Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986

by

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Three different groups of countries have reformed their bankruptcy laws in recent years.[1][2] The transitional economies adopt bankruptcy law as part of a larger set of institutional reforms needed to transform a command economy into a market economy. In general, transitional economies lack experience with both bankruptcy and bankruptcy law, and so devise their new bankruptcy systems virtually *de novo.* A second group (notably in Latin America and East Asia) already possess market economies, but have experienced a sharp economic or financial crisis. They are reforming their bankruptcy laws, often at the behest of (and under considerable financial pressure from) international financial institutions and foreign creditors. The third group is the advanced industrial market economies which have not suffered an acute crisis. These countries possess a bankruptcy system and are not being pressed by outsiders to reform.

We expect the reform of bankruptcy law to work differently in these three sets of countries. In this paper we focus on the third group, the ad-

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[1]They include: Denmark (1977), the United States (1978), Austria (1982, 1997), the United Kingdom (1985), France (1985, 1994), Norway (1986), the former Yugoslavia (1986), Chile (1987), China (1988), Columbia (1988-89), Poland (1990), the Czech Republic (1991, 1993), Hungary (1991), Australia (1992), Canada (1992, 1997), Finland (1992), Japan (1992), Russia (1993), Vietnam (1993), Germany (1994), Argentina (1995), Romania (1995), Azerbaijan (1997), Kazakhstan (1997), and Thailand (1998), and this list is not exhaustive.

[2]This paper draws heavily on Bruce G. Carruthers and Terence C. Halliday, Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States (Oxford University Press, ed. 1998) (hereinafter "Rescuing Business").

vanced market economies[3] and we address a key question for the practitioners of bankruptcy: What role do expert professions—accountants, lawyers, judges, insolvency practitioners—play in bankruptcy reforms? In the absence of crisis, advanced countries are less vulnerable to the dictates of foreign creditors and so the process is much more "internally" driven. Since they are already market economies, parties in interest in bankruptcy in principle should know how a bankruptcy system operates and the politics may be shaped heavily by the vested interests of various groups. We argue that in the passage of two landmark pieces of legislation, the 1978 United States Bankruptcy Code and the English Insolvency Act 1986, professionals played an exceptional role.

In this paper we shall deal less with substantive law and procedures than with the character of professional mobilization. How did professionals mobilize politically? What was distinctive about their politicking? What were their interests? Was there any relationship between professional interests and substantive or administrative outcomes? In other words, to what extent were the administrative outcomes of the legislation not the direct result of rational planning or political trade-off, but a by-product of the politics of professionals themselves?

First, we shall present a perspective on reforms that is derived from theories of property and jurisdictional rights. Second, we provide a brief overview of the legislative history of each Act and look in more detail at the involvement of professions. Third, we turn to an interpretation of professional influence, how it was exercised and to what ends.[4]

I. THE PARAMETERS OF PROFESSIONAL INFLUENCE ON LAWMAKING

The insolvency reforms present a specific instance of a research problem that has exercised social scientists for several decades: What is the power of professionals—in our case, specifically in the sphere of lawmaking? The question has relevance for professionals for the answer partly defines the impact of professionals on modern economic and political life. The question is also significant for citizens for expert influence might endow lawmaking with a rationality that legitimizes good government, or might deprive interested par-

[3]We are currently undertaking research on the international diffusion of bankruptcy law, especially in transitional economies or those economies that have recently experienced major financial crises.

[4]The research relies on three main sources of data. First, we utilized the archives of both reform commissions, parliamentary papers, submissions from various interest groups, and some private papers. Second, we interviewed some fifty of the leading reformers on both sides of the Atlantic, including private professionals, legislators, civil servants, leaders of lobbying organizations, and representatives of interest groups. Third, we drew upon a large number of secondary sources. *See* RESCUING BUSINESS, *supra* note 1, at 8-11.

ties from their full democratic participation. The question is of special significance for social scientists and social historians, since the impact of professions on modern social and political life has been much debated since the rise of professionalism in the mid-nineteenth century.[5]

A. Factors to be Considered in Defining Parameters

The role of professions in legislative reforms differs dramatically, depending on several factors. First, how well organized are the professionals? Like creditors, the easier it is for professions to mobilize on a national scale, the quicker they can act, the greater their internal consensus, the more coordination and focus they can bring to bear on the political process, the more likely it is—other things being equal—that they will exert influence.

Second, what resources can professions bring to bear on agenda setting and decision making? Not all professional groups have the same resources. Some, like the English bar, may be smaller but putatively influential because their status in society and their integration into elite circles gives them ready access to the levers of power.[6] Others, like the bankruptcy judges in the U.S. pre-1978, might have had less professional prestige, but they had formidable capacities for organization, and had excellent access to grassroots politicians.[7] Yet others, like the National Bankruptcy Conference, bring to bear the authority of specialization, pre-eminence in practice, eminent academic affiliations, and a membership that cuts across several occupations.[8] Others, such as the English Law Society or the English accounting professionals, represent large professions with strong organizational infrastructures and significant public standing.[9]

Third, what credibility and authority do professions have on the issues where law is to be reformed? There are issues resolved in legislatures where professions can stake no claim to particular expertise. Their expertise may have some relevance to the issue, indeed some scholars argue that lawyers, for instance, can effectively claim an expert opinion on any piece of legislation,[10] but they have little more special claim than citizens at large. On other issues, where proposed legislation deals with matters close to professionals' every-

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[5]W. J. Reader, Professional Men: The Rise of Professional Classes in Nineteenth Century England (Basic Books, ed., 1966); Magali Sarfatti Larson, The Rise of Professionalism (University of California Press, ed., 1977); Harold Perkin, The Rise of Professional Society: England Since 1880 (Rouotledge & Kegan Paul, 1989); Talcott Parsons, "Professions," International Encyclopedia of Social Sciences, 536-47 (Macmillan, ed. 1968).

[6]*See* Rescuing Business, *supra* note 2, at 131.

[7]*See* Rescuing Business, *supra* note 2, at 97-99.

[8]*See* Rescuing Business, *supra* note 2, at 94-97.

[9]*See* Rescuing Business, *supra* note 2, at 131-33, 145.

[10]Terence C. Halliday, Beyond Monopoly: Lawyers, State Crises and Professional Empowerment, ch.2 (University of Chicago Press, ed., 1987).

day experience, it would be surprising if their influence counted for little. Citizens and scholars would expect that expert opinion counts for more in certain areas, e.g., doctors and the regulation of disease, lawyers and the redrafting of a commercial code, accountants and reporting of finances in securities issues, and the military in the development of weapons. Bankruptcy law historically has appeared to be a marginal or complex field of law where most citizens or companies have had little interest[11] and where professional experience should count a great deal.

Fourth, how far does statutory reform trigger classic struggles among interest groups, such as between labor and management or consumers and corporations? Often, in national politics, there is a set-piece quality. Since major interest groups tend to understand both their own interests and those who will oppose them, they can predict rather well which issues will engage their attention and which parties will be allies or opponents. An efficient way to monitor the political scene will be to observe closely one's prospective opponents. If they rise to political bait, then it is likely that an issue also concerns one's own organization. When issues arise that do not trigger classic struggles, it may present an opening for the influence of experts. The issue will not be seen as politics-as-usual. If bankruptcy or insolvency law cannot be readily aligned with party politics, then it opens an opportunity for unusual professional engagement.

