaking is set out in Chapter Six. Structurally, the framework draws from the agenda setting, policy implementation, and interbranch literatures to identify three venues in which bankruptcy policy is made: Congress; an organized bankruptcy policy community made up of lawyers, judges, and scholars; and the courts. Scope of conflict principles determine the venue where particular policies are made. Courts acting in individual cases make policy at the lowest level of conflict. Such policies may remain localized or may be transmitted within the network and adopted in other courts. Broader conflicts arise when the courts can no longer adapt existing statutes to meet changing circumstances. Congress then turns to the policy community to formulate new laws, which it ordinarily adopts with little controversy. Congress' deference to the community prevailed from the early 1930s until the end of the twentieth century.

The core image underlying the bankruptcy policy community's policymaking monopoly was the "fresh start." Major statutory reforms enacted in 1938 and 1978 incorporated this principle, which favors individual consumer debtors [2] by combining a broad discharge of debts with generous exemption provisions allowing them to retain all or most of their real and personal property after bankruptcy.[3] However, by the 1990s, new systemic conflicts resulting from rising levels of consumer debt and increased filing rates led to new calls for bankruptcy reform. Congress rejected the community's recommended changes and instead embraced stricter reforms proposed by the consumer credit card industry. Industry interests drew Congress directly into the reform debate and gained members' broad bipartisan support by recasting bankruptcy's image in politically popular terms of debtor responsibility. Their efforts followed classic agenda setting principles, which

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[2] Until enactment of the Bankruptcy Code in 1978, bankruptcy filers were known as "bankrupts." The Code adopted the term "debtors" to describe such entities. Today, both common usage and the academic literature distinguish between consumer debtors, i.e., those whose debts are of a household or personal nature, and business debtors, which are typically formally organized entities engaged in business.

[3] *See* Chapter Four.

maintain that issue re-definition is essential to insurgents' efforts to break a monopoly's hold in a particular policy arena. The framework not only provides a basis for understanding how bankruptcy policy is made in the United States, but it also provides a template for analysis of policymaking in other fields of American law.

C. Methodology and Sources

This dissertation employs a long-term, longitudinal case study method to analyze policymaking in a single policy domain, bankruptcy law. Longitudinal studies are particularly well suited to understanding changes in the policy and agenda status of single issues, as the effects of changes in political systems may be cumulative and only discernible over long (forty to one hundred year) periods of time (Baumgartner and Jones 1993, 39-41). Similarly, Sabatier (1988) maintains that long-term examination of policy change is necessary, at a minimum, to fully understand internal feedback effects and evaluate policy success or failure.[4]

The case study method of analysis derives from the subject matter. Studies of both interest groups and judicial policymaking rely heavily on this methodology (Pralle, 2006; Feeley and Rubin 1999, 29). Case study is the primary mode of analysis in the interbranch literature, especially when the subjects of study include the lower courts. The almost infinite number of variables and paths to a particular decision, and the multiple potential decision points in a given case restrict the use of quantitative analysis in the study of trial level courts. As stated in a recent study:

> [A] district judge may rule in a single case on multiple occasions and on different types of questions, only a few of which could be dispositive but all

[4] Sabatier (1988, 131) recommends periods of a decade or more.

> of which affect the case's progress and ultimate outcome. Moreover, because many of the judge's actions are taken in response to motions by the parties, there is no determinate sequence in which pretrial litigation events occur. Rather, how a case proceeds depends on the choices made by the parties—what motions are filed by whom and how discovery unfolds (Kim, *et al*. 2009, 85).[5]

Similarly, the discussion of BAPCPA's enactment in Chapter 5 points out the difficulty of making quantitative associations between external variables and legislative action in specific cases. For instance, relationships between roll call votes and general factors like party affiliation or political ideology may be readily discerned. However, correlations are more difficult to measure when the external factors are asymmetrical, as is true when an interest group with broad interests, like the financial industry, seeks to influence legislation. Therefore, this dissertation uses the specific, heavily fact-driven approach typical of case studies for data gathering and analysis.

The legislative cases selected for study are the three major bankruptcy reform measures enacted since 1930s: the Chandler Act of 1938, the Bankruptcy Code of 1978, and the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. The long-term nature of the study requires multiple data sources. Events leading to enactment of the Chandler Act and the Code are the subject of extensive examinations, including scholarly analyses and primary source material including first person accounts and contemporaneous media reports. Fewer academic studies

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[5] However, the development of newer databases affords some potential for such studies (Kim 2009). BAPCPA included mandates for data keeping and study by the Department of Justice's United States Trustee Program and by the Administrative Office of the U.S. Courts. A proposal using this data for a quantitative, multi-district study of BAPCPA's implementation in the bankruptcy courts is contained in the Appendix of this dissertation.

are directed to enactment of the 2005 Act; most of those were published prior to its final passage, although valuable studies by Warren (1999), Jacoby (2004), and Skeel (2001) provide valuable accounts up to their respective dates of publication. Examination of the 2005 legislation will necessarily rely more on primary source materials, especially contemporaneous media reports.

D. A Brief Overview of U.S. Bankruptcy Law

American bankruptcy law is noted for its complexity. Even lawyers who do not regularly practice in the bankruptcy courts find its terms and procedures to be arcane and convoluted (indeed, its apparent complexity is a central feature of this study). The following overview is not intended to provide a comprehensive summary of bankruptcy practice. Rather, it provides an explanation of the basic provisions of bankruptcy law intended to be useful to understanding the remainder of the study.

Some portions of bankruptcy law are applicable to all bankruptcy filers (called debtors) and all kinds of cases. However, for purposes of a basic understanding of bankruptcy law, it is useful to categorize the different types of bankruptcy cases, first by the nature of the debtor, and then by the kind of relief sought. Hence, there are personal liquidations (Chapter 7) and repayment plans (Chapter 13), corporate liquidations (also Chapter 7, but with significant differences from personal cases, and business reorganizations (Chapter 11).[6]

[6] Other forms of bankruptcy include Chapter 9 (municipalities) and Chapter 12 (family farmers). However, the incidence of filings under these chapters is very small and so they are not discussed here).

1. *Personal Bankruptcy: Chapter 7*

The ultimate goal of individual debtors (also called consumer or personal debtors) who file bankruptcy is that at the end of their case they receive a discharge from, with few exceptions, all of their financial obligations that exist as of the time their case is filed. Those obligations are voided, and creditors are barred from seeking collection of those debts.

A debtor may be denied discharge for certain kinds of serious wrongdoing, such as failing to obey bankruptcy court orders or concealing assets. Specific debts may also be excepted from discharge. These include certain classes of debt, such as student loans, most tax debts, and family support obligations. Other excepted debts are the result of particular acts of misconduct, such as fraud committed by the debtor while acting in a fiduciary capacity, or for injuries and losses caused by the debtor's willful and malicious actions. Such actions are uncommon. In the vast majority of consumer Chapter 7 cases, the debtor is relieved of all of his obligations to repay his debts owed at the time his case was filed, and creditors are barred by the discharge from seeking repayment.

Personal bankruptcy may be one of two types, Chapter 7 or Chapter 13 (see below). In a Chapter 7, or straight liquidation case, the debtor turns all of its assets over to the bankruptcy court and the assets are sold by a bankruptcy trustee. The sale proceeds are used first to pay the trustee's fees and costs associated with liquidation and distribution, and then are distributed to the debtor's creditors. Federal bankruptcy law establishes the order of payment. Secured creditors, i.e., those who have liens on particular assets, are paid first from the sale proceeds of those particular assets. The remaining proceeds are distributed to certain claimants designated by law as holding "priority" claims, including certain claims for wages and employment benefits, taxing authorities, and unpaid spousal and child support. Remaining funds, if any, are distributed pro-rata to the debtor's remaining creditors (known in bankruptcy parlance as unsecured creditors).

In fact, relatively few personal Chapter 7 cases result in any distribution to creditors. This is because bankruptcy law allows debtors to retain a specified portion of their real and personal property (determined by value), notwithstanding their bankruptcy filing. These are known as exemptions. Exemptions are allowed on items provided by federal or state law, such as household goods, professional tools, motor vehicles, and a portion of the equity in the debtor's residence. Although the exemptions are mostly limited in amount, that limit usually exceeds the actual value of the debtor's property. As a result, no property is liquidated, and no distribution is made to creditors. These are called "no-asset" cases, and account for the bulk of personal Chapter 7 filings (Skeel 2001, 7).

Most Chapter 7 cases are resolved fairly quickly. A "first meeting of creditors" is held approximately thirty days after a new case is filed. The meeting has some of the characteristics of a formal judicial hearing but is held outside of the court and is presided over by a case trustee. The case trustee is a private attorney or other insolvency professional appointed by the Department of Justice to investigate the debtor's financial affairs, collect and liquidate non-exempt property, and supervise the claims process. Because of case volumes, most first meetings are over within minutes. In nearly all consumer Chapter 7 cases, the first meeting is the only formal contact the debtor will have with the bankruptcy system. In most cases, an order discharging the debtor from all of his financial obligations incurred prior to filing bankruptcy is entered about sixty days after the first meeting. Overall, the median duration of a consumer bankruptcy case in 2010, from filing to formal closing by the court clerk, was 120 days.[7]

Aside from discharge, the other, and most immediate, benefit to the debtor is the automatic stay of proceedings. The automatic stay goes into effect immediately when a new bankruptcy case is filed, without notice to any creditor, and halts any kind of action by a creditor to enforce or collect a debt or other financial obligation. A creditor or collector who knowingly violates the stay may be subject to sanctions, and actions taken in violation of the stay are void or voidable.[8] Creditors may seek an order from the court modifying the automatic stay in limited circumstances. Therefore, once the debtor files bankruptcy, the only remedy available to most unsecured creditors is to file a proof of claim with the bankruptcy court and share in any distribution that might be made in the case.

2. *Personal Bankruptcy: Chapter 13*

Chapter 13 bankruptcy is available to debtors with regular income. Debtors agree to use a portion of their on-going income to repay all or a portion of the debts over a three to five year period, during which time their financial affairs remain under the supervision of a case trustee (known as a Standing Chapter 13 Trustee).

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[7] Administrative Office of the United States Courts. 2010 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Washington, D.C.: U.S. Government Printing Office, 2011.

[8] For example, a lender that repossesses a motor vehicle from the debtor after bankruptcy without first obtaining court approval will have to return the vehicle to the debtor.

In return, Chapter 13 debtors obtain the benefit of the automatic stay and retain all of their property, even if it is valued higher than the exempt amounts allowed under the law. Therefore, Chapter 13 is sometimes an attractive option for debtors with substantial equity in their property, particularly their personal residences.

Payments are made according to a Chapter 13 Plan that is subject to review by the standing trustee and creditors, and which must be approved by the court. Debtors receive a discharge when they make all of the payments required under the approved plan. Debtors who fail to comply with the plan either have their cases dismissed, or converted to Chapter 7. Overall, 29.2% of the individual bankruptcy cases filed in the 12 month period ended September 30, 2011 were Chapter 13 cases.[9]

3. *Business Bankruptcy: Chapter 7*

For businesses like corporations and limited liability companies, Chapter 7 remains the basic form of bankruptcy. However, unlike individuals, business organizations neither receive a discharge, nor may they claim a portion of their property as exempt from liquidation. This is because bankruptcy law permits corporations and other business entities to either reorganize under Chapter 11 (see below) or liquidate under Chapter 7. In a Chapter 7 liquidation, the operations of the business cease when the bankruptcy case is filed. The bankrupt business' property is turned over to the court and is liquidated by the trustee. In addition, the

[9] Administrative Office of the United States Courts, U.S. Bankruptcy Courts–– *Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2011*, available at http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx (accessed January 6, 2012).

trustee may seek recovery of certain pre-filing payments made by the debtor to its creditors (known as avoidance actions in the Bankruptcy Code, but often described in media reports as "claw-back" actions). Any recoveries from those actions are added to the liquidation proceeds and are distributed to creditors according to the priorities established by bankruptcy law.

4. *Business Bankruptcy: Chapter 11*

Financially troubled businesses that do not wish to liquidate may seek relief under Chapter 11. Chapter 11 bankruptcy, known as reorganization, is the most complicated form of bankruptcy. Cases often stretch out for years before they are finally resolved.

Under Chapter 11, the automatic stay provides companies with breathing space from their creditors while their managers develop a plan of reorganization. The contents of the plan are regulated by statute and subject to approval by the court and acceptance of a majority of the debtor's creditors. Creditor acceptance is key. Therefore, much of management's efforts in a Chapter 11 case are directed toward negotiations with creditors. A plan of reorganization agreed to by a majority of creditors is likely to be approved by the court, sometimes even if it does not meet all of the statutory requirements. Alternatively, the court has the authority to approve a plan even when creditors do not accept it under a procedure known as "cram-down."

Chapter 11 provides major benefits to a reorganizing company besides debt reduction. Provisions of the bankruptcy code allow the courts to terminate the debtor's long-term contracts and obligations, including real estate and equipment leases, purchase contracts, and collective bargaining agreements. Hence, Chapter 11 has become a favorite restructuring tool of retailers and airlines.

As noted, businesses in Chapter 11 are usually run by their pre-bankruptcy managers. However, creditors may organize into formal committees with some oversight powers. Additional oversight is provided by the Office of the United States Trustee, a division of the Department of Justice (and different than Chapter 7 case trustees or Chapter 13 standing trustees). Despite the attention given to prominent Chapter 11 cases like Lehman Brothers, Enron, and General Motors, they account for a small number of overall bankruptcy case filings. According to the Administrative Office of the United States Courts, Chapter 11 cases accounted for only 11,979 of the 1,467,221 bankruptcy cases filed (0.8%) in the U.S. in the fiscal year ending September 30, 2011.[10]

Business reorganization law was overhauled in both the 1938 and 1978 reforms (the latter creating the modern Chapter 11 bankruptcy). However, the technical nature and limited scope of business bankruptcy means that it historically draws little attention outside of the narrow confines of the policy community. Personal bankruptcy, on the other hand, more directly provokes debate on questions of values and morality, and so lends itself to greater controversy. As a result, public debates about bankruptcy policy are mainly debates about personal bankruptcy.

E. A Brief Review of Major Bankruptcy Legislation

[10] *See* Footnote 9.

Article I, Section 8 of the Constitution authorizes Congress to enact uniform bankruptcy laws for the nation. Nonetheless, throughout the nineteenth century, efforts by Congress to pass such laws were controversial, and statutes enacted in 1800, 1841, and 1867 were very unpopular. Each was repealed; their aggregate duration was less than fifteen years.

National financial troubles in the late eighteenth century led Congress to narrowly pass the first national bankruptcy law in 1800. Cases under the law were limited to those filed by creditors against "merchant" debtors. There was no provision for voluntary bankruptcy filings. The 1800 Act was repealed in 1803. Presaging criticism to be leveled at later bankruptcy laws, opponents claimed, among other things, that the Act provided little real financial benefit to creditors.

Despite frequent economic downturns, Congress did not enact another bankruptcy law until 1841. Like many other issues of the antebellum period, bankruptcy legislation was caught up in the growing divide between the North and South and their conflicting concepts of national power. Uniform bankruptcy laws were favored on the whole by northern merchant and manufacturing interests but opposed in the southern agrarian states. However, in its early days, the United States' economy frequently swayed between periods of boom and bust, spurring efforts to adopt a national bankruptcy law.

The effects of the 1837 Depression induced Congress to adopt a new bankruptcy law in 1841. 33,000 Americans sought relief under the new law, which unlike the 1800 statute permitted voluntary case filings, yet like its predecessor it proved highly unpopular. High administrative costs again resulted in allegations of meager dividends for creditors, and challenges to the constitutionality of the law kept its legitimacy in doubt. The law was repealed in 1843 after being in effect for only 14 months.

Congress enacted another national bankruptcy law in 1867. Although the law achieved passage by only a two-vote margin in each chamber, it was initially well utilized. More than 25,000 cases were filed in each of the first four years following its enactment. Officers called registers (so named because debtors were registered as bankrupt once a district judge had adjudicated their petitions) performed the daily work of administering bankruptcy cases. However, unlike the referees or judges of later bankruptcy laws, registers had little judicial authority; that was granted to the district judges. Although the law was amended several times, the changes were inadequate to bridge factional divides. However, debtors and creditors were united in their criticism of the bankruptcy system's high administrative costs and low creditor dividends. The law was finally repealed in 1878.

The Bankruptcy Act of 1898 was the nation's first "permanent" bankruptcy law. In the absence of a national bankruptcy law, debtor-creditor relations were litigated in the state courts. The results were often unsatisfactory. Creditors raced to obtain court judgments so that they could be the first to seize the debtor's property. The process favored local vendors over interstate ones, and discouraged any of them from allowing their debtors to work out their financial problems. Moreover, although debtors' prisons had been long abandoned as a remedy for unpaid bills, many individuals lost their homes, farms, or businesses, and still were burdened with staggering debt that they had no ability to repay.[11] The Bankruptcy Act of 1898 addressed these dual concerns. Passage of the Bankruptcy Act of 1898 (the "1898 Act") is traced to the formation of the National Organization of Members of Commercial Bodies in 1880. That group lobbied Congress for a new bankruptcy law for eighteen years before finally finding success in 1898.

The law then enacted included many of the terms and procedures of the modern law. It provided for voluntary filings, dedicated bankruptcy tribunals, and generous provisions for discharge of personal debts. It lacked provisions for large business reorganizations or individual wage earner plans, like the current Chapters 11 and 13, respectively (*see above*).

By the early 1930s, these shortcomings, coupled with investigations revealing corruption in many bankruptcy cases and the effects of the Great Depression, led to a move to revise the 1898 Act. Those efforts began in 1932 but were not complete until 1938 (Chapter Three). The resulting legislation, named after its congressional sponsor, Representative Walter Chandler of Tennessee, made major changes to the Act, most notably the addition of the aforementioned corporate reorganization and wage earner sections.

As in 1938, it would be another forty years before federal bankruptcy law would again be substantially revised. In 1978, after approximately eight years of work, the Bankruptcy Act was completely overhauled and replaced by the Bankruptcy Code (Chapter Four). The Code included streamlined provisions for individual Chapter 7 bankruptcy cases, and all new rules for corporate

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[11] See Coleman (1974) for a detailed analysis of state debtor-creditor laws prior to the 1900s.

reorganizations (11 USC §§ 1101, *et seq*., commonly known as Chapter 11) and for individual wage earner cases (11 U.S.C. §§ 1301, *et seq*., known as Chapter 13).

Both the 1938 and the 1978 legislation were enacted with relatively little controversy. However, by the mid-1990s, a growing unease in Congress over ever-increasing numbers of new bankruptcy filings, support for financial deregulation, and a general social welfare policy retrenchment that emphasized personal responsibility combined to spur the introduction of legislation intended by its supporters to meliorate what they perceived as the existing law's pro-debtor tendencies (Chapter 5). Like the prior reforms, it took proponents several years to enact the new legislation. Unlike the previous two efforts, however, the new bill's new limits on consumer bankruptcy filers was extremely controversial, and it was enacted into law in 2005 only after four attempts over eight years. Although Congress has sole constitutional authority to enact bankruptcy laws, it did so only sporadically throughout the nineteenth century. Bankruptcy laws enacted in 1800, 1841, and 1867 were short in duration and generally unpopular. They were adopted in response to specific financial crises and provoked significant political conflict. The 1867 law, which was the most durable of the three and remained in place until 1878, was repealed amid charges of ineffective and corrupt administration. Although it was overhauled in 1978 (Chapter 4) and substantially amended in 1938 (this chapter) and 2005 (Chapter 5), the 1898 Act established the basic principles and procedures that still serve as the foundation for American bankruptcy policy.

CHAPTER TWO: FOUNDATIONS OF JUDICIAL POLICYMAKING IN THE BANKRUPTCY COURTS

The study of judicial politics has developed in ways that parallel public policy studies of the legislative and executive branches of government. However, despite such similarities, it has mostly been pursued as a distinct sub-field of political science, with its own concepts, models, and terminologies (Barnes 2007). Judicial politics' disciplinary isolation is partly due to its historic focus on the Supreme Court, which has led judicial scholars toward behaviorally based "attitudinal" models not commonly used in other areas of the profession. It is also partly due to the field's overlap with legal scholarship and the influence of the latter's persistent insistence that judges, particularly those on the lower courts, do not (or at least should not) engage in policymaking (Feeley and Rubin 1998). The result is that lower court judges' policymaking roles have mostly avoided rigorous attention.

However, in recent years, the study of judicial politics has experienced a surge as a new generation of political scientists has utilized contemporary institutional models to explain judicial policymaking and identify its legitimate place in America's constitutional structure of separated powers. This approach, which is identified as the interbranch perspective (Miller and Barnes 2004), is built on "a set of working assumptions about the nature of American policy making and politics, which provide an analytical foundation for building diverse research agendas on the courts and judicial decision making (Barnes 2007)." Its fundamental premise is that policymaking authority in the American system is constitutionally shared among the three branches, with central authority shifting across issues and over time.

However, despite the modest impact that its name implies, the interbranch perspective proposes a normative framework that places judicial policymaking firmly within the legitimate activities of the American policy process.

As stated above, this chapter's basic premise is that studies in judicial politics have developed separate from, but in important ways parallel to, studies in the area of public policy and more particularly policy implementation. The plan of this chapter is that it will first chart the development of the general implementation literature, followed by a description of the parallel course taken in judicial politics scholarship. Building on these sections, the chapter will proceed to a discussion of the general agenda setting literature, establishing a basis for development of a bankruptcy policymaking framework in the following chapters.

A. Policy Implementation: General Studies

The study of public policy encompasses three broad areas: formation, also known as policymaking; implementation, or the manner in which policy decisions are carried out;[12] and evaluation, or the assessment of the efficacy of implemented policies. Policy most basically is government's expression of what it intends to do or not do (Birkland 2001, 132). Anderson opts for a more limited definition. He defines policy as "a relatively stable, purposive course of action followed by an actor or set of actors in dealing with a problem or matter of concern (Anderson 2003, 2). Either definition is broad enough to not only include laws, regulations, and rules, but their implementation and enforcement as well.

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[12] Policy formation is further divided into multiple sub-categories, which will be described later in this chapter.

A comprehensive examination of the policy roles of lower courts must start by considering them as policy implementors. Lower court judges interpret and apply rules promulgated by legislatures or appellate courts. Although examples of judges making up their own rules are the stuff of popular debate and courtroom legend, they are also rightly described as idiosyncratic. The bulk of judicial policy making is interstitial, i.e., it happens when judges fill in gaps in existing rules, or it happens when judges extend existing laws to new or changed circumstances.

This part of the chapter reviews the implementation literature, with an emphasis on the parallel development of implementation models in general policy studies and judicial politics. The review serves two purposes. First, it advances understanding of the interbranch perspective through examination of the parallel challenges faced by general policy specialists and the similar approaches developed by scholars in both fields. Second, it establishes the basis for extending general policy formation models to the judicial politics field, thereby providing the means to address questions so far left unanswered by the interbranch studies.

1. *"Bottom Up" Implementation Approaches*

The original work on implementation was composed of case studies of the seeming failures of federal programs, most notably that of a Commerce Department economic development program in Oakland, California (Pressman and Wildavsky 1984). These studies were generally descriptive and not theoretical. However, one of their main contentions was that legislators and executive branch officials generally guaranteed the failure of their policies if they ignored the circumstances in which they would be implemented. This insight led to two divergent but more rigorous perspectives on implementation, commonly known respectively as the "bottom up" and "top down" approaches.

Bottom-uppers and top-downers share the observation that the way in which policies are carried out "on the ground" often deviate from their makers' intentions. From there, however, they diverge, particularly on the desirability of such deviations. Top down theorists see governments as hierarchical systems in which policy is made at the top levels and implemented at the lowest ones. In the ideal system, discretion is greatest at policymaking levels while implementors' actions are wholly ministerial. Top-downers argue against any normative role for variable implementation on the basis that policy deviations are anti-majoritarian because they undermine the decisions of elected officials and their duly appointed subordinates.

Bottom up advocates counter the top downer's normative argument with one of their own. They contend that local bureaucrats are better attuned to the circumstances "on the ground." Therefore, bottom up implementation is more effective because it allows policies to be tailored to the needs of their intended beneficiaries. Therefore, bottom uppers argue that effective policymaking should promote the participation of the policies' intended implementors (deLeon and deLeon 2002, 469).

3. *Top down approaches*

To no small extent, the difference between the bottom up and top down approaches is a matter of perspective. Advocates of the top down approach[13] share bottom uppers' concern that the policy formation process should take the role of implementors into account. However, top downers favor enacting policies that expressly constrain implementors' discretion by setting explicit implementation standards. Their fundamental premise is that variable policy implementation represents a failure of policymakers' intentions and, more fundamentally, a subversion of representative government.

The same hierarchical perspective lends the top down approach to a more orderly and rigorous examination than do bottom up perspectives. Mazmanian and Sabatier (1983) broadly group the challenges policymakers face in the implementation process into three categories: first, the amenability of the problem addressed to resolution; second, the degree to which policymakers' mobilize political support for their objectives; and third, their ability to formally structure institutions to influence the implementation process. The third category includes factors such as, *inter alia*, the clarity with which the policymaker communicates its policy objectives; policymakers' ability to persuasively connect the new policy to a particular cause or phenomena; the degree of hierarchical integration within and among implementing institutions; and implementing officials' commitment to policymakers' objectives (Mazmanian and Sabatier 1983, 25). Failure in any area is sufficient to thwart policymakers' intentions and enhance the likelihood that policy implementors would deviate from them. Although later scholars (including

[13] Other works and fields of study bodies variously identify the top-down approach as the "command and control" or "agency" models.

Sabatier) would reject their rigid hierarchal formulation, Mazmanian and Sabatier's empirical structure would influence later implementation perspectives, partly for its identification of elements in the implementation process, partly as a scholarly foil for future policy theorists, and partly because it captures the perspective many policymakers bring to the policy process.

3. *Hybrid or Synthesized Approaches*

The inability of either the top down or bottom up approaches to capture the full scope of the policy implementation process led researchers to propose newer multi-faceted models. These integrated, or contingency, models of policy implementation are based on the concept that different conditions require different implementation strategies (deLeon and deLeon 2002, 471). They combine various implementation modes within a single policy area, sometimes in the process blurring or eliminating distinctions between policymaking and policy implementation. According to Matland (1995), the venue (*i.e.,* unit of government) and manner in which a particular policy is implemented is a function of its broader political context. Specifically, the manner and venue of implementation correlates with two variables, policy conflict and policy ambiguity. Policy conflicts arise when two entities with incompatible objectives and views see a particular policy as affecting their respective interests. Ambiguity results from intentional and unintentional gaps in formal policy statements, unarticulated or compromised goals, or a disjunction between goals and means, where implementors lack the tools necessary to carry out policymakers' intentions. Using a contingency table (Figure 1), Matland identifies four implementing modes: administrative (low conflict and

Figure 2.1: Ambiguity-Conflict Matrix (Matland 1995, 160)

	Low Conflict	High Conflict
Low Ambiguity	Administrative Implementation *["top-down"]*	Political Implementation *[President, Congress]*
High Ambiguity	Experimental Implementation *["bottom-up"]*	Symbolic Implementation *[policy failure]*

ambiguity); experimental (low conflict, high ambiguity); political (high conflict, low ambiguity); and symbolic (high conflict, high ambiguity). The first two categories correspond to top-down and bottom-up implementation, respectively. Political implementation occurs at the highest levels of conflict when either the executive or legislative branches are led by highly publicized political factors to be actively engaged in policy implementation. According to Matland, outcomes at this level are determined by power (Matland 1995, 163). The White House's active involvement in the automobile industry bailout in 2009-10 is an example especially pertinent to this paper. The Obama administration, relying on a broad interpretation of TARP legislation adopted late in George W. Bush's second term, pushed Congress to authorize a bailout of General Motors and Chrysler Corporation, and then closely supervised the restructuring of both companies through a specially appointed "car czar." The administration also pushed for legislation called "cash for clunkers, " where the federal government subsidized new car purchases by consumers who traded in certain old, gas guzzling vehicles.[14] Because symbolic implementation

[14] The Troubled Asset Relief Program ("TARP") was enacted to bail out banks on the brink of financial ruin because of investments in mortgage-backed securities. Its

involves high levels of both conflict and ambiguity, it is the hardest to define, and it is commonly associated with policy failure (Matland 1995, 168).

To a large extent, Matland's specific categories are less important than his identification of multiple venues in which a given policy might be implemented, based in substantial part on the level of conflict surrounding the policy.

Sabatier's advocacy coalition framework takes the latter point further, and in the process blurs or even obliterates any distinction between implementation and the other stages of the policy process (deLeon and deLeon 2002). By the mid 1980s, Sabatier had abandoned the rigid hierarchical perspective that had marked his earlier work in favor of a model based on the policy subsystems described by Heclo (1978), Kingdon (1995), and others.[15] According to Sabatier,

> [U]nderstanding the policy process requires looking at an intergovernmental policy community or subsystem – composed of bureaucrats, legislative personnel, interest group leaders, researchers, and specialist reporters within a substantive policy area – as the basic unit of study. The traditional focus of political scientists on single institutions, or single levels of government, will help in understanding the effects of institutional rules on behavior and at times, in understanding specific decisions. But it is usually inadequate for understanding the policy process over any length of time . . . (Sabatier 1991, 148).

In Sabatier's view, implementation is therefore part of the larger policy process. His advocacy coalition framework is made up of (1) a policy subsystem or community consisting of public and private actors who compete to achieve their preferred

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application to the automobile manufacturers was highly political and led to one of the earlier battles between President Obama and congressional Republicans. For an account of auto bailout from the administrations point of view, see Rattner, Steven (2010). *Overhaul: An Insiders Account of the Obama Administrations Emergency Rescue of the Auto Industry*. New York: Houghton Mifflin Harcourt Trade. For a critical analysis of the program, see Zywicki, Todd (Spring 2011). "The Auto Bailout and the Rule of Law," *National Affairs*, 7:66-80.

[15] See below in this chapter for a discussion of policy subsystems.

policy goals; (2) external influences including socio-economic conditions, the effects of actions by other policy subsystems or broader governing coalitions; and (3) "stable system parameters" like constitutional rules (Sabatier 1991. 152-3).

Although the advocacy coalition framework risks ignoring implementation as a separate field of policy study, it places it squarely within the broader field of policy studies and, like the ambiguity-conflict model, identifies it as an explicitly political activity. Moreover, the ACF recognizes that policymakers' intentions are most likely to be realized when implementors are members of a long-standing and stable policy subsystem.

B. Judicial Policy Implementation

Political scientists have not generally drawn on the implementation literature for explanations of judicial activity.[16] However, comparisons of the two demonstrate marked similarities. Utilizing the descriptive framework from general implementation studies described in the preceding section of this chapter, this section will make those comparisons and establish the basis for application of agenda setting models to judicial politics.

1. *Bottom Up Policy Implementation and the Judiciary*

The bottom up approach's defining lack of standards hindered its acceptance by political scientists, including those focused on judicial politics. However, some of its central elements have parallels in other areas of judicial study. One example of this is the legal-sociological study of local legal culture. That doctrine merits some examination here because it achieved some prominence in studies of the bankruptcy

[16] The most prominent exception is Baum's adoption of Mazmanian and Sabatier's top down model (1976), discussed in Part 2 of this section.

courts in the 1990s, and because it highlights both the promises and shortcomings of applying bottom up approaches to the courts.

Sullivan, *et al*., defined local legal culture as “systematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality, and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal legal regime (Sullivan, *et al*. 1994, 804).” The authors identified and examined three types of local variation in consumer bankruptcy matters. They are (1) the debtor’s decision to file bankruptcy (in which the courts are not directly involved); (2) the debtor’s election to seek relief in bankruptcy under Chapter 7 or 13; and (3) the amount of pre-bankruptcy debt repaid to creditors, either through a formal process in Chapter 7 cases known as “reaffirmation,” or through a court approved plan in Chapter 13. Local geographic variations in these areas persisted uniformly over long periods of time, notwithstanding that the courts examined were enforcing the same national bankruptcy law, and despite relative economic similarities of debtors in the examined districts.

