
U.S. EXCEPTIONALISM, HISTORICAL INSTITUTIONALISM, AND THE COMPARATIVE STUDY OF CONSUMER BANKRUPTCY LAW

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I. INTRODUCTION

The liberal fresh start for individuals in U.S. bankruptcy law is “peculiarly American”¹ and the debtor-friendly U.S. bankruptcy law is “unique in the world.”² The swift, fresh start for a debtor without the need for an income payment as a condition of discharge or even the requirement of insolvency as a condition of access is a defining characteristic of U.S. consumer bankruptcy law. The U.S. system is also organized around courts and lawyers rather than a public administrator, with the consequent U.S. “primacy of lawyers rather than an administrator.”³ Given these characteristics, and their link to U.S. values,⁴

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1. MONICA PRASAD, *THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY* 183 (2012).

2. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 1 (2001); see also William C. Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. CONSUMER POL'Y 179, 179 (1997) (“US consumer bankruptcy law is nearly unique in the world in its commitment to the ‘fresh start.’”). He notes, however, expanding limitations on the fresh start make it more of a “stale start.” *Id.* at 190–91; see also TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 341 (1988) (“[O]ur bankruptcy law is distinctively American. . . . American bankruptcy laws are unique in concept, not merely in detail.”).

3. See SKEEL *supra* note 2, at 47 (“Since 1898 bankruptcy professionals have been the single most important influence on the development of bankruptcy law.”). For a discussion of the U.S. lawyer-centered system in comparative perspective see Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933 (2011).

4. See SULLIVAN ET AL., *supra* note 2, at 341 (“American bankruptcy laws . . . rest on the notions of the fresh start and protecting the little guy, ideas some might describe as liberal. But they also differ from the rest of the world in being highly individualistic and in minimizing the role of government regulation and subsidy, values generally considered conservative. In one sense, bankruptcy is un-American, because we do not much like to think about failure. But it is peculiarly our own because of its solicitude for the risk-taker. In that sense, bankruptcy is as American as apple pie”); see also Nathalie Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 B.C. INT'L & COMP. L. REV. 1, 3 (2005).

foreign models may be of limited use as blueprints for reform.⁵ However, since the 1980s, many European states have introduced the possibility of a “fresh start” for consumers,⁶ a process accelerated by the Great Recession, while the United States modified its commitment to access to the fresh start in 2005 through the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).⁷ The U.S. consumer bankruptcy system could also be increasingly characterized as an “administrative” system of processing.⁸

Ideas about the U.S. system of consumer bankruptcy influenced European reforms,⁹ but substantial differences exist between European systems in terms of access criteria, institutional frameworks, financing, and discharge conditions. What explains these differences within Europe and between Europe and the United States? Why have distinct institutional frameworks emerged for implementing consumer bankruptcy law in Europe and the United States? My current research focuses on these questions, using England, France, Sweden, and the United States as case studies. My approach draws on insights from historical institutionalism, which provides useful concepts for identifying mechanisms of change, recognizing the importance of the role of “law in action.” This approach does not provide a causal theory of change. Indeed its recognition of contingency, unintended consequences, and path dependency in development suggest challenges for developing such a theory. It may, however, assist understanding of the likelihood of greater convergence of laws. For example, European policymakers have, since the Great Recession, demonstrated greater interest in harmonization of European personal insolvency laws,¹⁰ a topic that traditionally was conceptualized as subject to particular national, cultural, and

5. Thus, Judge Robert Martin dismissed the possibility of an administrative agency to process bankrupts as something that “can’t be taken seriously as blueprint for change. . . . While this might work in some hypothetical nation where people are used to surrendering personal rights under contracts to administrative authority, it would be a radical departure from the social climate of the United States in 1997.” Robert Martin, *A Riposte to Klee*, 71 AM. BANKR. L.J. 453, 453 (1997). For general arguments of U.S. exceptionalism in law see ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); see also MATHIAS SIEMS, *COMPARATIVE LAW* 39 (2014) (discussing the responses of U.S. lawyers to the potential adoption of practices from German civil procedure that “the majority of US lawyers responded that the institutional arrangements of civil procedure were so deeply embedded in US society and culture that it would not be appropriate to change them”).

6. All states of the European Union except Bulgaria now provide some form of discharge of debts, although the conditions for receiving it differ substantially between countries.

7. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11, 12, 18, 28 U.S.C.).

8. See generally Littwin, *supra* note 3, at 1980–2022 (examining proposals to restructure the U.S. system of judicial bankruptcy as an informal, administrative program).

9. Nick Huls, *American Influence on European Consumer Bankruptcy Law*, 15 J. CONSUMER POL’Y 125, 135–37 (1992).

10. See e.g., *EU Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency C* (2014) 1500 final (Dec. 3, 2014). Although this recommendation applies primarily to business insolvency, Recital 15 states that “[m]ember States are invited to explore the possibility of applying these recommendations also to consumers, since some of the principles followed in the Recommendation may also be relevant to them.” *Id.*

social values which prevented harmonization.¹¹ This Article outlines some of the key concepts associated with varieties of historical institutionalism, suggesting their relevance to comparative studies of bankruptcy, and illustrates them with examples from England and Wales, the United States, Canada, and France. It concludes that consumer bankruptcy laws and institutions are neither expressions of enduring national values nor merely the outcome of the current configuration of interest group pressures.

II. EXPLANATIONS FOR PATTERNS OF CONSUMER BANKRUPTCY LAW

In 2003 Johanna Niemi, Bill Whitford, and I published the first collection of essays on comparative consumer bankruptcy in a global perspective, opening with the comment that “[t]wenty years ago an academic book about consumer bankruptcy systems around the world would not have been possible. Most countries did not have a consumer bankruptcy system”¹² We situated the growth of consumer bankruptcy law against the background of the “democratisation of credit,” which created greater risks for default and the “need” for a bankruptcy safety net as a protection against hardship.¹³ This evolutionary functionalist argument¹⁴ foregrounded the idea of convergence as a theme, and the question whether the United States was either the outlier or model for the future.¹⁵ Johanna Niemi developed different classifications of

11. The World Bank also hesitated to develop best practices in personal insolvency because personal insolvency is “intertwined with social, political and cultural issues that present too many differences to be treated uniformly.” THE WORLD BANK, REPORT ON THE TREATMENT OF THE INSOLVENCY OF NATURAL PERSONS 4 (2013). The author of this Article was a drafter of this report.

12. Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford, *Introduction to CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 1* (Johanna Niemi-Kiesiläinen et al. eds. 2003). Our friend Jacob Ziegel also published in the same year a monograph on comparative consumer insolvency. See JACOB ZIEGEL, *COMPARATIVE CONSUMER INSOLVENCY REGIMES: A CANADIAN PERSPECTIVE* (2003).

13. Niemi-Kiesiläinen et al., *supra* note 12, at 1–3. (“[T]here has been a rapid growth in consumer credit, nearly everywhere, as well as problems of over-indebtedness and consumer bankruptcy. . . . [T]he groups in society to whom unsecured credit is available [have] also expanded. Today in an increasing number of countries around the world unsecured credit is much more available to working class families. . . . There are many causes for this growth and expansion in credit availability, . . . [including] the deregulation of credit markets, . . . the abolition of interest rate ceilings, . . . the growth of . . . credit bureau[s], . . . [and] consumers are expected to pay more for their medical care and education. Income support when unemployment strikes is less available. When medical emergencies or unemployment arises, incurring debt is often the only practical course for consumers . . .”).

14. We did not assume a particular end or goal for this evolution. I discuss evolutionary functionalism in Iain D.C. Ramsay, *Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales*, 7 THEORETICAL INQUIRIES IN L. 625, 628–42 (2006). For a comprehensive analysis of different forms of functionalism see Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339–82 (Mathias Reimann & Reinhard Zimmermann eds., 2006)

15. Niemi-Kiesiläinen et al., *supra* note 12, at 12–14. For further discussion of convergence see, e.g., Jean Braucher, *A Law-in-Action Approach to Comparative Study of Repayment Forms of Consumer Bankruptcy*, in CONSUMER CREDIT, DEBT AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 331 (Johanna Niemi, Iain Ramsay & William Whitford eds., 2009)

existing consumer bankruptcy systems, drawing on Jürgen Habermas's concept of legal paradigms as representing images of society. She concluded that the U.S. consumer bankruptcy system was a tool for market regulation, while Scandinavian systems represented a social welfare vision of the debtor as citizen, and the French system was based on a consumer protection model. Germany's system, with its long repayment plan (initially seven years) requiring good behavior as a condition of discharge, seemed to reflect a moral tone of personal responsibility.¹⁶ These classifications suggested that the law of personal insolvency was expressive of certain influential national values and institutions (market or welfare state orientation).

We suggested in 2009 that explanations for continuing differences between countries might "reflect particular conjunctures of events, interest groups and ideology."¹⁷ Contemporary explanations for differences in national systems of personal insolvency include functionalism, political interest group analyses, legal origins, and cultural values. Interest group analyses, often inspired by public choice, have been applied to national systems to explain the patterns of consumer insolvency law and the exceptional nature of U.S. bankruptcy law.¹⁸

("[T]here is now sufficient convergence in consumer bankruptcy and insolvency approaches around the world that some key common criteria can be used to compare them."); Jason Kilborn, *Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice*, in Niemi et al., *supra*, at 307 ("We can now see some convergence of policies across Europe over time.").

16. Johanna Niemi-Kiesiläinen, *Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 12, at 41–60. Johanna Niemi visited Madison, Wisconsin in the late 1990s, working with Bill Whitford during her stay. A more recent empirical analysis of consumer bankruptcy systems classifies them as follows: market model (United States, Canada); restrictions model (England and Wales, Scotland, Australia, New Zealand); mercy model (Belgium, France, Sweden, Denmark, Finland, Norway); and liability model (Germany, Austria). See JAN-OCKO HEUER, *THE POLITICAL ECONOMY OF CONSUMER DEBT RELIEF: CONSUMER BANKRUPTCY IN COMPARATIVE PERSPECTIVE* (8th ECPR General Conference, University of Glasgow) (on file with author).

Models of consumer bankruptcy systems were also undertaken during the 1990s by Nick Huls and Udo Reifner who contrasted a U.S. market model with a "re-educational" model associated with the then-proposed German law. NICK HULS, *OVERINDEBTEDNESS OF CONSUMERS IN THE EC MEMBER STATES: FACTS AND SEARCH FOR SOLUTIONS* 110–13, 133 (Nick Huls et al. eds, 1994). Huls studied with Marjorie Girth and was influential in proposing a modified version of Chapter 13 in Europe and the enactment of the Dutch law on consumer bankruptcy. He also visited Madison to discuss U.S. consumer bankruptcy with Bill Whitford. For other conceptualizations of consumer bankruptcy systems see Iain Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, 20 J. CONSUMER POL'Y 269 (1997).