Fifth, does law reform coincide with party-political differences and thus set off conventional left-right, liberal-conservative debates? If a reform issue does precipitate conventional mobilization by ideological opponents, and engage political parties in predictable conflict, there is less room for expert politics. Put another way, when expert politics get politicized, then experts' claim to authority may be submerged in ideological posturing. Since bankruptcy is not usually seen as a liberal-conservative, left-right issue, then it may offer professionals another opportunity to exercise influence.

Finally, what are the stakes for professionals themselves? Is their livelihood, their status, their autonomy, their power at stake? When they are heavily threatened, professions are far more likely to mobilize in like measure. Alternatively, when new domains of work open up, a scramble for "territory" can also ensue, as professions lay claim to work on grounds of their special competencies, in contrast to other occupations.

B. Predictions About the Impact of Professionals

We predict that professionals will exert greater influence on lawmaking in circumstances where professions are highly organized and can mobilize substantial resources to the politicking; where issues clearly engage their profes-

[11]*See* Rescuing Business, *supra* note 2, at 30-37.

sional expertise and do *not* precipitate conventional interest-group or party politics; and where the issues affect their own livelihoods. The bankruptcy politics of the 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986 had many, if not all, of these attributes and thus permitted an unusually high degree of impact on the legislative reforms by bankruptcy and insolvency practitioners.

To what ends did they exercise this influence?

II. STRUGGLES OVER PROPERTY AND JURISDICTIONAL RIGHTS

The impact of professionals can be seen in the redistribution of two sets of rights. In insolvency law reforms, there are two kinds of stakes: property rights, and jurisdictional rights. The bankruptcy reforms in both countries precipitated struggles over both.

A. Property Rights

By "property rights" we refer to the enforceable rights that an individual or corporation has to use, exploit, transmit or bequeath an object. Such objects may be tangible or intangible. The creation and protection of property rights significantly engage the state. In bankruptcy law, all substantive and procedural issues at stake—moratoriums or stays, state preferences, floating charges, the absolute priority rule, setoff, cramdown, the ten percent fund—influence the relative distribution of assets in what we call the credit network. Virtually all parties in the credit network have an interest in reducing the rights of three sets of strong creditors—secured creditors (usually banks), the state (mostly its revenue agencies), and utilities. Politicians, professionals, unsecured creditors, and the agents of debtors know that they must loosen the grip of secured creditors over their property or the ideal of rehabilitation cannot be achieved. Moreover, weak creditors—consumers, trade suppliers, and workers—will seek to increase protections over purchases, salaries, or goods, almost always at the expense of strong creditors. A zero-sum game is played (one party's gain will produce another party's loss) in most bankruptcy reforms.[12]

We do not dwell further on property rights in this article, since they are the regular bread and butter of legal commentary.[13] Rather we focus on what is usually less apparent in the legislative accounts of bankruptcy codes—the

[12]This is not entirely the case, for it is arguable that if a law can solve the problem of a rush to seize the assets where the swiftest or strongest prevail, then keeping all assets (suitably protected) inside a company while it restructures itself may create a larger asset pool where all creditors benefit proportionately.

[13]For an extensive treatment of property rights in the bankruptcy reforms of England and the United States, see RESCUING BUSINESS, *supra* note 2, at 151-370.

role of professions in pursuing jurisdictional rights and the effects that they can have on the overall shape of bankruptcy law, procedure and administration.

B. Jurisdictional Rights

Jurisdictional rights[14] determine which people can govern or control an area of work, how it is to be performed, by whom, and on what terms. Jurisdictional rights determine who controls valuable activities. The more valuable the activity, the more likely it is that others may try to intrude or capture it for themselves. Jurisdictional rights are frequently enforced by the same public institutions that protect property rights: the government, law, and police. Jurisdictional monopolies are state-enforced.

Like property, jurisdiction over work consists of a set of rights. Control over certain occupations or types of work can be extremely valuable, not only in terms of monetary compensation, but also prestige, autonomy, and working conditions. Like usufructuary rights over property, jurisdiction allows rights holders to control, regulate and perform valuable labor, and enjoy its fruits. Jurisdictional rights are usually held collectively. A group of persons, rather than a single individual, lays claim over a category of work. Jurisdictional rights are also usually *exclusive.* Not only do professionals possess the right to perform work, but they also exclude others from doing so. Much of the struggle over jurisdiction between rival claimants focuses on their ability to prohibit each other from valuable areas of work. It is precisely the right of exclusivity that structures much of the bankruptcy politics in both countries.

Unlike property rights, jurisdictional rights cannot be transferred from one individual rights holder to another. A lawyer cannot readily transfer claims over a piece of work to a nonlawyer. Claims are contingent on a professional status that must be attained and accredited, person by person. Since jurisdictional rights are nontransferable, no market exists for them. Significantly, this means that the allocation of those rights occurs not in the market, but in the polity. They are determined by political bargaining.

Thus a major reform of the law presents a moment in which the division of occupational labor is disturbed. Old forms of work disappear and new kinds of work appear. New powers arise. Fresh opportunities occur for changing professional status and enlarging or constricting professional domains. Contests break out among occupations that struggle over work that has long been part of a domain, but the disturbance presents an occasion for an established division of labor to be reallocated. Moreover, reforms present

[14]We do not refer here to "jurisdiction" in the narrow legal sense of the reach of a law or court. We refer to a more expansive concept of jurisdiction as a domain or arena where professionals control work, often exclusively.

a moment in which professionals might create for themselves new responsibilities and attach more status or payment to responsibilities. Contests break out over these new work opportunities that arise and that do not have any established claimants to control them.

Property rights and jurisdictional rights are adjusted in quite different institutions. Property rights are routinely shifted and transferred in markets. Bargaining is highly decentralized. Sometimes, if a given "package" of property rights is no longer viable in the market (that is, the nexus of contracts which constitute a particular firm are unprofitable), they may also be transformed in a bankruptcy court.[15] Changes in jurisdictional rights occur in a much more structured and centralized political institution. The rules, the players, and the outcomes in the political realm may differ greatly from those that prevail in the market. Indeed, a powerful market player may not at all exert the same measure of power in the polity and vice versa. For example, neither, labor nor trade creditors can exert much bargaining power in the market. In the political arena, however, through trade groups, alliances, unions, or political parties, their influence may be very substantial. Thus it cannot be supposed for professionals that the politics of jurisdictional rights will play themselves out in the polity as if it were a reprise of contests they have for work in the market.

Consequently, the redistribution of power that occurs in bankruptcy reforms occurs along two dimensions. One concerns direct political bargaining among the primary actors with property rights interests—the creditors, debtors and other property owners concerned about corporate failure and reorganization. The other, less direct dimension, involves professions whose contests for work and jurisdictional rights leave indelible prints on legal administration and the division of labor. However, contests over redistributions of power over property and jurisdictional rights are not fully independent. Changes in substantive and procedural law will frequently be a byproduct of professional jurisdictional struggles. Thus the laws devised to treat financially distressed firms reflect both interest group politics and the accommodations that professionals make to each other, their clients, and the state. We find that the substantive outcomes of bankruptcy law, e.g., who uses the system, how effective it is in liquidating or reconstructing companies, and who gets what in the process, frequently is intertwined with interests and expertise of professions.