Instead, the Sullivan group argued that local variations in bankruptcy practice reflected the effect of actions of legal actors including judges, attorneys, case trustees and the local U.S Trustee. Based on interviews with such individuals in various districts, the authors identify day-to-day judicial activities other than formal opinion writing that affect bankruptcy policy in a particular jurisdiction.

For example, the question of whether a debtor elects to file a case under Chapter 7 or 13 appears on the surface to be a matter between attorney and client, subject only to statutory restrictions. However, Sullivan and her colleagues provide narrative evidence of the ways in which judges affect the local legal culture and influence that choice by making one or the other chapter comparatively more attractive to attorneys (Sullivan *et al*. 1994, 841). Those benefits and disadvantages are incorporated into the recommendations the attorneys then make to their clients. The authors cite the following examples as ways in which judges affect chapter choice (Sullivan *et al*. 1994, 844-5):

- Several of the described activities involved attorney fees. The court approves debtors' attorneys' fees in all cases. However, fees in Chapter 7 consumer cases are not scrutinized except in the most egregious circumstances; moreover, Chapter 13 cases are generally more time intensive than one under Chapter 7. Hence, many observers believe that the system provides an inherent bias toward Chapter 7 election. Higher fee awards in Chapter 13 cases act to counter such bias by making the cases more profitable for attorneys. The authors suggest that courts that routinely grant higher awards to debtors' counsel in Chapter 13 cases may be explicitly and implicitly promoting debtor election of the more complex chapter.
- More subtly, the authors observe that many judges have sought to streamline Chapter 13 procedures to make the cases less time-consuming for attorneys, with the result that attorneys in those jurisdictions view Chapter 13 as a more attractive alternative to Chapter 7

- Alternatively, the authors contend that some courts gave preferential scheduling to Chapter 7 cases, making Chapter 13 less attractive in those jurisdiction because of added waiting and delay.
- Judges who routinely approve only high distribution Chapter 13 plans while rejecting low ones effectively discourage Chapter 13 filings.

These examples demonstrate the myriad ways in just one narrow area in which bankruptcy judges can substantially affect consumer bankruptcy policy short of making formal case dispositions. Lopucki (1996) provides examples of how local legal culture is reflected in courts' formal decisions in both commercial and consumer cases, leading to diametrically opposed outcomes in similar cases across the country. By example, he cites the bankruptcy courts' varying acceptance of the practice of filing sequential consumer cases under Chapters 7 and 13, known euphemistically as "Chapter 20."[17]

Local legal culture models make important contributions to our understanding of the courts and their role in policy implementation. They demonstrate that localized judicial activities can have normative effects that are a potent form of policymaking. However, while the existence of wide variation in judicial implementation of the uniform national bankruptcy laws is widely acknowledged, explanations based on local cultural difference have not gained wide

[17] Debtors must fall within specified debt levels to qualify for Chapter 13 relief; on the other hand, it offers creditors fewer grounds to ask the court to except their claims from discharge. In certain circumstances, the debtor may first file Chapter 7 and then if left with any debt exempt from discharge, file a new Chapter 13 case that likely enables him to pay only a portion of the non-discharged debt over time. The procedure greatly benefited debtors with large unsecured debts and non-dischargeable debts, and is not expressly contemplated in the Bankruptcy Code.

acceptance. The most frequently made criticism is that explanations relying on legal culture identify differences but do not explain their sources. Alternatively, they share the fault of their better-known realist forebears, that they are ultimately so reductive as to lose analytical significance. Moreover, as Sullivan and her colleagues acknowledge, local legal culture models do not explain why judges in a single district might rule differently on similar issues (Sullivan *et al*. 1994, 841-2), or why judges' rulings deviate from expected results when applying some statutes but not others, or why local influences lead judges to rule in one way instead of another.

Moreover, while the variation identified by the legal culture scholars lends support to arguments treating the federal judiciary as a bottom-up system (at least in bankruptcy matters), the variability inherent in this and other bottom up approaches hinders empirical research of such models because it makes it difficult to gather, assess and compare data across policies or agencies. As a result, bottom-up implementation research lacks commonly recognized standards and relies heavily on case studies. Moreover, the bottom up model's emphasis on variation ignores the broader normative effects of implementing activities, e.g., the development of policy innovations in the courts and their diffusion across jurisdictions through reported decisions, conferences and journals, and appellate processes.

2. *Top Down Policy Implementation and the Judiciary*

Given the general understanding that there is no federal common law (*Erie Railroad v. Tompkins*, 304 U.S. 64 (1938)), scholars originally conceived the federal judiciary was as a dual hierarchical system, with the trial courts at the bottom implementing congressional statutes on the one hand and Supreme Court directives on the other. This perspective had profound implications for the study of judicial politics and continues to dominate law school curriculums. The study of judicial policy implementation evolved along similar lines as the general studies discussed above. Political scientists began to formally study judicial implementation to explain the failure of southern federal district court judges to follow the Supreme Court's desegregation rulings of the 1950s (*see* Murphy 1959). However, Baum (1976) was the first to apply specific lessons from public policy studies to the courts. Baum's concern is with lower courts' implementation of higher court decisions. His resulting model of judicial policy implementation is explicitly a "top-down" one that draws on the work of Mazmanian and Sabatier (Baum 1980). While Baum acknowledges that variation is inevitable in a system that conceptually separates policy-making from implementation, such deviation is considered to be undesirable. Multiple institutional factors contribute to variable implementation by the lower courts, including inadequate communication between judicial levels and the lack of effective sanctions within the judiciary. These combine with lower court judges' own interests, policy preferences, and perceptions of higher court authority to result in deviation from policies established in high court decisions.

However, Baum asserts that the instances when lower court judges deviate from policies established by senior courts are relatively low when compared to variation in executive branch bureaucracies. According to Baum, respect for authority is "unusually strong" in the federal judiciary, due in part to the normative role of *stare decisis*.[18] Respect for appellate authority is part of both legal culture but also the constitutional structure of American law and the common law role of precedent. An appellate court interpretation of a statute restricts the trial judge's own interpretive capacity, at least as concerns the particular application at issue in the appellate case. Therefore, the recognition of appellate authority provides "powerful cement" in the judicial system that is lacking in other bureaucratic systems (Baum, 1976).

Baum's application of the top down model of policy implementation to judicial politics was influential (see, e.g., Johnson and Canon 1984), and many of his insights retain considerable relevance more than three decades after they were first made. However, the limitation of the top down model is in its focus on only a portion of the activities of lower courts, i.e., implementation of Supreme Court decisions. In fact, federal trial-level courts (which include the district courts and bankruptcy courts) devote the bulk of their efforts to fact-finding and to interpreting and applying congressionally enacted statutes. While *stare decisis* may preclude lower court statutory interpretation on many issues, appellate courts review only a tiny fraction of the decisions made by trial-level judges, including those from bankruptcy courts. Moreover, virtually all federal cases originate in trial-level courts. Fact-finding is the exclusive function of trial courts in the federal system, and is rarely overturned on appellate review. In fact, despite rules of *de*

[18] Baum suggests that lower courts are similarly constrained, but legislators' common use of subjective and undefined terms like "abuse" provides trial judges with substantial latitude to depart from congressional intent.

novo review on issues of law, appellate courts often affirm trial courts' interpretation and application of statutes.

Only 793 of the 57,740 appeals instituted in all federal circuits (1.4%) in the 12-month period ended September 30, 2009 originated in bankruptcy courts. This in turn represents only a tiny fraction of the 1.4 million total bankruptcy cases filed in the same period. Therefore, in the federal system, higher courts do not review, or even supervise, the great bulk of bankruptcy court activity. Combined with the fact that many trial court decisions are affirmed, top-down approaches only describe at best a portion of the federal judiciary. Conversely, bottom up approaches do not account for conformity within the system.

3. *The Attitudinal Model*

The attitudinal model of judicial decision making merits attention, if for no other reason than to explain its unsuitability to understanding outcomes in trial-level courts. With their common focus on high court outputs, i.e., opinions, attitudinal explanations of judicial decision-making can in some ways be conceived as related to the top down model. However, while top down models have not been widely applied to the judiciary by political scientists, the attitudinal model has become the dominant model in the field. Although Supreme Court justices have long been characterized in political terms, the attitudinal model originated with Pritchett's study of the Roosevelt court (1948). Pritchett argued that Supreme Court justices are in fact political actors who decide cases according to their personal policy preferences, contrary to then-prevalent legal scholarship and the images the justices themselves sought to maintain. By the 1990s, Pritchett's perspective, bolstered by convincing arguments and empirical studies utilizing detailed databases, had become the dominant public law model of judicial decision-making (Segal and Spaeth 1993, 2002).

Proponents of the attitudinal model maintain that justices' policy preferences (*i.e.,* attitudes), as measured on a liberal – conservative scale, are the most important predictors of their judicial decisions. Those decisions are the product of the justices' interpretation of the facts of a case as filtered through their preferences. Legal precedents have no predictive value under the attitudinal model; proponents point to the fact that the authors of every Supreme Court majority opinion and dissent cite both texts (legal and constitutional) and extensive precedents to support their positions (Segal, Spaeth and Benesch 2005, 25-33)

Generalized versions of the attitudinal model dominate public and political discourse about the Supreme Court, and the development of more sophisticated applications have enabled the model to maintain its prominence in public law studies. However, while the attitudinal model dominates Supreme Court analysis in public law, and has found some application to the circuit courts of appeal (*see* Sunstein, *et al*. 2006), it has not been useful in the study of trial courts and is considered by some to be counter-productive to that end.

Early efforts to apply the attitudinal model to federal district court decision-making were ultimately found to be ineffectual and were abandoned in favor of different approaches (Carp and Rowland 1983; Rowland and Carp 1996). The problems are both methodological and conceptual, and as described by Kim, *et al*. (2009), derive from the fundamental differences between trial and appellate courts.

One important difference is that virtually every appellate case follows the same procedural path to a resolution, and is resolved by way of a single opinion entered at the end of the case. However, there are myriad ways for cases to proceed through the trial courts, many of which are determined by the litigants' choices and not the courts. Hence, the number of variables present at any given point in a trial court case are innumerable and frustrate comparison.

Methodology aside, the attitudinal model's broader limitation is its parochial outlook. Under the attitudinal model, judicial decision-making and policymaking are one and the same. By conflating decision-making, a personal or individual process, with policymaking, an institutional one, the attitudinal model reduces everything to the former and renders other perspectives irrelevant. The result has not only been the doctrinal isolation described by Barnes and a narrowed research agenda that excludes the bulk of activity in the federal judiciary, as discussed above, but also a research framework that all but precludes examination of the relationship between the judiciary and the other branches and delegitimizes judicial policymaking.

Therefore, the attitudinal approach is a methodologically and conceptually inappropriate method for understanding lower courts. Therefore, some judicial scholars have reconceived the study of lower courts in ways that draw from other doctrinal sources.

C. Interbranch Approaches to the Courts

Just as many general policy scholars moved to consider implementation in a broader context, some contemporary judicial politics scholars reconceived the judiciary and particularly the lower courts as integrated participants in the policy process. Commonly identified as the interbranch perspective (Miller and Barnes 2004), this institutionally-oriented viewpoint examines the role of the courts as one of three constitutionally empowered policy making centers in American government. The fundamental premise underlying this viewpoint is that power or authority over particular policies is dispersed across the government and its constituent parts. The interbranch perspective's power-sharing approach explicitly rejects traditional hierarchical policy-making models, particularly top-down ones, in favor of a constitutionally based, decentralized one: "No branch of government has the final say on the meaning of federal statutes or the U.S. Constitution. Instead, policymaking is best understood as an ongoing, interbranch dialogue, which is shaped by institutional, political, and strategic contexts (Miller and Barnes 2004, 5)."

1. *The Scholarship of Martin Shapiro*

The interbranch approach has its origins in the work of Martin Shapiro (Barnes 2010). Shapiro's studies of judicial politics, especially his early examination of the Supreme Court, develop two primary themes.[19] The first is the establishment of a concept of policymaking he identifies as "political jurisprudence" (Shapiro 1964a). The label describes an inclusive conceptualization of public policy in which courts are integral policymakers. Political jurisprudence is a considerable departure from political science's predominant treatment of the study of the courts as distinct from the political branches of government and separate within the

[19] Gillman (2004) provides an excellent overview and summation of Shapiro's work.

discipline. Shapiro argues that the distinctions are formalistic and artificial ones, because the courts, too, are political actors. "[T]he court is inside the political process. We have an Olympian judiciary. If it is to do anything, it must do it where the doing gets done, in the give and take of politics (Shapiro 1961, quoted in Gillman 2004, 364-5)." Therefore, Shapiro rejects traditional structural frameworks that segregate the courts from the other branches of government. Instead, he develops a policy-oriented conception of American politics in which the courts are one of several competing segments (Shapiro 1962). As summarized by Gillman, "Rather than talk (formalistically) about one nondemocratic branch of government and two democratic branches it would be more accurate to think about American politics as made up of 'many centers of decision-making' and then ask how courts fit into these competing power centers (Gillman 364)."

This reconception of the courts has significant consequences. "[T]he core of political jurisprudence is a vision of the courts as political agencies . . . any given court [can be] seen as part of the institutional structure of American government basically similar to such other agencies as the ICC, the House Rules Committee, the Bureau of the Budget, the city council of Omaha, the Forestry Service and the Strategic Air Command (Shapiro 1964a, 296-7)." This in turn leads Shapiro to re-describe much litigation as a political activity in terms drawn from David Truman's seminal work, *The Governmental Process* (1951), but which presage Lowi's later studies of interest group liberalism (1964, 1979). "His thesis . . . was that courts often have a clientele 'consisting of precisely those interests which find themselves unable to obtain representation from other agencies' (Gillman, 364, quoting from Shapiro 1961)."

Shapiro's formulation recalls Justice Stone's famous *dicta* in footnote 4 of his opinion in *United States v. Carolene Products* (1938), where he identified a particular role for the courts when dispossessed or disenfranchised minorities are unable to find redress for violation of their constitutional rights in the legislative or executive branches of government.[20] Shapiro's thesis recast that role in broader and more expressly political terms. Litigants have interests, and they seek recourse in the courts because they conclude that the likelihood of seeing their preferred policies enacted or enforced are better than in the other branches. American government is "an elaborate power structure in which groups seek advantage through maneuvering among various power centers" including the courts (Shapiro 1962). "As part of a governmental system designed to accommodate conflicting interests by allowing each access to and representation by some segment of the structure, the Supreme Court is therefore functioning properly when it acts as spokesman for an increasingly pressing political interest that can find no satisfaction elsewhere (Shapiro 1964b, 241)."

[20] Footnote 4 reads in relevant part: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities, [or] . . .*whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry* (304 U.S. 144 at 152 (1938); italics added)."

Shapiro's second theme, derived from his first and no less important, is that the Supreme Court can be studied using theories and methodologies developed in other area of American political study.[21] "Political jurisprudence is, among other things, an extension of the findings of other areas of political science by somehow integrating legal and judicial facets into the total picture of political life (Shapiro 1964a, 295)." In other words, by recasting the courts as political actors, judicial activity can be examined in explicitly political terms. Re-description, therefore, might lead to better understanding of judicial activity. For example, the doctrine of *stare decisis* is a fundamental principle of American jurisprudence that holds that "judges should look to past decisions for guidance and answer questions of law consistent with precedent (Hall 2005, 769). Under *stare decisis*, precedent is to be abandoned only rarely and instead should be observed in similar disputes. As a result, judicial policies tend on the whole to be fairly stable and normally evolve only slowly over time. In that sense, the judicial doctrine of *stare decisis* resembles the public policy concept of incrementalism (Lindblom 1959). Incrementalism is often described as a decision-making tool that promotes limited variation of existing policies (Anderson 2003). As with *stare decisis*, decision-makers view of a problem and the possible options available to address it are constrained by existing rules, institutions, policies, and traditions. Likewise, just as *stare decisis* promotes jurisprudential stability through consistency, so incrementalism promotes consensus by reducing uncertainty among policymakers, interest groups, and

[21] Shapiro's work focused on the United States Supreme Court. However, as both the discussion of the interbranch approach that follows and this dissertation makes clear, the principles are applicable to the entire judiciary.

others. These similarities suggest the possibility that public law scholars might gain new understandings of the role of stare decisis in judicial decision-making through use of the lessons learned from incrementalism and its related theories.[22]

According to Shapiro, the challenge for political jurisprudence specialists is the integration of judicial studies with the broader study of political science. Their segregation from the remainder of the profession is mostly self-imposed. Domestic public law scholars' focus on judicial behavior and constitutional law has led them to produce studies of little use or interest to other political scientists. Shapiro believes that their adoption of more generalized theories, models, and methods will promote acceptance by other members of the profession and better understanding of the role of judges and courts in every area of political study (Gilman 2004).

2. *The Interbranch School of American Public Law*

Taken together, the main themes underlying Shapiro's work reflect a commitment to the substantive and methodological integration of the judicial studies with the broader political discipline. That commitment is at the core of interbranch scholarship. The interbranch school is variously identified as a perspective, an approach, or a movement (Miller and Barnes 2004; Miller 2009). As described by one writer, it is "a set of working assumptions about the nature of American policy making and politics, which provide an analytic foundation for building diverse research agendas on the courts and judicial decision making (Barnes 2007)." These assumptions draw on Shapiro's basic framework and include the presumptions that (1) judicial decision-making encompasses policymaking; (2)

[22] For a similar analysis applying incrementalism to judicial decision-making, see Feeley and Rubin 1998, 297-335, and below in this text.

the courts legitimately share policymaking authority with the other branches of government; (3) policymaking authority is dispersed across and shifts within in the American political system; (4) policymaking processes are contextual and depend in part on the policy in question; and (5) variations in the number and nature of potential policymaking centers and the different means by which policymaking authority shifts between them requires multiple methodologies for the policy process to be fully understood. (Miller and Barnes 2004).

Moreover, unlike most public law studies, interbranch scholarship extends Shapiro's basic themes to the lower courts. Kagan (2004) groups judicial activities into two broad categories. The first encompasses the courts' role as boundary setter, exercising their judicial review powers to ensure that statutes and regulations pass constitutional muster and that the executive branch's rulemaking and enforcement activities do not violate due process. These activities typically fall within the domain of appellate courts, and have attracted most of the attention of public law scholars. Kagan's second category includes courts' role in adjudicating disputes over the meaning and application of statutes and regulations, and imposing sanctions on parties found to have violated them; i.e., judicial activities associated with trial courts.

Given the level of activity in the lower courts, the interbranch school's attention to them is a marked advance over other areas of judicial study. However, because nearly all lower court cases are in some way unique (Kim, et al., 2009), the level of complexity associated with their study is likewise increased. This situation leads to two dominant methodological choices in the interbranch approach. First, interbranch literature is policy-oriented, and describes both specific policy changes and the evolution of particular policies and policy areas over time. The second methodological choice is that interbranch scholarship typically examines entire cases; other branches of American public law focus on final decisions due to their overwhelming attention to high courts (Feeley and Rubin 1999, 29). As a result, the literature tends toward highly descriptive case studies.

3. *Select Case Studies*

Following Shapiro, the leading interbranch literature incorporates insights from other, non-judicial, branches of political science. Feeley and Rubin (1999) combine classic and incrementalist models of policymaking[23] developed in studies of administrative agencies to described the leading roles lower courts played in U.S. prison policy reform from the 1960s to the 1990s. Federal judges in Arkansas and Texas, responding to *pro se* petitions from prison inmates, took the lead in defining the problem and identifying the goal. The problem, as defined by district court judges in the mid-1960s, was that the methods and conditions of incarceration in the South diverged, often dramatically, from established and evolving standards in the rest of the country (Feeley and Rubin 1999, 157). It follows that their goal was to elevate Southern penal practices to equal those commonly accepted nationally, and which emphasized rehabilitation over punishment (Feeley and Rubin 1999,

[23] " [T]he best way to describe judicial policy making . . . is to rely on the familiar descriptions of public policy making by other governmental institutions, particularly executive or administrative agencies. The classic description divides the process into five discrete steps: defining the problem, identifying the goal, generating alternatives, choosing the solution from among these alternatives, and implementing the chosen solution. An alternative approach is to treat policy making as an intuitive, incremental process, where each step is based upon the decision maker's observations about the prior step's success (Feeley and Rubin 1999, 147)."

162, 252-8). As the authors describe, these courts became beacons of change. As judges in other jurisdictions learned of how their Arkansas and Texas colleagues defined problems and goals in their penal systems, they adopted their definition as the starting point of their own efforts to improve prison conditions.

Aside from its social and ethical merits, the rehabilitative model appealed to federal judges because it was already in place in the federal prisons. Therefore, Feeley and Rubin argue that the new prison policies imposed by the courts could be characterized as an incremental change because they were based on familiar and arguably successful existing policies (Feeley and Rubin 1999, 258-63). While that might be true with respect to the formulation of new policy options, the new policies as implemented nonetheless marked a major shift in the overall orientation of prison policy in the states.

Feeley and Rubin's analysis of prison policy is one of the earliest and fullest efforts to explicitly use major policy models to understand judicial policymaking in the lower courts. It is also typical of the research in the field, which shies away from quantitative analysis and instead favors the case study method used in policy literature (Feeley and Rubin 1999, 29). A recent effort in the same vein is Barnes' 2008 examination of the role of courts, particularly bankruptcy courts, in developing asbestos claims compensation policies in the 1980s and 90s. Barnes draws on Hacker's influential theory of drift (2004) as a starting point to describe how bankruptcy courts developed procedures for resolving growing numbers of asbestos claims in the absence of congressional action. The term "drift" describes the effects when "institutions and policies remain fixed while new risks emerge

(Barnes 2008, 636)." In other words, drift functionally changes policies without action that formally revises them.

According to Barnes, the combination of divided authority and economic dynamism combine to make drift a particularly potent factor in American politics. However, where Hacker describes drift as an endpoint in the policymaking process, Barnes argues that it can serve to stimulate venue shopping by entities seeking different outcomes. Alternate venues include the courts. Of course, this insight is not in itself new. Business owners in the early part of the twentieth century famously found relief in the courts from progressive labor regulation. The NAACP Legal Defense Fund redirected its efforts to the courts after southern committee chairs successfully blocked meaningful desegregation legislation in Congress, ultimately leading to the Supreme Court's decision in *Brown v. Board of Education*. Barnes' contribution, following Shapiro, is to examine such events in an explicit policy context, and particularly how they are played out in the lower courts.

Litigation by plaintiffs allegedly injured by asbestos exposure climbed from the mid-1970s and throughout the 1980s, overwhelming some courts and driving some manufacturers like Johns-Manville and their customers into bankruptcy. Numerous bills introduced in Congress to address the situation failed. Federal district court judges relied on multi-district rules to conduct consolidated pre-trial proceedings, and in some cases conducted group trials. Bankruptcy judges adapted existing bankruptcy statutes to create dedicated funds to pay asbestos injury claims in manufacturers' Chapter 11.

None of these procedural innovations were the result of statutory changes. Rather, judges both created and implemented these changes, acting on their own initiative or at the urging of litigants. Barnes highlights the Chapter 11 trusts as being most notable. The trusts, an extension of amendments to the Bankruptcy Code made in 1994, were incorporated into reorganizing asbestos manufacturers' plans of reorganization. They altered the nature of asbestos litigation in two major ways. First, they placed a cap on the reorganizing manufacturers' financial exposure on asbestos claims. Second, creation of a dedicated fund to satisfy those claims eliminated the need to litigate the manufacturers' liability. As a result, the highly inefficient tort litigation process, which drove the manufacturers into bankruptcy and resulted in relatively little compensation to victims, was replaced in the Chapter 11 cases with a more streamlined one of claims administration.

Explaining how relationships between American government's three branches change both across policy areas and over time is one of the interbranch school's critical missions (Miller 2009). The two studies discussed above demonstrate how policymaking authority can shift to the courts in the face of intransigence in the other branches (*e.g.*, state officials in the prison cases and Congress in asbestos litigation). These phenomena are of primary interest to general policy scholars through the agenda setting literature. However, agenda setting is given only brief mention in Barnes' study, and none in Feeley and Rubin's. A fuller integration of the two fields would promote better understanding of the role of courts in the policy process, not only in how they gain policymaking authority but how it shifts away from them to the other branches as well.

D. Agenda Setting

Notwithstanding the markedly similar developmental paths followed in the interbranch and implementation literature, interbranch scholars have not fully accessed the insights of general policy studies. In one common formulation, interbranch scholars describe the collective policymaking process as a "dialogue" (Miller and Barnes 2004), albeit a competitive and sometimes confrontational one. However, such classification is more descriptive than explanatory, giving the perspective indefinite contours. Examination of the policymaking "dialogue" within a broader policy framework would enhance the empirical value of the resulting research and advance the integration of judicial studies and the broader political science field.

1. *Policy Agendas*

The matter of how policy comes to be made in one venue rather than another is part of the well-developed body of agenda setting literature. An agenda is "a collection of problems, understandings of causes, symbols, solutions, and other elements of public problems that come to the attention of members of the public and their governmental officials (Birkland 2001, 106)." Cobb and Elder (1983, 14) refine the definition to "refer to a general set of political controversies that will be viewed at any point in time as falling within the range of legitimate concerns meriting the attention of the polity." Kingdon similarly defines an agenda as "the list of subjects or problems to which governmental officials, and people outside of government closely associated with those officials, are paying some serious attention at any given time (Kingdon 1984, 3)."

Cobb and Elder identify two kinds of agendas. The first is the systemic, or public, agenda. The systemic agenda "consists of all issues that are commonly perceived by members of the political community as meriting public attention and as involving matters within the legitimate jurisdiction of existing governmental authority (Cobb and Elder 1983, 85)." Systemic agendas tend to be general and abstract and include the wider universe of potential problems and solutions subject to governmental action. They are not by definition part of the formal policymaking process.

The other agenda, the institutional or formal one, consists of the matters given "active and serious consideration" by policymakers (Cobb and Elder 1983, 86). Actual policies, i.e., enacted laws, formal decisions, and the other things government actually does, are drawn from the institutional agenda.[24] Given the relatively small number of items actually acted on by policymakers, the major challenge to advocates of new policies is in moving those policies from the systemic to the institutional agenda. Alternatively, those who have already succeeded in gaining a place for their preferences on the institutional agenda will seek to preserve their agenda setting authority by blocking out challengers.

2. *Scope of Conflict*

Therefore, achieving and maintaining control of the institutional agenda is at the core of political activity. In pluralist democratic societies, control is properly viewed as the outcome of competition between interests. This insight is the

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[24] Kingdon (1984) additionally identifies a subset of the institutional agenda called the decisional agenda, which consists of those matters under active consideration by the policymaking body.

foundation of the work of E.E. Schattschneider (1960), on which all of the agenda setting literature is based. Schattschneider described how success in any policy dispute depends of the mobilization of parties to join the original disputants. He compared policy disputes to street fights. Just as the loser in a street fight can appeal to bystanders to join him in the brawl, and thereby improve his chances of prevailing, policy disputes frequently turn on the ability of advocates to gain allies and shift the balance of power in their favor. According to Schattschneider, advocates for policy change generally seek to expand the scope of conflict to add participants; the greater the success at mobilizing new participants, the more likely policy change will occur. Conversely, dominant actors generally act to restrict participation, since low levels of mobilization favor entrenched monopolies and established policies (Cobb and Elder 1983).

Schattschneider was mainly concerned with mono-dimensional policy disputes, i.e., those in which policy contestants appeal to a single authoritative venue. Later studies built on his work to describe how policy is made when multiple venues can lay claim to policymaking authority. Heclo (1978) recognizes that multiple venues in the American policy system give rise to diffuse issue networks, components of which may operate in concert or in conflict. Baumgartner and Jones (1991) observe that particular policy disputes can be decided in any of the venues within an issue network. Because conflict can originate from any of the venues within given policy network, advocates of a particular policy may expand the scope of conflict to include venues in which they are most likely to find success. The relative advantage of any particular venue depends on a combination of formal factors (laws, institutional structures) and informal ones (politics, resources).

The agenda setting models provide the explanation of how policymaking authority shifts within the American political system. One of the key questions raised in those studies is how courts rather than legislators or bureaucrats come to make policy on a given matter. Once the courts are identified as one of several venues within an issue network, the framework for understanding how they gain and lose policymaking authority falls into place. For instance, a group seeking to advance a new policy may have the option of pursuing change in congressional, administrative, or judicial venues, but will choose to litigate because the relevant congressional committees and administrative agencies are dominated by supporters of existing policies. On the other hand, other interest groups may find that their resources are best utilized seeking legislative change.

3. *Issue Definition and Policy Images*

Of course, not all issues are on their face equally accessible to every venue in a given issue network. For instance, in order to successfully appeal to the courts, policy proponents must cast their issues as legal or constitutional ones and not political matters. Baumgartner and Jones describe issue definition (also known as "framing") as central to the agenda setting process. In Schattschneider's oft-quoted formulation, "the definition of alternatives is the supreme instrument of power (Schattschneider 1960, 66)." Issue definition provides the link between substantive ideas and conflict expansion (Baumgartner and Jones 1994, 11).

However, definition alone is insufficient to elevate issues to the institutional agenda. Instead, definitions must align with other factors. According to Kingdon (1984), agendas change when policy "streams" converge to form what he calls a policy "window." Kingdon's three agenda setting streams include problems, proposals, and politics. The problems stream includes matters on which policymakers might act.[25] The proposals stream consists of the possible solutions to the problem. The political stream is the most unpredictable and includes factors like election results and administration changes, shifting public opinion, and interest group influences. Issue definition has a role in all three streams but is most prominent in the problems and proposals ones. In politics, the suitability of any given solution is due in large measure to how the problem is understood. Partisan debates over the effects of regulation are an example that runs throughout contemporary American politics. Democrats tend to identify problems like the mortgage crisis and rising health care costs as market failures that cannot be remedied without vigorous regulation of the private sector. Republicans, on the other hand, see government activity as the culprit and advocate cutbacks. However, neither side will see its preferences become official policy absent favorable political alignment.

4. *Policy Images and Policy Monopolies*

Successful issue definition is foundational to new policies and essential to their continuing viability. In this phase the issue definition becomes the "policy image" (Baumgartner and Jones 1993). A dominant policy image is critical to policy

[25] The policy stream is sometimes identified as the "issues" stream.

stability, which is strongly associated with policy monopolies. Policy monopolies are informally organized groups of bureaucrats, congressional committee members or their staffs, and interest groups that dominate policymaking in a given area.[26] Monopolies dominate policymaking in their given field for long periods of time, even decades. Existing members tightly control entry access to the policymaking process. Such control promotes minimal change, and hence policy stability.

Therefore, in addition to a dominant policy image, policy monopolies are characterized by well-defined institutional structures. Structures are maintained by restricting participation. Monopolies built on complex or technical policy images can most easily limit participation. Conversely, social images are associated with expanded conflict. Therefore, advocates for change are most likely to find success if they define their preferences in those terms. However, positive issue definition is usually insufficient to displace an existing policy monopoly; advocates for change must also discredit the existing monopoly's policy image. In fact, Baumgartner and Jones conclude that Congress generally responds only to negative characterizations of existing policies (Baumgartner and Jones 1993, 101).

As a result of this process, policy monopolies are not easily displaced. Major policy change can occur during periods of stability, but any change remains true to the monopoly's underlying policy image, and existing institutions endure and are even enhanced. However, while change advocates may toil for long periods, policy monopolies tend to topple quickly. Baumgartner and Jones describe this process as "punctuated equilibrium."