17. Johanna Niemi, Iain Ramsay & William Whitford, *Introduction to CONSUMER CREDIT, DEBT AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES*, *supra* note 15, at 9.

18. For application to the U.S. system see SKEEL, *supra* note 2, at 14–15; and Eric Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 47–50 (1997). For application to the Canadian system see Iain Ramsay, *Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada*, 53 U. TORONTO L.J. 379 (2003). For application to England and Wales see Ramsay, *supra* note 14, at 645–64. Barry Adler, Ben Polak, and Alan Schwartz claimed that the U.S. consumer bankruptcy system is not efficient because of the substantial benefits to the bankruptcy bar, judges, and academics from the existing system. Barry Adler, Ben Polak & Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 611 (2000).

Recent writing has demonstrated skepticism towards cultural explanations, arguing that differences between consumer bankruptcy regimes are not deeply rooted in legal origins or culture but represent the outcome of political interest group conflicts.¹⁹ Cultural values tend to provide a “toolkit” of arguments in these conflicts rather than a “coherent” set of hard-wired ideas.²⁰ A salient characteristic of consumer insolvency institutions is that they rarely emerge fully formed but often develop over time and may involve a process of conversion of existing institutions.²¹ Bankruptcy law is also part of creditor-debtor law, which has a long and tangled history. A comparative study of personal insolvency is therefore often a study of stability and change in legal regulation—an ongoing process. It is a study of politics over time.²²

Identifying and explaining change in bankruptcy law are not simple tasks. Political scientists often focus on public changes embodied in legislation or judicial rulings. Many important changes in insolvency law are introduced not through primary legislation but through delegated regulation, circulars, court rules, directives, and protocols. These mechanisms may be of low visibility.²³ The implementation of legislation may itself be dependent on the executive, which provides a potential veto point. A full picture of stability and change in insolvency law, however, requires a further step: understanding the operation in practice of insolvency institutions over time. Implementation by courts or officials may convert a law from its original purpose, and private actors and intermediaries may bring about substantial reform through inventive conversion of laws to serve unintended objectives.²⁴ A study of formal public changes provides therefore a limited picture of the dynamics of change and must be complemented through “law in action” study, a point emphasized in the 2003 introduction to *Consumer Bankruptcy in Global Perspective*.²⁵ Such studies of stability and change are difficult to achieve nationally: comparative analysis is

19. See Joseph Spooner, *Fresh Start or Stalemate? European Consumer Insolvency Law Reform and the Politics of Household Debt*, 21 EUR. REV. PRIVATE L. 747, 747 (2013).

20. Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263, 267 (1997).

21. See *infra* note 45 and accompanying text for a definition of conversion.

22. See PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004)

23. For example, see *infra* note 147 and accompanying text for a discussion of the nonlegally binding protocol on the use of Individual Voluntary Arrangements in England and Wales. The low visibility of decision making can sometimes mislead. Thus political scientists claim that England and Wales revised its consumer bankruptcy law in 1990 with the passage of section 13 of the Courts and Legal Services Act 1990, which permitted discharge of debts after a three-year administration order. Courts and Legal Services Act, 1990, c. 41, § 13(4) (Eng.); see GUNNAR TRUMBULL, *STRENGTH IN NUMBERS: THE POWER OF WEAK INTERESTS* 140 (2012); Waltraud Schelkle, *A Crisis of What? Mortgage Credit Markets and the Social Policy of Promoting Homeownership in the United States and in Europe*, 40 POLS. & SOC'Y 59, 73 (2012). But section 13 of the Act has never been brought into force. This executive veto had a significant impact on the balance of public and private repayment alternatives in England and Wales. See *infra* notes 131–32 and accompanying text.

24. See *infra* notes 45–47 and accompanying text.

25. “[S]ystems must be examined in context. There is an emphasis in each of the reports in this book on how each country’s system operates in practice—on any difference between the law-in-the-books and the law-in-action.” Niemi-Kiesiläinen et al., *supra* note 12, at 9.

more challenging. The law in action is not merely irrelevant detail, an obstacle to systematic analysis. Factors that may affect change include the changing demographics of the users of a system and their reasons for using it, the operation in practice of the various officials and private actors in the system, and the political mechanisms for change. This last factor includes different forms of legislatures and courts, and the role of public and private change agents such as professionals, academics, and government agencies.

III. HISTORICAL INSTITUTIONALISM²⁶

A. *Path Dependency, Contingency, and the Limits of Institutional Design*

The insight that policies are often shaped by history is hardly novel to legal scholars.²⁷ Historical institutionalism develops this insight by exploring the mechanisms leading to stability and change in policies and legal institutions. It conceptualizes policy change resulting from both exogenous (societal changes) and endogenous (institutional changes) forces and thus steers a middle path between views of law either as an autonomous institution or an unrefined functionalism. This approach is useful for understanding personal insolvency, which is both a technical subject with its own internal dynamics and professional corps, and also is an area affected by socioeconomic and political change, legislative politics, and public values such as promise keeping, personal responsibility, and relief of hardship. Historical institutionalism investigates the importance of sequence and timing in political change as well as the effects of differing mechanisms of change, for example, the role of parliaments, voting procedures, government bureaucracies, expert committees, and courts. The institutional fragmentation of U.S. politics, with its many veto points, makes “big

26. Historical institutionalism covers a broad range of writing. Influential texts on the subject include; EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER (James Mahoney & Kathleen Thelen eds., 2010); PIERSON, *supra* note 22; Wolfgang Streeck & Kathleen Thelen, *Introduction: Institutional Change in Advanced Political Economies*, in BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES (2005); Kathleen Thelen, *How Institutions Evolve: Insights from Comparative Historical Analysis*, in COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES (James Mahoney & Dietrich Rueschemeyer eds., 2003). A useful outline of the different varieties of institutionalism is provided in Vivien A. Schmidt, *Taking Ideas and Discourse Seriously: Explaining Change Through Discursive Institutionalism as the Fourth ‘New Institutionalism’*, 2 EUR. POL. SCI. REV. 1 (2010). Examples of applications by legal scholars include John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787 (2013); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

27. Hugh Heclo’s seminal study of the development of social policy in the UK and Sweden concluded that “even the most innovative creations are decisively shaped by the content of previous policy.” HUGH HECLO, *MODERN SOCIAL POLITICS IN BRITAIN AND SWEDEN: FROM RELIEF TO INCOME MAINTENANCE* 5 (2d ed. 2010). Justice Stephen Breyer argued that new regulation tends to copy old models. *See* STEPHEN BREYER, *REGULATION AND ITS REFORM* 6 (1982) (“[T]he framers of the Civil Aeronautics Act (1938), the precursor of today’s Federal Aviation Act, copied the language of the Interstate Commerce Act (1887), which was in turn modeled on the British Railway Act (1845).”) (footnotes omitted).

bang” changes difficult.²⁸ This contrasts with the “elective dictatorship” of the U.K. parliamentary model, or the important role of technocracies in France and Sweden.²⁹ The U.S. legislative structure may permit more opportunities for interest group provisions, and the decentralized implementation of the U.S. Bankruptcy Code allows for experimentation and learning. The persistence of “local legal culture” is one example.³⁰

Path dependency³¹ is a central concept in historical institutionalism, analogizing history to a “branching process.” Once one climbs one branch it becomes more difficult to reverse or move to another branch. Institutions may be initiated through deliberate political choices, but the actual operation may deviate from its original objectives, setting in motion a path which is independent of the initial causes. Timing is therefore important since early, possibly contingent, developments may have a long-term effect. There is an overlap here with legal origins theory, which argues that differences in styles and strategies of legal regulation can be explained by legal origins, and with the French civilian tradition more likely to intervene in market failures with centralized regulation.³² Legal origins theory suggests that, although legal systems are not hardwired to particular solutions, they may introduce centralized regulation during a crisis which is not abolished after the crisis. This seems to fit the development of the French system of overindebtedness regulation. The French government turned to the Bank of France to administer the newly created overindebtedness regime in 1989, as it seemed to provide an existing mechanism for rolling out a national program of conciliation which would not involve the creation of new judicial institutions. The Bank did not initially want to play this role but was convinced to do so because it was assumed that the 1989 law would be temporary. However, the Bank of France has gradually become the primary institution in the administration of the policy, exercising greater centralized

28. The Bankruptcy Reform Act of 1978 was enacted eight years after the creation of the Bankruptcy Reform Commission. See Kenneth N. Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275, 275–77 (1980). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) was enacted eleven years after the creation of the National Bankruptcy Review Commission. See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

29. See MONICA PRASAD, *THE POLITICS OF FREE MARKETS: THE RISE OF NEOLIBERAL ECONOMIC POLICIES IN BRITAIN, FRANCE, GERMANY & THE UNITED STATES* (2006); SVEN STEINMO, *THE EVOLUTION OF MODERN STATES: SWEDEN, JAPAN, AND THE UNITED STATES* (2010). Prasad suggests in discussing economic reforms that in France “cautious and careful technocrats . . . produced moderate innovations.” PRASAD, *supra*, at 238–39.

30. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801 (1994). The persistence of state differences in the use of Chapter 13 and Chapter 7 suggests that learning may be modest.

31. See PIERSON, *supra* note 22, at 17–53 for an excellent discussion of this concept.

32. See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008).

control over time, and it would be difficult for the Bank to retract from this responsibility.³³

The creation of organized groups associated with the administration of a policy may also increase the costs and political risks of reversing a policy. Applied to consumer bankruptcy, this suggests that professional groups associated with a particular institutional framework may have a strong interest in preserving an institution (even though they may press for reforms within the institution). Overindebted individuals are rarely a well-organized group, so professional groups are often proxy spokespersons for their interest.

Path dependency suggests that policies will persist unless there are strong forces for change and that legislators rarely write on a blank slate; the “dead weight of previous institutional choices” may limit their room to maneuver.³⁴ There is often a status quo bias to existing institutions. The potential significance of initial events casting a long shadow introduces an element of contingency to political development. David Skeel drew on path dependency in arguing that U.S. consumer bankruptcy law, with its early rejection of English “officialism” in 1898, and its reliance on courts, set in motion the need for lawyers and judges in the administration of bankruptcy.³⁵ The subsequent opposition of these groups to an administrative system increased the costs of political attempts in the 1930s during the New Deal, and again in the 1960s, to substitute an administrative model based on the English model of the Official Receiver. If the U.S. Bankruptcy Act had been first introduced in the 1930s, an administrative model might have been adopted.³⁶

Historical institutionalism, through highlighting the role of contingency and unintended consequences, draws attention to the limits of institutional design. Bankruptcy legislation in the United States has favored the idea of Chapter 13 repayment plans for consumers but with modest success.³⁷ The introduction of

33. For fuller discussions see Jason J. Kilborn, *La Responsabilisation de l'Économie: What the United States Can Learn from the New French Law on Consumer Overindebtedness* 26 MICH. J. INT'L L. 619 (2005) and Iain Ramsay, *A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France and England – A Story from the Trente Piteuses*, 75 MOD. L. REV. 212 (2012).

34. JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 54 (2002) [hereinafter HACKER, *THE DIVIDED WELFARE STATE*].

35. SKEEL, *supra* note 2, at 43.

36. *Id.* at 100.

The best way to appreciate how U.S. bankruptcy law could have taken a very different look is to consider a simple counterfactual. Suppose the nation had continued without a federal bankruptcy law into the twentieth century. If federal bankruptcy had remained precarious into the New Deal, Congress might have dealt with insolvency issues quite differently. . . . Each of the other strands of the [New Deal safety] net is administrative rather than judicial in nature. It does not take too great a leap of imagination to speculate that New Deal lawmakers, if they had been writing on a clean slate, might well have crafted an administrative bankruptcy system.

Id.

37. See Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103 (2011).

the Individual Voluntary Arrangement (IVA) in England was not intended to be a mass-produced consumer remedy.³⁸ Creditors who lobbied for increased powers for the U.S. Trustee Program in the BAPCPA probably did not expect that the agency would become a consumer protection agency attacking mortgage servicers' unfair practices.³⁹

Path dependency does not mean that a particular pattern is "locked in." A "critical juncture,"⁴⁰ "periods of contingency during which the usual constraints on action are lifted or eased,"⁴¹ may provide an opportunity for change agents or policy entrepreneurs to promote reform. Critical junctures may be major changes in partisan politics, exogenous events such as a severe economic downturn, or even a puzzle in existing explanations—for example, why do bankruptcies continue to increase during an apparently buoyant economy? These events provide opportunities for policy actors to provide new diagnoses and agenda for change. Since such events are not frequent, an initial picture emerged in institutional studies of long periods of stability "punctuated" by dramatic change.

B. Incremental Change: Drifting, Layering, and Conversion

This initial image of bankruptcy law as experiencing long periods of stability punctuated by significant change may underestimate the role of incremental, possibly low-visibility changes in policies and practices which may have significant long-term effects. Change may occur through mechanisms such as drifting, layering, and conversion. Drifting,⁴² for example, the failure to update

38. See *infra* Part IV for a discussion of the rise of IVA.

39. In the period before the BAPCPA, the U.S. Trustee Program foregrounded in its Annual Reports various enforcement initiatives against abuses of the Bankruptcy Act by debtors. It highlighted a "National Civil Enforcement Initiative" and, in 2004, featured its New York Office "aggressively" investigating actions against "debtors who have lived lavishly off credit card debt." U.S. DEP'T OF JUSTICE, U.S. TRUSTEE PROGRAM, ANNUAL REPORTS OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2004, at 13 (2005); see also U.S. DEP'T OF JUSTICE, U.S. TRUSTEE PROGRAM, ANNUAL REPORTS OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2002, at 7 (2003). However, by 2007, it reported potentially abusive conduct by subprime lenders as an issue for the agency. U.S. DEP'T OF JUSTICE, U.S. TRUSTEE PROGRAM, ANNUAL REPORTS OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2007, at 16 (2008). In 2008 mortgage servicer abuse and improper attempts by credit card servicers to recover discharged debt were the lead stories in the Annual Report, and by 2010 consumer protection had become one of the agency's top priorities. U.S. DEP'T OF JUSTICE, U.S. TRUSTEE PROGRAM, ANNUAL REPORTS OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2010, at 11 (2011); U.S. DEP'T OF JUSTICE, U.S. TRUSTEE PROGRAM, ANNUAL REPORTS OF SIGNIFICANT ACCOMPLISHMENTS: FISCAL YEAR 2008, at 10 (2009).

40. "Junctures are 'critical' because they place institutional arrangements on paths or trajectories, which are then difficult to alter." PIERSON, *supra* note 22, at 135.

41. See James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, in EXPLAINING INSTITUTIONAL CHANGE, *supra* note 26, at 7.

42. *Id.* at 17 ("Drift occurs when rules remain formally the same but their impact changes as a result of changes in external conditions. When actors choose not to respond to such environmental changes, their very inaction can cause change in the impact of the institution.") (citing Jacob S. Hacker, *Policy Drift: The Hidden Politics of US Welfare State Retrenchment*, in Streeck & Thelen, *supra* note 26) [hereinafter Hacker, *Policy Drift*].

ceilings in legislation or adjust bankruptcy law to the changing profile of debtors, might be the result of mere inadvertence or may represent a deliberate political strategy.⁴³ Layering occurs with the addition of new rules which do not displace existing rules but operate “on top of or alongside” existing rules and policies and may “alter” or “compromise” the existing institution.⁴⁴ Finally, conversion describes a situation where the rules remain the same but are interpreted or implemented differently by actors who “actively exploit the inherent ambiguities of the institutions.”⁴⁵ Jacob Hacker suggests that these may be mechanisms of “stealth, obstruction, and indirection” and that to understand them it “may become increasingly difficult to judge policy effects simply by reading statute books or examining disputes over policy rules.”⁴⁶ This insight is hardly novel to socio-legal scholars⁴⁷ but the conceptual framework provides a useful grid for understanding change. If direct legislative revision through displacement of existing rules has high political costs, then change agents—public or private actors—may attempt to achieve change through layering or conversion.

Hacker applies the insights of historical institutionalism to the development of the U.S. system of social security and healthcare,⁴⁸ arguing that these programs are neither “a one time event that occurs because of a particular constellation of political and social factors” nor a reflection of deep-seated or enduring national values such as antigovernment biases.⁴⁹ Rather they represent an ongoing historical process whose sequence of development, itself reflecting initial contingency, critically determined eventual outcomes. The initial development of widespread private health insurance and a substantial medical industry created high political costs for the introduction of national health insurance in the United States. Public systems worked around instead of challenging private provision of insurance.⁵⁰ The highly visible and contested public arena of public programs and the lower visibility and perceived costs of the introduction of private programs structured long-term change. Hacker contrasts the U.S. healthcare system with Canada’s system, where private provision was less entrenched,⁵¹ and province-level experimentation, which

43. Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 246–49 (2004) [hereinafter Hacker, *Privatizing Risk*].

44. Mahoney & Thelen, *supra* note 41, at 16–17. Hacker states that these are often “covert strategies that political actors adopt when trying to transform embedded policy commitments.” Hacker, *Privatizing Risk*, *supra* note 43, at 243.

45. Mahoney & Thelen, *supra* note 41, at 17.

46. See Hacker, *Privatizing Risk*, *supra* note 43, at 243, 247.

47. See TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* 15–16 (2009).

48. See generally HACKER, *THE DIVIDED WELFARE STATE*, *supra* note 34.

49. Jacob S. Hacker, *The Historical Logic of National Health Insurance: Structure and Sequence in the Development of British, Canadian, and U.S. Medical Policy*, 12 STUDS. IN AM. POL. DEV. 57, 127–28 (1998).

50. *Id.* at 127.

51. See *id.* at 60–65. His account also suggests that Canada’s healthcare system is not an enduring characteristic of Canadian values. See *id.*

subsequently led to a national program of healthcare, was not hampered by fear of capital flight. He draws two implications for policy reform. The first is a greater appreciation of contingency and alternative possibilities in political change: policies are not “rooted in enduring characteristics of nations, whether they be institutions or ideas, structure or culture.”⁵² The second “is toward greater realism about the ability to change institutions once they have become firmly embedded.”⁵³

Hacker illustrates the role of drifting, layering, and conversion in the “hidden politics” of social policy retrenchment in the United States, where “everyday forms of retrenchment” might occur.⁵⁴ Formal revision of policy is not the “normal politics” of modern U.S. welfare politics, so change is more likely to occur through drifting, layering, and conversion than through authoritative revision.⁵⁵ He cites the failure of U.S. social welfare policy to adjust to the new social risks associated with the demise of the “male breadwinner” model and the rise of the two-income family (drift), with the consequence that greater numbers of middle-class individuals file for bankruptcy.⁵⁶

Individual bankruptcy law differs from social security policy in many respects. But the insights of Hacker’s institutional approach remain valuable. Thus, in England and Wales, the development of a private overindebtedness industry, partly stimulated by a drifting public system⁵⁷—which may have reflected a deliberate choice by government departments unwilling to subsidize the processing of consumer bankruptcy—has resulted in an institutional landscape of public and private providers. This landscape structures the politics of reform since these private groups have a voice in reform. In addition, harnessing the private debt industry to achieve government goals is financially attractive to cost-conscious governments and ideologically attractive against a background of deregulation. In contrast, in France, the dominance of the public system of overindebtedness commissions is not challenged by private debt managers since an early intervention prohibited for-profit debt management companies.⁵⁸

Layering might include techniques such as the addition of a partial repayment alternative to a straight bankruptcy procedure. This introduction of new rules alongside the existing system may over time and through small-scale continuing adjustments lead to substantial long-term change. In Canada, consumer proposals⁵⁹ were introduced in 1992 as an addition to the straight

52. HACKER, *THE DIVIDED WELFARE STATE*, *supra* note 34, at 27.

53. *Id.*

54. Hacker, *Privatizing Risk* *supra* note 43, at 246–47.

55. Hacker hypothesizes that “political settings that militate against authoritative change encourage reformers to seek the conversion or erosion of existing policies.” *Id.* at 247 (emphasis omitted).

56. *Id.* at 249–50.

57. Ramsay, *supra* note 33, at 213–16.

58. CODE DE LA CONSOMMATION [C. CONS.] art. L. 321-1 (Fr).

59. These consumer proposals permit a debtor to repay a portion of her unsecured debts over a period no longer than five years. The proposal must be approved by fifty percent of unsecured

bankruptcy option.⁶⁰ They initially constituted a tiny percentage of bankruptcies.⁶¹ However, through a variety of changes between 1997 and 1998⁶² and in 2009,⁶³ they now constitute 44.7% of bankruptcies.⁶⁴ These incremental changes may alter ideas about the “appropriate” decision that individuals should take if faced with severe financial difficulties. A partial repayment plan may be increasingly viewed as the responsible alternative.