C. Jurisdictional Conflict

Three kinds of jurisdictional conflict can break out in any major legislative reform, and bankruptcy reforms are no exception.

[15] *See* Rescuing Business, *supra* note 2, at 470-87.

1. *Conflicts Within the Market*

Since legislative reforms can open up new work in the market or loosen habitual allocations of work, negotiations at best, or conflict at worst, can break out among market professions. A profession may seek to drive another profession in the field out of work by establishing a monopoly. One faction of a profession may seek to exclude another faction. Professions may agree to coexist, dividing the work among them. One profession or fragment of a profession may seek dominance over another. In the bankruptcy field, we could expect struggles between lawyers and accountants, between fully professionalized occupations and nonprofessional occupations, between highly specialized bankruptcy practitioners versus generalists who practice bankruptcy law from time to time. New professions can emerge; old occupations can wither away.

Moreover, the disturbance in the market also reaches to the rewards of professionalism and how they are structured. How, and how well, does the market reward bankruptcy practitioners and what effect does this have on the quality of professionals entering a field?

2. *Conflicts Within the State*

Many state agencies and departments have an interest in bankruptcy. Within the executive branch of government, for instance, bankruptcy work may be located in a specialized agency, such as the English Insolvency Service. Judges and civil servants will find this an opportunity to seek more or less powers which may cause conflicts among different classes of judges within the judiciary, between different arms of the state, such as the judiciary and executive, or between departments in the executive branch. The conflicts can be over status or the scope of powers.

3. *Conflict Between Market and State Professions*

A major disturbance in established patterns of work throws into doubt where work should be located. Should it be a civil service or public function located in government? Or should it be undertaken by private professionals in the market? Of course, the actual story is more complicated for various kinds of work can conceivably be shifted back and forth among private practitioners or state officials. This is not simply a matter of one group wanting to seize desirable work from the other. A state or private profession may seek to off-load undesirable work onto the other.

The influence of professionals on redistributions of rights in bankruptcy law and the effective functioning of the bankruptcy system turns significantly on the resolution of these three sets of jurisdictional conflicts. We shall exemplify these jurisdictional struggles in the United States and England in Part III. In each case, we first briefly review the legislative reforms in both countries; second, we make some summary statements about the level of involvement evidenced by professionals in both countries; and third, we note examples of these three sets of struggles in both countries.

III. UNITED STATES AND BRITISH EXAMPLES

A. The United States

1. *An Overview of the Legislative History*[16]

Unlike the major bankruptcy acts of the past 150 years, the 1978 Bankruptcy Code did not spring from a severe economic downturn or depression.[17] Nor did it spring from widespread public or corporate grievance.

Within the small community of U.S. bankruptcy specialists, opinions differed over the maladies of the bankruptcy system. For those collections' lawyers, trustees, and bankruptcy judges who comprised the so-called "bankruptcy ring,"[18] collecting debts, liquidating companies, managing small bankruptcy estates, the current system worked tolerably well.[19] Yet even many of these could echo the litany of complaints that came from law professors, practicing bankruptcy lawyers, credit companies and financial institutions, and judges about many aspects of the bankruptcy system.[20] For instance, almost everyone complained about the high priority in the recovery of assets from bankrupt companies that the law gave to the Internal Revenue Service.[21] Some suggested that the heavy hand of the SEC in large corporate reorganizations did more harm than good.[22] Large credit institutions and corporate bankruptcy lawyers bemoaned the confusion among three different chapters (X, XI, XII) that governed corporations in bankruptcy; they vented frustration over confusion in jurisdiction of the court, and the ensuing

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[16]*See* Rescuing Business, *supra* note 2, at 78-86.

[17]Kenneth N. Klee, *Legislative History of the New Bankruptcy Code*, Am. Bankr. L.J. 275, 275-97 (1979).

[18]Referring originally to the close ties among the relatively few pre-Bankruptcy Reform Act professionals who controlled the insolvent's actions and assets, the term "bankruptcy ring" reveals apprehension about systemic risks of collusion. *See* Rescuing Business, *supra* note 2, at 78-80.

[19]*See*, for example, the statement of Congressman Caldwell Butler:

> [T]he bankruptcy system was not working very well. It was run by a bankruptcy ring of not very qualified lawyers and judges, just a bunch of guys gettinig up there and trading it off with one another, using up all of the assets to take care of attorney's fees and trustees' fees . . . (a) process that was not quick, and did not lend itself to quick reorganization and salvage. It was more of a discharge operation than anything else . . . The system was oppressive and not really accomplishing much for the individual debtor.

US Interview 91:04. The interviewees were promised anonymity to encourage candid remarks. Thus, the interviewees are not named in this article. The interviews were given numbers instead. The interview materials are on file with the authors.

[20]*See* Rescuing Business, *supra* note 2, at 80.

[21]*See* Rescuing Business, *supra* note 2, at 80, 254-66.

[22]*See* Rescuing Business, *supra* note 2, at 80, 215-22.

problems of interminable litigation as parties to bankruptcy appealed from the derivative, low-prestige, limited-powers bankruptcy court to the high-status federal district courts.[23] Elite lawyers, law professors, and judges pointed at gray areas of bankruptcy practice where favoritism, benefits to lawyers rather than clients, and the most rudimentary of legal skills cast a cloud over the entire bankruptcy field.[24] For many reformers, existing law did not have adequate mechanisms to facilitate corporate rehabilitation in a straightforward, predictable way.[25]

Congress established The Commission on the Bankruptcy Laws of the United States (the Bankruptcy Commission) to investigate and recommend changes in individual and corporate bankruptcy law. The Commission Report, which was presented to Congress on July 30, 1973, came in two parts.[26] The first systematically reviewed bankruptcy law and administration, both for consumers and companies.[27] It made recommendations about the restructuring of the bankruptcy system and provided new mechanisms for corporate reorganizations.[28] Moreover, it restructured the delivery of legal services by providing new incentives to induce "the best and brightest" corporate lawyers to enter the bankruptcy field.[29] Most controversially, the recommendations proposed a radical reformation, and upgrading, of bankruptcy courts and judges.[30] The recommendations were accompanied by a draft bill.

In the intervening eighteen months, the respective House and Senate Committees appointed lawyer-staffers to examine the Commission Bill and its relationship to a competing bill, H.R. 32, which had been drafted by the bankruptcy judges, who had been excluded—reportedly by the Chief Justice—from the Bankruptcy Commission.[31] Among reformers, it made no sense for two rival bills to continue to divide reformist forces. House legislators pressured the National Bankruptcy Conference and the National Conference of Bankruptcy Judges to settle their differences.[32] The compromise bill, introduced as H.R. 6 on January 4, 1977, was further circulated among bankruptcy lawyers, judges, and law professors. Subsequently, a revised bill, H.R. 8200, passed through the House Judiciary Committee and onto the floor of

[23]*See* RESCUING BUSINESS, *supra* note 2, at 80.

[24]*See* RESCUING BUSINESS, *supra* note 2, at 80-84.