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[26] Policy monopolies are discussed in further detail in the next chapter.

The policy process is cyclical. As conflict expands, it displaces existing institutions, clearing the way for the eventual establishment of new ones. New institutions are structured; those best able to define their policy agendas become monopolies that provide preferred access and influence to those who help establish them.

Agenda setting provides the link in the integrated implementation models between the various policy entities and explains how their formal roles are blurred. In Matland's ambiguity-conflict model, conflict is not merely an independent force. Interested parties and policy entities themselves recast implementation issues to gain the attention of and direct authority to their preferred venue in hopes of maximizing or minimizing the effects of particular policies. The advocacy coalition framework recognizes even fewer functional distinctions between formal entities; formally designated implementors are understood to be de facto policymakers. Whether and how they act as such is again a function of the agenda setting process.

And so it goes with courts. Once the Shapiro/interbranch description of the courts as political entities is accepted, it follows that they are part of the agenda setting process. Moreover, they participate both as preferred destinations for policy advocates, and as active agenda setters themselves. Therefore, they can play active roles in creating and maintaining policy monopolies that structure policymaking around legal and technical policy images. Furthermore, these judicial monopolies are in no way neutral, but instead favor access and outcomes consistent with their underlying policy image. Because these monopolies are difficult to displace, opponents of existing judicial policies must either seek help from other policymaking entities, particularly Congress, or redefine issues to gain access to other agencies or entities.

E. Chapter Summary

Traditional separation of powers models maintain that policy is made by Congress and implemented by either the bureaucracy or the courts. Contemporary scholars reject those rigid distinctions in favor of a more dynamic view of the policy process. Review of the general implementation and judicial politics literature demonstrates that they have evolved along similar lines, with each concluding that entities traditionally viewed strictly as implementors are in fact active policymakers. Students of judicial politics have long recognized that courts, including lower level courts, are active policymakers, both overtly, through formal dispositive decisions, and less explicitly, through their interpretation and application of statutes.

Explanations of how courts gain policymaking authority within the American system are found in the agenda setting literature. By defining issues to attract or limit attention to their preferences, policy advocates structure them in ways that favor particular venues. Successful agenda setting efforts give rise to stable structures called policy monopolies. American bankruptcy policy provides a compelling example of how agenda setting process plays out across a single issue. Although originally conceived as adjuncts of the federal district courts, bankruptcy judges (or referees, as they were known until 1973) joined with other specialists by 1930 to form what will be described here as the bankruptcy policy community. The community dominated policymaking both in and out of Congress throughout the remainder of the twentieth century. The core principle of this monopoly was contained in its policy image, and is commonly known as the “fresh start.” The fresh start encompasses broad elimination of debts with generous provisions allowing consumer bankruptcy filers to keep all or most of their property notwithstanding those debts. However, by the last decade of the century, creditors argued that rising consumer bankruptcy filings reflected an abuse of the fresh start. By reframing the question in terms of the socially and political appealing matter of personal responsibility, advocates for more rigorous consumer bankruptcy laws were able to break the community’s hold on policy and instead draw members of Congress directly into the policymaking process. Ultimately, despite vigorous opposition from the community, creditor interests successfully saw their preferences become law in 2005. The next two chapters will trace the development of the bankruptcy policy community through two major legislative enactments in 1938 and 1978, paying careful attention to the role of the judiciary. The chapter following those will describe how proponents of reform fundamentally reframed central bankruptcy policy issues to draw Congress’ direct attention and overcome the community’s dominant influence. Relying on that analysis, the next chapters will describe and examine a comprehensive framework of American bankruptcy policymaking that fully takes into account the dual roles of bankruptcy judges in that process.

CHAPTER THREE: BANKRUPTCY POLICY REFORM IN THE 1930s - Conflict Containment and the Origins of the Bankruptcy Policy Community

As described in the preceding chapter, one of the fundamental premises of policy studies is that the bounds of policymaking authority are not rigidly defined in the American system. Instead, policymaking on a specific issue can often be might come from multiple sources, or venues, any one of which might be dominant at a given point in time. The volatility associated with venue competition is tempered over the long term by the emergence of stable policy subsystems. Policy subsystems may dominate policymaking in a given field for long periods of time, even decades. As explained in the preceding chapter, such domination is the function of conflict management, which in turn is the product of successful issue definition.

The emergence of a bankruptcy policy subsystem in the 1930s is a classic example of how a small group of policy specialists employed the tools of conflict containment to gain near exclusive control of policymaking authority from Congress and then consolidate that authority so that it lasted for more than sixty years. This chapter examines the origins of the group, explains how it gained dominant status, and describes its impact on 1930s bankruptcy reforms. The next chapter will explain how, as a mature monopoly, the group used its status to completely rewrite the bankruptcy laws according to its own preferences.

A. Policy Communities and Policy Monopolies

Political scientists generally describe stable policymaking processes in a given field as being dominated by a narrowly drawn collection of highly interested specialists. Participation in these groups crosses formal lines of authority and is organized around particular policies or programs. Political scientists propose various models to describe these entities. One of the oldest describes the policymaking structure as an iron triangle. The three "corners" of an iron triangle include (1) representatives of a regulated business, activity, or other endeavor; (2) the administrative agency charged with regulating that endeavor; and (3) members of Congress keenly interested in the regulated endeavor, often the chairs of affected committees or subcommittees (Birkland 2001, 96).

Despite its rigidity, the iron triangle model can be a fairly accurate description of the policy making process in a number of policy areas, particularly those in which policies are mature and stable. However, the model by itself does not adequately capture the dynamic policymaking processes described by Baumgartner and Jones (1993). As a result, political scientists employ broader, more flexible concepts to describe policymaking structures. Cobb and Elder (1983, 4) describe these entities as systems of limited participation, based on their dominant functional characteristic, that is the limitation of decision makers' consideration of new issues and policy solutions.

Thurber (1991) refers to such groups as policy subsystems. Policy subsystems are "decentralized power structures with close informal communications among their participants (Thurber 1991, 324)." Unlike political parties, the subsystem's focus is limited to efforts to influence particular issues and policies in a single policy domain. Hence, the concept is similar to other policy-centered constructs like Heclo's issue networks, Sabatier's advocacy coalition framework,[27] and Kingdon's policy communities. Each of these models shares the idea that policymaking is substantially influenced by highly specialized groups outside of formal lines of authority. However, each term has a meaning and usage slightly different that the others. Some of them are subject to varying use in the literature.

One such term is "policy community." As originally used by Kingdon, it refers to "specialists in a given policy area . . . scattered both through and outside of government . . . [who] have in common their concern with one area of policy problems (Kingdon 1984, 123). Although it includes members of the government, Kingdon's community mainly operates separate from formal political structures (1984, 124). Instead, the community works to advance policy options from the systemic agenda to the formal agenda, i.e., those options actively considered by formal policymakers (Cobb and Elder 1983).

Birkland' view of the policy community is closer to Cobb and Elder's system of limited participation and includes policymakers. He describes a policy community as "those actors who are actively involved in policymaking in a particular domain. This is a small subset of people that could possibly be involved in an issue (Birkland 2001, 95)." Policy communities vary in the level of participation they permit. Birkland describes both iron triangles and Baumgartner and Jones' policy monopolies as closed policy communities. Baumgartner and Jones(1994) and Wilson (2000, 249) distinguish policy monopolies from other

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[27] See Chapter Two.

policy communities based on the former's dependence on a dominant policy image.[28]

Both "policy community" and "policy monopoly" describe what Thurber (1991, 327) calls dominant policy subsystems, *i.e.,* "relatively stable communications and decision-making clusters with a small number of participant who significantly influence and often control government programs or issues." However, in the analysis that follows, the term policy community will be used more generally to describe the bankruptcy policymaking subsystem, while policy monopoly will be limited to the meaning given it by Baumgartner and Jones (1993) and will be applied to the subsystem during its period of dominance from the 1930s through the mid-1990s.

As this and the following chapter will describe, from the 1930s to the mid-1990s, bankruptcy policy in the United States was monopolized by a small group of lawyers and legal scholars, on the one hand, and judges (identified until 1974 as referees-in-bankruptcy) on the other. Congressional participation in the community was not constant but was instead limited to those members needed to enact new legislative reforms. Otherwise, the community only grudgingly conceded

[28] Wilson (2000) synthesizes the various approaches into a single model of dominant subsystem policymaking he calls the policy regime. Unlike other models, Wilson's policy regime classifies the policies promulgated by the subsystem as part of the regime itself, rather than as a product of the subsystem. This appears to be an effort to accommodate the feedback mechanisms described as policy learning in the advocacy coalition framework (Sabatier 1988). It necessarily follows from Kingdon's policy streams (1983) and Baumgartner and Jones' (1994) punctuated equilibrium models, that successful policies reinforce the subsystems that promulgate them while unsuccessful ones will ultimately lead to the monopoly's undoing. However, to think conceptually of policies as parts of the regime rather than its products is analytically difficult.

policymaking influence on specific issues in order to retain their broader control of the domain. The referees occupied a unique role in the community, acting as policymakers in their traditional adjudicative roles, but also as policy entrepreneurs and advocates, sometimes in their separate capacity and at other times as members of the professional group. This chapter focuses on how a movement for major reform of U.S. bankruptcy laws in the 1930s led to the monopoly's rapid rise and laid the foundation for its sixty years long period of policymaking dominance.

B. The Reasons for Bankruptcy Reform in the 1930s

By the early 1930s, the Bankruptcy Act had been in effect for more than thirty years. Overall case filings fluctuated between 13,000 and 27,000 annually in the first twenty years after the law became effective in 1898, but new cases increased past the 40,000 mark in 1923 and by 1930 they had reached 63,845 (Attorney General of the United States, 1899-1930).

The upsurge of cases by 1930 was due to the effects of the Great Depression, which added dramatically both to the number of business failures and the number of individuals seeking bankruptcy relief. Part of the challenge was structural. As established under the Bankruptcy Act, the bankruptcy courts did not have a national administrator or supervisory authority. Instead, referees-in-bankruptcy (as the judges were identified until the 1970s) were appointed by, and were responsible to, the chief judge of the federal district in which they sat. However, district judges often paid little attention to the operation of the bankruptcy courts, leaving responsibility for their administration to the referees whenever possible. Moreover, there were no uniform rules of bankruptcy procedure; in practical effect, referees had broad discretion over the administration of cases in their own courts. Predictably, the quality of administration varied widely across the country, and in many jurisdictions was considered shoddy or even corrupt.

The number and complexity of the new cases magnified the inefficiency and other shortcomings in some courts, adding to the disparities in bankruptcy case administration across the country. The National Association of Referees in Bankruptcy was organized in 1926. The organization sought to improve the quality of bankruptcy administration and the reputation of the bankruptcy courts through the exchange of information and the promotion of uniform methods and standards. Membership in the association was voluntary, and many referees chose not to join. Nonetheless, the group sought to make significant contributions toward improving the overall quality of case administration through dissemination of data, case developments, and policy initiatives at its annual conference and through its publications.

The other systemic challenge to the bankruptcy system also resulted from the design of the 1898 statute. As originally enacted, the Bankruptcy Act did not include provisions to reorganize large corporations, the equivalent of the modern Chapter 11. Railroads, large manufacturing concerns, and commercial real estate owners were restructured in loosely defined state and federal court actions known as equity receiverships. Then (as now) the major business restructurings took place in Manhattan, regardless of the location of the debtor's business. However, by the 1920s, the New York receivership practice had gained a reputation for corruption and cronyism through the operation of "bankruptcy rings." An investigation requested by the Association of the Bar of the City of New York, the New York County Lawyers Association, and the Bronx County Bar Association and conducted under the supervision of federal district judge Thomas Thacher resulted in a prominent report that revealed the extent of malfeasance among the New York receivership bar;[29] a second report, conducted by Thacher after he was appointed Solicitor General of the United States, identified similar "rings" in bankruptcy courts throughout the country and went further to detail proposed reforms.

While these investigations resulted in some prosecutions, the main effects were legislative. A bill incorporating the Thacher investigation's proposed reforms was introduced in the Congress in 1932. Among its key provisions was a proposal to change bankruptcy administration from a legal process to a bureaucratic one administered by a new federal executive branch agency. Such a move would have dramatically curtailed the need for referees and reduced the work available for bankruptcy lawyers. Not surprisingly, professional legal groups and the referees opposed the change. They were not in general opposed to reform. Instead, when hearings on the new legislation began in 1932, lawyers proposed many of their own amendments to the national bankruptcy law while defending the current system's basic structure. Their efforts would result in a dramatic shift in the way bankruptcy policy would be made for the next sixty years.

C. Agenda Setting and Bankruptcy Reform: Limiting Access

[29] This report is often identified as the "Donovan Report," after the bar groups' lead investigator, William Donovan, later founder of the Office of Strategic Services, or OSS. The report detailed the operation of tight associations, or rings, of receivership specialists, who controlled most of the cases and benefited from large fee payments for their work in them. Such cases often resulted in little recovery for general creditors.

Therefore, the move for bankruptcy reform in the early 1930s was driven by a number of factors. The most public ones were the demands for congressional action to address the effects of the Great Depression and the systemic problems reported by Solicitor General Thacher and his commissions. The other force for reform was the recognition, mainly by policy specialists, that the Bankruptcy Act's thirty-plus year old provisions were in need of substantial changes. Because this issue was more technical than the others, it drew less attention from Congress. The bankruptcy policy community's first accomplishment was its redirection of congressional attention from the public issues to the technical ones. This re-characterization of reform was essential to the policymaking dominance the community achieved in the 1930s.

1. *Limiting Access: Technicality as a Policy Image*

The community was mobilized by a proposal that many of its members perceived as a threat not only to the existing system of bankruptcy administration but also to their own livelihoods. The Thacher reports, the second of which was issued in 1932, called for replacement of the bankruptcy courts with a national bankruptcy administrator. Bankruptcy matters would be handled by an executive branch agency in an administrative proceeding under the proposal.[30] The agency proposal was at the core of the new legislation. The judiciary committees of both houses met as a "Joint Subcommittee of the Committees on the Judiciary" and held extensive hearings on the bill beginning in late April 1932, and proceeding throughout the following month. The portion of the bill establishing the new

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[30] Bureaucratic bankruptcy systems predominate in the rest of the world and had been used in England since the 1880s.

bankruptcy agency garnered the most attention from witnesses. Most of the groups represented at the hearings, other than lawyers, favored creation of an administrative bankruptcy agency. This faction included creditor trade groups, most prominently local chapters of the National Association of Credit Men, which was the nation's largest association of general trade creditors. They emphatically favored the bill and its conversion of bankruptcy into a bureaucratic system. The American Bankers Association was less vocal but likewise supported the legislation (Skeel 2001, 91).

Lawyers and referees understandably opposed the proposed agency, fearing that it would result in a loss of their livelihoods. They were quite explicit on this point, at least among themselves. A letter circulated to attorneys on behalf of a new organization that called itself the National Association of Federal Practitioners[31] stated:

> Should the measure pass, not only would the administration of bankruptcy estates become distinctly political and under bureaucratic domination, costing the taxpayers millions of dollars annually, but the rights of citizens and indeed their liberty, including wage earners unfortunate enough to become bankrupts, would be seriously affected, while lawyers would practically cease to function in such cases. (1932 Hearings, 734).

Such arguments were not likely to sway Congress, and were susceptible to characterizations that the lawyers were acting out of self-interest. Instead, the theme underling the testimony of various lawyers before the joint subcommittee

[31] This organization should not be confused with the Federal Bar Association. Jacob Weinstein, a Philadelphia lawyer, appeared on behalf of the group. His testimony indicates that the organization was formed specifically to oppose the Hastings-Michener Bill. The group does not seem to have caught on. Although Weinstein would be one of the most important participants in the National Bankruptcy Conference, no further mention of the National Association of Federal Practitioners appears in the literature.

was that the bankruptcy system was in need of some modifications but that it generally worked quite well. Explicit in the testimony was the argument that bankruptcy was a legal matter to be handled by courts and lawyers, not bureaucrats. Jacob Weinstein, testifying at a hearing before the Senate Judiciary subcommittee on May 24, 1938, said:

> We have no hesitancy in saying that we think that the present bankruptcy act is as magnificent a piece of legislation for its subject as any that has been enacted anywhere by any country, and that is barring none. Experience, of course, sometimes will disclose things that nobody who prepares or molds the law can anticipate, and like changing conditions which have taken place in the last 20 years, have disclosed that in some respects the act may be strengthened, in our judgment, principally in procedural respects.
>
> We do not think that the present bill accomplishes that purpose; on the contrary, we think it only distorts the present act and will only create many abuses. (1932 Hearings, 735).

The joint subcommittee was already backing away from the administrative option by the time Weinstein testified. Moreover, having opened the door to wider conflict by scheduling extensive hearings, it displayed doubts about many other key provisions of the legislation, particularly new amendments concerning business restructuring. The subcommittee's ambivalence, particular that of its chairman, Senator Bratton of Oregon, and of Senator Hastings himself, came to fore early in the hearings during the testimony of Jacob Lashly, chair of the American Bar Association's bankruptcy committee. Lashly, a prominent St. Louis lawyer who would head the ABA in 1940-41, spoke to the subcommittee for two days, May 4 and 5, 1932, during which time he both provided committee members with a broad examination of practices under the Bankruptcy Act and in addition offered a detailed critique of the proposed amendments. Most significantly, both in terms of the content of his testimony and the authority he exhibited, he reinforced the image of bankruptcy as a complex, law-based system best left to legal professionals.[32] Adoption of bureaucratic system in its place would, according to Lashly, be hazardous, even chaotic. On his first day of testimony, Lashly told Senator Hastings and the Senate subcommittee:

> We feel that there would be considerable hazard in this time of industrial depression and economic disturbance to enact a revolutionary, in some respects, system of bankruptcy, in the process of which a great many of the old, well understood, forms of procedure are rejected[33] (1932 Hearings, 477).
>
> [T]he American Bar Association . . . have the feeling that the bankruptcy law . . . is a sound bit of legislation, perhaps as sound, generally speaking, as any other nation-wide system of jurisprudence which we have in effect in this country . . . We take the position that our bankruptcy law is sound in its conception, that it has made a tremendous contribution to the commercial and economic life of the country, and so we start with this premise – that this law must not be rejected for any projected experimental substitute system, but that all that is good in the law and all that is found to be sound in the main . . . ought to be preserved, and moreover, that the experience of the country of 33 years and more of this law ought not be scrapped, and that the precedents and the judicial decisions through which rules of law and interpretations and application of law have been builded up by the courts of this country ought to be preserved (1932 Hearings, 484-5)."

The National Association of Referees in Bankruptcy credited Lashly's testimony as the most important factor blocking approval of the proposed bankruptcy legislation (Journal of the National Association of Referees in Bankruptcy 1938, 125). That testimony, which stretched over two days and included detailed analyses of the existing law and the proposed amendments, crystallized opposition to the proposed legislation. By the time he concluded, Lashly

[32] Lashly's obituary in the New York Times quoted an associate's description of him as "a man with a piercing look who was skillful at eliciting information from witnesses" and "who spoke eloquently with a careful, literary turn of phrase . . . . (New York Times, October 3, 1967)."

[33] The other countries had administrative-based insolvency systems.

had convinced the subcommittee's members not only that the proposed revisions were ill conceived, but also that bankruptcy law was so complex and technologically challenging that only bankruptcy professionals should undertake its revision.

Therefore, as Lashly's appearance neared its end, Senators Hastings and Bratton, the subcommittee's chairmen, invited him and his colleagues on the ABA's bankruptcy committee to prepare and submit to the subcommittee their own changes to the bankruptcy laws:

> Senator Hastings. You are not in sympathy with this act in any particular. You did suggest, however, in two particulars the bankruptcy act might be amended with respect to the composition, which would leave it to the referee instead of the judge, and with respect to leaving the discharge for the referee instead of the judge. I am wondering if it would be too much to ask of your committee to submit to this committee in writing such proposed amendments to the bankruptcy act as you would be willing to sponsor.
>
> Mr. Lashly. We would be very glad indeed to do that.
> . . .
>
> Senator Bratton. I want to join the chairman in extending an earnest-invitation to your committee to furnish us a bill that would carry into effect the views of your committee . . . Would it be too much for your committee to draft and submit to us a proposed omnibus bill, if I may call it that, which will accomplish the results which you and your committee have in mind?
>
> Mr. Lashly. It would not be too much, Senator Bratton; on the other hand, we would feel complimented to be intrusted [*sic*] by your invitation with that work . . . Our own idea about the matter is that the present law is a sound fundamental principle; that it has earned the sanction of the country for the work it has performed in more than 33 years; that a great system of precedents and adjudicated cases has been built up on this foundation, and we would rather by a gradual process improve the operation of the law as it stands in ways that will not find us rejecting the experience of the past or turning away from our written law and adjudicated decisions . . . (1932 Hearings, 515-16).

This exchange is remarkable several reasons. First, the committee chairmen are rejecting their own bill. Second, they readily delegated drafting authority to an outside party. Third, they not only succumbed, but readily endorsed the implicit theme of Lashly's argument, namely that bankruptcy is a highly technical area of law that is best left to specialists, both to create laws and to administer them. Most remarkably, the exchange between Lashly and the senators is a clearly documented example of conflict containment resulting in the creation of a policy monopoly.

As Baumgartner and Jones (1993, 7) explain, the successful establishment of a policy monopoly depends on creation of a defined structure that limits external participation. Complex or technically defined issues are most likely to frustrate agenda access (Cobb and Elder, 98-99; Baumgartner and Jones 1993, 41). Therefore, members of the status quo commonly define policies in technical terms in order to maintain their dominance of the policy (Pralle, 17).

Issues that can be defined as legal problems are especially susceptible to complex and technical definitions. Tocqueville described the special status of lawyers this way:

> The special information which lawyers derive from their studies ensures them a separate station in society, and they constitute a sort of privileged body in the scale of intelligence. This notion of their superiority perpetually recurs to them in the practice of their profession: they are the masters of a science which is necessary, but which is not very generally known; they serve as arbiters between the citizens; and the habit of directing blind parties in litigation to their purpose inspires them with a certain contempt for the judgment of the multitude (318).
>
> [T]he English or American lawyer resembles the hierophants of Egypt, for, like them, he is the sole interpreter of an occult science (322).

Even within the various fields of law, bankruptcy is particularly susceptible to narrow, technical definition. Like its courts and judges, attorneys who practice bankruptcy law tend to do nothing else. Other lawyers who do not usually find themselves in bankruptcy court often refer such matters to the specialists. The bankruptcy statutes themselves befuddle non-specialists because they turn traditional areas of law on their figurative heads: debts are not paid, contracts are broken, creditors can be made to give back some pre-filing payments for the benefit of other creditors, and the ultimate recovery by any given creditor depends in large part on a statutory ranking system and not on the relative merits of its claim. Lashly and the other attorney-witnesses that testified before the joint subcommittee played the specialist card to great effect, emphasizing the legal nature of bankruptcy, at the same time raising the specter of problems that arose when non-lawyers were placed in charge of bankruptcy administration in other countries (without actually detailing those problems). Senators Hastings and Bratton, themselves both lawyers, accepted Lashly's authority without question after his two-day exposition on the proposed reforms and their effects on American bankruptcy law. In fact, as shown in the next chapter, deference to the technical expertise of the bankruptcy policy community was the dominant principle structuring Congress' efforts to make statutory reforms the in the 1970s. Moreover, as described in Chapter Five, Congress would initially defer to the experts again in the 1990s until opponents of reform upset the status quo, in part by marginalizing the expertise of the policy community.

Issue networks, policy communities, and the like by definition do not consist of a single entity or interest. By the time the ABA group convened the following month to draft new legislation, they were joined by representatives of National Association of Referees in Bankruptcy, the Commercial Law League, private lawyers, and academics. As discussed in the next section, the group quickly developed a fairly detailed organizational structure, and took to formally identifying itself as the National Bankruptcy Conference. Although the group's efforts would extend over the next six years, during which it held several meetings with representatives of various other groups and interests in attendance, the core group remained intact throughout.

2. *Limiting Agenda Access: Strategic Concessions*

Not all relationships within a policy community are consensual. In fact, these alliances may sometimes represent coalitions of necessity. In 1936, the National Bankruptcy Conference was nearing the end of its work when the Securities and Exchange Commission made its own proposals to reform business bankruptcy law. The proposals would give the Commission a major role in business bankruptcy cases.[34] William O. Douglas, the new head of the SEC and a former Yale Law School professor, was one of the nation's foremost authorities on business reorganizations. Moreover, Douglas' SEC was not just a casual interloper but in fact had been investigating reorganization practices in New York and elsewhere for some time.

Nonetheless, members of the National Bankruptcy Conference ("NBC") were not receptive to the SEC's participation. One member described the changes proposed by the SEC as "startling and radical," and lamented the delay caused by the commission's intervention (Hunt 1937). Nonetheless, the NBC was in no position to exclude the SEC's participation. As Douglas was arguably the nation's leading expert

[34] These proposals included the right of the SEC to intervene in reorganization cases, the appointment of trustees in reorganization cases in place of pre-bankruptcy management, and providing labor organizations standing to be heard on employers' plans of reorganization.

on business reorganizations, he was well positioned to challenge the NBC's technical authority on bankruptcy matters. Moreover, as chair of one of the leading commissions established by President Roosevelt and his congressional allies, Douglas had the structural support he needed to break up the NBC's newly-developed hold on bankruptcy policy (and establish his own, if necessary).

With those factors in mind, the conference adopted the only realistic course of action available to it: it grudgingly conceded to Douglas nearly all of the SEC's specific demands in order to retain its control over the broader reform process. When the Conference convened in Washington in late March 1937, it included all but one of the SEC's proposals in a new draft of the legislation. With that accomplished, the SEC ended its efforts to influence the legislation.

Strategic concessions are essential to a policy monopoly's on-going viability. The bankruptcy policy community would employ the practice again when it considered exemptions policies as part of the 1970s reforms.[35] However, when the group perceives that concessions would violate its core principles, as it did in the 1990s – 2000s, it rejects the changes, even at the risk of losing control of the policymaking process.[36]

3. *Limiting Agenda Access: Engaging Congress*

Any group seeking to promote or affect federal legislation must ultimately engage Congress. This poses a definitional, and even existential, challenge for dominant policy subsystems or policy monopolies, whose function is in substantial part to limit access to policymaking processes. The answer, of course, is to bring

[35] See Chapter Four, Part D.
[36] *See* Chapter Five.

members of Congress into the subsystem only to the extent necessary to achieve its legislative goals. Iron triangle models posit the participation of one or at most a very small number of committee or subcommittee members (usually their chairs) in policy subsystems. Such models typically describe policymaking in heavily-regulated endeavors with regular business before Congress. However, bankruptcy policy only sporadically reaches the congressional agenda. As described in this dissertation, major reforms of the bankruptcy law were made in the 1930s, 1970s, and 1990s-2000s, with other lesser amendments and additions in between. Hence, the strategic challenge for the bankruptcy policy community is to form periodic alliances with members of Congress without opening broader participation and loss of control over the policymaking process. Therefore, the community must choose its congressional alliances carefully.

Once congressional attention turned in 1933 to enacting the New Deal, the bankruptcy reform group had to proceed through 1933 and 1934 without a clear means of turning their proposals into law. That changed when Walter Chandler was appointed chair of the joint Congressional bankruptcy subcommittee in 1935. Chandler, a Democrat from Memphis, Tennessee, and former counsel for the city's branch of the National Association of Credit Men, was particularly interested in bankruptcy law; in fact, he may have been the conference's handpicked candidate to sponsor its legislation (Skeel 2001, 74). Chandler's appointment provided the third essential element of the bankruptcy policy community's functional structure. The conference's bill was introduced in the House under his sponsorship, and it was he who sheparded it through the next two years of revisions culminating in its enactment in 1938.

Representative Chandler's association with the conference provided the group with at least two other benefits. First, the conference had focused almost entirely on the commercial side of bankruptcy reform. Chandler, however, had a special interest in the difficulties the Great Depression had caused individual debtors. HIs sympathies grew out of his service as Memphis city attorney from 1928 to 1934 (Dixon and Epstein, 2002, 755-7). Chandler added a new provision for wage earner reorganization (a forerunner of the current Chapter 13) that was based on a procedure developed in the Alabama bankruptcy courts. This portion of the legislation was drafted by Chandler, or at least at his behest by officials from the Alabama court (Dixon and Epstein, 2002, 755-8).

Congressional participation provides a policy monopoly with an important benefit besides a means of enacting its policy choices into law. Congressional patrons can also take efforts to ensure that competing bills are stopped or at least receive lesser treatment than those promoted by the monopoly. Representative Adolf Sabath (D-IL) led a congressional inquiry into real estate reorganization practices in 1933-34. Efforts to draft legislation based on the investigation's findings led to introduction of a broader, and many ways more radical legislation than the Chandler bill. The Sabath bill proposed the creation of a national bankruptcy administrator called the conservator to replace the Act's system of referees and trustees. In addition, the conservator proposed duties included many of those the SEC wanted to assume itself. However, given the National Bankruptcy Conference's alignment with Congressman Chandler, and Chandler's support, in turn, from the House Judiciary Committee's chairman, the Sabath bill had no chance of getting through Congress. After it was introduced by Congressman Sabath in 1936, it was assigned to the Judiciary Committee, where it was never brought up for a vote and died at the end of the term.. Neither Congressman Chandler, the National Bankruptcy Conference, nor the House Judiciary Committee (whose chair had appointed Chandler to the joint bankruptcy committee) endorsed Representative's Sabath's efforts. Without that support, the assignment of Sabath's bill to the Judiciary Committee assured its quick demise.

D. Agenda Setting and Bankruptcy Reform: Organizing the Policy Community

The creation and subsequent durability of policy monopolies depends on two essential elements: a dominant issue definition, expressed as a policy image, and a definable structure. Issue definition establishes the parameters of participation in a policy subsystem, but it does not by itself organize participants into a definable structure. In the case of bankruptcy policy, the various specialists quickly formed a well-organized community. The group quickly coalesced into a well-organized entity with a name, the National Bankruptcy Conference;[37] a chairman; and defined roles for its members.

Factors leading to the creation of structures necessary to sustain a policy monopoly are perhaps the least-examined part of agenda setting theory. Most agenda setting studies begin with the existence of a core group of interested parties.

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[37] The group, which soon came to include the National Association of Credit Men, was collectively identified as the National Bankruptcy Conference at least as early as 1935 (New York *Times*, March 24, 1935). The organization formally organized under that name in the 1940s.

However, the wealth of documentation available on the origins of the bankruptcy policy community in the 1930s makes it possible to understand both how and why the bankruptcy policy community originally formed, and gain from that a better understanding of how policy monopolies are created.

Salisbury's exchange theory (1969) provides the standard framework for understanding the origins of interest groups and political organizations. Salisbury identifies two essential factors to the creation of such organizations: (1) definable benefits to be distributed to the group, and (2) an entrepreneur or organizer who takes the lead in establishing the group, often with little hope of additional benefit or profit. He classifies benefits into three types. Benefit types include (a) material benefits; (b) solidary benefits, generally the intrinsic and intangible awards associated from being the member of a group, like status, identification, and social rewards; and (c) purposive, or expressive, benefits, which accrue to the group as a whole and reflect its core purposes (Salisbury 1969, 15-7).[38]

Benefits are defining; different benefits or sets of benefits attract different participants. Moreover, benefits, especially purposive ones, may be linked to policy images. The benefits ultimately deriving to the first participants in the bankruptcy policy community included preservation of the existing court-based system, and the ability to shape reforms consistent with members' preferences. Those benefits paralleled the technical image fostered by the community to control the policy

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[38] The typology is derived from Clark, Peter and Wilson, James Q. (1966). "Incentive Systems: A Theory of Organizations," *Administrative Sciences Quarterly* 6 (September 1966):129-66. For an expanded explanation of benefits, also called incentives, see Wilson, James Q. (1973). *Political Organizations*. New York: Basic Books.

process. Moreover, benefits can derive from more than one of Salisbury's categories. For instance, for many participants, preservation of the existing court-based system meant continuation of their source of livelihood.