Layering describes the approach of creditor interests in U.S. bankruptcy politics after the enactment of the Bankruptcy Reform Act of 1978 until the introduction of BAPCPA in a Congress dominated by Republicans. The large increase in post-1978 bankruptcies (from 196,976 in 1979 to 314,886 in 1980) formed the backdrop (critical juncture) to the creation of a consumer credit coalition⁶⁵ which argued (once again) that future income should be taken into account in determining access to bankruptcy. In the context of a Congress split on the need for bankruptcy reform creditor groups succeeded in layering on to the 1984 amendments to the Act the “substantial abuse” provision,⁶⁶ and in 1986, Congress conferred power on the newly created U.S. Trustee Office to review for abuse. Although the concept of substantial abuse represented a vague standard, it legitimated the idea that abuse existed in the bankruptcy system.

Conversion occurs when the formal rules remain the same but they are interpreted or implemented in a novel manner. The extent of conversion may depend on several factors, including the nature of the system and change agent. In a publicly implemented program, change agents will often be bureaucrats whose discretion may be more or less structured. But there will likely be opportunities for “street-level bureaucrats” to give a distinct meaning to a program.⁶⁷ Courts are obvious change agents, and their role may depend on the

creditors. The current provisions on consumer proposals are in Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, §§ 66.11–66.4 (Can.).

60. For a discussion of this development see Ramsay, *supra* note 18, at 405, 408.

61. In 1994 consumer proposals represented two percent of bankruptcies. *Id.* at 409.

62. *Id.* at 410.

63. The extension of surplus income payments in bankruptcy from nine-months to twenty-one months created incentives for debtors to offer lower payments spread over the longer time period of a consumer proposal (generally three years). R.S.C. § 168.1(1)(a) (Can.).

64. *Insolvency Statistics in Canada—October 2014 Highlights*, INDUSTRY CANADA, <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03332.html> (last modified Mar. 24, 2015).

65. See Unsigned Memorandum, Legislative History of the Bankruptcy and Federal Judgeship Act 1984 (on file among Kenneth Klee’s personal papers in the National Bankruptcy Archives, University of Pennsylvania); see also SKEEL, *supra* note 2, at 187.

66. Section 707(b), which originally did not define what constituted substantial abuse, now creates a presumption of abuse when the debtor’s adjusted monthly income is above a certain level. 11 U.S.C. § 707(b) (2012).

67. See Rafael Efrat, *The Evolution of the Fresh-Start Policy in Israeli Bankruptcy Law*, 32 VAND. J. TRANSNAT’L L. 49, 52 (1999) (describing different approaches of Official Receiver offices in Israel); Bengt Larsson & Bengt Jacobsson, *Discretion in the “Backyard of Law”: Case Handling of Debt Relief in Sweden*, 3 PROFS. & PROFESSIONALISM 4038 (2013) (providing an empirical study of exercise of discretion in the Swedish state system of debt enforcement); Henri Fraisse & Philippe Frouté, *Household Debt Restructuring: Evidence from the French Experience* (Banque de France,

particular national context. Thus, in France, the Cour de Cassation played a large role in converting the 1989 French law on overindebtedness towards an insolvency law, notwithstanding the official norm that its decisions are not a source of law.⁶⁸ Private intermediaries who implement bankruptcy may have greater ability to modify, or undermine, a legislative policy and be subject to less control than public actors. They may also act as champions of a policy. There are two examples of influential conversions. The first is Valentine Nesbit's improvisation from section 74 of the 1898 Bankruptcy Act, which created a debt repayment scheme for debtors in Birmingham, Alabama, in the 1930s, and became the model for Chapter 13 in 1938.⁶⁹ The second example is entrepreneurial accountants' conversion of the English IVA scheme into the primary insolvency remedy for consumers in England and Wales.⁷⁰

These examples, particularly the latter, underline the importance of studying the law in action and the manner in which it provides templates for change. Commercial law often develops through ratification of existing practices. Consumer bankruptcy practice, however, differs since the parties are not necessarily of equal bargaining power and the practices deserve greater external scrutiny before adoption in law.⁷¹

C. *The Role of Discourse in Institutional Change*

Ideas are important to institutional change and stability. These include both "deep world ideas,"⁷² assumptions about the goals of a policy, and the most appropriate instruments to achieve these goals.⁷³ Ideas help to build coalitions, function as political weapons, and become embedded in new institutions providing institutional stability.⁷⁴ The research question is why particular ideas become dominant, endure, and transform. The influence of ideas may depend on the context of their production and the structure of the "knowledge regime" in different countries. "Knowledge regimes are the organizational and institutional machinery that generates data, research, policy recommendations, and other

Working Paper No. 404, 2012) (noting the different approaches of file managers in the Bank of France dealing with overindebted individuals).

68. See Ramsay, *supra* note 33, at 229.

69. See generally *Revision of the Bankruptcy Act: Hearing on H.R. 6439 and H.R. 8046 Before the Comm. on the Judiciary H. of Rep.*, 75th Cong. 259 (1937) [hereinafter *Revision of the Bankruptcy Act Hearing*] (statement of Valentine J. Nesbit, Referee in Bankruptcy, Birmingham, Ala.); Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come from and Where Should It Go?* 10 AM. BANKR. INST. REV. 741 (2002).

70. See Ramsay, *supra* note 33, at 240–41, 245–47. See *infra* Part V.1 for a discussion of the development of IVAs.

71. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993).

72. See, e.g., Schmidt, *supra* note 26 (examining the relationship between ideas and institutional change).

73. See Peter Hall, *Policy Paradigms, Social Learning and the State: The Case of Economic Policy Making in Britain*, 25 COMP. POLS. 275 (2003).

74. See MARK BLYTH, *GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY* (2002); see also Schmidt, *supra* note 26, at 1–2.

ideas that influence public debate and policymaking.”⁷⁵ This includes the role of political think tanks, academic researchers, governmental advisory units, and their relationship to legislatures.

Changes in a knowledge regime will affect how influential ideas are produced and disseminated in policy regimes. For example, lawyers, legal academics, and judges have played an influential role in consumer bankruptcy development in the United States through institutions such as the National Bankruptcy Conference (NBC)⁷⁶ and the National Association of Bankruptcy Judges.⁷⁷ A chair of the NBC styled itself as a “Ministry of Justice” for bankruptcy law,⁷⁸ “a body of experts and specialists who will explore new ideas, take into account economic and political changes, and see to it that the law keeps abreast of progress in other areas.”⁷⁹ Many amendments to the Bankruptcy Act during the 1950s and 1960s were sponsored by NBC.⁸⁰ One author claims that this small, close-knit group of lawyers, academics, and judges exercised a policy monopoly from the 1930s to the 1970s with Congress delegating to them responsibility for bankruptcy policymaking.⁸¹ Policy monopolies are associated

75. JOHN L. CAMPBELL & OVE K. PEDERSEN, *THE NATIONAL ORIGINS OF POLICY IDEAS: KNOWLEDGE REGIMES IN THE UNITED STATES, FRANCE, GERMANY, AND DENMARK* 3 (2014).

76. The National Bankruptcy Conference, established in 1932, drafted many of the provisions of the 1938 Chandler Act, and during the 1950s and 1960s, annually presented to Congress proposed amendments to the Bankruptcy Act as well as commented and opposed proposals from other sources. It was an elite group of about fifty members by the 1960s, “half of whom are practitioners, and the other half divided fairly evenly between referees in bankruptcy and law professors [A]n effort is made to keep the conference representative of the several interests that are involved in bankruptcy cases.” *Commission to Study Bankruptcy Laws of 1968: Hearings on S.J. Res. 100 Before the Special Subcommittee on Bankruptcy of the Committee on the Judiciary*, 19th Cong. 84 (1968) (statement of Prof. Frank Kennedy, Univ. of Mich., Ann Arbor, Mich., Representing the National Bankruptcy Conference) [hereinafter Statement of Frank Kennedy]. The Conference promoted the modernization and rationalization of bankruptcy law.

77. This group was known as the National Conference of Bankruptcy Referees before the Bankruptcy Reform Act 1978. This group also sponsored congressional bills and proposed an alternative Judges Bill in 1973. For a discussion of their legislative role until the late 1960s see Benjamin Zelenko, *The Role of the Referee in the Legislative Reform of the Bankruptcy Act*, 43 J. NAT’L CONF. REF. BANKR. 101, 103 (1969).

78. See MINUTES OF THE NATIONAL BANKRUPTCY CONFERENCE 30 (1956) (statement of Charles Horsky).

79. *Id.*; see SKEEL, *supra* note 2, at 95–98. Horsky’s reference to a Ministry of Justice was drawn from a concept developed by Roscoe Pound. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921). I discuss the role of the NBC in consumer bankruptcy in greater detail in Chapter 2 of IAIN RAMSAY, *BANKRUPTCY IN THE 21ST CENTURY: A COMPARISON OF EUROPE AND THE US* (forthcoming 2016).

80. See Statement of Frank Kennedy, *supra* note 76, at 84 (“[T]he principal activity of the conference is the consideration and drafting of proposals to amend the Bankruptcy Act. As the members of the Judiciary Committee of the Senate know the conference presents to Congress every session, I should say a number of drafts of proposed amendments.”).

81. Kevin Mandell Ball, *Bankruptcy and Politics: A Framework for Bankruptcy Policymaking in the United States Congress and Courts* (Jan. 1, 2012) (unpublished Ph.D. dissertation, Wayne State University), available at http://digitalcommons.wayne.edu/cgi/viewcontent.cgi?article=1422&context=oa_dissertations. This thesis of a policy monopoly relies on FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

with dominant policy images—in this case the conception of bankruptcy as a technical subject within the overall objective of providing a fresh start.⁸² This monopoly was disrupted after 1978 by policy entrepreneurs for creditor interests.⁸³ This change coincided with the increasing “war of ideas” in the United States in the late 1970s as the post-war consensus on policymaking broke down.⁸⁴ A “contest for authority” existed as to the image of the nature of the bankruptcy problem, its causes, and the appropriate response. This was both a scholarly⁸⁵ and political battle, but according to Peter Hall’s analysis of policy changes, the outcome of such conflicts of authority depend not on the strength of technical arguments but on politicians and the media.⁸⁶ Consumer bankruptcy was transformed by policy entrepreneurs from a technical issue to the political issue of addressing personal responsibility.⁸⁷

IV. THE BAPCPA—CONTINUITY OR DISPLACEMENT?

Mahoney and Thelen’s final category of change is displacement, “when existing rules are replaced by new ones.”⁸⁸ Displacement can be swift or a slow-moving process. But it may be difficult to determine whether a displacement has occurred. For example, has the BAPCPA displaced earlier consumer bankruptcy laws? Susan Jensen describes it as “one of the most comprehensive overhauls of the Bankruptcy Code in more than twenty-five years.”⁸⁹ On the other hand, progressive scholars writing in 2014 conclude that, although BAPCPA represents

82. See BAUMGARTNER & JONES, *supra* note 81, at 25–38. Eric Posner argues that all parties during the passage of the Bankruptcy Reform Act of 1978 agreed on the importance of the role of bankruptcy as a safety net in “welfare state capitalism.” Posner, *supra* note 18, at 60.