[25]*See* RESCUING BUSINESS, *supra* note 2, at 80-81.

[26]COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES (1973).

[27]*See* RESCUING BUSINESS, *supra* note 2, at 81.

[28]*See* RESCUING BUSINESS, *supra* note 2, at 81.

[29]*See* RESCUING BUSINESS, *supra* note 2, at 81.

[30]*See* RESCUING BUSINESS, *supra* note 2, at 81-83.

[31]US Interview 92:01. *See also supra* note 19 for explanation of interview citation method. *See* RESCUING BUSINESS, *supra* note 2, at 83. Klee, *supra* note 18, at 943-44.

[32]*See* RESCUING BUSINESS, *supra* note 2, at 84.

the House for debate, only to confront a relatively hostile amendment from Congressmen Danielson and Railsback, who led a rump group opposed to the elevation of bankruptcy judges and courts to the status of article III federal courts.[33] Following defeat of this integral feature of the reforms, Congressman Edwards pulled the bill off the floor.[34]

Action then shifted to the Senate, where Senator DeConcini, Chair of the Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, introduced in late October 1977, a bill, S. 2266, which closely paralleled the House bill. Both House and Senate subcommittees held further hearings, but the Federal Judicial Conference continued to oppose the "dilution" of the status and power of federal judges if bankruptcy judges and courts were upgraded to Article III standing.[35] With his forces re-marshaled, Congressman Edwards took H.R. 8200 back onto the House floor and defeated the Danielson-Railsback amendment, thus clearing the way for the Bill to be sent on to the Senate.[36]

With time running short, the Senate Judiciary Committee adopted an amended S. 2266 and the bill finally adopted by the full Senate in late September 1978 was much more sympathetic to the federal judges than the House version.[37] The House and Senate moved quickly to resolve their differences, with the most important compromise coming in the agreement that the new bankruptcy courts would not have Article III status, but they would have substantially greater jurisdictional powers and their judges would serve for lengthy terms following appointment by the President.[38]

Even this scaled-back change was too much for the Chief Justice of the United States Supreme Court. He lobbied Senators DeConcini and Wallop, who were Senate leaders of the bill, and eventually persuaded Senator Strom Thurmond to put a "hold" on the bill.[39] In the following week, intense political negotiation brought the Attorney General, Griffin Bell, to meet with House and Senate managers of the legislation, while various interest groups—the commodities industry, the railroads, the Securities and Exchange Commission, and the consumer finance industry—sought last minute concessions.[40][41]

[33]*See* RESCUING BUSINESS, *supra* note 2, at 84.

[34]Klee, *supra* note 18, at 949.

[35]*See* RESCUING BUSINESS, *supra* note 2, at 84.

[36]US Interview 92:01. *See also supra* note 19 for explanation of interview citation method. *See* RESCUING BUSINESS, *supra* note 2, at 84 n.19.

[37]*Infra*.

[38]Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 1-45 (1985).

[39]Countryman, *supra* note 39, at 9-11.

[40]WASH. POST, October 3 and 7, 1978.

[41]Countryman, *supra* note 39, at 9-11.

With adjournment of the 95th Congress scheduled for October 14, 1978, prospects for passage became progressively bleaker. Eventually the deadlock was broken when someone close to the bill asked David Rockefeller to intervene and press Senator Thurmond to yield. He did, and Thurmond agreed to let the bill go forward.[42] As time expired, Congressman Edwards was given an ultimatum by Senator DiConcini: accept the Senate version of the bill as it was, or the bill would die in the 95th Congress. Edwards agreed, the bill went forward in the House, and was sent to the White House for President Carter's signature.[43]

At this penultimate moment, the strongest foes of the Bankruptcy Reform Bill, the Securities and Exchange Commission, who had lost considerable control over corporate reorganizations, together with Chief Justice Burger, made one last stand. Both urged President Carter to exercise his pocket veto. By doing nothing, the bill would fail and the entire legislative process would need to begin anew. According to sources, the President called his longtime colleague, Attorney General Griffin Bell, for advice minutes before midnight on the final day the bill could be signed into law. The President asked Bell what he should do. Bell replied that so many people had worked so hard on it, the President should go ahead "and sign the damn thing." And so he did.[44]

2. *Professions Involved*

a. Identification of Professions

Professionals—almost entirely lawyers and judges—permeated every facet and stage of the reforms. They participated as members of formal bodies, such as the Commission or the legislative subcommittees; as members of professional societies or associations; and as experts-at-large. Three key groups spearheaded the involvement of professionals: the National Bankruptcy Conference, the National Conference of Bankruptcy Referees, and the Commercial Law League.

i. *National Bankruptcy Conference*

The NBC described itself to Congress as a nonprofit, voluntary organization composed of representatives of different groups who were interested in bankruptcy law.[45] This self-perpetuating elite of judges, academics, and practicing lawyers had been formed in the 1930s to advise Congress during passage of the Chandler Act, and thereafter it continued as a general advisory group. Informants described it as a "debating society" or "a brain trust"

[42] *See* Rescuing Business, *supra* note 2, at 85.

[43] *See* Rescuing Business, *supra* note 2, at 85.

[44] US Interviews 92:01, 91:02. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 86, n.22.

[45] *Commission to Study Bankruptcy Laws: Hearings on S.J. Res. 100 Before the Subcom. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong. 84 (1968). *See* Rescuing Business, *supra* note 2, at 94.

which scrutinized bankruptcy law and practice and drafted legislation to improve it, a function that was evident in its role in the minor revisions of bankruptcy law in 1966 and 1970.[46]

Yet insiders differ over whether the NBC was the "hidden hand" behind the reform process from the start.[47] One senior staffer asserts categorically that the initiative for the Bankruptcy Code originated with the NBC, which was composed of "the leading practitioners" and the "cream of the crop" in bankruptcy practice and education.[48] Many of the key players in the reforms were also members of the NBC: Charles Seligson, a member of the Bankruptcy Commission; Frank Kennedy, Director of the Commission staff; Lawrence King, professor at New York University; J. Ronald Trost and George Treister, bankruptcy practitioners from Los Angeles; Vern Countryman, Harvard law professor; Conrad Cyr and Joe Lee, bankruptcy judges; and others who were specialists in such areas as international bankruptcies (John Honsberger) and taxes (William Plumb). These and other members repeatedly consulted and testified on a wide range of issues. Moreover, the experts with whom the House staffers consulted closely in the private drafting sessions from October through December of 1976 were almost entirely members of the NBC.[49]

The advice of the NBC was influential, not only because of its distinguished membership, but also because it brought together in a nonpartisan context a set of experts—some more sympathetic with creditors, others with debtors—who sought "consensus building." They were committed to a global view of bankruptcy law, and while some viewed them as elitist, they effectively acted as a private law "revision council."[50] They were one of the very few groups who were considered ideologically neutral, expert in theory and practice, and holistic in their conception of substantive and procedural law.[51] Furthermore "individual members of the conference," said one staffer, "were extremely influential in not only the technical side—in getting us to understand what the issues were on the technical side—but also the policy issues and the implications of the policy issues."[52]

ii. *National Conference of Bankruptcy Referees*

If the National Bankruptcy Conference approximated a private legislature

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[46]*See* Rescuing Business, *supra* note 2, at 95.