Although the definition of benefits identifies the *raison d'etre* for formation of a policy monopoly, it does not address the mechanics of creating such entities. For that, reference must be made to Salisbury's other essential factor, the participation of a policy entrepreneur. Kingdon (1984, 188) describes policy entrepreneurs as "advocates who are willing to invest their resources – time, energy, reputation, money – to promote a position in return for anticipated future gain in the form of material, purposive, or solidary benefits."

One of the key functions of the policy entrepreneur is to take advantage of the opportunity to advance a policy afforded by the opening of a policy window (Kingdon 1984, 190). Referee Paul King of Detroit provided this essential service in the creation of the bankruptcy policy community. First appointed to the bench in 1919, King was an inveterate organizer. In 1926, he was virtually single-handedly responsible for the formation of the National Association of Referees in Bankruptcy, and served as the group's first president. Early in his professional life, he chaired two senate campaigns, and served as secretary both of the Michigan Republican Party and of Michigan's constitutional convention in 1907 and 1908. He was also extensively involved in charitable groups and gained national prominence as the head of the Michigan, U.S., and International Societies for Crippled Children.[39]

[39] The group is now known as Easter Seals. In fact, King is credited by the society with creating its familiar fund-raising stamp (*http://www.easterseals.org/about-us/history*, last accessed January 30, 2012).

King took a keen interest in the proposed revisions to the Bankruptcy Act even before a bill was introduced (Honsberger 1985, 4). He met with both Solicitor General Thacher and his investigators. Once the bill was introduced in early 1932, King (who was opposed to many of its provisions) undertook to prepare and disseminate, at his own expense, a detailed analysis of the legislation, and corresponded with other professionals around the country (Honsberger 1985, 7). His correspondents included Jacob Lashly and Robert Cook of the Commercial Law League of America. Hence, by the time the Joint Committee extended its invitation to Lashly to draft an alternative bill, King had already cultivated a network of like-minded specialists ready to take on the task.

Therefore, when a meeting occurred at Cook's Boston home in mid-June, 1932 (just a month after the Joint Committee's invitation), the group included not only Lashly, King, and Cook, but also other lawyers, referees, and scholars as well. The group, albeit still informal, recognized King as its chair; his wife, Sarah, accompanied him to Boston, and according to Cook served as the group's "house mother" (Honsberger 1985, 15).

The group made some progress, but did not complete draft legislation before the Boston meeting concluded. It met twice more in 1932, and another two times in 1933 before producing a new bill. Although the attendees at these meetings differed, King held his core group together, despite the fact that he and they were not compensated for their efforts and in fact paid their own travel expenses (Honsberger 1985, 22). King organized the meetings and sent out weekly reports to the conference members on their colleagues' progress; reports note that he mediated the sometimes-heated differences between the group's members (Honsberger 1985, 18, 27; Hunt 1937, 196).

The conference's proposed bill included new provisions for corporate and railroad reorganizations. It notably did not require creation of a new bankruptcy agency. The proposed legislation was quickly adopted by Congress in place of the one introduced in 1932, and was signed into law by President Hoover immediately before leaving office in March 1933.

Congressional interest in bankruptcy reform died down after enactment of the 1933 amendments, as the House and Senate turned their attention first to the banking crisis and then the New Deal. Members of the National Bankruptcy Conference (as the group had now begun to formally identify itself) continued their efforts for broader bankruptcy reforms, albeit at a slower pace. It met another five times in 1933-4. As before, the attendees at these meetings tended to change, but the core group remained the same. King remained as the conference's chairman and organized its meetings (J.NARB 1938, 128). In order to promote efficiency, he sorted the various topics by subject matter, and then he did the same with the conference, creating several committees by topic and distributing to each of them the corresponding portions of each existing proposal (J.NARB 1938, 127). He coordinated their responses, and took overall responsibility for assembly of the final product and well as production and distribution of progress reports.

Observers from the Justice, Treasury, and Commerce Departments attended an eighth meeting of the Conference in Washington. Divisions among the conferees over the new corporate reorganization provisions were resolved at that meeting.

With those differences settled, Rep. Chandler introduced a comprehensive reform legislation bill on January 20, 1936.

Despite the four years the conference spent working on the proposed reforms, changes to the legislation were by no means complete. The conference's core group met with Representative Chandler and his subcommittee in April 1936, the result of which was the introduction in the House of a substitute bill.

The House Judiciary Committee held hearings on the Chandler bill in early June, resulting in additional amendments. The House of Representatives finally approved the amended bill by unanimous vote on August 9, 1937. The Senate Judiciary Committee took up the legislation in November 1937, with hearings continuing into the next year. On June 10, 1938, the Senate passed the bill with minor amendments. The House approved the amended legislation three days later, and the Chandler Act finally became law when President Roosevelt signed it on August 22, 1938.

As Kingdon (1984, 191-92) indicates, policy change requires both structural changes and the active involvement of "the right person in the right place at the right time" who can take advantage of a policymaking opportunity. In the 1930s, Paul King was that person for bankruptcy policy. Through King's efforts, a small group of bankruptcy specialists developed the internal structure and external relationships they needed to dominate the bankruptcy reform process. The two organizations King was most responsible for creating, the National Association of Referees in Bankruptcy and the National Bankruptcy Conference, would control bankruptcy policymaking into the 1990s (Chapter Four).

E. Chapter Summary: Bankruptcy Policymaking in the 1930s.

This chapter describes how the bankruptcy policy community rose quickly to monopoly status through a combination of congressional deference prompted by redefinition of central policy issues and a shifting political landscape, and was sustained through the creation of well-defined external and internal relationships. The essential participants in the policymaking apparatus were bankruptcy lawyers, law professors, and politically active referees. The referees occupied unique roles in the community. On the one hand, they engaged in their traditional adjudicative roles in bankruptcy cases, making policy through their interpretation and application of the Bankruptcy Act in their administration of discrete cases.[40] However, with respect to the activities of the community, they were organizers and active policy advocates. Referee Paul King was a classic policy entrepreneur. At considerable time and expense, he laid the groundwork to oppose new bankruptcy reform legislation. Once the opportunity arose for professionals to take an active role in the policymaking process, he undertook to lead the group's efforts, resulting in the enactment of major reform legislation, first in 1933 and more significantly in 1938. Equally important, King's work established the basis for the group's continued dominance of bankruptcy policymaking for the next sixty years.

Members of Congress provide the community's third structural element. Congressional participation in the community is essential if its policy choices are to become new law. The challenge to the community is to engage Congress while limiting its broader involvement so as not to provoke wider conflict. The addition of

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[40] See Chapters Two and Six.

Congressman Walter Chandler to the community was critical to the latter's ultimate success. While his contribution to substantive policy was limited to the addition of wage earner plans, he sheparded the conference's bill through Congress while fending off competing proposals.

The 1930s bankruptcy reform process provides a clear and detailed example of how policy monopolies develop. However, the long-term success of monopolies depends on more than defined structures. Rather, those structures must be grounded on a central principle, known as its policy image. The bankruptcy policymaking community gained its dominant position in the field through its successful characterization of the field as being too technical for non-specialists. While technicality would remain central to the group's on-going efforts, it would be joined substantively with an image at least as powerful, that of the "fresh start," which is discussed in the next chapter.

CHAPTER FOUR: BANKRUPTCY REFORM IN THE 1970s -

Enactment of the 1978 Bankruptcy Code

The policy community that bankruptcy professionals and officials formed in the 1930s dominated policymaking in the field for the next six decades. The group achieved its greatest success in the 1970s with the complete overhaul of bankruptcy laws that became Bankruptcy Code. The 1978 Code included provisions granting broad relief for individual Chapter bankruptcy filers and established an all-new procedure for business reorganizations identified as Chapter 11.[41] The foundational principle underlying that reform, and the ideological key to the community's long period of dominance, was the concept of debt forgiveness known as the "fresh start."

A. The Fresh Start as a Policy Image

Baumgartner and Jones (1993) explain that every policy monopoly must have two characteristics. The first is a stable, defined structure (Chapter III). The other is a dominant policy image. An "image" is the way in which a policy is understood and discussed (Baumgartner and Jones 1993, 25). Policy images are closely related to the concept of issue definition. Hence, the notion of bankruptcy law as a highly technical specialty best left to experts is part of its image, and one that the nascent bankruptcy policy community asserted to its great advantage in the early 1930s.

The characterization of policies as technical or complex ones establish the boundaries of participation in a monopoly, and legitimize the authority of the

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[41] Just as in the Act, the Code's statutes are arranged topically into sections called "chapters." For historical reasons, the Chapters are designated with odd numbers, except for Chapter 12, which concerns bankruptcy filings by certain kinds of farmers.

participants. Policy images can serve other purposes as well. They may give a monopoly ideological cohesion and draw support for the monopoly's policy outputs from outsiders as well. No matter how tight the monopoly, its members must from time to time explain and justify its policies to outsiders like the public or at least non-specialist elites, such as members of Congress (Baumgartner and Jones 1993, 25-6). The most successful policy images reflect core social and political values, such as "progress, participation, patriotism, freedom from foreign domination, fairness, [and] economic growth (Baumgartner and Jones 1993, 7)."

The policy image concept is expressed and utilized in various ways in the policy literature. Stone (1997) writes in term of "policy goals." Like images, policy goals speak to the broader purposes a policy seeks to achieve, such as equity, efficiency, security, and liberty (Stone 1997, 37). Sabatier focuses on the conceptualization of problems and solutions by members of the dominant policy coalition, stating "that public policies (or programs) can be conceptualized in the same manner as belief systems, i.e. as sets of value priorities and causal assumptions about how to realize them (Sabatier 1988, 131)." Wilson (2000) describes the concept in terms of policy paradigms, which he defines as the "policy ideologies through the way they portray issues, promote images, tell stories, explain cause and effect, and describe situations as problems in ways that favor the policy solutions they are advocating. These ideologies legitimize and sustain existing policies and institutional arrangements (Wilson 2000, 254)."

These various expressions of underlying principles supporting specific policies and policymaking processes are more similar than they are different. Wilson's description of policy paradigms could equally explain Baumgartner and Jones' policy images:[42]

> The paradigm also embodies ways of seeing, talking and defining problems, which in turn shape policy solutions . . . Policy paradigms are constructed by researchers and intellectuals who contribute to academic discourse which shapes the definition of the policy problem; by professionals and practitioners who are directly engaged with the issue; by interest group leaders and organizations who are promoting a particular policy agenda; and by policy makers who interact with academics, professionals, practitioners, and interest group leaders.

Given the similarity of the definitions of these concepts, the term "policy image" is used here in order to remain consistent with the application of Baumgartner and Jones's work on policy monopolies.

In American bankruptcy policy, the term fresh start refers to the debtor's ability to exit bankruptcy free from the burdens of his or her past financial misfortunes and mistakes. Generally, the concept is limited to personal bankruptcy filers and is used to refer to the provisions for discharge contained in Chapters 7 and 13 of the Bankruptcy Code (and their predecessors under the Act).[43] However, it properly also includes provisions allowing personal filers to exempt property from the reach of their creditors (see Chapter I for explanations of how discharges and exemptions work in personal bankruptcy cases).

Tales of new beginnings are central to the American story. Whether that story is one of emigrants to the New World, the Founding, or the Great Western

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[42] Which is not surprising, given the centrality of Baumgartner and Jones' work to Wilson's policy paradigms concept (Wilson 2000, 271).

[43] While neither discharges nor exemptions are available to business organizations that liquidate under Chapter 7, they do receive discharges upon completion of the obligations under their approved plans of reorganization in Chapter 11 cases. In that sense, they do get a fresh start, even though those obligations mean that it comes with strings attached (See Chapter One).

migration, tales of renewal and rebirth are an essential part of the American experience and its image as the "land of opportunity" (Sullivan, Warren, and Westbrook 1989, 341). The fresh start embodies this value by allowing bankruptcy individuals to start their lives anew, at least from a financial perspective. By 1915, the Supreme Court cited the principle as the primary function of American bankruptcy policy:

> It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent among business misfortunes (*Williams v. United States Fidelity Guaranty Company*, 236 U.S. 549, 554-55 (1915)).

By 1934, Justice Sutherland, writing for a majority of the Court at the same time that the National Bankruptcy Conference was drafting its major reforms, affirmed the centrality of the fresh start to U.S. bankruptcy policy and explained its relationship to American core values:

> When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern. From the viewpoint of the wage-earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. The amount of the indebtedness, or the proportion of wages assigned, may here be small, but the principle, once established, will equally apply where both are very great. The new opportunity in life and the clear field for future effort, which it is the purpose of the Bankruptcy Act to afford the emancipated debtor, would be of little value to the wage-earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy (*Local Loan Co. V. Hunt*, 292 U.S. 234, 245 (1934)).

Kenneth Klee, one of the drafters of the 1978 Bankruptcy Code, calls Sutherland's opinion "a powerful statement that would serve as the backbone of American consumer bankruptcy law for the next 70 years (Klee 2008, 407).

A corresponding view recognizes the public value of maximizing debt relief. Such expressions were being made as early as 1890, when the House Judiciary Committee reported the following:

> It is a matter of public concern that every citizen should have an opportunity to pursue the calling for which he is best adapted and in the way and under the circumstances which will enable him to be as large a producer as possible, to the end that the aggregate wealth of the community in which he lives may be increased. When a man has paid his honest debts to the extent of the distribution of his property, it becomes a matter of public concern that he should be released from his indebtedness (House Judiciary Committee Report 1890).

Similar understandings of the fresh start's collective role figure prominently in political and legal economists' analyses of consumer bankruptcy law (Baird 2005; Jackson 1986). Furthermore, when placed in a wider context, the fresh start complements the legal and legislative activity that dominated the Sixties and Seventies. Kagan (2001) writes that cultural norms among policy elites in that time period reflected an expectation that rich societies should enact laws to ameliorate the conditions of the victims of misfortune.

Given the monopoly's status within its own field and the consonance of its policy image with the broader political environment, its dominance of substantive policymaking leading up to enactment of the Bankruptcy Code in 1978 is no surprise. That dominance would prove strong enough to defeat a direct effort by the federal bench and the Chief Justice himself to split the monopoly and deny referees full judicial status under the new law.

B. Bankruptcy Reform: Enactment of the Bankruptcy Code

Bankruptcy policymaking entered a long period of stability after enactment of the Chandler Act in 1938. Baumgartner and Jones' punctuated equilibrium model predicts such periods following emergence of a new policy monopoly. However, the lull in policymaking activity must be attributed in part, at least initially, to the national mobilization effort, which led to a large decline in the number of new personal and business bankruptcy cases filed during the Second World War. That downturn contributed to a major change in the way the bankruptcy courts operated. Congress passed the Salary Act in 1946 at the urging of the Justice Department. The Salary Act brought the referees within the authority of the Administrative Office of the United States Courts, and replaced their commission-based system of compensation with a simple salary and overhead structure. The referees had been opposed to such action in the 1930s. However, case filings had fallen so low during the war that the commissions received by many referees were inadequate to keep their offices open, let alone pay themselves (DeNatale and Abrams 1995, 93). Hence, the Salary Act passed without opposition from within the bankruptcy policy community, even though the law also provided for the consolidation and reduction of several referee positions, especially part-time ones, causing some referees to lose their jobs.

Otherwise, the long period from the Forties to the Sixties was one of stability in U.S. bankruptcy law. Statutory changes were few, technical, and minor; none changed the basic structure of the law. Changes that were made arose from within the community. For example, the section of the 1938 Chandler Act governing business reorganizations (Chapter XI, a predecessor to the modern Chapter 11) required debtors to file voluminous, detailed documentation to start a new case, even when the perils of delay might be devastating. This worked to the disadvantage of some debtors, who often needed to file their cases quickly in order to obtain a stay of state court collection proceedings. The bankruptcy courts in some jurisdictions, including the Southern District of New York, adopted rules to facilitate emergency case filings by allowing debtors to file certain documents subsequent to their petitions. The National Bankruptcy Conference then incorporated a similar provision in an omnibus bankruptcy bill that was enacted by Congress in 1952 (Montgomery 1953). Other bankruptcy legislation of the period also made technical adjustments to the existing law and followed similar paths to enactment.

However, in articles and elsewhere, the referees in this period began focusing on two types of issues. The first set included an increased attention to legal questions, as opposed to matters of case administration. The issues in the other group were joined by a desire to have the bankruptcy courts treated as full-fledged judicial tribunals and not as adjuncts of the district courts. These two concerns became the underlying themes driving bankruptcy reform in the 1970s.

By the start of that decade, the referees' two issues were incorporated within the bankruptcy policy community's wider consensus that the nation's bankruptcy laws were in need of major reform. As the following account shows, substantive reforms turned out to be relatively easy to achieve, given the community's control of policymaking. The greater challenge to reform came from the opposition of the remainder of the federal bench to enhancing the status and privileges to be accorded the referees.

Therefore, the overhaul of the United States' bankruptcy law in 1978 can be analytically divided into two parts. The first part was the adoption of a new "Bankruptcy Code," which expanded protections for individual debtors and created a revolutionary process for business reorganization that remains the envy of the industrialized world. The second part of the 1970s reform process was a contentious debate over the status and duties of bankruptcy judges under the new law. That conflict initially divided two of the monopoly's constituent parts, pitting the referees against the NBC. However, intervention of the community's third element, members of Congress, would broker a reconciliation of the divided groups. The monopoly would hold, and prevail, establishing the primary legislative framework under which bankruptcy cases are administered yet today.

As would be true in the 1990s, bankruptcy reform gained attention in the Seventies because of increases in the number of new case filings, particularly by consumers. The post-war expansion of the American economy and the related rise of consumer credit had by the late sixties led to a dramatic increase in the number of new bankruptcy cases filed annually.[44] Annual personal bankruptcy filings, which had remained below 20,000 as late as 1949, increased to 131,402 by 1960 and 178,202 by 1970 (Skeel 2001, 137).[45] On the business side, case volumes were rarely burdensome. Rather, the increased complexity of commercial transactions

[44] Critics of the bankruptcy process also claimed that filing bankruptcy lacked the stigma that it had in the past, much as they would again in the 1990s.

[45] Business filings also increased overall during the same period, albeit in much smaller numbers.

and a shifting emphasis on rehabilitating troubled firms had outgrown the Bankruptcy Act's cumbersome restructuring rules, leading to a widespread consensus favoring the overhaul of existing corporate reorganization laws.

The increased volumes of new cases exacerbated existing pressures on the courts, fueling perceptions that bankruptcy administration was ineffective and inefficient. Moreover, despite periodic changes made since 1946, bankruptcy administration was commonly perceived in some quarters to be to be unethical and even corrupt, echoing criticisms that initiated the investigations that led to the Chandler Act in the 1930s. In 1971, the Brookings Institution issued a much-anticipated report primarily blaming the referees for the problem, describing them as undisciplined, sometimes corrupt, and as fostering cronyism that enriched the referees' preferred trustees, lawyers, appraisers, and auctioneers at the expense of bankruptcy professionals outside of the local "rings," to say nothing of the bankrupts themselves and their creditors.

Bankruptcy referees countered that the Brookings report's assessment of blame was misplaced. They blamed flaws in the statutory structure of the bankruptcy system, which relegated them to a quasi-judicial status without authority to effectively resolve many questions arising in the cases over which they presided. District judges continued to have primary judicial authority under the Act. However, because many district judges disliked bankruptcy matters, the degree to which they exercised their supervisory powers varied from court to court.

In fact, by the 1960s newer referees were speaking out in favor of reforming the bankruptcy system. Periodic educational conferences conducted by the

Administrative Office of the United States Courts, as well as communication and meetings within the referees' national association, provided these referees with a forum for developing their ideas. Moreover, the referees had by the 1970s developed a strong working relationship with Congress (Zelenko 1969). Therefore, they were ready to act when Congress took up the issue of bankruptcy reform in the late sixties.

Congressional action began in 1968 when a bankruptcy trustee told North Dakota's Democratic Senator Quentin Burdick about the difficulties he faced administering his cases on account of the referees' limited authority in business cases (2007a, 6). Burdick had been a practicing attorney before entering politics, and his interest was piqued by the trustee's complaint. He sent a letter to each referee seeking comments on the existing system. The number of responses citing a need for reform was overwhelming and led Burdick to introduce legislation creating a bankruptcy review commission.

Burdick's counterpart in the House was California Congressman Don Edwards, who took up the issue of reform via his Subcommittee on Civil and Constitutional Rights. Edwards was a liberal Democrat and a "good government" advocate who became one of bankruptcy reform's primary congressional champions (Mund 2007a). With Edwards taking the lead in the House, Congress enacted Burdick's bill establishing the Commission on the Bankruptcy Laws of the United States[46] in 1969.

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[46] The commission was commonly identified both in the media and by its members as the National Bankruptcy Review Commission, which is also the name given to the

The commission was established in 1970, with members selected by the President, the Chief Justice, the Speaker of the House, and the president of the Senate. However, there arose at this juncture what was to be the reform process' most prominent and enduring controversy. President Nixon's appointees were fairly conventional and included two members from the National Bankruptcy Conference: Harold Marsh, a prominent Los Angeles commercial bankruptcy lawyer who became the commission's chair, and Charles Seligson, the NBC's president as well as a practicing attorney and a member of the New York Law School Faculty. The president also appointed Wilson Newman, the former head of Dun & Bradstreet to the commission. The congressional appointees were likewise non-controversial. Besides Burdick and Edwards, Representative Charles Wiggins, a California Republican, and Senator Marlow Cook (R-KY) were named to the commission. In addition to having a special interest in bankruptcy reform, all of the legislative appointees had been practicing lawyers before seeking elective office.

However, the Chief Justice's appointees turned out to be particularly controversial, first because neither was a bankruptcy referee, and second because at least one of the appointees was openly contemptuous of the bankruptcy courts. The referees certainly expected to have a place on the committee. Their national association, The National Conference of Referees in Bankruptcy, took an active role in the hearings on Burdick's bill, the original version of which expressly provided for the appointment of two referees as commission members. As a whole, the referees were keenly interested not only in raising the level of administration in the

congressional commission formed in the 1990s to investigate and propose new bankruptcy law reforms.

bankruptcy courts, but in enhancing their own status as judicial officers. Although not overtly political, the referees group followed the practice established by Paul King in the 1930s and had taken an active role in substantively shaping bankruptcy legislation, establishing good working relationships with members of Congress along the way. Although the referees association's public activities declined after the Chandler Act's adoption, interest among its members was rekindled in the early 1960s when the referees periodically met at educational conferences organized by the United States Courts' administrative office (Mund 2007a, 4-5). By the 1970s, the referees association had played significant roles in drafting specific, albeit piecemeal, reforms (Zelenko 1968). More directly, the testimony of the group's members on the need for reform played a prominent part in Congress' decision to form the review commission (Cyr 1975).

However, notwithstanding the referees' substantive expertise and the role they played in the commission's creation, they were denied even one of its seats because of the efforts of Judicial Conference of the United States. The Judicial Conference of the United States is the federal judiciary's supervisory body. Moreover, it is the federal bench's primary liaison with Congress on matters of judicial policy. The conference's membership includes the Chief Justice of the United States, who serves as its chair; the chief judge from each federal circuit court of appeals; a district judge from each federal circuit; and the chief judge of the International Court of Trade. Much of its work takes place in standing committees, including one on bankruptcy administration.

Many members of the Judicial Conference were disdainful of the bankruptcy courts and the referees, and became more assertive in expressing their feelings as the latter group increased its efforts to enhance their authority. The Chief Justice of the United States, Warren Burger, was one of the referees' most vocal opponents. As recounted by Judge Mund, "Burger had told a member of Representative Edwards' staff that 'a magistrate is three times more important than a bankruptcy referee' and that 'elevating the referees to judicial stature is like elevating clerks of courts (Mund 2007b, 186).'" The members of the Judicial Conference barely tried to express their concerns in terms of policy, and instead were explicit in their belief that giving referees full judicial status would diminish the prestige of their own Article III appointments (Mund 2007b; Posner, 1998; Skeel 2001). Judicial attitudes toward the referees took on petty dimensions in some jurisdictions; referees were denied reserved parking spaces at some courthouses, and others were forbidden to wear judicial robes. Some referees were barred from the judges' dining rooms (Mund 1978b, 184-5).

Therefore, the Judicial Conferences' primary interest in bankruptcy reform was to ensure that it did not result in an improvement in the referees' status or the diminishment of their own sense of prestige. The Judicial Conference successfully lobbied to have the referee-designated seats on the review commission removed from the House version of Burdick's bill, although Burdick believed he had the Chief Justice's agreement to name two bankruptcy referees to the panel regardless of the deletion. Instead, Chief Justice Burger appointed two federal district judges, Edward Weinfeld of the Southern District of New York and Hubert Will of the Northern

District of Illinois. Although Weinfeld was chair of the Judicial Conference's Committee on Bankruptcy Administration, he was, like many of his conference colleagues, openly hostile toward the bankruptcy courts (Skeel 2001, 138).

With the referees at least temporarily blocked from the reform process, the Commission began its work. Just as the president drew from the National Bankruptcy Conference membership to fill two of his three appointments, the conference itself looked to the NBC to fill its main staff position. The commission's executive director and reporter was Frank Kennedy of the University of Michigan, an NBC member and one of the nation's foremost bankruptcy experts. NBC members filled out most of the rest of the commission's staff (Warren 1999, 191). Joining them were professors Walter Phillips of Texas Tech and Philip Shuchman of the University of Connecticut. Phillips was not a member of the NBC, but was active in bankruptcy matters on behalf of the American Bar Association.[47]

The Commission began work in June 1971, conducting four public hearings and deliberating as a full committee a total of 44 days (Klee, 277). Its staff naturally devoted more time and effort to the project; the Commission submitted its final report to Congress on July 30, 1973. The Commission's bill was introduced simultaneously in both the House (H.R. 10792) and Senate (S. 4026) in the first session of the 93rd Congress (1973). The changes proposed by the commission were dramatic. On the commercial side, it proposed replacing the old and cumbersome Chapters X, XI, and XII with an all-new Chapter 11, which provided, among other

[47] Phillips was a latecomer to academia; in 1961, he was appointed a referee in bankruptcy for the Northern District of Georgia. At 29 years of age, he was the youngest referee in the United States at the time.

things, for greater debtor control of reorganizing companies. It created a new Chapter 13 bankruptcy that would allow consumers filers the opportunity to repay all or a portion of their obligations over time without losing their non-exempt property. Moreover, it gave the referees[48] greater authority in these kinds of cases than they had under the Act. Conversely, it dramatically limited the role the referees would play in most bankruptcy cases by assigning the routine duties of bankruptcy administration to a new national bankruptcy administrator.

As Heclo (1978) explained, policy networks are not monolithic, and factions within the network are sometimes in conflict. The bankruptcy policy community is no exception to that rule. While the Commission and the referees were in general accord on substantive changes to bankruptcy law, they differed on the former's proposed administrative reforms. Although the Commission's proposal would have enhanced the referees' judicial powers, many of them feared that the elimination of administrative responsibilities would lead to significant cuts in their overall numbers. Their concerns were bolstered by their exclusion from the commission at the insistence of the Judicial Conference.

However, the referees had one vitally important advantage, which was the close working relationships they had developed with key members of Congress, particularly bankruptcy reform's principal supporters, Representative Edwards and Senator Burdick (Cyr, 1975, 99-100). Those relationships ensured the referees

[48] Or judges, as they were designated in 1974 in the first uniform set of bankruptcy rules, and would be identified under the new law. The rules had been approved by the Judicial Conference, which apparently did not understand their implications with respect to the judicial designation. The conference sought unsuccessfully throughout their subsequent lobbying efforts on the bankruptcy reform bill to get Congress to revert to the referee title.

continued access to the legislative process, if not to the commission's deliberations. When in 1974 the judges were ready to move forward, Representative Edwards and Senator Burdick each cosponsored their bill while simultaneously sponsoring the Commission's proposed legislation.

The competing bills and the split within the community that they reflected had the effect of impeding the progress of either. As a result, neither advanced beyond the subcommittee stage in the 93rd Congress. Each bill was reintroduced in both the House and in the Senate in 1975, with the same sponsors. However, neither faction within the community exhibited an interest in resolving their differences, jeopardizing the likelihood that any legislation would be passed. With his signature project on the verge of collapse, Representative Edwards advised the National Bankruptcy Conference and the referees[49] to resolve their differences or else bankruptcy reform would fail (Klee, 279; Skeel 2001, 140).[50]

Edwards warning was sufficient to bring the two factions together, and they resolved their differences in a series of meetings in 1975-76. However, the unified group did not present new legislation in place of their different drafts. Instead, Edwards directed his staff for the Judiciary Committee's Subcommittee on Civil and Constitutional Rights to prepare a new bill reconciling differences in the commission and judges' bills. According to one of the staffers, Kenneth Klee, they extensively

[49] The referees became identified as bankruptcy judges under when new Rules of Bankruptcy Procedure designated them as such in 1974. They will be described as judges from this point forward in this account to maintain historical consistency.

[50] It is interesting to note that accounts of this event specifically mention the National Bankruptcy Conference, and not the review commission, as one of the recipients of Edwards' warning. The Commission had maintained a prominent role in the development of new legislation, both in its historic role and through its members on the review commission.

sought and incorporated the contributions of “bankruptcy experts,” including referees, attorneys and law professors, both to develop the bill that was introduced at the beginning of the new Congress in 1977, and through committee mark-ups to consideration by the full Judiciary Committee in July 1977 (Klee, 280-2).

It should be noted at this juncture that the most serious concerns about bankruptcy reform continued to be the formal status of bankruptcy judges under the new law, as the Judicial Conference remained opposed to any measures that would bring them closer to the privileges and authority possessed by Article III judges. Efforts to find compromise were unsuccessful. Peter Rodino, chairman of the Judiciary Committee, sought to resolve the controversy by obtaining the opinions of some of the country’s leading constitutional scholars, including Erwin Griswold, Herbert Wechsler, and Charles Alan Wright. However, the scholars were themselves split on the question, and so they had no effect on the congressional debate.

Similarly, a provision in the bill would have altered tax collections from debtors at all levels of government. Implication of the Tax Code meant that the bill would have to be referred to the House Ways and Means Committee. Edwards and his allies feared that such referral would result in dramatic alterations to the bill. However the referral to Ways and Means was averted when the Judiciary Committee agreed to revise certain tax provisions so that they only applied to non-federal taxes. This allowed Judiciary to retain control over the bill and restrict access to the drafting and revision process.

The House bill, now identified as H.R. 8200, adopted many of the bankruptcy judges' preferred policies. It elevated the judges to full Article III status but also created a separate office of the U.S. trustee within the Department of Justice. The new U.S. trustee would be responsible for, among other things, appointing case trustees to administer individual bankruptcy cases. This would turn out to be one of the most important reforms enacted in the 1978 Code. Transferring the authority to appoint case trustees to the new agency denied judges their most important source of patronage and effectively ended the despised bankruptcy rings.

The legislation, as amended, was reported out of the Judiciary Committee on a vote of 23-8 on September 8, 1977. It did so over the active opposition of the Judicial Conference, which had published its own report in April 1977 opposing increased independence for bankruptcy judges and courts. However, while the Judicial Conference's position did not find favor within the Judiciary Committee, it gained more favorable treatment when the bill came up for consideration by the entire House, succeeding via a late floor amendment from Representatives Danielson and Railsback by a vote of 183-158.