83. See Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 190–96 (1999). John Fabian Witt refers to the importance of “narrative entrepreneurs” in U.S. bankruptcy history. This describes how particular groups were able to strategically shape ideas about risk and law’s approach to risk taking. See John Fabian Witt, *Narrating Bankruptcy / Narrating Risk* (2003) 98 NW. U. L. REV. 303 (2003) (reviewing EDWARD J. BALLEISEN, *NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA* (2001), BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2003), and SKEEL, *supra* note 2). John Pottow develops this theme in his analysis of the lobbying landscape surrounding the enactment of the BAPCPA. See John Pottow, *A U.S. Perspective on the Contextual Terrain of Political Economy in Insolvency Reform*, in *CANADIAN BANKRUPTCY AND INSOLVENCY LAW: BILL C-55 STATUTE C.47 AND BEYOND* 386–95 (Stephanie Ben Ishai & Anthony Duggan eds., 2007).

84. See CAMPBELL & PEDERSEN, *supra* note 75, at 22, 39–83 (discussing the relation to the U.S. policymaking). A popular account of these changes can be found in GEORGE PACKER, *THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA* (2013).

85. For a discussion of the scholarly divergence between a socio-legal approach to bankruptcy and law and economics approaches see SKEEL, *supra* note 2, at 12–14.

86. Hall, *supra* note 73, at 286–87.

87. Pottow, *supra* note 83, at 386–87.

88. Mahoney & Thelen, *supra* note 41, at 16.

89. See Jensen, *supra* note 28, at 485.

“far reaching changes” in the law, “most of the fundamental components of the prior system remain unchanged.”⁹⁰

The BAPCPA must be understood in the context of the long history of conflict in the United States over the balance between repayment alternatives and straight bankruptcy. It is not possible in this short Article to provide a full history of this conflict. However, U.S. consumer bankruptcy law did not spring like Athena, fully formed, from the 1898 Act. It was intended as a trader rather than consumer remedy,⁹¹ and its application to wage earners only became a political issue in the 1930s⁹² with conflict over how to adjust bankruptcy law—a liquidation statute—to income earners. Although a mandatory requirement of partial repayment as a condition of discharge was rejected in the early 1930s, the idea of a partial repayment option—ultimately embodied in Chapter XIII of the Chandler Act of 1938—was supported by some progressives, although they were more skeptical of the capacity of individuals to make repayments.⁹³ During the 1960s several bills were presented to Congress which would either require a debtor filing for bankruptcy to demonstrate that adequate relief could not be provided by a three-year Chapter XIII plan or would permit a referee to convert a bankruptcy to Chapter XIII without the debtor’s consent.⁹⁴ The American Bar Association promoted a similar bill in 1967, supporting their contentions by empirical studies which concluded that between twenty-five and fifty percent of bankrupts could pay their debts from future income without undue hardship.⁹⁵

90. ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN POTTOW, *THE LAW OF DEBTORS AND CREDITORS* 11 (7th ed.2014).

91. See David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 312 (1999). For example, Bradley Hansen and Mary Hansen argue that the 1898 Act was not viewed at the time as debtor friendly and that Olmstead’s comments about a “Hebrew Jubilee” was a warning against regarding bankruptcy as a jubilee and not a statement that it was a jubilee. Bradley Hansen & Mary Hansen, *The Role of Path Dependence in the Development of U.S. Bankruptcy Law, 1880–1938*, 3 J. INST. ECON. 203 (2007); see James Monroe Olmstead, *Bankruptcy A Commercial Regulation*, 15 HARV. L. REV. 829, 843 (1902).

92. Wage earner bankruptcies represented the majority of bankruptcies during the late 1920s. The level of wage earner bankruptcies seemed to be related to the impact of wage garnishment in certain states. See, e.g., Rolf Nugent, *Why Wage Earners Go Bankrupt*, AM. BANKERS ASS’N J., July 1931, at 9; MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RECOMMENDING THE STRENGTHENING OF PROCEDURE IN THE JUDICIAL SYSTEM TOGETHER WITH THE REPORT OF THE ATTORNEY GENERAL ON BANKRUPTCY LAW AND PRACTICE, S. DOC. NO. 65, at 85 (1932) (describing wage earner bankruptcies as a “subject of major importance”).

93. See William O. Douglas & J. Howard Marshall *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932); William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 YALE L.J. 591 (1933). See generally Skeel, *supra* note 2, at 98–99 (contrasting the general rehabilitation provisions of the early 1930s with the Chandler Act of 1938).

94. See, e.g., H.R. 5771, 90th Cong. (1st Sess. 1967); H.R. 1057, 90th Cong. (1st Sess. 1967); H.R. 292, 89th Cong. (1st Sess. 1965); S. 613, 89th Cong. (1st Sess. 1965); H.R. 12784, 88th Cong. (2d Sess. 1964).

95. See *Wage Earner Plans Under the Bankruptcy Act: Hearing on H.R. 1057 and H.R. 5771 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 38–44 (1967) (statements of Carroll R. Wetzel, Chairman, Section of Corporation, Banking and Business Law, and Linn K. Twinem, Chairman, Consumer Bankruptcy Committee of Am. Bar Ass’n) (citing testimony regarding

These bills were unsuccessful partly because a coalition of bankruptcy experts (NBC and National Association of Bankruptcy Referees) opposed them.⁹⁶ The Bankruptcy Commission in 1970 and Congress in the 1978 Bankruptcy Reform Act embraced, however, a voluntary Chapter XIII—providing a series of incentives for debtors with the intentions that Chapter XIII should become the primary remedy for the consumer debtor⁹⁷—at the same time as the English Cork report reached a similar conclusion in relation to the administration order.⁹⁸

suggested changes to Chapter 13 of the Bankruptcy Act); Robert Dolphin, *An Analysis of Economic and Personal Factors Leading to Consumer Bankruptcy* (1964) (unpublished D.B.A. thesis, Michigan State University). Dolphin's study claimed that twenty-eight percent of bankrupts could repay their debts over three years on a Chapter XIII plan living on a "comfortable" budget. *Id.* at 98. The study received financial support from an American Bankers Association fellowship. *Id.* at ii. It is not clear how many of the studies cited in legislative hearings by the American Bar Association were sponsored by them. The American Bar Association had indicated in 1961 that it would promote study of the consumer bankruptcy system. *See Bar Study Asked on Bankruptcies: Investigation Urged Into Reasons for Growth of Consumer Failures*, N.Y. TIMES, Feb. 11, 1961, at 29 (reporting comments of Linn K. Twinem, head of an association committee asked by the American Bar Association to investigate reasons behind the growing number of consumer bankruptcies).

96. *See, e.g.*, S. 613, 89th Cong. (1st Sess. 1965); H.R. 12784, 88th Cong. (2d Sess. 1964) (proposing a mandatory Chapter 13 as a condition of discharge). Vern Countryman noted,

Under one version, such a person would be required in any straight bankruptcy proceeding to persuade the court that "adequate relief" could not be obtained under Chapter XIII and, if he failed to do so, the straight bankruptcy proceeding was to be dismissed unless the debtor filed a converter petition under Chapter XIII. In the other version, the court would be authorized, in any voluntary straight bankruptcy proceeding involving a wage earner, to order the bankrupt to file a converted petition under Chapter XIII "whenever it determines it to be feasible and desirable, and for the best interests of creditors." These proposals seemed objectionable to most members of the National Bankruptcy Conference. . . .

Vern Countryman, *Proposed New Amendments for Chapter XIII*, 22 BUS. LAW. 1151, 1151 (1967) (quoting first H.R. 292, 89th Cong. (1st Sess. 1965); second S. 613, 89th Cong. (1st Sess. 1965)); *see also* NAT'L BANKR. CONFERENCE RESOLUTION NO. 21 (1964) ("Resolved that the conference is opposed to legislation which would authorize a referee to 'convert' a voluntary proceeding in bankruptcy to a wage earner's plan under Chapter XIII without the consent of the bankrupt; that the attention of labor organizations be called to the fact that proposals having such effect are under active consideration by interested groups; that the Conference prepare a brief on the subject for submission to the Bankruptcy Committee of the Judicial Conference, for the purpose of opposing the bill, appear at any Congressional Hearing with respect to any bill relating to this matter.").

97. According to a 1977 House Report, "the premises of the bill with respect to consumer bankruptcy are that the use of the bankruptcy law should be a last resort; that if it is used debtors should attempt repayment under Chapter 13." H.R. REP. NO. 595, 95th Cong. 118 (1977).

98. *See* KENNETH CORK, *INSOLVENCY LAW AND PRACTICE: REPORT OF THE REVIEW COMMITTEE* ch. 6, ¶ 313 (1982) (outlining the central role of the Debts Arrangement Order in permitting repayment of all or a portion of unsecured debts normally over three years). Later in the report, the committee argues that bankruptcy should be "reserved for the comparatively few serious cases . . . where the debtor has been dishonest or guilty of other wrongdoing, or where his conduct requires investigation." *Id.* at ch. 7, ¶ 554. The Cork Committee was appointed in 1977. The administration order did not provide the same "carrots" to debtors to address secured credit, and, in some respects, the English proposals resembled a system in which single secured creditors could prevent the law from becoming effective. *Id.* at ¶ 418.

The BAPCPA reflected legislative politics, the power of ideas, and interest group pressures which took place within a changed knowledge regime in the United States. A. Mechele Dickerson questions the conclusion that the BAPCPA represented a simple public choice or Marxist story where the Act was “written by, bought, and paid for by the consumer credit industry, especially the credit card industry.”⁹⁹ Dickerson points out that groups often draft legislation: the NBC did this in the 1950s and 1960s, for example. More significantly, she tracks the repeated bipartisan references to “personal responsibility” and a belief that only those who “were rendered unable to pay their debts through no fault of their own” should access bankruptcy.¹⁰⁰ These ideas chimed with contemporary neoliberalism, including the individualization and “responsibilization” of consumers, so that the Supreme Court could characterize “the heart of BAPCPA’s consumer bankruptcy reforms” as being “to help ensure that debtors who *can* pay creditors *do* pay them.”¹⁰¹

The BAPCPA’s reforms therefore seem to highlight continuing conflicts in U.S. law between a law of liberal and strict excuses, and between liberal and conservative themes.¹⁰² The move from standards in the 1984 “substantial abuse” amendment to the detailed rules in the BAPCPA also reflects the tendency of both conservatives and liberals in the United States to attempt to “enforce its legislative accomplishments in the face of private or official resistance.”¹⁰³ Distrust of the bankruptcy judiciary’s willingness to police for abuse under a vague standard animated the detailed rulemaking of the means test in the BAPCPA. The BAPCPA also enlarged the power of the U.S. Trustee Program, created as an experiment in 1978, embedded in 1986, and viewed by the early 2000s as a policer of debtor abuse. Paradoxically, an administrative agency had been opposed by creditors in the 1970s because it might promote consumer bankruptcy.¹⁰⁴ In light of this history of conflict and change, it is hard to view U.S. consumer bankruptcy law as either reflecting some timeless set of values or

99. A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1861 (2006). For a Marxist account of the enactment of the BAPCPA see SUSANNE SOEDERBERG, *DEBTFARE STATES AND THE POVERTY INDUSTRY: MONEY, DISCIPLINE AND THE SURPLUS POPULATION* 95–97 (2014).