[47]Richard I. Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-for-Lawyers Bill: Overview and Legislative History*, 22(2) Corporate Practice Commentator 201 (1980).

[48]US Interview 91:05. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 94 n.36.

[49]*See* Rescuing Business, *supra* note 2, at 95.

[50]*See* Rescuing Business, *supra* note 2, at 95.

[51]*See* Rescuing Business, *supra* note 2, at 95.

[52]*See* Rescuing Business, *supra* note 2, at 97.

which balanced the tensions intrinsic to bankruptcy, the National Conference of Bankruptcy Referees (later retitled Bankruptcy Judges) straddled the divide between technocratic neutrality and interest group politics. Of less status than the NBC, the NCBJ had some distinguished leaders—Conrad Cyr, Asa Herzog, Joe Lee (all of whom were also members of the NBC)—and it was positioned to offer a broad view of the legislation.[53] In this respect it paralleled the NBC. At the same time, the NCBJ represented the interests of bankruptcy specialists for whom the legislation promised upward mobility. On matters concerning judicial status, salary, methods and terms of judicial appointment, court powers—any facet of the legislation that could influence their own status position and power—according to one observer, they acted like "trade groups protecting their own personal interests."[54]

Since the bankruptcy bills offered the best opportunity for decades to advance the judges' collective fortunes, the NCBJ mobilized with great energy. They had been excluded from the Bankruptcy Commission, but responded with their own rival bill. They hired an effective lawyer-lobbyist, Murray Drabkin,[55] and exploited their local political connections across the nation to advocate their distinctive views.[56] While they were not politically strong enough to push through their own provisions, they could slow or stop the forward momentum of the legislation. Because they could "put the brakes on" and threaten the entire bill, they forced political leaders to co-opt them.[57] As a result, the Bankruptcy Act vastly improved the conditions of work, powers, and status of bankruptcy judges.[58] Such change was not only in the interests of the judges themselves: many other groups also pushed for improved judicial administration. Without a compromise in favor of the judges, the bill would likely have died in committee. This is not to say that the bankruptcy judges had no interests in other areas, for they made widespread submissions on business bankruptcy and several other issues, but these were dwarfed in proportion to the number of times they appeared before Congress on matters of bankruptcy administration and the status of bankruptcy judges.

iii. *Commercial Law League*

The Commercial Law League (CLL) represented the interests of those lawyers, wryly described by one of its leaders, as the "bankruptcy ring."[59] However, it was not purely a lawyers' association. Founded in 1895, the

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[53]*See* Rescuing Business, *supra* note 2, at 97.

[54]US Interview 92:01. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 97 n.38.

[55]Drabkin previously had served as a staffer on the House Judiciary Committee.

[56]*See* Rescuing Business, *supra* note 2, at 97, 99.

[57]*See* Rescuing Business, *supra* note 2, at 99.

[58]*Infra* p.411.

[59]*See* Rescuing Business, *supra* note 2, at 99.

CLL brought together three parties to commercial transactions as an expanding national economy made "buyers and sellers become strangers" to each other.[60] In addition to lawyers who acted as agents for those who extended commercial credit, the CLL included publishers of law lists, which provided lists of attorneys who could handle collections work in different communities, and credit collection agencies. Sometimes disparaged as "debt collectors," even "down and dirty, in the trenches, collections lawyers," it was CCL members who were the butt of the 1930 Donovan Report on bankruptcy in New York.[61] CLL members disproportionately served as trustees in the patronage relations of bankruptcy referees and trustees deplored by the Commission.[62]

Members of the League described themselves as a "creditors' rights" organization.[63] They represented unsecured trade creditors—businesses that loaned money when they sold goods or services. Consequently, they opposed innovations that would extend exemptions or discharges available to individual debtors, and they were apprehensive about wholesale changes to a form of bankruptcy administration in which their members had been primary beneficiaries. Despite their mobilization and involvement in each phase of the reforms, some staffers on the Hill perceived them as "a straight organization protecting their own interests."[64]

iv. *Judicial Conference of the United States*

The Judicial Conference, the organization for federal judges in which, at that time, only district court, appellate and Supreme Court justices had a participatory role, thrust itself prominently into the later phases of the legislative process. The federal judges were represented on the Bankruptcy Commission and they testified in the 1972 hearings, but until late 1977, when the bankruptcy bill looked increasingly likely to pass, the Judicial Conference remained largely mute. Its interests in bankruptcy law did not display the breadth of the National Bankruptcy Conference, or the National Conference of Bankruptcy Judges.

Because federal judges are nominated by senators and often have had close connections with politicians and their parties, the Judicial Conference had unusually strong influence in the Senate. Principally in the Senate, the Judicial Conference engaged one issue only, and so effectively that their oppo-

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[60]*See* Rescuing Business, *supra* note 2, at 99.

[61]*See* Rescuing Business, *supra* note 2, at 100.

[62]*See* Rescuing Business, *supra* note 2, at 100.

[63]*See* Rescuing Business, *supra* note 2, at 100.

[64]See Morris Weisman (ed.), A History of the Commercial Law League of America (1976). US Interviews 93:02, 92:01, 92:02. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 100 n.41.

sition put the entire bill in jeopardy.[65] It was the status of bankruptcy courts, their jurisdiction and powers, together with the standing of bankruptcy judges, that gripped the Judicial Conference. For twelve months, from November 1977 to November 1978, they fought collectively and individually—most notably in the person of Chief Justice Burger—to block proposals to raise bankruptcy courts and judges to the same status as federal district courts.[66]

b. Influence Profiles

Each of these groups had a rather different profile of influence. The National Bankruptcy Conference combined prestige, elite status, expertise, and the ability to mobilize a small organization for classic insider, technical politics. Its capacity was much less effective either for mobilizing lawyers or academics as a whole, or for engaging in interest group politics. While the bankruptcy judges as a whole could muster neither the prestige nor technical authority of the NBC or federal judiciary, they proved themselves to be adept at congressional politics. They put forward their best leaders, they offered an authority of practice on the ground, they took courses of action, such as offering an alternative bill, which compelled them to be taken seriously,[67] and they aligned themselves with some powerful interest groups, notably the bankers, for whom radical reform in the bankruptcy courts was imperative. Although the federal judges in principle could mobilize great prestige of office and technical authority, together with strong ties to political elites, they suffered from a deficit of some limits in their broad experience of bankruptcy practice and a failure to see that their intransigent stand against Article III courts alienated them from the banking industry and the political movement towards greater rationality and authority in the bankruptcy system.

Thus reforms were also intriguing because they pitted groups with strikingly different resources against each other with some surprising outcomes. Those groups with the highest prestige and closest ties to political power did not easily prevail.

3. *Professional Struggles*

Through the American reforms, jurisdictional politics, often but not always spearheaded by these professional groups, were broadly in evidence, yet not equally in each of the three domains.

a. Jurisdictional Issues Between State and Market[68]

The issue of allocating work between state and market professions arose

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[65] *See* RESCUING BUSINESS, *supra* note 2, at 100, 101 (Fig. 3.5).

[66] *See* RESCUING BUSINESS, *supra* note 2, at 102.

[67] *See* RESCUING BUSINESS, *supra* note 2, at 99-102.