Edwards believed that H.R. 8200's enhanced status for bankruptcy judges was essential to effectively reform the bankruptcy system. Moreover, he was unwilling to give up on his judicial allies to gain passage of a bill. Utilizing a procedural prerogative, Edwards pulled H.R. 8200 from the floor after the Danielson-Railsback amendment passed, preventing it from moving further until the revision was stripped from the legislation. He then held hearings on the issue of judicial status and bankruptcy case administration in his Civil and Constitutional

Rights Subcommittee, which reaffirmed its earlier position proposing Article III status for bankruptcy judges. Likewise, Senator Dennis DeConcini of Arizona[51] proceeded with hearings on the Senate's bankruptcy bill, S.2266, which contained most of H.R. 8200's important provisions even though it did not provide full Article III status for bankruptcy judges. Although the two hearings were not formally coordinated, the prospect of conflict with the Senate bill raised the likelihood that the Danielson-Railsback amendment would not survive. Finally, the judges' congressional supporters lobbied their colleagues to reverse their votes on the amendment. As a result, the Danielson-Railsback amendment was stripped from H.R. 8200, and the legislation was approved by the House.

As indicated above, the Senate was already considering its own bankruptcy reform legislation. S. 2266 was introduced by Senator DeConcini on October 31, 1977, and it was substantially similar to H.R. 8200. The Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery held hearings in November and December 1977. It did not take up H. R. 8200 when it was received from the House. Instead, it advanced S.2266 to the full Judiciary Committee, which approved it on July 12, 1978. From there, S. 2266 was referred to the Finance Committee, which approved it with amendments on August 8, 1978. The Senate then substituted the text of S. 2266 for the H.R. 8200 text, and passed the House bill as amended by unanimous consent on September 22, 1978.

[51] DeConcini replaced Senator Burdick when the latter moved from the Senate Subcommittee on Improvements to Judicial Machinery to the Appropriations Committee.

At this juncture, ordinary congressional procedures require the formation of a conference committee to reconcile differences between the two chambers' versions of the legislation. However, because of the pending adjournment for the midterm election, the respective bill managers, Rep. Edwards in the House and Senator DeConcini in the Senate, were concerned that insufficient time remained on the congressional calendar to form a conference committee, let alone work out a conference report. Therefore, in lieu of forming a conference committee, the two bill managers met privately to resolve differences between the House and Senate.

The House passed the managers' amended version of HR 8200 on September 28, 1978. As to the legislation's most controversial issue, the amended bill established the bankruptcy courts as independent courts within the federal judiciary. In a blow to the Judicial Conference, bankruptcy judges would be Article I judges, nominated by the president and confirmed by the Senate, who would serve 14-year terms. Despite the bankruptcy judges' Article I status, they would have virtually all of the powers of their Article III counterparts.

With Congress scheduled to adjourn on October 14, the bill was immediately forwarded to the Senate. Seizing the new opportunities presented by this transfer, Chief Justice Burger directly lobbied senators to reject H.R. 8200. He even enlisted Griffin Bell, the Attorney General and a former court of appeals judge, to assist him in his effort to derail the bill. However, by this point legislative momentum was with the bill's supporters, and H.R. 8200 passed the Senate with additional amendments on October 5, 1978. The House ratified the Senate-passed version the next day, October 6, 1978. Burger appealed directly to Pres. Carter to veto the bill, but was again rejected. The president signed H.R. 8200 on November 6, 1978.

C. Analysis

As this brief history suggests, the substantive proposals to reform the bankruptcy laws drew little attention beyond the policy community and were enacted with little controversy. Instead, nearly all of the conflict over the adoption of the new Code came from the Judicial Conference's opposition to enhancing the status of the bankruptcy bench. While this intramural dispute garnered little public attention, it nonetheless threatened to capsize the reform process. Ultimately, the policy monopoly overcame this challenge to achieve virtually all of its objectives, assuring its dominance in the field for another twenty years.

1. *The Judicial Conference and the Bankruptcy Bench*

The biggest obstacle to bankruptcy reform in the 1990s came from the federal bench via the Judicial Conference of the United States. Conference members were not, strictly speaking, opposed to bankruptcy reform; indeed, none of their concerns touched on the substance of bankruptcy law. Instead, the senior judges fixated on opposing any measure that would enhance the relative status of referees in bankruptcy.[52] However, despite the prestige of the federal bench and the active

[52] The referees in bankruptcy began identifying themselves as judges in 1974, based on provisions in the newly adopted Federal Rules of Bankruptcy Procedure that identified them as such. Although the inclusion of that designation in the Rules might have been inadvertent, it nonetheless quickly took hold and the referees were thereafter commonly called "judges." The name change adds confusion to the debates leading to the passage of the Bankruptcy Code in 1978, and particularly that part concerning the status of the referees. Therefore, for the purposes of this chapter, the referees in bankruptcy will be identified by their formal titles, except

involvement of Chief Justice Warren Burger, the Judicial Conference's efforts were ultimately futile, demonstrating the difficulty in breaking a policy monopoly.

As Baumgartner and Jones explain, the long-term stability of policies and policymaking systems is dependent on the structure of political institutions and "the definition of the issues processed by those institutions," *i.e.*, the dominant policy image. (Baumgartner and Jones 1994, 15). The Judicial Conference's efforts to thwart the referees were directed at both factors, at least initially. Institutionally, the law creating the National Bankruptcy Review Commission gave the Chief Justice authority to appoint two of its members. Senator Burdick believed that he had an understanding with the Chief Justice that those appointees would include bankruptcy judges (Mund 2007a, 8). Instead, the appointees were members of the Judicial Conference outspoken in their disregard for the bankruptcy bench (Skeel 2001). Not only were the referees seemingly kept out of the reform process, but the Judicial Conference also gained strategically key positions for advancing its exclusionary agenda.

However, exclusion of the referees from the Commission did not diminish their influence on the bankruptcy reform process. The Judicial Conference failed to keep the referees out of the process because it incorrectly assumed that the congressionally established National Bankruptcy Review Commission had supplanted the bankruptcy policy community as the dominant policymaking body in

for those descriptions making reference to events occurring after the Code's enactment.

American bankruptcy policymaking.[53] That error is understandable. The NBRC included both prominent members of the National Bankruptcy Conference and the congressional sponsors of bankruptcy reform. Given the federal judges' low regard for the bankruptcy bench, it is not surprising that they did not understand the referees' centrality to the bankruptcy policymaking process. Beginning in the 1960s, the referees reasserted themselves in the legislative process as advocates for changes to the Bankruptcy Act. In so doing, they formed working relationships with members of Congress interested in bankruptcy reform, including Representative Edwards and Senator Burdick. Those alliances served the referees well when they were excluded from the Review Commission. The referees drafted their own legislation. Representative Edwards and Senator Burdick ensured that the referees' bill would have equal standing in Congress with the Commissions' legislation by simultaneously sponsoring and introducing each of them. The bankruptcy policy community's structure was stable enough to persist despite the Judicial Conferences serious efforts to sever one of its key parts.

The Judicial Conference's other effort to limit the referees' status was to redefine the image of technical competence cultivated by the bankruptcy policy community since the 1932 hearings on reform. As already noted, members of the Conference repeatedly and publicly belittled the bankruptcy courts and the referees. However, instead of supporting their position, these were generally seen as petty

53 Given the disdain expressed by members of the Judicial Conference for bankruptcy law in general and the referees in particular, it seems equally likely that the federal judges were unaware of the policymaking process in the field and the referees' unique role in it. Regardless, the notion that special legislative commissions can successfully replace entrenched policy processes is common and helps explain why special commissions rarely see their proposals enacted into law.

and self-serving, and they undermined the Judicial Conference's own credibility on the matter of bankruptcy reform:

> While they [the Judicial Conference of the United States] argue strenuously that the transformation [of the bankruptcy courts] will be too costly, it seems obvious that the overriding reason for their opposition is the upgrading of the referees to judges, the removal of influence, control and jurisdiction from district judges, and a perceived diminution in the status of the district judges (Stuart Eizenstat, Assistant to the President for Domestic Affairs and Policy, and Frank White, Domestic Policy Staff Associate Director for Justice and Civil Rights, in a memorandum to President Carter dated November 4, 1978, cited in Mund 2007a, 1).

Ultimately, the bankruptcy judges mostly achieved what they wanted. Instead of Article III status, they were made Article I judges. Rather than lifetime appointments, the new law granted them terms of fourteen years, with no limits on renewals. In other respects, their judicial authority in bankruptcy matters approximated that of the federal bench.[54]

The failure of the Judicial Conference's effort to prevent enhancement of the referees' status demonstrates the difficulty of upending a well-established policy regime. The prestige or official status of the challenger are by themselves insufficient to effect policy change. Moreover, perceived structural changes may be inadequate to affect significant changes in policymaking structures when they merely add new entities while existing monopolies remain intact. Finally, the challenger's definition of relevant issues should broaden their appeal, not narrow it

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[54] In the end, however, Chief Justice Burger had the last word on the subject. In 1982, the Supreme Court ruled that the new bankruptcy judgeships were unconstitutional because they improperly extended Article III powers to Article I judges. *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). That led to a legislative scramble that re-designated the bankruptcy judges as officials within the district courts, somewhat analogous to the U.S. magistrate judges, and somewhat narrowed the broad power granted them in the 1978 Code.

to only reflect their own unique interests. Without either permanent structural changes or a message with broader appeal, the Judicial Conference's actions were destined to fail.

2. *The National Bankruptcy Conference and the Referees*

A more curious development was the split that arose between the Review Commission staffers from the National Bankruptcy Conference, particularly Frank Kennedy (the Commission's reporter and chief of staff, and a prominent member of the NBC), and the referees. Dealings between the two groups were not confrontational, and the referees were invited to testify before the Commission. However, the Commission's proposed legislation would have created an executive branch agency to take over many of the duties handled by the referees under the Act. That proposal was vigorously opposed by the referees and was a primary reason for their decision to proceed with drafting their own bill (Mund 2007a, 17-8). However, unlike the Judicial Conference, it does not appear that the Commission's proposal was motivated by antipathy toward the referees. Rather, political considerations notwithstanding, Kennedy and other NBC members of the Review Commission seem to have sincerely believed that the creation of a bankruptcy administrator would be more efficient and would enhance the quality of bankruptcy officiating, a concern of the Brookings report (Klee 2011, email message to author).

Regardless of the Commission's sincerity, its proposal divided the bankruptcy policy community and threatened to end bankruptcy reform efforts. As it was, the bill produced by the Commission represented a compromise of sorts between the Judicial Conference and the bankruptcy policy community. The Commission proposed that Congress create a bankruptcy court distinct from the district courts. The new bankruptcy judges would be nominated by the president and confirmed by the Senate for fifteen-year terms. However, the district judges would have retained considerable influence over the bankruptcy courts. The existing referees would have been terminated on the effective date of the new law. Although they would have ostensibly been eligible for appointment to the new court, the district judges in each district were given authority to determine both the geographic boundaries of the bankruptcy courts in their districts and the number of judges to be appointed. Furthermore, the clerks of the bankruptcy courts would be selected by the district judges and would be employees of the district courts and not the bankruptcy judges.

While this part of the Commission's bill might have been acceptable to the referees, its proposal to create a new United States Bankruptcy Administration was not. The proposed executive branch agency would have had primary responsibilities for intake of most initial case filings and claims disputes. Most consumer cases would be resolved within the Administration, which would have extensive supervisory powers in business matters. Therefore, while the Commission would have given the referees the judicial status they desired, it also reduced their overall authority and numbers, outcomes that the latter group deemed unacceptable.

The rift between the two groups was mended only when Representative Edwards insisted that they work out their differences (Skeel 2001). Much like the

Judicial Conference, the NBC members' error was in their implicit assumption that the Review Commission had replaced the bankruptcy policy community as America's primary bankruptcy policymaking authority. However, as the Judicial Conference's experience demonstrated, policy monopolies are not so easily displaced. New entities, particularly short-lived special commissions, may not in themselves supplant existing institutions.

Moreover, the NBC members apparently failed to appreciate the importance their congressional patrons placed on the referees' contributions. As the policymaking process proceeds toward formal congressional action, the influence of members of Congress within the policy community naturally increases. In the 1930s, Walter Chandler, the House sponsor who gave the 1938 law its name, was especially interested in reforming individual (i.e., consumer) bankruptcy procedures. The National Bankruptcy Conference, which had paid little attention to that part of the law in their deliberations, readily acceded to his proposals. The situation in the 1970s was somewhat different. The NBC was keenly interested in creation of a new administrative agency. However, without the support of Congressman Edwards and Senator Burdick, their project would collapse. Not only would they not get any reforms, but the rupture of the bankruptcy policy community might mean a permanent loss of the group's influence on bankruptcy policy. Therefore, both the NBC's near and long-term interests were served by its concessions on the administrative agency issue. The NBC's capitulation on the matter demonstrates how aggregate benefits (*i.e.*, agenda control) serve to bind policy monopolies notwithstanding their members' divergent interests.[55]

D. Exemptions: Limiting the Scope of Conflict

Broad reforms of the kind advocated by the bankruptcy policy community in the 1970s carry with them a certain risk. Statutory changes to the bankruptcy laws necessarily require the involvement of Congress and its 535 members. Agenda setting models predict that the likelihood that a monopoly will lose control of its policymaking domain increases as the number of participants in a policy dispute grows. That number need not be as large as the whole of Congress. The Judicial Conference might have successfully leveraged its prestige and status as a coordinate branch of government to upend bankruptcy reform had its efforts not been so narrowly focused and self-serving. However, the balancing act faced by the bankruptcy policy community (or other similarly situated monopolies) is to invite sufficient participation to gain success with losing control of the broader process.

Issue definition is one method of limiting adverse participation; another is issue selection. Broad based legislation like the proposed 1970s bankruptcy reforms cover numerous issues. Any of them can be a source of support, but can also be grounds for opposition. The latter is the more potent challenge; Congress on the whole is more likely to become actively engaged on an issue when its members

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[55] The U.S. Trustee was established as a pilot program in the 1978 legislation and was later expanded to cover all but a few jurisdictions. It appoints and supervises case trustees in Chapter 7 cases and standing trustees in Chapter 13. It also plays a limited administrative role in Chapter 11 cases and has standing to review and object to professional fee requests, disclosure statements and plans of reorganization in Chapter 11 matters, and to file motions to dismiss in Chapter 7 consumer cases.

view existing policies or policy monopolies in negative ways (Baumgartner and Jones 1993, 101). Therefore, policy monopolies must act strategically when engaging Congress to enact wide-scale legislation. They must effectively rank each item according to its importance to their greater agenda, and at the same time assess both the probability and scope of opposition such proposals will generate. Monopolies will drop individual items of lesser importance if they are deemed too provocative.

This process of issue selection is exemplified by the bankruptcy policy community's handling of exemption reform in the 1970s. While it was an issue of keen interest to certain members of the community, it also threatened to draw the adverse attention of many members of Congress not otherwise interested in bankruptcy reform. Exemptions are one of the more curious intersections of federal and state law. American debtor creditor law historically provided individual debtors with a kind of safety net, through provisions that allowed them and their families to shield sufficient property from their creditors to maintain at least a meager subsistence.[56] The breadth of these statutes varied widely among the different states. Some states, such as Texas and Florida, granted virtually unlimited protections for real and personal property held jointly by husband and wife (generally known as homestead exemptions; some states offer similar protection only to real property). Other states granted more modest protections to homes, crops and livestock, tools of the trade, family heirlooms, and life insurance policies. The Bankruptcy Act incorporated these state provisions by providing that consumer

[56] Exemption laws only apply to individual and not corporate debtors. See 11 USC §522.

debtors could exempt their property from liquidation by a bankruptcy trustee only to the extent provided by the laws of their states of residence. The result was a legal patchwork, with similar cases in different states having different outcomes.

By the Seventies, critics within the bankruptcy policy community were advocating for a set of uniform bankruptcy exemptions. Some simply wanted the exemptions to be uniform. Some believed that the unlimited exemption schemes in states like Texas and Florida were too generous. Others thought that the exemptions in some states were too meager or antiquated and failed to provide debtors a real opportunity for a fresh start after bankruptcy.

However, the states tend to be quite parochial about their own exemption laws. Texas' broad entireties exemption, for example, was first enacted in the 1830s as an incentive for married couples and families to migrate to the area (then a republic) and was seen by many there as an inseparable element of their state's heritage. Other states, like Delaware, were interested in attracting financial interests to their state and therefore enacted more limited exemptions. Members of Congress from these states and others seemed to the monopoly likely to vigorously oppose efforts to adopt uniform federal bankruptcy exemptions.

Therefore, although support for federal exemptions was strong among certain members of the bankruptcy policy community, they were realistic about the chances of displacing the state laws. Instead, the National Bankruptcy Conference proposed that Congress enact a dual exemption system, under which debtors could elect either uniform federal exemptions *or* those provided by their states of residence (but not a combination of both). That plan was conceived with the intention of minimizing congressional resistance. However, in order to gain approval, proponents of the federal exemption rule had to dilute it even further to include a clause allowing individual state legislatures to "opt out" of the federal scheme for bankruptcy filings in their respective states. Several states quickly chose to do so, effectively leaving intact the patchwork system that bankruptcy experts had sought to replace. Consumer debtors in each state still had some protections, just not the ideal ones envisioned by the bankruptcy policy community. More important to the community, however, was its retention of authority to see its other reforms enacted into law. "By keeping the temperatures of the debates low, the NBC and other reform proponents achieved sweeping reform with remarkably little controversy (Skeel 2001, 132)."

E. Chapter Summary

The 1978 Code ushered in a sea change in American bankruptcy law. It streamlined reorganization provisions to give business debtors substantial discretion in shaping their own exits from bankruptcy as the debtor-in-possession, a legal status which allowed the debtor to manage its own business while reorganizing without the supervision of a court appointed trustee. In fact, Trustee appointments were eliminated in all Chapter 11 cases except in instances of debtor misconduct. Instead, the new Code provided for the appointment of unsecured creditors committees, which were given special standing to monitor the activities of debtors-in-possession, authority to hire their own attorneys and accountants (to be paid by the debtor), and generally act as a watchdog to protect the interests of debtors' trade creditors, who otherwise occupied the lowest rung on the distribution ladder. However, the new provisions encouraged courts to give great consideration to negotiated outcomes. Generally, the Code promoted efforts to reorganize troubled businesses over their immediate liquidation.

The new statute's provision for wage earner reorganizations, relabeled Chapter 13 under the new Code, provided debtors broader discharges and relief from home foreclosure than was available under Chapter 7, in exchange for an agreement to make monthly payments to their creditors from their future income. Procedures for the appointment of Chapter 7 case trustees were dramatically modified. While cases would continue to be filed in the bankruptcy court, most consumer Chapter 7 cases were handled by the trustees without formal judicial intervention, particularly those where there were no assets to liquidate after allowance of the debtor's exemptions. The bankruptcy judges would no longer appoint case trustees under the Code. Instead, they would be appointed and supervised by a new administrative agency within the Justice Department, the United States Trustee. The case trustees, and not the judges, conducted the initial (and usually only) hearing in Chapter 7 cases, reviewed claims, and distributed proceeds from liquidated assets to creditors. While at first glance the U.S. Trustee bore some resemblance to the proposed administrative agency that had provoked the judges to draft their own bill in the early Seventies, it in fact was a very different and far less authoritative entity, and much less a threat than the judges had feared.[57]

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[57] According to one author, "the U.S. Trustee's Office bears no resemblance to the agency envisaged by the Commission. Unlike the Commission's bankruptcy administrators, U.S. Trustees are charged with limited duties, such as maintaining a panel of standing trustees and depositing funds held by trustees in designated accounts. Moreover, . . . U.S. Trustees act as a litigant, appearing as trustee in wage

Moreover, ending the judges' authority to appoint trustees and other case professionals ended the rumors of "bankruptcy rings" once and for all. On the whole, the changes contributed to the elevated perception of the bankruptcy courts that had been the judges' primary goal. Freed of routine ministerial duties, the new judges (most of whom were reappointed referees) could devote their efforts to judging instead of the administrative duties that had been their primary responsibilities under the former Act.

The Code granted bankruptcy judges expanded powers comparable to full-fledged Article III judges. Unlike the Act, in which the district judges had authority over many significant matters, the Code empowered bankruptcy judges to decide most of the matters arising in cases in their courts. Moreover, the new provisions for business reorganization meant longer cases with more judicial involvement. Those changes, with the possibility of significant legal fees, attracted established law firms to the bankruptcy courts for the first time. Overall, the effect was to improve the status of the bankruptcy courts, almost instantly. Bankruptcy courts were perceived as courts of law instead of low-level collection agencies.[58]

Notwithstanding its structural split in the early stages of the legislative process, enactment of the Bankruptcy Code was in the end a triumph for the bankruptcy policy community. That was doubly true for the new bankruptcy judges.

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earner cases and a party in formal hearings on fee applications, plan confirmations, and other matter. Thus, U.S. Trustees add an additional set of lawyers to the already adversarial process of administering bankruptcy cases (Barnes 1997, 921)."

[58] "The effect of the changes . . . has been to usher in a dramatically new bankruptcy regime. The political balance between debtors' and creditors' interests remains intact, but the "bankruptcy ring" has disappeared. For both better and worse, bankruptcy no longer is a mysterious process that takes place in dark rooms or behind closed doors (Skeel 2001, 159)."

After being frozen out of the process at the start, they leveraged their position within the community and more particularly their relationships with reform's congressional backers to realize virtually all of their policy goals. The bankruptcy bench's victory over the generalist federal bench emphasized one of the former group's unique, and most important features. The bankruptcy judges' status as long time policy entrepreneurs gave them a kind of credibility with Congress that they would likely not have enjoyed had they limited their activities to traditional judicial roles. That influence, and not their adjudicatory roles, enabled them to change the structure and jurisdiction of the bankruptcy courts. However, once those changes were enacted, members of the new bankruptcy bench had the *judicial* authority to make even wider ranging changes to American bankruptcy policy.[59]

[59] It was only after the Code's enactment that West Publishing Company, the official publisher of the federal judiciary, began publishing its Bankruptcy Reporter, a compendium of bankruptcy court decisions. This not only made local court opinions more readily available nationwide, but conferred a kind of credibility on those decisions that they did not enjoy when they were only included in smaller, specialty-oriented publications.

CHAPTER FIVE: BANKRUPTCY REFORM, 1997 – 2005: The Bankruptcy Abuse Prevention and Consumer Protection Act and the Decline of the Bankruptcy Policymaking Community

The number of new bankruptcy cases grew rapidly following the Code's adoption in 1978, as judges and lawyers alike worked to implement the new law. However, the Supreme Court's 1982 ruling that the Bankruptcy Code's judicial structure improperly granted Article III authority to the bankruptcy courts[60] posed a major challenge to the law's early success. The bankruptcy policy community, still riding the wave of its 1978 triumph, used its influence to ensure that the legislative response to the Supreme Court minimized disruption of the new system. Congress resolved the constitutional question by returning primary jurisdiction over bankruptcy cases to the district courts, but with the proviso that the district courts could enter general orders referring most bankruptcy matters to the bankruptcy judges. The district courts quickly did so, meaning that, in practice if not in form, bankruptcy judges retained most of the authority they had gained under the Code.[61] Moreover, the power to appoint bankruptcy judges was not returned to the district judges; that responsibility was given to the judges of the federal circuit courts of appeal. Therefore, despite some technical differences, the bankruptcy courts continued to function essentially as contemplated in 1978.[62]

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[60] See Chapter Four, fn. 53.

[61] In a limited class of matters, the bankruptcy judges, like federal magistrates, could only make recommendations to the senior court.

[62] Some commentators suggest that the 1984 amendments might not have resolved the constitutional questions raised by the Court in *Northern Pipeline* (Warren and Westbrook 2009, 803). However, the Supreme Court has passed on raising that issue directly in a line of cases addressing the specific amendments; it recently

Consumer lenders were more active in the process leading to the adoption of the 1984 amendments than they were in the 1970s. The lenders were undoubtedly motivated by the rapidly growing numbers of new cases filed following the Code's enactment. New bankruptcy filings jumped from 196,976 in 1979 to 314,886 in 1980, an increase of almost sixty percent.[63] Although filings eased somewhat to 284,517 by 1984, alarmed lenders convinced Congress to place some limits on consumer filers. Besides restructuring the bankruptcy courts, the 1984 amendments gave judges the authority to dismiss consumer bankruptcy cases if they determined that the filing constituted a substantial abuse of the bankruptcy laws.[64] It also clarified the repayment requirements for debtors electing to file Chapter 13. Some commentators describe the changes as major (Warren and Westbrook 2009), while others identify them as relatively minor (Skeel 2001, 196). In fact, the changes seem to have had little practical impact on bankruptcy filings. The number of new cases continued to increase, from 341,189 in 1985 to 549,831 in 1988, and 900,874 in 1992.

A. The 1994 Amendments and the National Bankruptcy Review Commission: the Bankruptcy Policy Community's Last Best Chance

Congress waited ten years before it again made significant changes to the Code. Those amendments were enacted in 1994 with little attention and no

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addressed the matter of the bankruptcy courts' subject matter jurisdiction under the 1984 amendments and left untouched the amendments' basic scheme (*Stern v. Marshall*, __ U.S. __, 131 S.Ct. 2594 (2011).

[63] Case filings leveled off and even decreased somewhat in subsequent years, but remained well above their pre-Code rates. All national annual case filing data in this section is taken from Skeel 2001, 188).

[64] 11 U.S.C. §707(b). As described below in this chapter, this provision would figure prominently in the 2005 amendments to the Code.

surrounding controversy. They were mostly technical in nature; many were intended to resolve conflicting applications of the Code that had arisen between the various judicial district and circuits since 1978.

The most consequential provision in the new legislation was its creation of a new National Bankruptcy Review Commission. The creation of a new review commission was not a foregone conclusion. Earlier legislative revisions of bankruptcy law occurred at forty-year intervals. In addition, unlike the 1930s or the 1970s, there were no complaints of fundamental shortcomings in the structure of the Code. In fact, "when Congress established the National Bankruptcy Review Commission, it pronounced itself 'generally satisfied with the basic framework established in the current Bankruptcy Code,' counseling that the Commission's recommendations 'not disturb the fundamental tenets of current law (National Bankruptcy Review Commission ("NBRC") 1997, iv).'"

However, in view of the alignment of interest groups supporting and opposing the Commission's formation, it is probable that creditor influence played an important role. Many creditor groups publically supported formation of a new Review Commission.[65] On the other hand, the National Bankruptcy Conference and several consumer groups opposed it. It may be surmised that both sides believed that formation of the Commission would open up the bankruptcy policymaking process, making it more accessible to creditor-friendly influences.

Hence, Congress' creation of the National Bankruptcy Review Commission

[65] The American Bankruptcy Institute, a non-partisan group devoted mainly to professional education that drew its members from across the bankruptcy bar and bench, also supported creation of the new Commission.

was a set back for the bankruptcy policy community, and a distinct sign that its hold over bankruptcy policymaking had weakened. Nonetheless, once Congress authorized creation of the Commission, the community moved to assume its traditional role. The Commission's original chairperson, former Oklahoma Democratic congressman Michael Synar, had an important role in sheparding the 1994 amendments through the House, as well as legislation in 1986 that expanded the United States Trustee Program and enacted Chapter 12, which provided specially targeted bankruptcy relief for family farmers. When Congressman Synar died in early 1996, he was replaced by Brady Williamson, a prominent commercial bankruptcy attorney and a member of the National Bankruptcy Conference ("NBC"), as was Harold Marsh, his counterpart in the 1970s. Another former congressman, M. Caldwell Butler (D-VA), was also appointed to the Commission. Butler provided legislative continuity to the group; he had been one of the Code's primary co-sponsors when it was enacted in 1978.

The membership of the new Review Commission differed from its 1970s predecessor in one important respect. Unlike the earlier commission, from which bankruptcy judges were actively excluded, the new legislation included terms requiring that the Commission's members be knowledgeable in bankruptcy law. The Chief Justice used one of his appointments to name Illinois bankruptcy judge Robert Ginsburg to the panel. Ginsburg became vice chairman of the group, and served as its acting chairman after Synar's death. He was a member of both the NBC and the National Conference of Bankruptcy Judges.

The authorizing legislation also required the Commission reflect a "diversity of background and opinion" in bankruptcy matters. Chief Justice William Rehnquist took this proviso to heart. His other appointee to the Commission was Fifth Circuit Court of Appeals Judge Edith Jones. Judge Jones specialized in bankruptcy law while in private practice and served on various Judicial Conference and American Bar Association committees on the subject. She was also famously conservative and her rulings in bankruptcy and debtor-creditor matters frequently sided with the creditors. Her appointment would have considerable consequences, as she would turn out to be the leading spokesperson within the Commission for pro-creditor reforms.[66] Judge Jones' counterpoint on the Commission would turn out to be not one of her fellow appointees but instead Professor Elizabeth Warren of Harvard Law School. A member of the National Bankruptcy Conference and the co-author of a leading bankruptcy casebook and several other texts on the subject, Warren was named the Commission's reporter at its first meeting. Although not formally a commission member, she would turn out to be its most forceful debtors' advocate.

The Commission met frequently and held public hearings throughout the country prior to issuing its report on October 20, 1997.[67] Unlike the 1970s commission (or for that matter, the informally authorized National Bankruptcy Conference of the 1930s), the Commission's nine members were sharply split along debtor-creditor lines, with many issues decided by a single vote in favor of the NBC-

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[66] The other commission appointees were Jay Alix, a corporate reorganization specialist from Detroit; Babette Ceccotti, a New York lawyer; John Gose, a Seattle lawyer specializing in real estate insolvency; Jeffrey Hartley, a lawyer and former majority counsel to the Senate Courts and Administrative Practice subcommittee, and James Shepard, a bankruptcy and tax lawyer.

[67] The full report is available online at http://govinfo. library.unt.edu/ nbrc/reportcont.html (most recently viewed 10/20/11).

led pro-debtor group. Neither group seemed interested in achieving a workable consensus. While both sides agreed on many matters, some of them significant, they refused to budge on the central issue of consumer bankruptcy reform.[68] The Commission's majority favored the Code's existing pro-debtor bias and refused to entertain most of the minority's suggestions. Although the majority's report included 170 separate recommendations, its proposed changes to consumer bankruptcy law were essentially an extension of existing policy. Moreover, the report resurrected two of the policy community's unsuccessful standbys from the past, uniform exemptions for consumer debtors and Article III status for bankruptcy judges.[69]

Motivating the majority's proposals was its fundamental commitment to existing law and the principle of the fresh start. They characterized their proposals to modify consumer bankruptcy law as an interconnected "framework," such that the removal or alteration of any of its provisions would undermine the entire structure and cause its collapse. The majority relied on that characterization to block consideration of changes favored by the minority, including amendments that would have placed stricter qualification requirements on debtors filing Chapter 7 bankruptcy. The majority members may have stood firm in defense of their own notion of the fresh start, but their steadfastness cost them a larger and more

[68] The majority and minority concurred on the need for technical changes to Chapter 11 and the creation of a nationwide bankruptcy case filing system. They also agreed, at least in principle, on the need to limit repeat bankruptcy case filers, to improve debtor education, and even on increasing utilization of Chapter 13. However, the majority's insistence that the full Commission adopt its proposals as a single package prevented even these uncontroversial items from receiving a consensus recommendation.

[69] *See* Chapter Four.

balanced consensus. Two of the dissenting members wrote separately to indicate that the majority's intransigence left them no option but to side with the minority: "Unfortunately, the framework [*i.e.,* the majority proposal] was put forth on a 'take it or leave it' basis . . . Many of its substantive proposals are both unfeasible and, if adopted, would put unnecessary strain on the current consumer system. (Commissioners Gose and Hartley, concurrence with Consumer Dissenting Opinion, NBRC 1995, 1120)." The minority insisted on alternate proposals limiting debtors' existing options and rejecting reforms that in their view would have placed additional burdens on creditors, calling them "misguided and unresponsive (NBRC 1995, 1046)."