100. Dickerson, *supra* note 99, at 1894.

101. *Ransom v. FIA Card Servs. N.A.*, 562 U.S. 61, 64 (2011) (alterations omitted) (quoting H.R. REP. NO. 109-31, pt. 1, at 2 (2005)).

102. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]* (1997).

103. KENNEDY, *supra* note 102, at 151–52. See 146 CONG. REC. 26462–26464 (2000) (statement of Sen. Chuck Grassley) (introducing H.R. 2415 in 1998 (an early version of the BAPCPA), where, after noting the disagreements between Circuits on the criteria for the application of “substantial abuse” under 707(b), he concluded that “the complete overhaul of 707(b) was necessary, with clear, non-discretionary requirements imposed on the bankruptcy court . . . HR 2415 is the culmination of these efforts and is intended to both remove unequivocally the bankruptcy court’s discretion with regard to whether a debtor with ability to pay should be dismissed from chapter 7, and to restrict as much as possible reliance upon judicial discretion to determine the debtor’s ability to pay”).

104. See SKEEL, *supra* note 2, at 145 (quoting Linn Twinem of Beneficial Finance, who thought that an agency might encourage bankruptcies and create “a bankruptcy explosion”).

solely a reflection of the current configuration of interest group pressures or even contemporary neoliberalism. This seems excessively reductionist.

The U.S. court-based system of bankruptcy administration might seem consonant with U.S. values of modest government intervention and distrust of state bureaucracy, contrasting with a European preference for officialism as reflected in administrative processing of bankrupts in France and Sweden. But in fact European systems initially preferred out-of-court settlements in contrast to the requirement of court approval of Chapter 13 plans. England and Wales treats the IVA—the dominant consumer insolvency remedy—as a private agreement. The United States invests substantial resources in the bankruptcy process with an extensive bankruptcy plant of judges and administrative staff who process consumer bankruptcy cases,¹⁰⁵ private trustees, Chapter 13 trustees, certified debt counselors, and the U.S. Trustee Program, which since 2005 has substantially increased powers.¹⁰⁶ Chapter 7 processing is an administrative regime with rare judicial intervention. Weberian conceptions of state administration as a hierarchical bureaucracy may obscure the significance of this extensive role of the U.S. state. Bankruptcy lawyers are increasingly part of this administration given the requirement to certify that they have investigated the accuracy of data provided by the debtor.¹⁰⁷ Contemporary U.S. historians argue that the idea of a weak U.S. state does not fit the historical facts. William Novak, for example, argues that “the American state is and always has been more powerful, capacious, tenacious, interventionist, and redistributive than was recognized in earlier accounts of U.S. history.”¹⁰⁸ The idea that U.S. bankruptcy administration reflects deep cultural values of distrust of state bureaucracies seems therefore less compelling as an explanation for the particular structure of contemporary U.S. bankruptcy administration.

V. DRIFTING AND CONVERSION: THE DECLINE OF THE ENGLISH ADMINISTRATION ORDER AND THE RISE OF THE INDIVIDUAL VOLUNTARY ARRANGEMENT

In 1861, England and Wales abolished the trader restriction on insolvency, which had over the preceding three hundred years become “mired in . . . legal technicalities” of determining whether a particular occupation constituted a “trade.”¹⁰⁹ The extension to nontraders in 1861 was not, however, intended to

105. See Witt, *supra* at note 83, at 304 (describing the “massive administrative apparatus dedicated to facilitating contract breaking”).

106. See WARREN ET AL., *supra* note 90, at 130 (observing that the BAPCPA “added greatly to the responsibilities and authority of the U.S. Trustee Service and represented a major extension of the power of the executive branch”); see also Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875 (2015) (highlighting the increasing delegation of authority to Chapter 13 trustees within the U.S. bankruptcy court system).

107. 11 U.S.C. § 707(b)(4)(C)–(D) (2012).

108. William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752, 758 (2008).

109. V. MARKHAM LESTER, *VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND* 16 (1995).

expand access for debtors but to enhance creditor power to bring a bankruptcy action against a wider group in society. It was opposed by Members of Parliament who thought that it might be used by “unscrupulous moneylenders” against gentlemen and landowners.¹¹⁰ Bankruptcy law, which envisaged a liquidation of assets, was unsuited to the situation of debtors with few or no assets and limited earnings. The working-class debtor faced the possibility of imprisonment for debt throughout the nineteenth and twentieth centuries (not being effectively abolished for ordinary debts in England and Wales until 1970).¹¹¹ Commentators have noted the discrimination in judicial approaches to working-class debtors (regarded as feckless) and those small businessmen (“who may have missed success by the merest chance”) who could afford to access the bankruptcy laws.¹¹² At the same time wage garnishment was not possible in England, given the strictures of the nineteenth century Truck Acts and the Wages Attachment Abolition Act 1870:¹¹³ wage attachment would not be introduced in England until 1971.¹¹⁴ The absence of wage garnishment in England marks a potentially important institutional difference with the United States where liberal state garnishment laws were associated with high bankruptcy filing rates in the 1920s.¹¹⁵

The administration order was enacted as part of Joseph Chamberlain’s 1883 Bankruptcy Act which established the framework for twentieth century

110. *Id.* at 136.

111. It is true that the Debtors Act 1869 abolished imprisonment for debt but it retained the possibility of imprisonment if the court thought that the debtor had the means to pay. Evidence of this was often provided by the plaintiff, and imprisonment often depended on the discretionary decision of the county court judge with wide variations between circuits. See Gerry Rubin, *Law, Poverty and Imprisonment for Debt, 1869–1914*, in *LAW, ECONOMY AND SOCIETY, 1750–1914: ESSAYS IN THE HISTORY OF ENGLISH LAW* (G.R. Rubin & David Sugarman eds., 1984). In 1969 the Lord Chancellor introduced the Administration of Justice Bill 1969 with the following comments:

The judges have, of course, done their best, in difficult circumstances, to exercise this jurisdiction humanely. However, as the Committee showed, conditions in the courts really do not give them a chance to distinguish between the persistent, dishonest debtors and those who are merely inadequate. The persistent, dishonest debtors may often be clever enough to avoid actually going to prison, while those who are inadequate suffer from their inability to manage their affairs. The sanction of imprisonment serves little purpose and it contributes to the overcrowding of our already overcrowded prisons. This is, I believe, the only country in Western Europe where imprisonment for ordinary civil debt has been retained.

306 PARL. DEB., H.L. (5th ser.) (1969) 203 (U.K.).

112. See Paul Johnson, *Creditors, Debtors and the Law in Victorian and Edwardian England*, in *PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES* 502–03 (Willibald Steinmetz ed., 2000); RUBIN, *supra* note 111, at 275 (citing a comment in *The Times* in 1873 highlighting the class nature of bankruptcy law which was out of reach of the poor debtor).

113. For an account of the history of the protection of the worker’s wage packet from deductions, see REPORT OF THE COMMITTEE ON THE ENFORCEMENT OF JUDGMENT DEBTS, 1969, Cmnd. 3909, at 149–52 [hereinafter PAYNE COMMITTEE].

114. Attachment of Earnings Act, 1971, c. 32 (U.K.).

115. See Attachment of Earnings Act, 1971, c. 32 (U.K.); Nugent, *supra* note 92.

English bankruptcy law.¹¹⁶ The administration order provided a wage earner with the possibility of a repayment or composition order in the county court administered by the court with the possibility of an ultimate discharge and immunity from further collection action during the period of the order.¹¹⁷ It responded to the criticisms of the inaccessibility of bankruptcy for the working class and provided an alternative collection remedy to imprisonment for debt. Chamberlain, at that time a radical liberal, viewed the order as a response to claims of unequal treatment of working-class debtors.

The administration order was therefore an early attempt to adjust bankruptcy law to the situation of wage earners. While the administration order had a limited success in England, it did provide a model for Valentine Nesbit's practice in Birmingham, Alabama in the 1930s,¹¹⁸ which was codified in Chapter XIII in 1938. It also influenced European reformers in the late 1980s¹¹⁹ who wished to introduce a discharge after an attempt at partial repayment by a debtor. The administration order drifted for most of the twentieth century with

116. Chamberlain introduced the administration order procedure on second reading of the bill with the following comments:

But the more important provision which he had made for dealing with this subject was that under which a County Court Judge might, in future, make an order for the payment by a debtor who owed less than £50, by instalments or otherwise, of all or any part of his debts. A debtor, who was brought up on a judgment summons or a County Court plaint, might state that he was indebted to other persons, might give in a schedule of his debts, and propose an arrangement for discharging them, and if the Court thought it reasonable it might at once confirm it, so that a small debtor would then be in exactly the same position as a large debtor, who had succeeded in making a composition with his creditors, or in arranging for a scheme of liquidation. Although he had not abolished in all cases imprisonment for debt, yet, if these provisions became law, it could be no longer said that any inequality existed in the law as between rich and poor. The resort to imprisonment to secure payment would be much rarer, and a large discretion would be vested in the Judges to arrange for the relief of the small debtor by a reasonable composition.

277 PARL. DEB., H.C., (3rd ser.) (1883) 834 (Eng.). Chamberlain was advised on section 122 by Judge Motteram, a Birmingham County Court judge who may have adopted a similar practice in his court. See SOLICITORS JOURNAL AND REPORTER 789 (1883–84).

117. The original section 122 stated:

122. (1.) Where a judgment has been obtained in a County Court to and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to a sum not exceeding fifty pounds, inclusive of the debt for which the judgment is obtained, the County Court may make an order providing for the administration of his estate, and for the payment of his debts by instalments or otherwise, and either in full or to such extent as to the County Court under the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the Court may think just.

Bankruptcy Act, 1883, 46 & 47 Vict., c. 52, § 122 (Eng.).

118. *Revision of the Bankruptcy Act Hearing*, *supra* note 69, at 247–60 (statement of Valentine J. Nesbit, Referee in Bankruptcy, Birmingham, Ala.). Nesbit, in discussing his repayment system for wage earners, stated: “[O]f course, there have been similar provisions in the Canadian and the British law We are just 25 or 30 years behind the Canadians and the British to that extent. They have had a partial payment plan in the British law for several generations.” *Id.* at 259. Nesbit did not identify the specific English procedure but it is possible that he was thinking of the administration order. See Dixon and Epstein, *supra* note 69, at 750.