[68] *See* RESCUING BUSINESS, *supra* note 2, at 400-416.

at the outset of the American reforms. In any bankruptcy system, a fundamental decision must be made about where to draw the public-private boundary that demarcates bankruptcy work. Since privatization and nationalization constitute the two polar positions open to policymakers, it is noteworthy that the United States and Britain each considered exactly opposite movements of work from the private to the public sectors or vice versa. Since the locus of work in the market or state may also coincide with political ideologies ("downsizing the state," "protecting the public interest"), this was one aspect of the bankruptcy reforms that brushed most closely against party ideologies.

In the United States, the Brookings Report on bankruptcy[69] saw a fundamental disjunction between the essentially administrative character of the 200,000 or more uncontested cases they studied and the prevailing adversarial system that seemed to add layers of personnel and costs to a process better suited to a rational bureaucracy. When corruption and patronage compounded inefficiency, the solution was to erect a regime of disinterested expertise.[70] In place of courts with "their habituation to patronage, their resistance to co-ordination, standardization and procedural change,"[71] the simple and effective solution was to move most bankruptcy work from the courts and create a new bankruptcy administration in the executive branch.

This "nationalization" of bankruptcy work was bold in conception. It valorized civil service norms, meritocratic selection of personnel, and a nationally coordinated, uniform system of administration. Lawyers would intrude in individual cases but rarely. The Bankruptcy Commission essentially concurred with Brookings and sharply divided bankruptcy cases between those that were best handled administratively, in a new United States Bankruptcy Commission, and those that demanded adjudicatory and adversarial proceedings. Most adversary proceedings—and lawyers—would become redundant in a significant proportion of cases. With the transfer of administrative functions to the executive branch of government, judicial proceedings would handle only contested matters where adjudication was inescapable.[72]

This proposed "nationalization" of a previously market activity drew some support from the National Bankruptcy Conference[73] and some House committee members and staffers,[74] but otherwise it attracted significant hos-

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[69]David T. Stanley and Marjorie Girth, Bankruptcy: Problem, Process, Reform (Brookings Institute, 1971).

[70]Minutes of the Bankruptcy Commission (May 1, 1972).

[71]*See* Rescuing Business, *supra* note 2, at 403.

[72]*See* Bankruptcy Commission, *supra* note 27, at 81.

[73]*See* Rescuing Business, *supra* note 2, at 404-406.

[74]*See* Rescuing Business, *supra* note 2, at 406.

tility from lawyers' and judges' groups.[75] The bankruptcy judges vigorously attacked the premise that there was a bankruptcy ring and the conclusion that "the erection of yet another doubtlessly impervious vertical bureaucracy, which is pervaded by a 'maze of red tape,'" would solve the problem.[76] Producing some of the most vivid rhetoric of the lawmaking, Conrad Cyr, a leading bankruptcy judge, said a Washington-based national agency would spawn another "dangerous federal bureaucracy which will inevitably multiply and prosper like some uncontrollable malignancy on the shank of the body politic."[77]

The Administrative Office of the U.S. Courts also opposed the notion of an executive agency and argued that such a "legal proceeding" should be handled through due process in the judiciary.[78] The American Bar Association, the Commercial Law League, and legal aid lawyers all criticized the notion that an inherently adversarial function should be turned into either a bureaucratic or counseling function.[79] When the bankers joined the chorus of opposition[80] and the National Bankruptcy Conference itself divided on this issue,[81] the proposal for an executive bankruptcy administration became an early casualty of congressional lobbying.

A substantial part of the opposition can be interpreted as jurisdictional politics, by the practicing bar on the one side, which did not want to lose work, and the judiciary on the other side, which resented an executive agency taking over work that was presumptively a judicial matter. Of course, the rhetoric of debate emphasized issues of due process,[82] the need for client representation by competent counsel,[83] a resistance to the melding of adjudicatory and administrative roles,[84] and the like. That is, the opposition was expressed in principled forms and was an expression of principle—and the two are not equivalent. Nevertheless, the result appeared as a jurisdictional victory for those who either would lose work (smaller, private practitioners) or wanted it.

b. Jurisdictional Issues Within the Market[85]

Market conflicts were much less pronounced than those that occurred

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[75]*See* Rescuing Business, *supra* note 2, at 408-409.

[76]*See* Rescuing Business, *supra* note 2, at 409.

[77]Conrad K. Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, Am. Bankr. L.J. 142 (1975).

[78]*See* Rescuing Business, *supra* note 2, at 410.

[79]*See* Rescuing Business, *supra* note 2, at 411-12.

[80]*See* Rescuing Business, *supra* note 2, at 413-14.

[81]*See* Rescuing Business, *supra* note 2, at 414.

[82]*See* Rescuing Business, *supra* note 2, at 419-20.

[83]*See* Rescuing Business, *supra* note 2, at 419-20.

[84]*See* Rescuing Business, *supra* note 2, at 420.

[85]*See* Rescuing Business, *supra* note 2, at Ch. 2.

within the state. American bankruptcy lawyers were catapulted from the edge of professional recognition into the center of corporate practice in less than two decades—one of the most rapid changes of any legal specialty in the history of the American legal profession.

Before the decade of the 1970s, most bankruptcy practitioners existed in a legal backwater, where fees were low and reputations were questionable. The patronage relationships of the "bankruptcy ring," which was alleged to surround the courts, were indicative of a pall that hung over bankruptcy lawyers.[86] The culture of derogation was clearly understood by lawyers advising congressional committees. A staffer on the House subcommittee, observed:

> One of the principal objectives of the '78 legislation was to bring bankruptcy into the mainstream of American law. It was a backwater of American law that was looked at with disdain. Many undesirable elements practiced it, and there were bankruptcy rings and charges of corruption. And many of the traditional firms would have nothing to do with it.[87]

By the late 1980s, the landscape of bankruptcy practice had become unrecognizable, with radical changes in the reputation and the structure of practice. Corporate reorganization has taken its place alongside mergers and acquisitions as a revenue center in the most prestigious corporate law firms.[88] Change was already underway before the 1970s' reforms as increasing numbers of the leading boutique firms were merged with elite corporate firms, principally because the latter found themselves unable to deal with the demand for expertise in corporate insolvencies that occurred in the 1960s.[89] The banking industry had a strong incentive to ensure that the expertise at the top of the bankruptcy bar could be melded with the traditional strength of leading law firms.

The Bankruptcy Code changed the philosophy underlying lawyers' fees from a "spirit of economy" to a standard of "the cost of comparable services."[90] In place of the principle that suppressed lawyers' fees in order to preserve more assets for estates, a principle that acted as a disincentive for the best and brightest lawyers, provisions were inserted into H.R. 8200 that judges "were to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional

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[86]*See* Rescuing Business, *supra* note 2, at 441.

[87]US Interview 91:05. *See also supra* note 19 for an explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 442 n.45.

[88]*See* Rescuing Business, *supra* note 2, at 442.

[89]*See* Rescuing Business, *supra* note 2, at 443.