Underlying and ultimately consuming the Commission's deliberations was a debate over the fundamental direction and purposes of bankruptcy law. To a large extent, the debates within the Commission became a kind of blame game. The basic facts were beyond dispute. Both consumer borrowing and personal bankruptcy filings had dramatically increased since the Seventies. The Commission reported that while fewer than forty percent of American families had at least one credit card in 1978, that number had doubled by 1997 (NBRC 1997, ii). Non-business bankruptcy case filings likewise increased; they exceeded the 1 million mark in 1996, and reached 1,350,118 in 1997, the year of the Commission's report. However, each side interpreted the raw data to its own ends. The majority, being drawn from the ranks of the traditional bankruptcy establishment, emphasized their belief that preservation of the fresh start was central to bankruptcy policy. As the core image on which the bankruptcy policy community was built, the fresh start remained central to the majority's proposals: "While some debtors in bankruptcy no doubt file for reasons that are illegitimate, most families come to the bankruptcy courts as they have for many years – seeking relief from debts they have virtually no hope of repaying (NBRC 1997, 83)." Furthermore, the majority challenged critics' arguments that the rising numbers of consumer bankruptcy filings were the result of lenient bankruptcy policies. Instead, they countered, the increase in new bankruptcy cases was the result of the over-extension of credit and a lack of restraint by the lenders themselves (NBRC 1997, 84-87; Jacoby 2004, 1096).

The minority group, led by Judge Jones, described bankruptcy in a very different way, one that challenged the legitimacy of the fresh start as its fundamental image:

> One basic defect in the Framework [the name commonly used within the Commission to identify the majority's proposal] is philosophical. The Framework is based on two major assumptions: first, that debtors are financially disadvantaged through no fault of their own; and second, that debtors are inadequately represented in the bankruptcy process. From these two assumptions comes the Framework's inevitable conclusion: that as a matter of social justice, it is necessary to level the playing field by insuring that debtors are treated better under the reformed Code than they were before. As a result, much of the Framework can be characterized as social engineering designed to redistribute wealth, rather than bankruptcy reform (Jones and Shepard, NBRC 1997, 1115-16).

The minority's alternate concept of bankruptcy's proper role grew out of what economists call "moral hazard." Moral hazard is the idea that people will engage in riskier behavior in search of greater returns if they are insulated from the consequences of their actions. Bankruptcy, argued the minority, makes it too convenient to ignore one's financial obligations. In its own recommendations, the minority wrote:

> [T]here is a growing perception that bankruptcy has become the first resort rather than a last measure for people who cannot keep up with their bills. Lenders everywhere are reporting an increase in the number of bankruptcy petitions filed by people who were current on their debt payments. This phenomenon implies that bankruptcy relief is too easy to obtain, that the moral stigma once attached to bankruptcy has eroded, and that debtors are insufficiently counseled both about personal financial management and about the use of bankruptcy (Minority Recommendations, NBRC 1997, 1044).

The minority argued that the majority's proposal (and by extension the underlying premises of existing bankruptcy law) incorrectly shifted the risk of failure to the vastly larger number of borrowers who do not default or file bankruptcy but instead prudently handle their credit:

> The tragedy of the Commission's review process has been that the largest affected group has been left out: the legions of hard-working individuals who live within their means and pay their bills. They have been entirely unrepresented. As a consequence, the Framework implicitly assumes that its proposed changes will have no broader effects. We disagree. Many of the proposed changes will adversely affect this group through increased borrowing costs, and reduced credit availability . . . If the Framework does nothing to stem the flood of increasing bankruptcy petitions during prosperous times, then a cataclysm of filings, whose damage we cannot foresee, will ensue with the next recession (Jones and Shepard, NBRC 1997, 116).

The minority argued that bankruptcy law needed to be changed to force more debtors to make partial payments of their debts as determined by a new "means test." As originally conceived in the 1978 Code, the choice of obtaining an immediate discharge of debts under Chapter 7 or making repayments under a Chapter 13 plan was left to the debtor (the 1984 amendments did allow judges to dismiss Chapter 7 in undefined instances of "substantial abuse," but such dismissals were relatively uncommon). Unsurprisingly, the great majority of consumer debtors filed bankruptcy under the faster and less rigorous Chapter 7 procedure. Proponents of creditor-friendly reforms argued that many debtors filed Chapter 7 after accumulating large credit card balances, wiping out such claims even though they had sufficient regular income to allow them to repay at least of portion of such amounts through a Chapter 13 plan. The means test conditioned consumer debtors' election of Chapter 7 on meeting certain income qualifications. Proponents of the test argued that it was fairer to creditors and would promote consumers' responsible use of credit by borrower by making it harder for them to simply walk away from large loan balances by filing bankruptcy, regardless of their income.

In sum, even though each side started from the same set of facts, their disparate ideologies led them to opposing explanations of its causes and consequences. Neither side was willing to concede to the other on the most critical consumer bankruptcy issues. While this polarization would work to the majority's advantage within the Commission, its broader implications proved fatal to the majority's recommendations. The close dispute within the Commission assured that its report would be ignored. Senator Grassley (R-IA), one of the Senate's reform leaders, said upon presentation of the report, "The commission's recommendations are highly controversial. Because they passed by a 5-4 majority, I don't think Congress will be guided by them (Hansell 1997)." The dissension gave reform proponents the opening they needed to engage Congress directly. However, even though the report itself rapidly disappeared as a subject of ongoing debate, the distinctive images underlying each group's characterization of the bankruptcy process would dominate congressional debates for the next eight years.

Because of the highly publicized nature of the Commission's deliberations, its divided vote was expected and reform proponents had mobilized for congressional action (Jacoby 2004, 1098). By December 1996, consumer lenders formed the National Consumer Bankruptcy Coalition.[70] This organization would be the primary representative of the groups supporting reform. Following the example set by the bankruptcy policy community, it drafted its own proposed legislation and established key alliances with members of Congress. Unlike the community, the Coalition used its financial clout to hire prominent lobbyists to make its case to the legislature.[71]

Reform opponents were not nearly so well organized for a congressional fight. The bankruptcy policy community was constructed to make policy in dominant, low conflict situations, not high conflict competitive ones. Community members like the National Bankruptcy Conference and the National Conference of Bankruptcy Judges would issue position papers, testify at hearings, and publish articles in scholarly journals, but did not directly engage Congress in the way that the financial community did. Debtor interests are by themselves notoriously difficult to organize (Posner 1997; Warren 1999; Skeel 2001). By definition, debtors lack the resources essential for organized advocacy. More importantly, no

[70] The members of the coalition were the American Bankers Association, Credit Union National Association, America's Community Bankers, Independent Bankers Association, Visa USA, National Retail Federation, American Financial Service Association, MasterCard International, and Consumer Bankers Association. MBNA America, a major credit card issuer, funded a substantial portion of its operations (Nunez and Rosenthal 2004, 535).

[71] The Coalition's lobbyists included leading members of the Washington establishment such as Lloyd Bentsen, the former Secretary of the Treasury; former Republican National Committee chair Haley Barbour; and Lloyd Cutler, who had been White House counsel for Bill Clinton and whose firm, Wilmer, Cutler & Pickering, was one of the firms hired by the Coalition to write the new bill (Warren 1999, 195).

one wants to be a debtor; at most, it is a transient state from which its members hope to escape, the sooner the better.

Hence, debtor interests must rely on others to do their bidding for them. The bankruptcy policy community, built on the concept of the fresh start, filled that role in the Thirties and Seventies. However, other entities had to fill the void left by the Community's marginalization in the wake of the failure of the Commission's report. Consumer advocacy groups and a newly formed association of debtors' attorneys lacked the resources or clout to effectively compete with the better-financed and organized creditor interests. Finding themselves outside the policymaking process for the first time in more than sixty years, members of the bankruptcy policy community were forced to look beyond their own ranks for support.

Conflict expansion models identify issue linkage as an important tool for gaining allies (Pralle 2003, 51). Parties to policy disputes can gain critical support by associating their concerns with those of others nominally not interested in the dispute. "When the public and policymakers connect a previously isolated problem to a broader issue, its significance increases . . . [I]f problem proponents are able to connect their issue to deep cleavages or ideological debates in politics, then the stakes of the issue increase as the battle takes on added significance (Pralle 2003, 19-20)." With their own influence in Congress dissipated and their resources outmatched, reform opponents would employ this strategy with remarkable success over the next eight years.

B. A Chronological Review of Bankruptcy Reform Legislation (1997-2005)

The legislative history of bankruptcy reform from the introduction of the first bill in 1997 until its eventual enactment in 2005 demonstrates how congressional minorities can succeed despite overwhelming opposition. Reformers needed to make five attempts over eight years to finally obtain approval of their bill. When examined in the context of agenda setting, these events provide an understanding of how minority interests can leverage congressional rules to thwart their better-financed opponents.

1. *The 105th Congress (1997-98)*

Because of the public nature of its proceedings, the outcome of the Review Commission's efforts were known in advance of its final report. The credit industry and its congressional supporters moved forward without waiting on the Commission. Congressman Bill McCollum (R-FL) introduced "The Responsible Borrower Protection Bankruptcy Act," on September 18, 1997, a month before the NBRC submitted its report. McCollum's withdrew his bill the following February, when it was replaced by Representative George Gekas' (R-PA) Bankruptcy Reform Act of 1998 (H.R. 3150). Gekas' bill passed the House on June 10, 1998. The bill enjoyed widespread bipartisan support. In a pattern that would be followed in all House voting on bankruptcy reform legislation through five sessions of Congress, H.R. 3150 passed by a vote of 306-118, with 82 Democrats joining every Republican in support.

In the Senate, Senators Grassley and Durbin (D-IL) filed their own bill, the Consumer Bankruptcy Reform Act of 1997 (S.1301) on October 21, 1997, two days after the Commission filed its report. Eventually, that bill was replaced by the House-passed version of H.R. 3150 and approved by an overwhelming 97-1 majority on September 23, 1998. Senate amendments to the bill precipitated the formation of a conference committee, which was duly formed and issued its report. The House approved the report on a 300-125 vote, but efforts to bring it to a vote in the Senate before the end of the term failed. Opponents relied on the Senate's slower calendar and formidable procedural barriers to stall the bill. Their recourse to dilatory tactics was a desperate move but one that they would use again in an effort to prevent bankruptcy reform from becoming law.

2. *The 106th Congress (1999-2000)*

Representative Gekas and Senator Grassley each introduced the 1998 conference report as new legislation in the following term, on February 24, 1999 and March 16, 1999, respectively. The House again quickly approved the bill (without amendment) on May 5, 1999, by a vote of 313-108. The Senate adopted the House bill in place of its own (as S.625) and approved it, again with amendments, on February 2, 2000. Another conference committee was formed. The House approved the conference report by voice vote on October 12, 2000. It likewise passed in the Senate on vote of 70-28 on December 7, 2000.

At this point, with passage of the bill virtually certain, the bankruptcy policy community pulled out the last tool left at its disposal, a direct appeal to the President. Although the report had been approved by veto proof margins in each chamber, Congress was set to adjourn for the year, leaving open the possibility of a pocket veto.

Having been marginalized in the legislative process, and given unanimous Republican support for the legislation, the bankruptcy community established alliances with traditional Democratic interests, including groups devoted to labor issues, civil rights, and women's and children's interests. The latter association proved particularly useful, as First Lady Hillary Clinton was well known to be particularly concerned with those issues. According to Mrs. Clinton, she "weighed in" on the President's decision, citing concerns that the legislation relegated unpaid child support obligations to the same status as credit card debt (Clinton 384-5). President Clinton in fact pocket vetoed the bill.[72] Attempts by supporters to force the President to approve the bankruptcy bill by attaching it to pending spending legislation were likewise unsuccessful. Therefore, despite overwhelming congressional support for the legislation, the bankruptcy policy community and its new allies had yet again succeeded in keeping the creditors' reforms from becoming law.

3. *The 107th Congress (2001-02)*

Given their legislation's widespread support, congressional sponsors of bankruptcy reform were not deterred by their two failures. Indeed, 2001 saw the inauguration of a Republican president who supported their efforts. On January 31, 2001, Rep. Gekas introduced the 106th Congress' conference report as H.R. 333. The bill passed by the now usual overwhelming margin of 306-108 on March 1, 2001. The Senate, acting with more alacrity than in past sessions, approved similar

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[72] The primary reason cited by the President in his veto message was the legislation's continued incorporation of controversial state exemption laws like those in Texas and Florida (See Part 3 of this chapter). Other sources cite the deletion from the final bill of Senate Democrat Charles Schumer's amendment to deny the discharge of civil judgments against abortion clinic protesters. (Mann and Ornstein, 143). This latter provision would figure prominently in the next two attempts to pass the reform bill.

legislation, designated S. 420, by a vote of 83-15 on March 15, 2001. This time, outside events slowed further consideration of the bill. Congressional attention was first directed to enactment of President Bush's tax cutting plan, and then to the response to the September 11th attacks and the subsequent D.C. anthrax scare, which closed down or hindered congressional operations in late 2001 and into 2002. When the conference committee finally met, it was faced with two significant obstacles. The first related back to President Clinton's veto message and the issue of personal exemptions. News reports of wealthy debtors escaping their creditors by relocating to states with generous homestead exemptions like Florida and Texas led gave new life to the matter of exemption reform. Legislators from both parties supported proposals to either enact uniform exemptions or at least limiting the amounts debtors could claim using state exemptions in bankruptcy. However, Texas and Florida's congressional delegations unanimously opposed such measures, and threatened to block the entire legislation if the caps were not removed. Although the two sides repeatedly seemed at an impasse, House and Senate conferees ultimately reached a compromise with the Texas and Florida delegations that left unlimited exemptions in place for debtors who had resided in a state for at least 40 months prior to filing bankruptcy.

The more troublesome provision for reform proponents was an amendment made by Senator Charles Schumer (D-NY). Schumer had taken up the debtor's cause, leading efforts to block the reforms from becoming law despite their overwhelming congressional support. His amendment pushed what was possibly the hottest button in partisan politics, abortion rights. The added provision authorized bankruptcy judges to block the discharge of any debts incurred on account of criminal fines or civil damages arising out of violent abortion clinic protests.

The amendment had no real impact on the Bankruptcy Code. Existing laws already barred the discharge of debts resulting from willful and malicious acts. Bankruptcy experts acknowledged as much. However, as a political strategy, Schumer's maneuver was brilliant. The solid Republican support for the bill was split; many conservative legislators, under pressure by pro-life interest groups, refused to support the conference report so long as it included the abortion violence amendment. Conversely, many Democrats who had previously voted for the bill indicated that they would not do so again if the amendment were stripped out.

The legislation was reported out of the conference with the amendment in place. True to their word, the Republican-led House refused to bring it to a floor vote, instead blocking further consideration of the report on a vote of 243-172, and bankruptcy reform died for yet a third time.

4. *The 108th Congress (2003-04)*

When the 108th Congress convened in 2003, bankruptcy reform legislation had a new name and a new House sponsor. The old name, Bankruptcy Reform Act, had given way in the style of the 2000s to a more elaborate one, The Bankruptcy Abuse and Consumer Protection Act, commonly known by its acronym, BAPCPA. In addition, Representative George Gekas had lost his bid for reelection. James Sensenbrenner (R-WI) assumed leadership of House efforts to enact bankruptcy reform. He introduced his bankruptcy bill, identified as H.R. 975, on February 27,

2003. It was essentially the same as the one the House approved in the prior session of Congress. It again went through the House quickly, passing on a vote of 315-113 on March 19, 2003, and was sent to the Senate.

However, despite the fact that reform opponents had repeatedly succeeded in quashing the legislation by playing the Senate off of the House, reform supporters had yet to coordinate the chambers' efforts. The Senate did not take any action on H.R. 975. Instead, it took up Senator Grassley's version of the bill, S.1920, which he introduced on November 21, 2003. It passed the Senate four days later by unanimous consent. The House took up S.1920 after returning from its holiday break and approved it, with amendments, on January 28, 2004. Another conference committee was duly formed. However, threats by Schumer and others to add the abortion clinic provision to S.1920 left little appetite among members of either chamber to pursue the bill further. In addition, congressional attention to the war in Iraq and upcoming elections meant that the legislation received no additional attention. It died without further action when Congress adjourned at the end of the year.

5. *109th Congress (2005)*

The 2004 elections placed both Congress and the White House under solid Republican control. Moreover, legislative supporters of bankruptcy reform finally realized that wide majorities were by themselves inadequate to achieve its passage. Unlike in the four prior sessions, Republican leadership in the two chambers coordinated their efforts. Consideration of the legislation would begin this time in the Senate, since the House leaders had committed to pass any measure approved by the upper chamber and thereby bypass a historically troublesome conference committee. To facilitate House passage, the Senate's Republican leadership said it would block efforts to tack unfavorable amendments to the bill. House Republicans agreed to do the same. This by itself should have been controversial. However, in the highly charged partisan atmosphere of the modern Senate, such maneuvers had become commonplace.

Senator Grassley introduced the bill, S.256, for the final time on February 1, 2005. In little more than two weeks it was passed without changes by the Judiciary Committee and was sent to the floor, where it was approved with minor amendments on March 10, 2005 on a vote of 74-25. The bill was sent to the House, where it was substituted for H.R. 685, a similar bill that had been introduced by Representative Sensenbrenner as a placeholder while the Senate engaged in its deliberations. S.625 cleared the House Financial Services Committee on April 8, 2005, and was approved by the House (without amendments) by a vote of 302-126 on April 14, 2005. True to their word, the House Republican leadership blocked attempts to amend the bill. There was no need for a conference committee to reconcile differences between the two chambers. S.625 was sent to the president, who signed it on March 10, 2005. It became effective just short of seven months later, on October 5, 2005.

6. *A Brief Summary of the Bankruptcy Abuse and Consumer Protection Act*

For all of the controversy they generated, the 2005 reforms followed, rather than replaced, the structure of the existing Bankruptcy Code. Essential procedures and institutions were left intact; the basic standards for obtaining discharge were essentially unchanged. Instead, the most important, and most controversial parts of the new law were so-called "gate-keeping" or qualifying provisions intended to limit debtors at the beginning of consumer cases. The most controversial addition, means testing, conditioned individual filers' election of the quicker, less burdensome Chapter 7 proceedings on qualification under a complex income and expense analysis derived from IRS collection procedures. Debtors with specified net cash flow, identified in the law as "disposable income," would be compelled to repay at least of portion of their debts to creditors under a Chapter 13 plan of three to five years length. New filers who passed the means test were not automatically in the clear. Their cases might still be subject to dismissal if a judge concluded that the filing was for an improper purpose that was an "abuse" of the terms and protections of the Bankruptcy Code (11 U.S.C. §707(b); Wedoff 2005; Wedoff 2006). This amendment was derived from the various bills introduced by Senator Grassley; it was intended to give judges broader discretion to review new cases than the old standard, which required actionable abuse to be "substantial" (Hansell 1997) and resulted in relatively few dismissals.[73]

Other parts of BAPCPA, while still controversial, drew less attention than the means test. All consumer filers were required to attend a debtor education class before seeking bankruptcy relief. In addition, the new law imposed an obligation on attorneys to independently verify the accuracy of the information contained in their

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[73] Congress has not defined the term "abuse" in §707, even though it has been part of the Bankruptcy Code since 1984. Judicial interpretations of the term have widely varied. *See* Ruttenberg (2009) and Chapter Six of this dissertation.

debtor clients' schedules of assets and liabilities and statements of financial affairs, documents that require a detailed analysis of a filer's financial circumstances. One uncontroversial provision important placed restrictions on serial filers, who, for example, filed bankruptcy to stop foreclosure but otherwise did nothing until their cases were dismissed, and then filed again when foreclosure proceedings were restarted against them.

C. Analysis

The main challenge facing proponents of pro-creditor bankruptcy reforms in the early Nineties was the fact that bankruptcy policymaking was dominated by a monopoly that had been in place for sixty years. Monopolies are by definition closed to new participants, especially reformers whose goals are at odds with the monopoly's core policy image. As the National Bankruptcy Review Commission report demonstrated, the bankruptcy policy community rejected most of the reformers' proposals, but it was most emphatically opposed to measures like the means test that it perceived as being at odds with the fresh start principle. Therefore, creditor groups had to break the bankruptcy policymaking community's hold on the policymaking process in order to see their proposals become law. Since American bankruptcy is based in federal law (Warren 1999, 189), the key to the pro-creditor reformers' success was to bypass the community and directly engage Congress in the policymaking process. Their strategy encompassed two related challenges: (1) breaking the community's hold on the policymaking process, and (2) expanding the scope of conflict to draw Congress directly into the policymaking fray.

In order to displace a policy monopoly, challengers must both develop a compelling image of their own *and* discredit the monopoly's core image (Baumgartner and Jones 1993). Defining the issue to assert that the existing system had unfairly tipped the balance in the relationship between debtors and creditor too far in the direction of the former would not in itself have been likely to gain sufficient congressional support at a time when the credit card industry was reporting record profits. Instead, reformers defined their efforts in terms of promoting personal responsibility. The motivating image underlying the statutory reforms in 1938 and 1978, and on which the bankruptcy policy community was built, was of providing a fresh start to the honest but unfortunate debtor. The great mass of consumer filers were viewed as victims of circumstances which were either beyond their control (*e.g.*, job loss or illness), or were at most the creation of their own erroneous judgment.[74]

Reform proponents turned that image around in the 1990s. The proliferation of credit card debt, increases in consumer goods purchases, and the rapid growth of bankruptcy filings allowed reformers to redescribe many consumer filers as shiftless rather than honest and manipulative instead of unfortunate. The National Consumer Bankruptcy Coalition in objecting to the Review Commission's majority report (three months before it was actually released), published the following statement:

> [T]he Commission has assembled a package of proposed consumer bankruptcy "reforms" which would benefit unscrupulous or undeserving debtors at the expense of lenders and responsible borrowers, and would encourage more chapter 7 bankruptcy filings. Its recommendations condone and encourage outrageous and irresponsible financial behavior. Adoption of these proposals would substantially increase lenders' risk and result in

[74] *See* Chapter Four.

> consumer credit becoming less available and more costly. The public's overwhelming view that those who have the ability to repay should do so would be thwarted. And the public would likely view the resulting Bankruptcy Code as a perverse system of debt forgiveness on demand for the financially reckless (National Consumer Bankruptcy Coalition 1997).

The Review Commission's minority group refined the coalition's characterization with the observation that many debtors were using bankruptcy as an option of "first resort" (Minority Recommendations, NBRC 1997, 1044). Such images were fueled by industry-funded studies from Purdue University asserting that possibly as much as twenty-five percent of bankruptcy filers had the ability to repay at least some of their discharged debts (Seelye 1998; Warren 1999).[75]

Congressional supporters of reform legislation were quick to incorporate these themes into their own descriptions of the bankruptcy process. Congressman Scott McInnis (R-CO) said that the legislation was "another example of this Congress's efforts to encourage individual responsibility. We will renotify people that they do need to be held accountable for their debts that they have accumulated. We will remind them about keeping their work. We will remind them about 'Don't go out and spend money that you don't have.' (Seelye 1998a)." Representative Deborah Pryce (R-OH) offered an even broader critique of debtors: "[W]hen intelligent citizens ignore basic common sense by spending outside of their means,

[75] Consumer advocates criticized the Purdue studies were both because of the researchers' methodology and their conclusions (Warren 1999, 195, calling the results "made up"). Studies by consumer advocates have been subject to similar criticism. In one such study, the authors claimed that nearly one-half of all consumer bankruptcy cases were "medical-related (Jacoby, et al. 2001). Cases in a sample taken from eight different jurisdictions were designated as medical-related if described as such by the filers themselves, or if the court documents indicated medical debts greater than $1,000. Critics of that study argue that these standards are arbitrary and fail to account for other significant factors that may have contributed to the debtors' decisions to file bankruptcy (Jacoby 2001, 236, fn. 24).

we need to establish a reasonable level of accountability and demand some personal responsibility to protect those who have extended credit to them in good faith (quoted in Jacoby 2004, fn. 8)."

"Personal responsibility" became the reformers' rallying cry. It met the requirement that policy images derive from fundamental values. In addition, while sounding positive, it implicitly denigrated the idea of the fresh start. If refraining from filing bankruptcy was a sign of responsible behavior, then the growing numbers of bankruptcy filings were a mark of increasing irresponsibility, or worse, fraud. Congressman Gekas echoed the NBRC minority when he said in support of his bill, "We guarantee a fresh start to any American who needs it . . . But by the same token, we can't permit anyone to use bankruptcy as a financial planning tool (Labaton 2000)." Representative McCollum was more pointed in his criticism:

> [P]eople see bankruptcy as a financial planning tool, spurred on by advertisements....[T]he social stigma associated with filing for bankruptcy has eroded. Bankruptcy was never meant to be used as a financial planning tool or for mere convenience. These "bankruptcies of convenience" are a clear misuse of the bankruptcy system, as bankruptcy becomes a first stop rather than a last resort (quoted in Jacoby 2004, fn. 8).

Defining debtors as irresponsible also enabled the reformers to expand conflict to attract support among the vast majority of consumers who borrowed conservatively, paid their bills on time, and did not file bankruptcy. The argument at least allowed members of Congress to claim to be acting on their behalf. An officer of the American Bankers Association criticized the Review Commission's majority report, stating that the "recommendations make it easy for people of means to walk away from their debts while raising the cost of goods and services for every U.S. consumer--not the solution we need given record consumer bankruptcy filings (Donald G. Ogilvie, Executive Vice President, Am. Bankers' Ass'n, Letters to the Editor: Placing the Blame for Bankruptcy Reform, *Wall St. J.,* Aug. 26, 1997, at A17, cited in Jacoby 2004, fn. 26). Judge Jones and James Shepard made the argument most dramatically in their minority recommendations to the NBRC report, when they described the failure of the majority to take account of the costs of discharge on non-filing borrowers as a "tragedy."[76] The creditors' coalition ran a series of advertisements to bolster this argument, asserting that the cost of covering discharged debts amounted to a $400 annual tax on non-bankrupt households.[77]

Finally, because the bankruptcy policy community's dominance of the policymaking process was predicated on the validity of the fresh start as its policy image, discrediting that doctrine undermined the community's long-standing authority and exiled it from the new policymaking process (Jacoby 2004; Warren 1999). Representative McCollum described the "campaign of false information being disseminated by bankruptcy attorneys, bankruptcy 'experts' and other people maligning the legislation to further their agendas (Jacoby 1999, fn. 3). Congressman Gekas announced at a speech to the American Bankruptcy Institute's annual meeting in 1998 that he was not interested in receiving input from the bankruptcy community (Tabb 1999, 351). Senator Grassley resorted to lawyer stereotypes, arguing that bankruptcy lawyers opposed reform out of self-interest:

> Many lawyers who specialize in bankruptcy view bankruptcy as an opportunity to make big money for themselves. This profit motive causes bankruptcy lawyers to promote bankruptcy as the only option, even when a

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[76] Chapter Five, Part A; Jones and Shepard, NBRC 1997, 1116.

[77] Warren 1999, 195; according to Professor Warren, "the number [was] simply made up." The advertisements were based on the Purdue studies described above in footnote 16.

> financially troubled client might obviously have the ability to repay some debt (Jacoby 2004a).[78]

However, as usual, the most pointed commentary was from Judge Jones and Commissioner Shepard in their NBRC dissent:

> Seen in its best light, the Framework reflects the well-intentioned aspirations of individuals who live in ivy-covered towers who have no real day-to-day experience with the law they are seeking to reform. The sum of their knowledge of consumer bankruptcy is the incomplete raw data from selected judicial districts from which they draw "undisputable" conclusions and make recommendations, and the culled and selected portions of the Commission's hearings and materials forwarded to the Commission which reflect and support their preconceived ideas of problems and the need for reform (NBRC 1997, 1115).[79]

Baumgartner and Jones (1993) point out that Congress generally responds only to negative characterizations of existing policies. By re-characterizing the fresh start as a tool for unscrupulous debtors, and by extension impugning the role and motives of the bankruptcy policy community, reform proponents not only broke the community's hold on the policymaking process, but also fully isolated the community and its members from any role in Congress' policy deliberations. Organizations like the National Bankruptcy Conference and the National Conference of Bankruptcy Judges offered to participate in the drafting process but were rebuffed (Jacoby 1999), and no wonder. Once the reformers had displaced the

[78] In defense of the lawyers, it should be noted that fees paid to attorneys in Chapter 13 cases are generally more than those paid in Chapter 7, reflecting the greater amount of work required in the former. Under Senator Grassley's reasoning, attorneys should be directing their clients to the better compensating Chapter 13 filings.

[79] This comment was a none-too-veiled criticism of Commission Reporter Elizabeth Warren, a professor of law at Harvard and the author of several empirically based studies of consumers and consumer debt, who spent virtually her entire professional career in the ranks of academia until becoming President Obama's special advisor on the establishment of the Consumer Financial Protection Bureau in 2010.

community's monopoly, it was of no benefit to them to allow the community's members a seat at the new policymaking table.

D. The Effect of Congressional Support of Financial Interests

According to Kingdon, the likelihood of bringing about policy change is maximized when three conditions simultaneously converge: (1) the existence of an event or problem subject to resolution by policymakers; (2) a solution to the problem that may be adopted by policymakers; (3) a political atmosphere conducive to adoption of the proposed solution (Kingdon 1984; *see also* Chapter Two, Part D.3). In the case of 1990s bankruptcy reform, financial interests and their political allies successfully defined the problem as the increase in the number of irresponsible consumer bankruptcy filers. Their solution was to change the Bankruptcy Code to place stricter requirements on those debtors. As to the third condition, it is fair to say that by the mid 1990s, Congress did not need much encouragement to take positions favorable to the financial industry. Pro-banking attitudes had become increasingly prevalent among policymakers by the second half of the 1990s; bankruptcy reform fit neatly into the new legislative agenda.

1. *Bankruptcy Reform and the Financial Sector*

Bankruptcy reform advocates operated in a congressional environment that was broadly supportive of scaling back restrictions on the financial industry. Bankruptcy reform was just one of many issues, and not even the most important one, advanced by the financial sector and supported by Congress in the Nineties. Other legislative successes for the industry included the Riegle-Neal Act of 1994, which permitted interstate banking; the Gramm-Leach-Bliley Act of 1999, which repealed the Depression Era Glass-Steagall Act and eliminated the barriers between commercial and investment banking, and the Commodities Futures Modernization Act of 2000, which placed over-the-counter derivatives beyond the reach of federal regulators. In other words, bankruptcy reform was part of a larger agenda favoring the financial industry that enjoyed widespread bipartisan support in Congress.