119. See Huls, *supra* note 9, at 135–37.

no attempt either to address known defects in the procedure, identified as early as 1887¹²⁰ and 1908,¹²¹ or to raise the ceiling on debts from the original £50. During the interwar period “few people . . . seemed interested” in the administration order, and it was downgraded from the Bankruptcy Act to the County Courts Act in 1934.¹²² Judges rarely made composition orders,¹²³ court administrators disliked the significant work involved in effective management of administration orders, and by 1964 only four administration orders were made.¹²⁴ However, starting in the mid-1960s successive government committees identified the administration order as the central mechanism for addressing the new phenomenon of the “multiple consumer debtor,” providing an alternative to bankruptcy.¹²⁵ The ceiling on debts was raised several times during this period (£50 to £300 in 1965; £500 in 1970; £1,000 in 1972; £2,000 in 1977; and £5,000 in 1981) and several reforms were introduced. Empirical studies of the orders found that “the typical person who received an administration order was male, under 50 in employment earning lower than average income with two or more dependents’ and approximately six consumer debts.”¹²⁶ An official study in the 1980s found that almost fifty percent of the orders lasted for up to ten years.¹²⁷

The Insolvency Act 1986 reduced the discharge period in straight bankruptcy from five to three years, but the focus was not on consumer debtors

120. See REPORT OF A COMMITTEE APPOINTED BY THE LORD CHANCELLOR AND THE BOARD OF TRADE TO INQUIRE INTO THE WORKING OF SECT. 122 OF THE BANKRUPTCY ACT, 1883 [C. (2d series) 5139] (Eng.) at 2.

121. See DEPARTMENTAL COMMITTEE ON BANKRUPTCY, REPORT OF THE COMMITTEE APPOINTED BY THE BOARD OF TRADE TO INQUIRE INTO THE BANKRUPTCY LAW AND ITS ADMINISTRATION, 1908, [Cd. 4068], ¶¶ 170–80 (Eng.) (highlighting, for example, that a debtor could only apply for an order if a judgment existed against him).

122. See PATRICK POLDEN, A HISTORY OF THE COUNTY COURT 1846–1971, at 142 (1999). The primary political action in the 1930s concerned abuses of repossession of goods let on hire purchase, where a coalition of “responsible” industry representatives and poverty activists negotiated a consensus reform implemented in the Hire-Purchase Act 1938. See Peter Scott, *The Twilight World of Interwar British Hire Purchase*, 177 PAST & PRESENT 195, 223 (2002).

123. For example, in 1966, approximately five percent of orders represented orders for less than full repayment. See GREAT BRITAIN, PARLIAMENT, HOUSE OF COMMONS, JUDICIAL STATISTICS, ENGLAND AND WALES, 1966 tbl.23 (2007).

124. See POLDEN, *supra* note 122, at App.3, tbl.2a.

125. See PAYNE COMMITTEE, *supra* note 113, ¶¶ 49, 69 (referring to the “huge expansion of consumer credit that has taken place during the last quarter of a century . . . we regard the multiple debtor as an important figure in our enquiry”). A revised administration order would be “one of the important and essential modes of enforcement.” *Id.* ¶ 762; see also CORK, *supra* note 98, at ch. 6. This Committee identified the most urgent need for reform as

the introduction of a simple, accessible and inexpensive procedure for dealing with the ordinary consumer debtor, whose conduct does not require investigation, and who has no significant realisable assets, but who has a reasonable prospect of being able to discharge all or part of his liabilities out of future earnings surplus to his essential requirements.

Id. at ch. 6, ¶ 272. A modified administration order would meet these objectives.

126. Jane Davies, *Delegalisation of Debt Recovery Proceedings: A Socio-Legal Study of Money Advice Centres and Administration Orders*, in DEBTORS AND CREDITORS: A SOCIO-LEGAL PERSPECTIVE 193 (Iain Ramsay ed., 1986).

127. Civil Justice Review, Report of the Review Body on Civil Justice, Cm. 394 (1988), ¶ 609.

for whom bankruptcy was assumed to be too costly. Consumer constituencies lobbied for greater remedies for consumer creditors who had paid deposits to failed businesses,¹²⁸ but no groups lobbied for more effective and simple consumer insolvency.¹²⁹ The Lord Chancellor's Office, the government department responsible for the courts and legal administration, took over responsibility for reform of the administration order. The Courts and Legal Services Act 1990 enacted a provision which gave effect to the Cork proposals,¹³⁰ empowering a court to make a composition order with repayments of no more than three years and a discharge at the end of this period. A debtor would not pay for an order with deductions from repayments being made to the court service. This provision has, however, never been brought into force. This executive veto has never been satisfactorily justified¹³¹ but seemed primarily to arise from a fear of the increased court costs of processing large numbers of debtors in the early 1990s as the United Kingdom experienced a severe recession. No change has been enacted to the ceiling on debts for an order (currently £5,000). A damning empirical study of practice under the order in the early years of the twenty-first century painted a picture of high levels of default, little consistency between courts in application, with users primarily female, single parents, almost two-thirds of whom had serious health problems or caregiver responsibilities.¹³² In 2004 the government recognized the failure of the administration order,¹³³ and although reform provisions of the administration order were included in 2007 legislation, again the relevant sections have never been brought into force.¹³⁴ As a consequence the administration order had withered to almost complete extinction by 2013. However, the government did introduce a debt relief order in 2009 for "vulnerable people trapped in debt" intended to provide bankruptcy relief for "no income, no asset debtors" with a modest level of debt.¹³⁵

128. BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES* 139 (1998).

129. A phenomenon noted by Bryan Gould M.P. during passage of the Insolvency Bill that the Bill "is remiss in not providing a simpler and less expensive alternative proceeding for insolvencies at the lower end of the scale . . . [it] does not adequately address that problem." 81 *PARL. DEB., H.C.* (6th ser.) (1985) 381 (U.K.).

130. Courts and Legal Services Act, 1990, c. 41, § 13 (U.K.).

131. The initial argument was the increased costs for courts with an anticipated rise in administration orders in the recession of the early 1990s. Arguments later developed that section 13 of the Courts and Legal Services Act, 1990, might be interpreted to include secured debt permitting a mortgage to be written down over three years, and by 2005 the Ministry of Justice claimed that the administration order was unworkable for insolvents because it did not include assets of a debtor and provided no method for investigating an individual's affairs. *THE INSOLVENCY SERVICE, RELIEF FOR THE INDEBTED: AN ALTERNATIVE TO BANKRUPTCY* 14 (2005).

132. See ELAINE KEMPSON & SHARON COLLARD, *MANAGING MULTIPLE DEBTS: EXPERIENCES OF COUNTY COURT ADMINISTRATION ORDERS AMONG DEBTORS, CREDITORS AND ADVISORS* (2004).

133. See DEP'T FOR CONSTITUTIONAL AFFAIRS, *A CHOICE OF PATHS: BETTER OPTIONS TO MANAGE OVER-INDEBTEDNESS AND MULTIPLE DEBT*, 2004, C.P. 23/04, at 6 (U.K.)

134. See Tribunals, Courts and Enforcement Act, 2007, c. 15, § 6 (U.K.)

135. A debt relief order, which provides a discharge from unsecured debts after one year, is now available to insolvent individuals with less than £20,000 in unsecured debts, surplus income of less than

During the 1990s, the limits of the administration order coincided with the growth of “money advice” services, with publicly subsidized, creditor-financed, and private firms developing informal repayment plans with creditors, so that by the end of the 1990s a significant advice industry existed.¹³⁶

A. *Conversion: The Rise of the Individual Voluntary Arrangement*¹³⁷

The failure of the publicly subsidized administration order contrasts with the rise of the individual voluntary arrangement (IVA) procedure, originally enacted in 1986. This permits an individual to make a composition, through an insolvency practitioner, with his unsecured creditors, provided seventy-five percent of creditors accept the proposal.¹³⁸ The Cork Committee assumed that the normal repayment period would be three years and envisaged its applicability to three classes of debtor: directors of companies who had given personal guarantees, members of professions not permitted to take advantage of limited liability, and traders.¹³⁹ During the late 1980s and early 1990s only a modest number of IVAs were registered. The high costs and relatively cumbersome procedure—requiring the debtor to obtain a “nominee” (licensed insolvency practitioner) to report to the court on the proposal, convene a meeting of creditors, and then have the nominee act as supervisor—were cited as reasons for this modest uptake.¹⁴⁰ The courts reduced these costs by a practice direction permitting a “concertina order”¹⁴¹ which permitted a documents-only process without court attendance.¹⁴² By the mid-1990s IVAs were the domain of small insolvency practitioners generally taking referrals from professional advisors. Almost half the cases exceeded three years, with employee and

£50, and maximum assets of £1000. It costs £90 (in contrast to bankruptcy which will cost approximately £700 in fees). The procedure can only be accessed online and is processed through an authorized intermediary. See Insolvency Act, 1986, c. 45, § 251 (U.K.).

136. By the mid-1980s pioneers such as the Birmingham Money Advice Centre had developed informal alternatives which outstripped the number of administration orders. See Davies, *supra* note 126, at 194. For an outline of this development see Iain Ramsay, *Bankruptcy in Transition: The Case of England and Wales—The Neo-Liberal Cuckoo in the European Bankruptcy Nest?*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE, *supra* note 12, at 214–17.

137. I discuss this also in Ramsay, *supra* note 33, at 240–42. A full description of the development of IVAs and the politics of change can be found in Adrian Walters, *Individual Voluntary Arrangements: A ‘Fresh Start’ for Salaried Consumer Debtors in England and Wales?* 18 INT’L INSOLVENCY REV. 1 (2009).