[90]3 Collier on Bankruptcy, ¶ 330.04(2)(3) at 330-35-38 (15th ed. 1999).

would be compensated for performing comparable services other than in a case under title 11."[91]

Building a new incentive system that transformed the bankruptcy bar vindicated the proposition that better lawyering followed better fees.[92] Moreover lawyers might now be paid earlier and more often.[93] When the business cycle turned, and the mergers and acquisitions boom no longer absorbed so many corporate lawyers, mergers and acquisitions lawyers figured, "well, we can do deals out of court, we can do deals in bankruptcy as well."[94] Setting market rates in bankruptcy that were equivalent to fees generated for other corporate legal services simultaneously upgraded the status, increased the power, and multiplied the financial returns of this previously derogated area of the law. As Representative Drinan drily commented to a House subcommittee, "I realize it is a full employment bill for lawyers."[95]

In theory, this creation of a lucrative arena of work might have precipitated a surge of interest by other professions, such as accountants. American lawyers seem to have been protected from such competition because U.S. bankruptcy regimes place the courts in a far more central role than many other common law systems.[96] Since lawyers have exclusive access to the courts, their jurisdictional monopoly on court standing kept rival professions from lucrative professional work. That a legal monopoly should not be taken for granted we will see with the English case. In the politics of the United States, not a murmur of interest was shown by the accounting profession in capturing some measure of this new work.

c. Jurisdictional Issues Within the State[97]

By far the most acrimonious struggle for jurisdictional rights occurred between bankruptcy judges and federal judges. The status conflicts between Article I and Article III American judges, between the bankruptcy judges and the district, appellate and supreme court judges, became so bitter that they threatened to sabotage the entire legislation. At issue was the power of bankruptcy courts and the status and power of bankruptcy judges.

Both the Brookings Institute and The Bankruptcy Commission loudly criticized the inadequacies of a bankruptcy court system that was simply inadequate to handle company rehabilitation with any degree of consistency,

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[91]H.R. 8200, 124 Cong., § 330 (1978); 124 CONG. REC. H32383 (Sept. 28, 1978) (statement of Cong. Edwards).

[92]*See* RESCUING BUSINESS, *supra* note 2, at 447-49.

[93]*See* RESCUING BUSINESS, *supra* note 2, at 447-48.

[94]US Interview 92:01. *See also supra* note 19 for explanation of interview citation method. *See* RESCUING BUSINESS, *supra* note 2, at 448 n.65.

[95]*See* Aaron, *supra* note 48, at 201.

[96]*See* RESCUING BUSINESS, *supra* note 2, at 501-502.

[97]*See* RESCUING BUSINESS, *supra* note 2, at 470-90.

competency, speed, and reasonable costs.[98] In this they were joined by three powerful peak associations—the American Banking Association, the Robert Morris Associates, and the American Council of Life Insurance—who complained loudly about a banking community with hundreds of millions of dollars invested in debtors and no reliable way to deal swiftly with corporate rehabilitations. Three issues dominated both critiques of the courts and measures to improve them: the efficiency of justice, the neutrality of justice, and the competence of the justice system.[99]

Court efficiency was impugned by critics because delay forestalled rapid and decisive reorganization, thus impairing changes for corporate turnarounds. One problem was court jurisdictions, which were variously uncertain, overlapping, or incomplete. Another was whether Article I bankruptcy courts and generalist courts were sufficiently powerful or specialized to handle large, complex rehabilitations that demanded swift, decisive action.

Together with the need for rapid judgments by an empowered court, lawyers and the banking industry vigorously pressed for resolution of the patronage, partisanship, and conflicts of interest that bedeviled the bankruptcy courts. These threats to neutral justice distressed the banking community which was loath to take important issues before a court, especially one away from a bank's home base, where local or political bias might prevail over economic rationality.[100]

Finally, most parties to bankruptcy law bemoaned the quality and caliber of bankruptcy judges.[101] The position of a bankruptcy referee required no formal qualifications, apart from those common to all lawyers, and it demanded no prior experience in bankruptcy.[102] Terms of appointment were limited and salaries were low.[103] None of these factors provided inducements to highly qualified practitioners.

To solve these problems the Brookings Institute, the Bankruptcy Commission, several lawyers' groups, the bankruptcy judges, and the financial community supported measures that would radically upgrade the bankruptcy courts. In its strongest formulation, the Article I bankruptcy courts would be elevated to specialized Article III courts, with a rank commensurate with district court judges, although the broadened court jurisdiction would be narrower than the federal district court.[104] Courts with greatly expanded powers would require highly specialized, skilled judges appointed for life with

[98] *See* Rescuing Business, *supra* note 2, at 471-72.
[99] *See* Rescuing Business, *supra* note 2, at 474-87.
[100] *See* Rescuing Business, *supra* note 2, at 480-83.
[101] *See* Rescuing Business, *supra* note 2, at 482-85.
[102] *See* Rescuing Business, *supra* note 2, at 483.
[103] *See* Rescuing Business, *supra* note 2, at 483.
[104] *See* Rescuing Business, *supra* note 2, at 484-86.

salaries and perquisites to match. There would be strict separation of the court from local political influences and administrative and judicial functions would be sharply demarcated.

Not surprisingly, bankruptcy judges lobbied strenuously for measures that would radically upgrade their status and powers.[105] Equally vocal were the Article III judges, who were determined that this usurpation of their powers would never happen, that purported problems with the existing system were overstated, and that much more moderate changes would be sufficient.[106] It would be easy to see this struggle as one of status politics—between two groups of judges, one commonly derogated and the other usually valorized. Yet the impetus to upgrade the courts flowed from virtually all parties, especially the banking groups and lawyers' associations, although the federal judges did receive support from the American College of Trial Lawyers and the U.S. Attorney General in their opposition to Article III bankruptcy courts.[107] The House tended to side with the bankruptcy judges;[108] the Senate with the federal judges.[109]

Eventually a set of compromises gave bankruptcy courts expanded jurisdiction, if not Article III status, permitted bankruptcy judges to be appointed by the President for terms of fourteen years, and increased salaries to just below those of federal judges.[110] The fight between the federal judges and their allies in the Senate, on the one hand, and the insurgent bankruptcy judges and their extensive allies continued throughout 1978. Substantial differences remained between H.R. 8200 and S. 2266. Even the conference compromises were insufficient for the Chief Justice whose Senate allies held the bill for ransom as the legislative clock ran out.[111] At the last minute, more compromises were introduced, mostly from the House side. The bill was forwarded to the President for signing. Again the Chief Justice intervened, this time calling the President directly to urge he veto the bill. On the very last day on which the bill could have been signed into law, November 6, 1978, President Carter ignored his Chief Justice and placed his signature on the bill.[112]

These cases of jurisdictional politics indicate that the rights of professionals become heavily entangled in substantive decisions about all aspects of bankruptcy administration—where it takes place, who presides over it, what

[105]*See* RESCUING BUSINESS, *supra* note 2, at 484-85.
[106]*See* RESCUING BUSINESS, *supra* note 2, at 486-87.
[107]*See* RESCUING BUSINESS, *supra* note 2, at 485.
[108]*See* RESCUING BUSINESS, *supra* note 2, at 486-87.
[109]*See* RESCUING BUSINESS, *supra* note 2, at 486-87.
[110]*See* RESCUING BUSINESS, *supra* note 2, at 486-87.
[111]*See* RESCUING BUSINESS, *supra* note 2, at 487.
[112]Klee, *supra* note 18, at 281-94; Countryman, *supra* note 39, at 7-12.

powers are exercised by institutions, how much expertise is invested in bankruptcy proceedings—and, in virtue of these, how much confidence the most critical actors of all, the secured creditors, will have in the use of bankruptcy regimes as means of corporate rehabilitation.