The financial sector's influence was the product of three factors: (1) money spent on campaign contributions and lobbying expenditures (see below); (2) the appointment of Wall Street executives to prominent executive branch positions; and (3) a near unrestrained admiration among policymakers for the financial industry: "The idea that a sophisticated, unrestrained financial sector was good for America became part of the conventional wisdom of the political and intellectual class (Johnson and Kwak, 90, 105)." [80]

In Johnson and Kwak's analysis, the amount of money spent by the financial sector on public affairs is only part of the reason for its success. However, in the case of financial reform, the money spent by the industry to promote bankruptcy reform became the focus of contention in and of itself (Jacoby 2004). The financial

[80] Footnote: several books have detailed how the financial industry successfully lobbied Congress in the 1990s to dismantle long-standing restrictions on banks and other financial institutions, ultimately leading to dramatic profits for those institutions but also to the financial crisis of 2008. These include Johnson, Simon and Kwak, James (2010). *13 Bankers: The Wall Street Takeover and the Next Financial Meltdown*. New York: Vintage Books; Morgenson, Gretchen and Rosner, Joshua (2011). *Reckless Endangerment*. New York: Times Books; McLean, Bethany and Nocera, Joe (2010). *All the Devils are Here: the Hidden History of the Financial Crisis*. New York: the Penguin Group. See also Financial Crisis Inquiry Commission (2011). *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*. New York: Public Affairs. None of these books address bankruptcy reform legislation; instead, they provide a broader view of the political atmosphere in which congressional bankruptcy policy was made in the 1990s and 2000s.

sector (including banking, insurance, and real estate) is by far and away the largest contributor to congressional campaigns.[81] The New York Times reported on the eve of passage of BAPCPA in 2005 that the main financial organizations supporting the bill had spent more than $40 million on political fund raising since 1989 (Labaton 2005). By 2000, the amount paid by these companies for lobbyists just to work on bankruptcy legislation was more than $5 million (Bartlett and Steele). Press stories routinely mentioned the amounts spent by the financial industry in reports on the successive bankruptcy bills, and other accounts frequently cited money as the primary reason for the legislation's resilience and ultimate passage. The industry's expenditures became a reason itself for opposition to the bill.[82]

However, the instances in which vote buying can be proven with statistical certainty are uncommon; this is particularly true when legislation enjoys widespread bipartisan support and virtually all legislators receive some contributions from the financial sector. Direct correlations between contributions and roll call votes in such cases are difficult if not impossible to detect.[83] By way of

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[81] Johnson and Kwak report that from 1998 to 2008, the financial sector spent $1.7 billion on campaign contributions and $3.4 billion on lobbying expenses (Johnson and Kwak 2010, 91).

[82] For instance, the Washington Post's David Broder, frequently described as the dean of the D.C. press corps, wrote in 2005: "This 'reform,' which parades as an effort to stop folks from spending lavishly and then stiffing creditors by filing for bankruptcy protection, is a perfect illustration of how the political money system tilts the law against average Americans. The simple fact that for eight straight years it has gained a place on a crowded congressional calendar is testimony to the impact of millions of dollars that banks and credit card companies have spent on lobbyists and campaign contributions . . . . For two weeks [in 2005] the Senate sponsors shot down virtually every attempt to separate the sheep from the goats and carve out protections for the average family trapped by circumstances (Broder 2005)."

[83] Nunez and Rosenthal (2004) examined roll call votes on bankruptcy reform legislation in the 107th Congress (2001-02). They found no significant correlation

a straightforward illustration, the table below compares the roll call votes on bankruptcy reform legislation in the 108th Congress by the eight highest and lowest Democratic House recipients of campaign contributions from the financial sector (including banking, insurance, and real estate) in the 2003 – 2004 election cycle, as compiled by the Center for Responsive Politics. The following chart shows that members of each group were equally divided in their support of the legislation:

Figure 5.1: Roll Call Votes by Democratic House Members on H.R. 975, by Receipt of Contributions from the Financial Sector, Eight Highest and Lowest (2003-04)[84]

Top 8 Recipients:		**Bottom 8 Recipients:**	
Gephardt (MO)	Y	Deutsch (FL)	Y
Carson (OK)	Y	Dooley (CA)	Y
Emanuel (IL)	*N*	McCarthy (MO)	Y
Menendez (NJ)	*N*	*Turner (TX)*	*N*
Ford (TN)	Y	*Conyers (MI)*	*N*
Frost (TX)	Y	*DeFazio (OR)*	*N*
Meehan (MA)	*N*	Sanders (VT)	Y
Frank (NY)	*N*	*Taylor (MS)*	*N*

The lack of a significant correlation between campaign contributions and roll call votes does not mean that money played no role in the ultimate success of the credit card industry in gaining support for BAPCPA; it may only mean that such tests are not a suitable metric for ascertaining such influence. As Johnson and Kwak point out, political expenditures may be best understood as part of a larger picture, with indirect or distant rewards, including a political environment receptive to wide-

between roll call voting and contributions from particular finance and credit card companies. However, they also found that the National Consumer Bankruptcy Coalition's contributions to House members were mainly directed to the Republican leadership; while those members' favorable votes may not have been in question, the contributions were thought necessary to keep the bill on the House's legislative agenda notwithstanding proponents' repeated failures gain its enactment.

[84] Data source: Center for Responsive Politics, www.opensecrets.org.

ranging legislative reforms favorable to the contributors.[85]

2. *Bankruptcy Reform and Partisanship*

Moreover, the emphasis on the financial sector's political spending obscures other congressional motivations. Partisanship and ideological polarization in Congress both increased markedly following the Republican takeover of the House of Representatives in 1994 (Mann and Ornstein). Studies demonstrate that roll call votes on bankruptcy reform legislation in the House were positively aligned on a conservative – liberal ideological axis, i.e., conservatives were more likely to support the legislation, while liberal members tended to oppose it (Nunez and Rosenthal 2004). Congress's increasing conservatism in the Nineties was reflected in its retreat from the social welfare policies of earlier decades. Bartels (2008) and Hacker and Pierson (2010) demonstrate how Congress is more likely now than in the past to disfavor policies that directly benefit the poor and disadvantaged and the middle class.[86] According to Hacker and Pierson (2010a, 154), shifts in U.S. public policy as it relates to financial markets, corporate governance, industrial relations, and taxation, reflect a distinct governmental bias in favor of the wealthy that is largely the result of the actions of organized interests like those described by Johnson and Kwak. Because the benefits of this activity accrue almost exclusively to the already wealthy, with little distributed to the rest of the population, Hacker and

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[85] In addition to broadly supporting financial deregulation, Congress in the 1990s was increasingly conservative and receptive to a general retrenchment of social welfare policy.

[86] The most prominent of these efforts was the welfare reform law of 1996. Like bankruptcy reform legislation, it was given a name that obscured its real purpose: The Personal Responsibility and Work Opportunity Reconciliation Act. Note again Congress' use of the phrase "personal responsibility."

Pierson have named the process “winner-take-all politics.” Bankruptcy reform fits into this pattern, with its shift in emphasis from the debtor-friendly fresh start to a creditor-friendly policy of personal responsibility.

When viewed in terms of competing ideologies, rather than as a battle between interest groups with vastly disproportionate resources, the long fight over the enactment of bankruptcy reform makes more sense. If money by itself were an accurate predictor of political success, then bankruptcy reform legislation would have passed Congress in 1998. Instead, the bankruptcy policy community was able to hinder the financial industry-backed reform forces in four consecutive congressional sessions, notwithstanding its limited resources.

E. The Bankruptcy Policy Community’s Response to Bankruptcy Reform: Expanding the Scope of Conflict

The bankruptcy policy community had two goals the outset of the reform process in 1994: (1) to ensure that bankruptcy policy remained consistent with its own preferences, and (2) to maintain its monopoly over the bankruptcy policymaking process. However, in the 1990s, unlike in the 1930s or the 1970s, the community had to adopt new strategies reflecting its declining influence over that process. The community mostly opposed formation of the National Bankruptcy Review Commission, fearing (with good reason) the loss of its policymaking authority to the financial interests. However, once the commission was formed, it attempted to reassert its authority and assume the leadership position it had occupied for more than sixty years. Members of the community, principally from the National Bankruptcy Conference, filled many of the spots on the Commission and its staff. They formed a solid voting bloc that controlled the content of the Commission's final report to Congress.

However, unlike in 1938 or 1978, the commission also included vocal outsiders opposed to the fundamental aims of existing bankruptcy policy. Rather than accommodate competition, as the NBC did in 1938 when it incorporated the SEC's position on business reorganization, or 1978, when compromise between the NBC and the bankruptcy judges resulted in a single bill that for the most part became the new Code, the commission majority refused to consider compromise on the issue of means testing, preferring to send its report to Congress despite the vigorous dissent of its minority members. In addition, members of the community, both on and off the commission, engaged their critics in the popular, professional, and academic media.

These efforts may have been meant to reinforce the status quo, but in reality were counter-productive to that end. Increased attention rarely benefits the status quo, especially not when it is embodied in a closed policy monopoly. The controversy engendered by the NBRC report and the bankruptcy policy community's publicity campaign made it certain that bankruptcy policymaking would attract Congress's attention and put an end to the community's influence in the field.

Being suddenly relegated to a minor place in bankruptcy policymaking, and faced with overwhelming opposition among members of Congress, the community quickly adopted the legislative strategies of policymaking minorities. It formed strategic alliances with key political figures and interests by linking existing bankruptcy policies to allies' special areas of interest, like women's rights. It tried with remarkable success to divide the legislation's supporters, first on exemption policy, and then on the highly volatile politics of the abortion debate.

However, these efforts, while successful in the short term, ultimately failed. BAPCPA's opponents were never able to diminish its support among legislators. Despite repeated defeats, roll call voting for the bill remained virtually unchanged from the 105th Congress to the 109th. Without new legislative support, the minority's strategy of blocking and delay inevitably ran its course. Supporters learned to tailor their own strategy to block the minority's methods, and BAPCPA was eventually approved in 2005.

F. The Bankruptcy Policy Community Reacts to its New Status

The bankruptcy policy community's long dominance of the policymaking process, followed by its relatively sudden loss of authority, typifies the cyclical nature of policymaking. Baumgartner and Jones (1993) describe the process as one of "punctuated equilibrium." Policy monopolies dominate their fields for long periods of time, but they are displaced quickly. That displacement is a function of the changing definitions of a policy's central issues. Bankruptcy policy's redefinition had two aspects: (1) a shift in focus from providing debtors a fresh start from the effects of financial misfortune to holding them accountable for their debt management, and (2) marginalization of the members of the community themselves.

Monopolies' declines happen so suddenly that members of the monopoly often do not comprehend the changes in time to make adjustments that might extend their dominance. By the mid Nineties, Congress had moved away from enacting laws intended to ameliorate the conditions of the unfortunate; policies like the fresh start had lost their salience. However, a reading of accounts by some members the bankruptcy policy community of the legislative battle over reform suggests that they came too late to realize that their formerly unchallenged influence with Congress was gone. In one telling account, a committee staffer wrote of the early legislative process that "the Senate essentially preempted the Bankruptcy Commission's efforts with its own bill" (Jacoby 2004, 1099), as though the Commission had lawmaking authority independent of Congress.

The community did not see itself as an interest group, and objected when Congress treated it as such, even though its efforts to engender support in the media and its alliances with other interests only reinforced that treatment. Instead, members saw themselves was one of an apolitical expert class that was above self-interest:

> The bankruptcy professionals, volunteering their time, and working in a far less structured and coordinated environment, fought an uphill battle to find legislators and staffers who would listen to their views and understand the incredible complexity of the system Congress was considering re-writing (Warren 1999, 193-94).[87]

Given the broad support in Congress for limiting the availability of discharge for certain individuals, the passage of bankruptcy reform legislation was inevitable. The bankruptcy policy community's refusal to compromise or offer realistic alternatives guaranteed its marginalization in the reform process. This leads to the question of whether a long-standing policy monopoly like the community can adopt positions contrary to its core policy image, or even more fundamentally, alter its

[87] Note that this passage reiterates one of the Bankruptcy Policy Community's main images, that bankruptcy law is too technical for outsiders.

core image and retain its monopoly status. The question suggests an answer that seems in part a matter of degree (*i.e.,* how much compromise?), but more so one of definition. For example, the bankruptcy policy community saw means testing, which requires Chapter 7 filers to demonstrate that their disposable income is within specified limits, as being fundamentally incompatible with its core policy image. However, debtors have long had to satisfy exclusionary debt and income standards to qualify for Chapter 13. When viewed in that context, the adoption of means testing requirements for Chapter 7 filers might be considered more an incremental extension of existing policy rather than an upending of the entire policy.[88]

Because policy image is central to a policy monopoly, modification of those images may not be definitionally possible, especially when the monopoly is a long-standing one and its image is firmly entrenched in existing policies. Under agenda setting models, new images imply new participants and new purposes. Therefore, monopolies cannot survive image redefinition; even if successful, the result is a new monopoly. However, it is more likely, as happened here, that the monopoly is not sufficiently malleable to accommodate such changes. It loses influence, and opponents take active measures to keep the former monopolists outside of the policy process they once dominated. The new outsiders' challenge is to find their way back into the policy debate. Professor Warren, recognizing the bankruptcy policy community's lost influence in the Nineties, urged her colleagues to take on a

[88] In fact, National Bankruptcy Review Commission members Gose and Hartley made this specific argument in their written concurrence of the Minority Recommendations. Commissioners Gose and Hartley, concurrence with Consumer Dissenting Opinion, NBRC 1995, 1120.

more overtly political role in the bankruptcy reform debate:

> The professionals who once patiently crafted the . . . Bankruptcy Code, no longer have the power to write whole sections of the bankruptcy laws by talking only with each other. Debates that were once confined to those who were "in the know" have expanded greatly—in scope and in volume. The professionals still have an important role to play, but the world in which bankruptcy laws are made has shifted dramatically (Warren 1999, 204).

The next chapter will describe how the "professionals" were not entirely shut out of the policymaking process. Instead, notwithstanding the legislative changes wrought by bankruptcy reform, they still had near-complete control of bankruptcy policymaking in another venue, the courts.

CHAPTER SIX: BANKRUPTCY POLICYMAKING IN THE POST-BAPCPA ERA

The bankruptcy policy community's long period of closed-structure policymaking dominance (Chapters Three and Four), followed by the sudden rupture of its stable legislative arrangements and resulting loss of monopolist status (Chapter Five), follows Baumgartner and Jones' classic model of punctuated equilibrium (1993). Punctuated equilibrium models predict that major policy changes will be followed by long periods of stasis. However, while policy systems may achieve new equilibriums and even new dominant coalitions, such outcomes are not automatic and in any event may not occur until after a significant period of competition and disjunction. In other words, policymaking systems may remain dynamic for some time following punctuated disruptions. Venue shopping in these periods may increase as policy competitors seek to capitalize on their unique resources. The study of this competition promotes better understanding of the role of venues in agenda setting.

Therefore, this chapter begins with an examination of the post-BAPCPA policymaking environment, followed by a discussion of judicial policymaking that expands on the material in Chapter Two and further explores the role of bankruptcy courts as alternate policymaking venues.

A. Congressional Policymaking After BAPCPA

As described in Chapter Five, the process leading to BAPCPA's enactment in 2005 did not eliminate the bankruptcy policy community so much as make it irrelevant to the outcome of the legislative process. The community has not regained the prominence it enjoyed prior to 1997. It remains active, collectively and through its constituent parts, but does so as just one of many interests seeking to influence Congress on bankruptcy issues. For its part, Congress has not enacted any major bankruptcy reforms since 2005, although it has considered several minor, mostly technical bills. This is expected from punctuated equilibrium theory, which predicts that systemic policy disruptions are followed by long periods of stasis.

However, the absence of legislation is not for lack of problems or proposals; it is also a sign of negative attention. In other words, congressional policy activity may be directed toward blocking new initiatives. Baumgartner, *et al.* (2009, 20) explain that existing policies reflect current mobilizations of social, business, and corporate interests. "Unless something important has changed in terms of the inputs to the decision-making process (e.g., a new set of policy makers, important new evidence about a policy alternative, a new understanding of an issue, a newly mobilized interest group), there is little reason to expect the outputs to change."

The most prominent example of this in the post-BAPCPA period is Congress' rejection of legislation that would have allowed some homeowners file bankruptcy and amend the terms of their home mortgage loans to avoid foreclosure. One of the most straightforward solutions to the foreclosure crisis introduced in Congress in the wake of the 2008 financial crisis would have amended Chapter 13 to enable bankruptcy judges to modify the balance debtors owed on their home mortgages, based on the properties' decreased values. The proposed legislation had several benefits: it would have stemmed the rising numbers of foreclosures, which would have allowed people to remain in their homes, and would have reduced the number of unsold empty properties that were depressing home values. Since the proposal would have applied existing bankruptcy procedures in an established forum,[89] it could have been implemented quickly.

Despite these benefits, the legislation failed to gain Senate approval. All of the chamber's Republicans and twelve of its Democratic members voted against the bill. Debate over the measure demonstrated that the moral hazard argument underlying BAPCPA's enactment in 2005 continued to motivate congressional opposition to pro-debtor legislation (Andrews 2009). Echoing the BAPCPA debates, opponents of these homeowner relief measures argued that the foreclosure crisis was the result of overspending borrowers abetted by federal agencies (Freddie Mac and Fannie Mae) that provided access to easy credit. (McArdle 2009). Therefore, prevailing congressional attitudes continue to be hostile to "fresh start" type legislation.

B. Policy Implementation and Policy Images

However, this is not to say that the bankruptcy policy community has disappeared. Instead, it may be that the community has redirected its efforts to other venues and other forms of policymaking.[90] Punctuated equilibrium theory maintains that policy monopolies retain their authority over long periods of time but lose it relatively quickly (Baumgartner and Jones, 1993). However, the cyclical nature of policy monopolies indicates that their members may not simply disappear

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[89] Existing law allowed bankruptcy judges to modify the terms and conditions of many kinds of secured debt, but not primary mortgages securing home loans.
[90] Jacoby (2004, 226) suggests that after the long battle over enactment of BAPCPA "many bankruptcy experts are both weary and wary, and, consequently, likely to stay away from Washington, D.C."

from the policy process, but instead press on in hopes of regaining their former prominence. Moreover, the existence of multiple venues within the American political system provides members of displaced monopolies with alternative policymaking opportunities, notwithstanding formal changes made elsewhere. Therefore, policymaking can be relatively static in one venue, but simultaneously active in another. This observation is the underlying premise of that part of the implementation literature that conceptualizes implementation as part of the broader policymaking framework, such as Matland's ambiguity-conflict model, Sabatier's advocacy coalition framework, and the interbranch perspective of the courts.[91]

Placing the matter within the implementation literature, the basic question is whether policymakers enacting major changes in one venue will see those changes fully effected in another, given the potential susceptibility of those venues to influence from other interests. According to Mazmanian and Sabatier (1983, 25), faithful implementation of policies depends on, *inter alia,* (1) the degree of hierarchical integration within and among implementing institutions, and (2) the implementing officials' commitment to the policymakers' objectives. In the matter of bankruptcy policy, the constitutional separation of powers means that the degree of hierarchical integration between Congress and the courts is low.[92] Moreover,

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[91] *See* Chapter Two.

[92] Which is not to say that Congress lacks coercive power over the bankruptcy courts. Like all lower federal courts, the bankruptcy courts are a creation of Congress. The bankruptcy clause in Article I, §8 of the Constitution gives Congress exclusive power to make laws concerning bankruptcy, but it does not require it to do so. Congress chose not to have national bankruptcy laws for most of the 19th century. It enacted and repealed three laws in that time and could do the same with

Wilson (2000, 265) indicates that reorganization of implementation structures is a necessary element in policy change. In other words, major policy changes may require not just a change of laws but a change in the structures that implement them as well

Despite, or more accurately, because of the bankruptcy policy community's long-standing dominance in its field, it was excluded from any important role in formulating the 2005 BAPCPA amendments. Those amendments were drafted and enacted by a new coalition of members of Congress and representatives of the financial industry. The main focus of the new coalition's attention was the reform of consumer bankruptcy law, premised on a policy image that emphasized holding debtors at least partially accountable for their financial troubles. However, despite this fundamental image shift, Congress largely left intact the basic institutions of bankruptcy law (i.e., the courts and the overall structure and processes of the Bankruptcy Code). Therefore, to restate the dilemma raised by Mazmanian and Sabatier in agenda setting terms, will faithful implementation of new policies be thwarted if the conflicting images underlying the replaced policy remain entrenched in the implementing entities? More specifically, would BAPCPA's implementors (mainly bankruptcy judges and lawyers) mediate the new law's effects through its interpretation and application according to their own long-held image and understanding of bankruptcy policy? The next section discusses particular

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all or part of the current law if it chose to do so. Despite this authority, and repeated efforts to turn over all or some of the duties of the bankruptcy courts to an administrative agency, the modern Congress has demonstrated no inclination to disband the bankruptcy courts (*See* Chapters Three and Four).

examples of overt policymaking activity by bankruptcy judges. The section following that one proposes an empirical test of the proposition.

C. Policymaking in the Bankruptcy Courts.

Jacoby (2004, 2005) raises the possibility that bankruptcy professionals,[93] who were excluded from participation in the reform process, might alter or impede BAPCPA's implementation through their interpretation and application of the new law:

> Bankruptcy may be especially susceptible to shaping by the day-to-day actors because the vast majority of cases yield no formal litigation, let alone appeals. Whether one prefers a precise model of local legal culture [*see* Chapter 2] or a more generalized recognition of the role of real people, this inevitable shaping and filtering complicate statute-centered assessments of the future of bankruptcy. Indeed, . . . the latest revisions may invite system players to shape the system much more than Congress anticipated (Jacoby 2005, 177).

Variation among individual courts has been a durable characteristic of the American bankruptcy system since its creation in 1898. The adoption of uniform standards of practice was one of the primary goals motivating the founders of the National Association of Referees in Bankruptcy in 1926 (National Association of Referees in Bankruptcy 1926-27). Variation persisted among the courts despite those efforts. The Association eventually scaled back its efforts in the 1930s, changing the name of its Committee on Uniformity of Practice to simply the Committee on Practice. A 1940 report by the attorney general found major differences in the general administration of bankruptcy cases among courts in the

[93] Jacoby uses the terms "bankruptcy professionals" and "bankruptcy experts" interchangeably. Her use of the term encompasses judges, attorneys, and scholars actively engaged in what she describes as the bankruptcy "system." Jacoby's terminology overlaps and is encompassed within what is described here as the bankruptcy policy community.

various federal districts (Shea 1941). Although bankruptcy referees were placed under the supervisory authority of the Administrative Office of the United States Courts in 1946, the Brookings Study found that substantial variation among the courts in their application of the Act continued to persist.

This continued across some issues notwithstanding enactment of the Bankruptcy Code. Sullivan, et al. and Lopucki's local legal culture studies[94] are based on observed variations in the ways different courts and practitioners interpret and apply the Bankruptcy Code. In 1997, the NBRC minority described differences in consumer bankruptcy discernible just from reported cases. In a lengthy footnote to its dissent, the minority identified differences in Chapter 13 cases[95] relating to the length of time a debtor must remain in bankruptcy, the minimum percentage of indebtedness to be repaid for a plan to be approved, and in the manner in which courts valued property subject to liens. The minority similarly reported differences in Chapter 7 cases pertaining to standards for dismissal of cases under §707(b) and for the reaffirmation of debts, a process permitted by the Code that allows debtors to agree to pay particular debts notwithstanding bankruptcy, usually in exchange for retaining property subject to liens like homes or motor vehicles (NBRC Report, Minority Dissent, 1112-13).

Most of the variation occurs within the parameters of the bankruptcy statutes and case precedents, which nevertheless can lead to diametrically different outcomes. Less often, bankruptcy judges employ the Code creatively to reach results

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[94] *See* Chapter Two.

[95] Chapter 13 requires debtors to commit a portion of their income to repaying their creditors over a specified period of time, usually three to five years, according to the terms of a court approved plan (*see* Chapter One).

expressly prohibited by Congress. One prominent recent example of judicial deviation from long established statutory policy was some courts' adoption of what became known as the "critical vendor rule." Among bankruptcy law's basic rules is that creditors in Chapter 11 cases may receive payment on account of their pre-filing claims only according to a very specific priority classification scheme established by statute and implemented through a court approved plan of reorganization. The system groups creditors according to the nature of their claim, for example secured claims, taxes, employee wages and benefits, trade debt, and so forth (*see* 11 U.S.C. §§ 507, 726, 1129). The Bankruptcy Code further mandates that all creditors within a particular priority class must be treated equally. Finally, most trade debt incurred prior to bankruptcy is classified as general unsecured debt, which occupies the lowest statutory priority status among creditors. Unsecured creditors rarely receive full payment of their pre-filing claims in Chapter 11 cases, and in many instances they wait several years to receive even pennies on the dollar. Distribution is made pro-rata according to claim size when funds are insufficient to pay all creditors within a class in full.

Beginning in the 1990s, attorneys for both creditors and debtors began to seek orders allowing debtors to pay certain unsecured claims in full immediately after filing Chapter 11. These requests were based on assertions that goods or service provided by a particular vendor were essential to the debtor's successful reorganization but that the vendor refused to continue to trade with the debtor unless its outstanding bills were paid in full. While judges in some jurisdictions rejected these requests, those in Delaware's business-friendly bankruptcy court granted them, adopting came to be called the critical vendor rule. The critical vendor rule could not be found in any statute; in fact, the Code expressly bars such payments.[96] To avoid the prohibition, Delaware's judges relied on the general equitable powers granted them in 11 U.S.C. §105(a). Under that statute, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title [*i.e.,* the Bankruptcy Code]." While the language of the section seems to give bankruptcy courts broad authority to depart from the Code's express restrictions, the Supreme Court had long held that §105 is not an open ended grant of authority to be used to expand or contradict the specific powers given to judges by the Bankruptcy Code (*Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988)).

Once the critical vendor rule gained traction in Delaware, some judges in other jurisdictions followed suit. According to one scholar who was highly critical of the rule, its adoption was not motivated by legal considerations but instead was the result of competition between specific courts to attract large high profile Chapter 11 cases to their districts by easing statutory restrictions on the parties (Lopucki 2005). The rule's spread eventually stalled when the Seventh Circuit Court of Appeals reversed a bankruptcy court order in Kmart Corporation's Chapter 11 case authorizing the company to pay up to $300 million in "critical vendor" claims, finding that such orders were prohibited by the Bankruptcy Code.[97]

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[96] 11 U.S.C. §§362, 549.

[97] *In re Kmart Corporation*, 359 F.3d 866 (7th Cir. 2005). The disparate treatment between critical and non-critical vendors in these cases is emphasized by the fact that Kmart's unsecured creditors, including the putative critical vendors, ultimately received about 10¢ on the dollar for their claims, most of it in the form of stock in

This recounting of the story of the critical vendor rule is not made to suggest that bankruptcy judges routinely ignore the Bankruptcy Code's express terms; experience indicates otherwise. Rather, its purpose is to demonstrate the capacity of judges to find both real and arguable contradictions within and among statutes, even when the legislative proscriptions seem explicit. In fact, studies indicate that judges on the whole are usually more restrained (Baum 1976). They are more likely to find variation within the ambiguities of established statutory or precedential parameters, or at least make only incremental excursions beyond them. Within the judiciary, this restraint is due in large part to an institutional respect for precedent and the rule of law (Chapter Two). Feeley and Rubin (1999, 355) state that, "the process of judicial policy making is constrained by legal doctrine . . . the need to maintain contact with existing doctrine, to stretch it without snapping it, is one of several conditions for effective judicial policy making." They cite the courts' respect for legal doctrine as the factor that distinguishes judicial policymaking from that of other governmental institutions.

Even within those boundaries, the accumulated effects of even small changes can result in significant alterations in policy. Legislators' use of vague or undefined terms, the rare instances of appeal, and the ability to resort to multiple sources of authority[98] give judges considerable latitude in making decisions. Feeley and Rubin's (1999) explanation of how judges extended their existing authority to

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the reorganized company (Lopucki 2005, 284). In other words, had the bankruptcy court's critical vendor order been affirmed, the critical vendors would have received 1000% more than their fellow unsecured trade creditors.

[98] For example, both the majority and dissenting opinion contain copious references to case precedent supporting their respective positions in virtually every appellate case.

reform Southern prisons, and Barnes' (2008) description of the development and implementation of asbestos victim compensation plans in the bankruptcy courts are better examples of the ways in which trial level judges can adapt existing rules and procedures to enact broad-scale policy changes.[99] Moreover, the legal culture studies and the other analyses cited above in this section and in Chapter Two show that bankruptcy judges can dramatically affect policy not just through their pursuit of specific programs but in their routine administration of cases in their courts. In this context, judicial policymaking resembles incrementalism, or bounded decision-making (Lindblom, 1959).

D. Chapter Summary

The administration of cases in the United States bankruptcy courts has long been characterized by differences in the way specific statutes are interpreted and applied in particular jurisdictions. While such variations are usually small, they may sometimes mark significant departures from the Bankruptcy Code. Either way, these differences can have significant impacts on the outcomes of bankruptcy cases.

Studies indicate that policymakers are most likely to see their objectives implemented when implementing officials share their commitment to the same goals and purposes. Shared commitments are weakest when policymakers' and implementing officials' respective policy images are at odds. Such may be the case with respect to the changes made by Congress when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005. Those amendments reflected a major change in the way that Congress conceptualized bankruptcy

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[99] Both studies are discussed at length in Chapter Two, Part C.3.

policy. However, Congress left intact the existing system of bankruptcy courts. The chief officials in that system, bankruptcy judges, had long been engaged in policymaking as part of the bankruptcy policy community. The community had long dominated bankruptcy policymaking, developing and advocating the adoption of laws built on the notion of the fresh start. Despite its displacement from congressional policymaking, both scholarly commentary and agenda setting models suggest that members of the community could direct their efforts to affecting policy in venues where they have greater influence and control, *i.e*., the courts.

Historical variations in statutory implementation by the bankruptcy courts, and bankruptcy judges' longtime participation in the bankruptcy policy community, means that a complete explanation of bankruptcy policymaking must take into account the judges' actions, both as policy entrepreneurs actively seeking changes at the legislative level, and in their traditional adjudicative roles. Changes in the 2005 amendments may provide a basis for comparing implementation of the new law with its older version. The Appendix contains an empirical test of this proposition.

CHAPTER SEVEN:

A BANKRUPTCY POLICYMAKING FRAMEWORK

Several characteristics of American bankruptcy policymaking can be discerned from the analyses contained in the foregoing chapters. The first is that although the Constitution gives Congress sole authority "to establish . . . uniform laws on the subject of bankruptcies throughout the United States," bankruptcy policy in fact derives from three sources: Congress, the courts, and a sub-systemic bankruptcy policy community. These three venues were tightly linked for over sixty years, with the community being the system's most influential member. They split in the 1990s-2000s, with Congress separating itself from the others to assert its constitutional prerogative apart from the influence of the community. Bankruptcy judges remained a source of policy throughout, based both on their traditional duties and as policy advocates and entrepreneurs.

These various events are explained with reference to the agenda setting and policy implementation literature. Taken together, these factors describe a bankruptcy policymaking framework that fully integrates the activities of all three venues. As such, the framework makes an important contribution to the literature that identifies courts as essential policymakers in the American system.

This chapter begins by constructing a general framework for understanding bankruptcy policymaking. A discussion of the significance of the framework follows. Finally, the framework is compared to existing public choice theories of bankruptcy policymaking.

A. The Sources of American Bankruptcy Policy

The examination of bankruptcy policymaking in the United States over the seventy-five year period between 1930 and 2005 contained in Chapters Three through Six indicates that such policies are made in three separate but sometimes strategically interconnected venues. The first two of are formal institutions of government; the other is what is commonly described as a policy subsystem.

The first institutional venue is Congress, which has sole constitutional authority to enact bankruptcy laws. As Warren (1999, 189-90) states, "Without congressional action, there would be not national bankruptcy laws." However, the analyses in Chapters Three and Four demonstrates that in the long period from 1932 to 1997, Congress effectively delegated the development of new laws to the bankruptcy policy community, and enacted that group's proposals with little general attention or debate. The community's hold on the policymaking process was broken only when the proponents of pro-lender reforms drew Congress directly into a lengthy and contentious policy fight. While Congress relied on the lender interests for technical support, the institution as a whole debated the scope and direction of bankruptcy policy in a way it had not since at least the early 1930s.

The second institutional source of bankruptcy policy, as described in the foregoing section, is the courts, principally the bankruptcy courts, but to a significant but lesser extent (in terms of volume and activity), the federal district and appellate courts. Judges make policy through their decisions in individual cases, although policy changes may only be discernible over time. In most federal districts, the courts may also enact local rules that institutionalize local practices. Judicial policymaking is highly structured and its effects are at least initially narrow in scope. However, judicial policies may expand to include all of the cases before a particular judge, or all of the cases in a particular court. Some judge-made policies will be applied in other jurisdictions, as information is transmitted through personal communication, conferences and seminars, case reporting services, or formally through *stare decisis* (if a local policy is affirmed on appeal).