138. See generally Insolvency Act, 1986, c. 45, §§ 247–63 (U.K.).

139. CORK, *supra* note 98, at ch. 7, §§ 350–99.

140. See Keith Pond, *The Individual Voluntary Arrangement Experience*, 39 J. BUS. L. 118, 120–22 (1995).

141. Practice Direction (Bankruptcy: Voluntary Arrangements) (EWHC Ch) [1992] 1 W.L.R. 120 (Eng.).

142. David Milman argues that “[t]he courts have played a key role in promoting the successful operation of the IVA.” DAVID MILMAN, PERSONAL INSOLVENCY, LAW, REGULATION AND POLICY 132 (2005); see also Insolvency Act, 2000, c. 39, § 3, sch. 3 (Gr. Brit.) (making it no longer obligatory for a debtor to seek an interim order).

consumer cases representing only twenty-seven percent of cases.¹⁴³ The large banks in the United Kingdom developed centralized recovery units to monitor the relative performance of IVAs from different insolvency practitioners, and actively participated through standardized voting proxies exercised by large accounting firms (e.g., KPMG).¹⁴⁴

In 2002 the New Labour government annexed bankruptcy reform to a flagship Enterprise Act as part of an attempt to encourage entrepreneurialism.¹⁴⁵ The Act reduced the bankruptcy discharge period to one year (from three years) and also certain bankruptcy disabilities. It was predicted that as a consequence the IVA would wither. Figure 1 indicates, however, that IVAs have increased substantially so that the IVA procedure is now the dominant bankruptcy alternative. The IVA market was transformed in the early years of the twenty-first century with the entry to the market of a new model of insolvency practitioner,¹⁴⁶ volume processors with a business model which cut costs and advertised widely, offering IVAs as an alternative to existing public and private debt management plans. Individuals could also in practice retain a home under the IVA by continuing to pay the mortgage outside the plan. This business model has transformed the market so that high volume “one-stop shops” now dominate the market, offering services ranging from consolidation loans to bankruptcies.

The development of the IVA procedure in England, and the withering of the administration order, documents a process of policy drift with the failure to adapt the public administration order, and conversion by private intermediaries of a commercial process to a consumer remedy. As a consequence, public processing of bankruptcies is reduced with the debt relief order established as an exceptional remedy for the low-income, “vulnerable” debtor. Reform discussions take place within the context of this institutional landscape of private and public actors. Public policy making on IVAs has been privatized with changes to standardized terms on IVAs negotiated in low-visibility committees where financial institutions and insolvency professionals dominate.¹⁴⁷ Had

143. Keith Pond, *A Decade of Change for Individual Voluntary Arrangements*, 14 *INSOLVENCY L. & PRAC.* 342 (1998).

144. See Keith Pond, *Administration of Recoveries in Individual Insolvency: Case Studies of Two UK Banks*, 8 *EUR. J. FIN.* 206 (2002). Pond notes that modifications demanded by creditors related primarily to increased income contributions, increased duration, property revaluation, and a windfall clause, limiting the supervisor’s fee. *Id.* at 217. He concluded that “IVAs are far more ‘creditor friendly’ than in the past and . . . they reflect less and less the wishes of . . . debtor[s].” *Id.* at 218. During this period, a thirty-one percent failure rate existed with the average dividend of 30.69 pence in the pound. *Id.* at 214–15.

145. I discuss this in Ramsay, *supra* note 136, 218–22.

146. For example, Debt Free Direct was established in 1997, and is now part of Fairpoint Group. *History*, FAIRPOINT, <http://www.fairpoint.co.uk/about-us/history.html> (last visited Sept. 15, 2015).

147. For further discussion see Joseph Spooner & Iain Ramsay, *Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit* (Submission to Insolvency Service Call for Evidence, Oct. 8, 2014) (on file with author); and Michael Green, *New Labour: More Debt—The Political Response*, in *CONSUMER CREDIT, DEBT & BANKRUPTCY*, *supra* note 15. See also Ramsay, *supra* note

section 13 of the Courts and Legal Services Act been implemented a different balance of public and private regimes might have emerged. The absence of adequate court-based schemes stimulated the growth of the informal advice agency alternatives, which in turn were spotted as a possible market niche by private providers. There is therefore an element of contingency to these developments. However, the process was also partly a result of one government department (the Lord Chancellor's Office/Ministry of Justice) being unwilling to invest in the costs of managing the administration order. Other government departments were happy to permit increased private handling of debt cases through the IVA since it reduced government costs and fitted with the ideology of privatization of many services in the United Kingdom.

VI. TIMING AND SOCIAL LEARNING: FRANCE

Timing is relevant to understanding the distinct ways in which European countries responded to consumer overindebtedness in the 1980s with the growth of increasing numbers of overindebted individuals.¹⁴⁸ The initial reluctance of civil law countries, such as France, to introduce consumer bankruptcy is sometimes attributed to a French cultural aversion to the writing down of debts for individuals, and a strong commitment in French civil law to *pacta sunt servanda*.¹⁴⁹ This story of reform is therefore a cultural one of an increasing tempering of this commitment in European countries. The importance of *pacta sunt servanda* was certainly an argument in French reforms, but the French story is rather one of the initially high political costs of introducing a straight discharge. Like many European countries, France had no debt discharge procedure for nontraders at this time. Unlike in the United States a bankruptcy process originally designed for commercial traders could not simply be converted by insolvency practitioners to serve consumers. The existence of a substantial consumer credit industry in France ensured substantial opposition to any initial attempt to introduce consumer bankruptcy in 1989.¹⁵⁰ Consumer groups in France had promoted the idea of bankruptcy as a solution for the overindebted in the mid-1980s, based on *faillite civile*, which existed in Alsace-Lorraine.¹⁵¹ The French consumer minister floated the idea in the late 1980s but the Ministry of

18, at 408–09. For a judicial discussion of the IVA protocol see *Mond v. MBNA Eur. Bank*, [2010] EWHC (Ch) 1710 (Eng.).

148. This Section relies on the following sources: Kilborn, *supra* note 33; Ramsay, *supra* note 33.

149. Vivienne Curran argues that the morality of contract performance is of more concern in civil law systems than in the more pragmatic common law systems. See Vivienne Grosswald Curran, *Cultural Immersion, Differences and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 81–82 (1998).

150. Trumbull contrasts this with the 1978 U.S. Bankruptcy Reform Act, when consumer credit in the U.S. was relatively unprofitable, whereas in France reform was challenging a highly profitable sector. See GUNNAR TRUMBULL, CONSUMER LENDING IN FRANCE AND AMERICA: CREDIT AND WELFARE 9–11 (2014); see also Ramsay, *supra* note 33, at 216–20.

151. In 1877 the German government had introduced German insolvency law to Alsace-Moselle. When this area was reoccupied in 1924 the French government extended it locally to nontraders, ultimately permitting a discharge of debts. See Ramsay, *supra* note 33, at 217.

Finance, as representative of French financial interests, blocked it, highlighting potential concerns about moral hazard. The initial law was primarily a method of providing a collective procedure for reorganizing and repaying debts rather than providing the opportunity for a discharge. It was soon shown to be inadequate in relation to the many debtors who had no repayment capacity. The courts and commissions modified in practice (conversion) the application of the law¹⁵² which was recognized in legislative changes in 1995, 1998, and 2003 with the introduction of a process of *rétablissement personnel*, permitting a liquidation bankruptcy and discharge. In 2010 an immediate discharge was introduced for individuals with no capacity to repay and no assets. The French system now provides a variety of alternatives for debtors including moratoria, extended repayments, and discharge.

The relatively swift transformation of the French law from a repayment law to an insolvency law may partly be accounted for by the structure of French policymaking in this area.¹⁵³ Much policy development in France was managed by technocrats within the Bank of France, relevant Ministries (Economy and Finance, and Justice), and corporatist-style committees, such as the Consultative Committee on Finance. Consumer and financial groups attempted to influence policy through representation on the Consultative Committee, and the Bank of France convened meetings of the various groups to discuss approaches to overindebtedness. This approach to policy making might be described as “social learning” with the state bureaucracy playing a central role, pragmatically adjusting the law to the perceived changes in debtor characteristics.

A remarkable consensus existed in the changing narratives about debtors and their reasons for default. This narrative drew on official statistics provided by the Bank of France in annual reports on the overindebtedness regime. These statistics distinguished between “active” and “passive” overindebtedness. Initial statistics in the 1990s suggested a profile of a debtor as a middle-class individual who had taken on too much debt (active overindebtedness), with housing debt a primary reason for the overindebtedness. However, later statistics suggested the dominance of unemployment and other categories of passive overindebtedness as the primary reason. Public policy documents from the mid-1990s continually refer to the dominance of passive overindebtedness as a rationale for increased leniency and the introduction of a discharge procedure.¹⁵⁴ The passive construction of debtors provided common ground between creditors and consumer groups since reasons for debt, such as unemployment, did not directly implicate either side in responsibility for the problem. The state therefore managed the official narrative about the nature of the problem. There was no “war of ideas” in France and the consensual approach to policymaking may have assisted in the continuing adjustment of the overindebtedness policy.

152. See *id.* at 227–29.

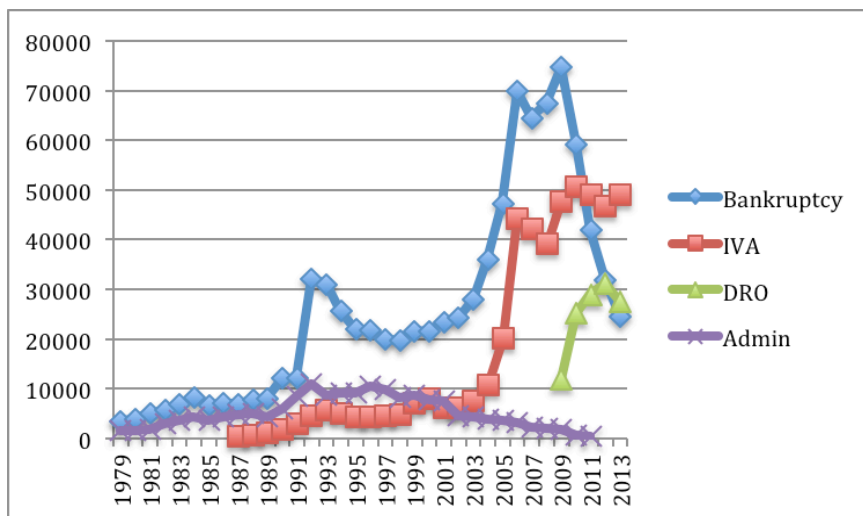
153. See generally PRASAD, *supra* note 29, at 238–39 (discussing of French policymaking on insolvency law).

154. See, e.g., Ramsay, *supra* note 33, at 222–25.

VII. CONCLUSION

Explanations for patterns of consumer bankruptcy law raise issues of politics over time and institutional context. National cultures usually contain conflicting ideas, and cultural arguments function as part of a political toolkit. Explanations which suggest that one particular value dominates in consumer bankruptcy law are likely to be arguing for a particular normative approach. Historical institutionalism provides useful concepts for understanding the distinct ways in which countries have adapted to consumer overindebtedness. This Article merely sketches the possibilities for future research which should be attentive both to the law in books and the law in action.

FIGURE 1: BANKRUPTCY, IVAs, ADMINISTRATION ORDERS, AND DEBT RELIEF ORDERS 1979–2013



Source: Insolvency Service England and Wales; Civil Judicial Statistics. Administration Orders 1979-2011, Debt Relief Orders only from 2009.