The third, non-institutional, source of bankruptcy policy is identified here as the bankruptcy policy community. As described in Chapters Three and Four, the community is a policy subsystem made up of bankruptcy lawyers, bankruptcy judges, and legal scholars. They engage in policymaking primarily through associations and trade groups. The two most significant of these representative groups are the National Bankruptcy Conference and the National Conference of Bankruptcy Judges (Warren 1999, 191).[100] Although they are highly influential, both organizations draw their membership from a narrow group of bankruptcy specialists. The National Bankruptcy Conference ("NBC") claims to be the elite intellectual organization for bankruptcy policy in the United States. Membership in the group is by invitation. The NBC describes itself as "A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of

[100] A newer organization, the American Bankruptcy Institute, is a broad based trade association that draws its membership principally from attorneys, other professionals, and judges. While it does engage in some legislative activity, its primary role in the bankruptcy policy community is to promote the dissemination of policies and practices through publications and conferences. Other organizations provide similar roles. These include the National Association of Bankruptcy Trustees, the National Association of Chapter 13 Trustees, and the National Association of Consumer Bankruptcy Attorneys, and the Commercial Law League.

bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws."[101]. After its ad hoc origins in 1932, the NBC formally organized in the 1940s. It remained the dominant member of the bankruptcy policy community until the 1970s (when its influence was matched by that of the bankruptcy judges), and it continued to make major contributions to bankruptcy legislation until its marginalization in the 1990s. It still retains considerable respect within the community.

The other group of major significance within the bankruptcy policy community is the National Conference of Bankruptcy Judges. As described in Chapter Three, this group was organized in 1926;[102] its founding member, Paul H. King of Detroit, was one of the principal organizers of the National Bankruptcy Conference in 1932. The group's formal efforts to influence Congress waned after the Chandler Act was passed in 1938, but were revived in the 1960s, when the referees' association was a major instigator of bankruptcy reform in the late Sixties and early Seventies. The referees built strong relationships with select members of Congress during that period. That access not only provided them with influence in the area of bankruptcy policymaking, but it allowed them to withstand efforts in the Seventies to diminish their status by both the federal bench and by the NBC-led National Bankruptcy Review Commission (Chapter Four). Although membership in the judges' group is necessarily restricted to bankruptcy judges, it is generally more

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[101] *http://nationalbankruptcyconference.org/history.cfm*, last accessed November 28, 2011.

[102] The group was known as the National Conference of Referees in Bankruptcy until the 1970s.

inclusive than the National Bankruptcy Conference. The National Conference of Bankruptcy Judges publishes one of the most prestigious journals in the field, the *American Bankruptcy Law Journal*, and holds an annual conference open to the general bar. It also conducts regular educational conferences for its members.

One of the most distinctive structural features of the framework is the participation of bankruptcy judges in two separate, albeit complementary, roles. Bankruptcy judges are important policymakers in their formal capacity as judges, that is, through interpreting and applying the law in specific cases. However, they also, at various times, make important contributions to American bankruptcy policy as policy entrepreneurs, quite explicitly so in the case of both the Chandler Act and the Bankruptcy Code. This dual role appears to be unique within the broader class of federal judges, whose efforts to influence Congress are generally limited to matters of court administration or rules of evidence and procedure.[103] However, while the judges benefited from their entrepreneurial roles in the Thirties and the Seventies, such activity has a potential downside. Warren (1999, 193; 201) suggests that while some judges remained actively involved during the BAPCPA debates, a great many others chose to sit on the sidelines for fear of provoking reprisals from Congress. This suggests that judicial engagement of Congress is more likely when the two groups share policy goals. Engagement may therefore be strategic; judges may be more likely to lobby Congress when they believe they will be successful.

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[103] On the latter point, see Staszak 2010. One exception to the general practice was the effort by federal judges in the early 2000s to convince Congress to eliminate mandatory criminal sentencing rules. These efforts were ultimately supplanted by the Supreme Court's ruling that such laws were unconstitutional in *United States v. Booker*, 543 U.S. 220 (2005).

Of course, the same is true of congressional cooperation with the bankruptcy policy community. Unlike traditional iron triangles, members of Congress are not regular participants in the bankruptcy policy community. Instead, the relationships are mutually strategic. The community forms congressional relationships in order to achieve formal enactment of its major initiatives. Members of Congress gain access to technical expertise rather than political support. As described in Chapter III, the community brought Congressman Walter Chandler into its fold in the 1930s in order to turn its long-gestating proposals into law. Chandler, having been designated by the chairman of the House Judiciary Committee to usher bankruptcy reform to its conclusion, allied himself with the community as the most effective way to complete his mission. In the Seventies, the interests of the NBC and the bankruptcy bench in reform complemented Congressman Edwards and Senator Burdick's own interest in bankruptcy and their general support for "good government" legislation.

By contrast, Chapter Five describes how Congress and the community split in the 1990s over bankruptcy's policy image. The community, rather than being treated by members of Congress as a source of technical expertise, was instead portrayed as another entrenched interest group seeking to block popular legislation. Moreover, although other groups rose to challenge pro-creditor reforms, the community's technical expertise played a minimal role in efforts to derail the bill. Congressional opponents of the measure engaged their traditional allies (*e.g.,* women's groups, consumer rights organizations, etc.) to repeatedly block its adoption. Unlike in the past, the community had become just one voice of many, even among its allies.

B. The Structure of American Bankruptcy Policymaking Community.

The foregoing section identifies three sources of American bankruptcy policy: (1) the courts; (2) the bankruptcy policy community; and (3) Congress. From the 1930s to the 1970s, the community was at the center of American bankruptcy policymaking. Moreover, its influence broadly overlapped the other sources. The dual role of referees/judges in bankruptcy policymaking ensured its influence in judicial policymaking. Moreover, congressional reliance on the community's technical expertise and a common understanding of policy goals meant that Congress mostly adopted its proposals with little debate. As a result, the community monopolized bankruptcy policymaking for six decades.

However, in the mid-1990s, Congress became the locus of bankruptcy policymaking activity when proponents of reform succeeded in breaking the bankruptcy policy community's hold on the policymaking process. Instead of a unified, three part structure, the structure of the American bankruptcy policymaking structure was split into two, with Congress on one side of the divide and the courts and the bankruptcy policy community on the other.

The implications of the split are two fold. First, placement of Congress and the courts on opposite sides of the policy divide contradicts traditional top-down, agency-based conceptions of the relationship between Congress and the courts, but is fully consistent with the interbranch perspective's conception of the latter as distinct policy actors in the American system of separated powers.

Second, while the division separated Congress from the courts in terms of policymaking, it did not sever the relationship between the courts and the bankruptcy policy community. That connection between the two latter venues remained intact, reflecting their shared membership and policy image. Chapter Five describes how consumer lenders and their congressional allies made policy image the essential fault line in the debate over bankruptcy reform. The likelihood that policymakers' goals will be achieved is increased if implementing officials share the same objectives (Sabatier and Mazmanian 1983; Baum 1976). Unlike earlier periods, when bankruptcy policymaking's coordinated structure did not allow for the expression of conflicting views, the distinct policy images on either side of the divide suggest the possibility of differing outcomes based on venue choice.

C. Scope of Conflict and American Bankruptcy Policymaking

Bankruptcy policy is made in three distinct venues. Over time, those venues and their relationship to each other can be characterized in large measure by the images reflected in, and rendering intuitively plausible, the policies they make. As explained in Chapter Two, image (or definition) is central to the management of policy conflict. Policy image may serve to join the venues, as it did in the 1930s when characterization of bankruptcy as a technical enterprise united groups seeking to advance the notion of the fresh start at the time of the Great Depression. However, major changes in the direction of bankruptcy policy, as in the 1990s-2000s, are founded on distinctly different images. The level of conflict surrounding a given policy is, in turn, closely associated with its likelihood of change. In other words, the relative influence of any venue at a given point in time is related to the scope of conflict surrounding bankruptcy policy at that same point in time.

At the lowest level of conflict in the bankruptcy policymaking system, policy is made in the courts. Conflict of this type can be described as private conflict. Policymaking at this level occurs in individual cases. Unlike in the Supreme Court, where third parties can file amicus briefs solely on account of their interest in the policies in question, procedural rules limit participants to the judge and parties with a tangible or institutional interest in a particular case: the debtor, creditors, the case trustee, the U.S. Trustee, etc.[104] Policymaking in the courts is incremental, and generally occurs within the parameters of existing statutory law and case precedent.

The term *courts*, as used here, is not simply synonymous with judges. It must necessarily also include other case participants, but especially lawyers. As is often noted, American courts are fundamentally reflexive institutions; party prosecution is an essential element of the adversary system. Parties, acting through their legal counsel, select the cases to be brought to the courts and the matters at issue within those cases. They frame those issues and offer competing solutions through their pleadings, motions and trials (Barnes 2009). Judges select between these alternatives.[105] The process is mutually reinforcing. Assuming that a judge's rulings on a given issue are consistent over time, subsequent parties and their lawyers will take those rulings into account in their own cases (Sullivan, et al. 1994). In other words, trial lawyers are not necessarily interested in establishing policy; their goal

[104] *Amicus* briefs are accepted in a small number of bankruptcy appeals, but usually only those that reach the Supreme Court.
[105] Jury trials are rare in bankruptcy cases.

is to win cases. In order to do so, they will shape the positions in the ways they believe will most likely result in success with the decision-makers, i.e., the judges overseeing their cases.

A case in point is Barnes' examination of asbestos injury compensation in the bankruptcy courts (2008). Johns-Manville and other large asbestos manufacturers elected to file Chapter 11 not to stop their imminent collapse but rather to control the enormous number of lawsuits against them alleging injuries caused by their products. Lawyers for the companies filed plans in the bankruptcy courts that adapted the Bankruptcy Code's provisions for reorganization and payment of claims to create no-fault claims trusts for alleged asbestos victims. However, these proposals were not binding on the parties until approved by the courts. Once approved by the courts, the bankruptcy trusts were enforceable against the parties, brought all of the claimants within the trust, and provided a template for resolution of other similar cases.

The second policy venue, the bankruptcy policy community, may facilitate policy change in the courts, principally through its dissemination of information among lawyers and judges. However, its more important role occurs when existing statutes and precedents cannot be interpreted and extended to address new or changed circumstances. The inadequacy of existing policies to address these challenges gives rise to what can be described as sub-systemic conflict. Sub-systemic conflict is wider than private conflict (*i.e.*, have more participants), but it remains within the bounds of the policy sub-system, *i.e.*, the bankruptcy policy community.

The processes leading to the adoption of the Chandler Act in 1938 and the Bankruptcy Code in 1978 were both examples of sub-systemic policymaking. Policy disputes in both instances had the potential of spreading beyond the bounds of the sub-system. However, as sub-systemic policymaking is dominated by a policy monopoly, conflict containment is a critical feature of policymaking at this level. Possible boundary-breaking conflicts in the 1930s included (1) the competing legislation introduced by Congressman Sabath, and (2) the interjection of William O. Douglas and the SEC. Similar conflicts in the 1970s included (1) the dispute between the NBC and the bankruptcy judges; (2) the federal bench's disregard for bankruptcy judges; and (3) exemption reform.

In each instance, the community employed similar tactics to limit conflict. It cultivated an image of technical complexity in order exclude outsiders. However, that image alone was insufficient to fend off the external threat posed by the SEC in the 1930s, or the intramural dispute that threated to scuttle bankruptcy reform in the Seventies. In those matters, the community compromised on specific issues in order to retain its control over the broader policy process.

The other characteristic of policymaking in the bankruptcy policy community is that while congressional participation is essential to passage of the sub-system's major initiatives, that participation is limited and episodic. This is as much a matter of congressional interest as it is the desire of the bankruptcy policy community to limit the participation of non-specialists. As a deliberative body, Congress gave little attention to the passage of bankruptcy legislation in either 1938 or 1978. Although legislation gestated for long periods within the bankruptcy policy community, it passed relatively quickly and without significant debate once it reached the floor of each chamber.[106] Broad congressional involvement in both instances was limited to ratification of the community's proposals.

By contrast, reform proponents in the 1990s, unable to gain support within the bankruptcy policy community (as evidenced by the rejection of their proposals by the National Bankruptcy Review Commission majority), escalated the level of conflict to directly engage Congress on the issue. The events of 1997 - 2005 represent a third form of bankruptcy policy conflict, which is identified as here as congressional, or public, conflict. This level of conflict is necessarily high, and is as much about toppling the existing policy monopoly as it is about the substance of the proposed reforms. Reformers seeking policy changes must displace the existing monopoly. Doing so necessarily requires expansion of the scope of conflict to include Congress. Since Congress generally only directs its attention to an issue when the publicity surrounding it is negative (Baumgartner and Jones 1993), disparagement of the policy image supporting the existing monopoly is a classic tactic used to gain legislative attention.[107] The increased attention ensures greater

[106] The Danielson-Railsback amendment did briefly delay House passage of the Code in 1978 (Chapter Four), but the dispute was resolved fairly quickly. In addition, the amendment was an effort to advance the concerns of the Judicial Conference, and did not address the Code's broader substantive and procedural changes to bankruptcy law.

[107] Baumgartner and Jones (1993, 101) describe this as a "Schattschneider-type mobilization, that is, agenda access under negative publicity." Such action is effectively the obverse of Kingdon's policy streams model (1995), in which policy entrepreneurs link problems to solutions. Negative image re-characterization seeks to link problems to existing policies. In the case of bankruptcy policy, reform proponents successfully associated the rising number of consumer bankruptcy filings in the 1990s to the fresh start policy championed by the bankruptcy policy community (Chapter Four).

participation in the policy debate and higher levels of conflict. The adoption of BAPCPA in 2005 was preceded by eight years of public and often acrimonious debate, four separate roll call votes, conference committees, and continuous lobbying. The displaced bankruptcy policy monopoly did not simply disappear, nor was it is deprived of allies. Its members fought to block the legislative reforms, assuring that the level of conflict remained high throughout the period. However, as only one voice in the debate, and no longer the dominant one, their efforts were doomed to failure as bankruptcy's new policy image attracted a resolute congressional majority.

D. The Significance of the Framework

The central premise of the interbranch perspective is that the courts share policymaking authority with Congress and the President in the American system of government (Chapter II, Part C.2). While multiple studies identify instances of judicial policymaking, only a few examine lower courts and even fewer explain how courts exercise such authority relative to the political branches of government. Recent interbranch studies describe policymaking as a "dialogue" between the branches (Miller and Barnes 2008). However, that term is only descriptive and somewhat euphemistic, since it implies some form of direct or indirect communication and cooperation. In addition, it overemphasizes the role of institutions at the expense of other participants in the system and glosses over the dynamic tension among all involved institutions and groups. For example, the events leading to adoption of the Bankruptcy Code in 1978 and those resulting in the enactment of BAPCPA in 2005 would be described as part of Miller and Barnes' policy dialogue, even though the former was as extension and reinforcement of the status quo and the latter represented a major change in the direction and structure of bankruptcy policymaking. Likewise, the notion of policymaking as a form of institutional dialogue seems to exclude a place for both the bankruptcy policy community and the lower courts. Therefore, characterization of multi-institution policymaking as dialogue is at best a shorthand description for the direct and indirect interactions, and actions and reactions that take place within a policy system.

American public law's focus on the Supreme Court and the Constitution has not only limited the field's scope of inquiry, but has also restricted its means of study. Scholars of judicial politics have only mildly embraced the promise of Shapiro's concept of political jurisprudence, *i.e.*, using methods and theories from the field of political science to understand legal systems and actors. However, integrated studies are essential to understanding judicial policymaking, not only to understand the courts as political institutions, but for the analytical tools needed to explain the interplay between the courts, the "political" branches of government, and other political actors such as interest groups. If the courts are "in politics," in Shapiro's terminology, then they must be understood in the same way as other political institutions.

The long term of the study involved here (75 years) allows examination of both the creation and collapse of a strong policy monopoly. and identification of the relative level of conflict as the controlling variable in that cycle. The conflict-based framework provides definition and predictability to political jurisprudential models of policymaking by connecting processes and venues to outcomes.

The framework's two other contributions to understanding bankruptcy policymaking are its identification of (1) a distinct and influential bankruptcy policy community, and (2) bankruptcy judges' dual policymaking roles. The former highlights the role of non-institutional participants in the policymaking process, and how they relate to the courts, which are not normally understood to interact with such entities except in formal ways (as litigants, through the judicial confirmation process, etc.). The link between the courts and Congress that the community provides in times of low to moderate policy conflict tangibly manifests the dialogue described in the interbranch literature. Likewise, the account of bankruptcy judges' dual policymaking roles describes how they provide ideological cohesion to bankruptcy policy in periods of low and moderate conflict (albeit imperfectly), but are potentially more likely to depart from congressional intentions when conflict is high.

E. Comparison to Public Choice Models

The framework better explains bankruptcy policymaking than does public choice analysis, the predominant model used to explain bankruptcy policy. The use of public choice models in this context was introduced by Posner (1997), in his study of the enactment of the Bankruptcy Code, and extended by Skeel (2001) in his historical survey of the field. Public choice theory applies economic methods to the study of politics. Its fundamental premise is that individuals (or groups of like individuals) engage in political activities in order to maximize their own interests, and that political outcomes are the successful result of collective action:

> We assume that agents maximize utility. Creditors, debtors, lawyers, and other citizens seek legislation that transfers wealth to them. Judges and other government officials seek prestige, either for its own sake or for its effect on future income. We adopt the standard public choice view that a relatively small number of people with similar interests and a lot at stake will have more of an incentive to organize into politically effective interest groups, while larger numbers of people will have less of an incentive to form such groups. Interest groups have a disproportionate influence on the outcome of legislation, because politicians depend on their financial support for reelection and because politicians depend on the information supplied by interest groups with respect to legislative proposals. (Posner 1997, 59).

In other word, public choice models predict that groups with the best organization and the greatest resources will prevail in a policy dispute.

However, public choice models have significant shortcomings. They oversimplify policy disputes, ignoring variables like the scope or depth of a problem, the feasibility of proposed solutions, the dominant political environment, policy image, etc. The theory's reliance on power as its sole variable limits its usefulness as a predictor of policy outcomes. In the case of bankruptcy policy, it does not explain why better financed and organized financial interests failed four times before finally seeing BAPCPA enacted into law. Moreover, public choice models do not adequately explain why for over sixty years bankruptcy policies were built on a debtor-friendly image, even though debtors were neither politically-organized nor directly represented within the bankruptcy policy community in either 1938 or 1978. Skeel notes that although the National Bankruptcy Conference's membership includes many commercial lawyers, and effectively has no consumer bankruptcy lawyers, it nonetheless was an ardent advocate for pro-debtor reforms in the 1970s.

He acknowledges that public choice theory cannot resolve the matter, and instead treats it as an anomaly. Skeel describes National Bankruptcy Conference members as "public-spirited" on issues of structural reform, and generally possessing a "sympathetic" and "long-standing, widespread ideological commitment" to helping troubled debtors (Skeel 2001, 138, 156-57).

The agenda setting framework places the National Bankruptcy Conference's "ideological commitment" in context, by explaining how that commitment was embodied in the "fresh start" image that formed the foundation of the policy community's sixty year monopolization of the field (Chapter Four). In other words, the Conference's "ideological commitments" are not exceptions to the broader rule but are instead essential to a general explanation of bankruptcy policymaking. Group resources and mobilization are important factors in bankruptcy policymaking only when conflict expands to the congressional level, and even then they are qualified by other factors. Those factors have little or no influence on policymaking processes in the courts or within a closed system like the bankruptcy policy community.

F. Conclusion

The fundamental premise of interbranch studies is that all three branches of government share policymaking authority in the American system. This basic insight draws on the work of Martin Shapiro, who maintains not only that courts are in fact political institutions, but that they can be studied and understood in the manner of the other branches. This dissertation puts these ideas into practice through a longitudinal case study of policymaking in a single policy area, bankruptcy law. The study draws on both agenda setting and implementation literature to identify three sources, or venues, of bankruptcy policy: Congress; the courts, particularly bankruptcy courts; and a bankruptcy policy community consisting of attorneys, judges, and academics. Scope of conflict principles determine the three venues' relative influence. That conflict is in large measure the product of manipulation of bankruptcy's policy "image."

The bankruptcy policy community's dominance was based on an image of bankruptcy policy that was part ideological, and partly technical. Policy images speak to fundamental values. The concept of the fresh start spoke to broader core values in the American canon like economic opportunity. It served as the foundational principle of bankruptcy policy for over sixty years. Meanwhile, the community controlled the terms of debate by limiting access to the policy process. Its exclusive dominance of the process was achieved through its successful characterization of bankruptcy policymaking as a complex endeavor best left to specialists.

Congress shared and fostered these images until the 1990s, when consumer lenders capitalized on congressional attitudes favoring financial deregulation and social welfare retrenchment to draw the legislature into debates over a new law that required some debtors to bear a greater share of their fiscal misfortunes and placed greater burdens on all filers. In the process, Congress not only rejected the fresh start in favor of a policy image that emphasized personal responsibility, but it broke the bankruptcy policy community's six decade-long hold on the shape and direction of policy in the field, following the classic pattern of monopoly dominance and collapse described in the punctuated equilibrium literature.

Perhaps the most intriguing aspect of the framework described here is its recognition of the significant policy making roles played by bankruptcy judges in two distinctly different capacities. In its traditional juridical capacity, the bankruptcy bench has long been noted for its considerable variation in interpretation and application of the laws across (and sometimes even within) jurisdictions. In addition, bankruptcy judges (as well as other professionals) have been leading advocates for legislative changes in bankruptcy law. These two factors suggest important questions about bankruptcy policy implementation and suggest that it is in significant part a “bottom up” process.

Another potential area of study is whether the framework is generally applicable to other areas of policy that rely on judicial implementation and enforcement. On the one hand, the legislative advocacy in which bankruptcy judges engage may be unique, at least in degree, among the federal judiciary. On the other, the increase in specialization noted in the courts (Baum 2011) indicates that judges may have important roles to play as policy advocates in other areas of law, and warrant further examination according to the methods employed here.

APPENDIX A: A PROPOSED TEST OF JUDICIAL POLICYMAKING

Chapters Two and Six highlight the long history of variable implementation of statutes in the bankruptcy courts. As Chapter Six suggests, that history supports the possibility that bankruptcy judges and lawyers might mediate BAPCPA's effects through their interpretation and application of the new law according to their own long-held image and understanding of bankruptcy policy. The changes to the Bankruptcy Code made in 2005 provide an opportunity to test this proposition empirically.

A. *11 U.S.C. §707(b) and the Means Test*

The empirical test involves an examination of the outcomes for one kind of proceeding, specifically being to dismiss Chapter 7 cases for "abuse" of the provisions of Chapter 7 of the Bankruptcy Code as specified in 11 U.S.C. §707(b). This statute is the centerpiece of the 2005 amendments, and drew the greatest attention and objections from the policy community. The amended law is in two parts. The first part contains a specific means test for Chapter 7 filers; the second part tracks the prior law but increases bankruptcy judges' authority to dismiss such cases if filers are deemed to be "abusing" the bankruptcy law.

The means test is a gate-keeping provision intended to compel certain higher income debtors to repay a portion of their debts from their ongoing earnings through court approved Chapter 13 plans, rather than obtain a rapid discharge of their obligations, without repayment, through less stringent Chapter 7 filings. The means test creates a rebuttable presumption that the debtor does not qualify for Chapter 7 if the results of a detailed arithmetical test reveal the debtor to have "disposable income" above the amount necessary to pay specific expenses. However, even if the debtor satisfies the means test or rebuts its statutory presumption, the court may still dismiss the case if "the granting of relief would be an *abuse* of the provisions of this chapter (11 U.S.C. §707(b)(1), emphasis added)." Grounds for finding abuse absent failing the means test include a showing that the debtor filed the petition in bad faith or that the totality of the circumstances of the debtor's financial situation demonstrates abuse (11 U.S.C. §707(b)(3)).

Prior to BAPCPA, §707(b) did not include an explicit means test, and the standard for dismissal was not just abuse but was *substantial* abuse. Judges commonly, although not universally, applied various means tests of their own making, with divergent results (Ruttenberg 2009). The means test's arithmetical form was intended to limit judicial discretion by standardizing decisional variables. Moreover, for those cases in which the means test did not catch offending filers, the standard for improper debtor conduct was changed from "substantial abuse" to "abuse." Congress intended to broaden the scope of disqualifying criteria when it eliminated the word "substantial" from §707(b).[108] However, the only criterion the statute offers, that abuse be demonstrated based on the totality of the debtor's financial situation, provides little more guidance than the term itself conveys.

The 2005 changes to §707(b) offer a way to test the hypothesis. Bankruptcy court decisions on pre-BAPCPA motions to dismiss for substantial abuse under the former §707(b) can be compared to post-BAPCPA motions to dismiss under new §§707(b)(2) & (3). An increase in the rate at which such motions are granted would

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[108] Hansell 1997. *See* Chapter Five.

indicate that bankruptcy professionals are applying the rules consistent with congressional intent. Conversely, if cases are being dismissed per the new §707(b)(2) and (3) at the same or lower rate as under the old statute, such outcomes may be consistent with the hypothesis that, as members of, bankruptcy judges adhere to values embodied in the bankruptcy policy community's policy image, i.e., the fresh start, rather than the newer image supporting the 2005 reforms.

B. *Testing the Hypothesis*

Comparisons should include analyses of individual courts to control for local influences and to isolate "cancellation effects," where variable applications within separate districts might balance each other out. The salient features the study are summarized as follows:

A. *Hypothesis*: Changes in 11 U.S.C. §707(b) simultaneously limiting the ability of higher income bankruptcy filers to seek discharge of their debts in Chapter 7 and relaxing the standards to dismiss cases for abuse have resulted in an increase in the rate at which motions to dismiss under the statute are granted.

B. *Null hypothesis*: Changes in the 11 U.S.C. §707(b) simultaneously limiting the ability of higher income bankruptcy filers to seek discharge of their debts in Chapter 7 and relaxing the standards to dismiss cases for abuse have not changed the rate at which motions to dismiss under the statute are granted [note: findings consistent with the null hypothesis would support the thesis].

C. *Dependent variable*: Judicial dispositions (i.e., grants and denials) of motions to dismiss pursuant to 11 U.S.C. §707(b) filed by U.S. Trustees. Dispositions should be recorded as either grants or denials, and should be expressed as a rate, e.g., motions granted/motions filed.

D. *Independent variables*:

a. Changes in 11 U.S.C. §707(b), as incorporated in motions to dismiss filed by United States Trustees in the federal bankruptcy courts. Other independent variables are cited below in sub-part F.3.

b. *Time Periods*:

1. October 1, 2000 to October 4, 2005

2. October 5, 2005 to September 30, 2011.

Ideally, a longer time-series post-BAPCPA would determine whether effects are permanent or temporary, and would allow better control for other variables, like economic conditions.

E. *Data source*: Statistical data collected and maintained by the Executive Office for United States Trustees, an office of the Department of Justice responsible for oversight of bankruptcy administration. United States Trustees have primary statutory responsibility to seek dismissal of cases under 11 U.S.C. §707(b). The program collects the data from each of its field offices[109] and provides summary reports in its annual Report of Significant Accomplishments. This data has been obtained.

F. *Methodology:*

1. Further study would compare pre and post BAPCPA dismissal rates. Specifically, rates at which the U.S. Trustee's §707(b) motions to dismiss were

[109] For reasons that are both historical and political, the U.S. Trustee program does not oversee cases in Alabama or North Carolina.

granted prior to amendment will be compared with post-amendment rates for dismissal of all U.S. Trustee post-amendment motions to dismiss under §707(b).

2. Pre and post amendment dismissal rates, both overall and across districts, will be initially compared using cross tabulation methods to identify significant changes in §707(b) motion outcomes.

3. Further comparison will be made using multiple regression analysis. Other variables can include local income/changes in local income; unemployment rate; case filings (adjusted for population, and/or as a function of annual variations); etc. A lack of significant change (or a negative change) in the y-intercept would support the hypothesis. Positive shifts in the y-intercept would be consistent with judicial adherence to congressional intent, i.e., rejection of the hypothesis.

4. *Case-specific effects*: As pointed out in Chapter Two, every trial level case is unique. Any given event is a case is influenced by numerous variables, making comparisons between cases difficult. Decisive outcomes can occur at multiple points in a case, and in multiple forms. Cases may be decided following a trial. The trial may be by jury, but in many cases the judge acts as both presiding officer and fact-finder. Cases may be resolved through dispositive motions made before trial. Non-dispositive orders on issues of evidence or procedure may have a significant impact on outcomes: "Unlike in the typical appellate case, a district judge may rule in a single case on multiple occasions and on different types of questions, only a few of which could be dispositive but all of which affect the case's progress and ultimate outcome (Kim, *et al.* 85)." Whether or not a trial judge's policy preference influences these decisions, other factors clearly play an important role.

For busy judges, case management concerns may play an influential part in their decisions (Kim, et al. 89). Moreover, judges acting at the early stages of a case are likely to have multiple additional opportunities to rule in the matter.

However, objections based on §707(b) are typically filed very early in a Chapter 7 bankruptcy case, usually before any other events of significance. Moreover, such motions are virtually always the only matters brought before the court in such cases. Therefore, the case specific and path dependent variables that ordinarily complicate studies of lower court decision-making (Kim, *et al* 2010) are not present in these cases and no adjustment for them is necessary.

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ABSTRACT

BANKRUPTCY AND POLITICS: A MODEL OF BANKRUPTCY POLICYMAKING IN THE UNITED STATES CONGRESS AND COURTS

by

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was enacted amid much controversy and was considered by many observers to mark a major change in the direction of U.S. bankruptcy policy. The dissertation uses the law's passage as a vehicle to develop an explicit model of the integrated role of Congress, issue networks, and the courts in making policy. Following Baumgartner and Jones (1993), Sabatier (1988), and others, the dissertation tracks bankruptcy policymaking and implementation over a seventy-five year period to demonstrate that policy is made in three distinct venues: Congress; a policy community made up of lawyers, bankruptcy judges, and members of academia; and the courts. Agenda setting theory explains why policymaking authority shifts between traditionally understood venues like Congress to non-traditional ones like the courts and the policy community. The community monopolized bankruptcy policymaking from the 1930s until the mid-1990s. Its hold on policymaking was broken when pro-creditor forces successfully characterized proposed reforms as fitting within a broader

congressional agenda of retrenchment in social welfare policy in favor of laws promoting particular notions of personal responsibility.

The dissertation identifies the key role of bankruptcy judges in the three-part structure: they make policy not only in their traditional juridical capacities, but also as active entrepreneurs and advocates for legislative reforms as part of the policy community. The inclusion of courts in the model places the dissertation squarely in the emerging area of interbranch scholarship. Moreover, it extends existing studies in that field through its application of agenda setting and policy implementation scholarship. The model suggests the differing policy image increases the likelihood that the new laws will not be faithfully implemented. The dissertation includes a proposal for testing its hypothesis.

AUTOBIOGRAPHICAL STATEMENT

In addition to his PhD, Kevin Ball received both his undergraduate and law degrees from Wayne State University. He has taught at Wayne State, the University of Detroit Mercy Law School, and Marygrove College. A former practicing attorney, Kevin is a member of the bar in the State of Michigan, the United States District Courts for the Eastern and Western Districts of Michigan, the United States Sixth Circuit Court of Appeals, and the United States Supreme. He is currently at work on a book about the United States Bankruptcy Court for the Eastern District of Michigan.

A lifelong Detroit-area resident, Kevin lives in Troy, Michigan with his wife, Krispen Carroll, and his children, Brian and Lauren. He is also the father of an adult son, Steven. Kevin currently chairs the Board of Trustees of the First Presbyterian Church of Royal Oak.