B. England

1. *The Path to Statutory Reform*[113]

Like the United States, the origins of the 1986 Insolvency Act cannot be explained simply in terms of rising bankruptcy and insolvency rates, although the climb in corporate insolvencies that began after 1979 and peaked in 1985 surely increased the pressure for change.[114] England, too, had its share of high profile corporate failures: the collapse of Rolls Royce in 1971[115] and the failure of the Stern Property Group in 1974.[116] Massey Ferguson and International Harvester experienced severe financial difficulties too which demonstrated that insolvency law did not cater to the reorganization needs of a large class of very important companies.[117]

In the early 1970s the Conservative Government announced that it would no longer rescue "lame duck" companies.[118] At the same time, the major investing institutions of the City of London, together with the Confederation of British Industry, the Law Society, the Institute of Chartered Accountants, the Stock Exchange, and the British Insurance Association, with encouragement from the Bank of England, began to discuss setting up a specialized institution to aid in the management—and turnaround—of problem companies.[119]

Consumer pressures provided added impetus to reform. Consumer associations and the media exposed the ugly way that some company directors and liquidators dealt with weaker creditors.[120] The public labeling of "rogue directors,"[121] "cowboy liquidators,"[122] and the "Phoenix syndrome"[123] signaled dissatisfaction with company directors who exploited limited liability and regulatory loopholes to defraud customers, and with liquidators of com-

[113]*See* RESCUING BUSINESS, *supra* note 2, at 106-43.

[114]*See* RESCUING BUSINESS, *supra* note 2, at 106.

[115]*See* RESCUING BUSINESS, *supra* note 2, at 107.

[116]*See* RESCUING BUSINESS, *supra* note 2, at 107.

[117]*See* KENNETH CORK, CORK ON CORK: SIR KENNETH CORK TAKES STOCK, 71-78, 195 (Macmillan, ed., 1988); UK Interview 89:01. *See also supra* note 19 for an explanation of interview citation method. *See* RESCUING BUSINESS, *supra* note 2, at 107 n.48.

[118]*See* RESCUING BUSINESS, *supra* note 2, at 108.

[119]THE TIMES, March 16, 1972, 21; THE TIMES, March 17, 1972, 17; THE TIMES, August 3, 1972, 19.

[120]*See* RESCUING BUSINESS, *supra* note 2, at 109.

[121]*See* RESCUING BUSINESS, *supra* note 2, at 109.

[122]*See* RESCUING BUSINESS, *supra* note 2, at 109, 426.

[123]*See* RESCUING BUSINESS, *supra* note 2, at 109-10.

panies who were retained to sell off the company assets but who conspired with directors to drain companies of assets and relieve hapless consumers of their prepayments.

The "bad odor" cast upon all insolvency work by "rogue liquidators" underlined the problems that can arise when areas of potentially lucrative work are not adequately regulated. Since the tail end of insolvency practice dragged down the reputation of the entire field of work, many qualified or licensed accountants and liquidators who practiced insolvency work began to push for some government intervention to regulate the field, principally through professionalization.[124] Elite and specialist professionals had strong reputational interests in the regulation of insolvency work, and a general review of insolvency law offered a perfect moment at which to advance that cause.

The Labour Government appointed a committee on January 27, 1977 headed by Kenneth Cork with a fourfold charge:

> (1) to review the law and practice relating to insolvency, bankruptcy, liquidation and receiverships in England and Wales and to consider reforms;
> (2) to examine the possibility of formulating a comprehensive insolvency system and the extent to which existing procedures might be harmonized;
> (3) to suggest less formal procedures as alternatives to bankruptcy and company winding up proceedings in appropriate circumstances; and
> (4) to make recommendations.[125]

While the Insolvency Law Review Committee (Cork Committee) was deliberating, Margaret Thatcher's Conservative government came to power in 1979 with a political commitment to reduce the role of government and to stimulate private solutions to public problems.[126] The government alerted the Cork Committee that expansion of the state's role in bankruptcy administration would not be tolerable and also that privatization of bankruptcy work would be highly desirable. If the Cork Committee wanted its recommendations enacted, they would have to align with Tory policy to downsize the state.[127]

After extensive hearings on both its original charge and the Green Paper,

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[124] *See* Rescuing Business, *supra* note 2, at 110.

[125] Report of the Insolvency Law Review Committee, Insolvency Law and Practice, [1981] Cmnd. 8558, iii (hereinafter "Cork Report").

[126] *See* Rescuing Business, *supra* note 2, at 113.

[127] UK Interview 91.17. *See also supra* note 19 for an explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 115 n.66.

the Cork Report was tabled in Parliament on June 9, 1982.[128]

Cork had claimed at the inception of his committee that many more companies could be saved if outside administrators with stronger powers were brought into companies which did not have a loan structure that permitted the appointment of receivers.[129] A *Times* article styled Cork's recommendation for an administrator as a "new type of company doctor" which would be created by the law. The article concluded that the problems of business failures, lost jobs, and unscrupulous practices could be partially solved by several of Cork's recommendations, including the invention of "a new receiver-like figure called an administrator who could carry on the business when present law does not permit a receiver or manager, and who might be appointed at an earlier stage than present receivers so that there is more of a business left to save."[130]

If new capacities were to be mobilized to save businesses, then it was critical that higher standards be established for professionals acting as liquidators, receivers, and administrators. The Cork Report recommended that insolvency practice be subject to strict professional regulation, following the Government's preferred model of private self-regulating professionals within a statutory framework. Therefore, improvement of "the standard of administration of insolvent estates" would be achieved by minimum qualifications for individuals acting as receivers.[131]

The Cork Report also proposed a unification, so far as possible, of individual and corporate bankruptcy law, and recommended that the priority of Government claims be reduced.[132] It also proposed measures, such as "wrongful trading," to compel company directors to get help as early as possible for their companies, or find themselves *personally* liable for its debts.[133] The Report made several recommendations to protect consumers and trade creditors in bankruptcy.[134] Although it protected the banks' most hallowed security, the floating charge, nevertheless banks were persuaded to be more flexible in the appointment of administrators to run companies in favor of all the creditors, and not just themselves.[135]

In 1984, the Government released a White Paper (*A Revised Framework for Insolvency Law*) which set out its initial legislative ideas.[136] The Govern-

[128] *See* Rescuing Business, *supra* note 2, at 115.

[129] The Times, February 26, 1977, 15.

[130] The Times, April 4, 1982, 49; The Times, June 13, 1982, 49; The Times, August 18, 1983, 15.

[131] The Times, April 4, 1982, 49.

[132] *See* Rescuing Business, *supra* note 2, at 117.

[133] *See* Rescuing Business, *supra* note 2, at 117.

[134] *See* Rescuing Business, *supra* note 2, at 117.

[135] *See* Rescuing Business, *supra* note 2, at 117.

[136] Department of Trade and Industry, A Revised Framework for Insolvency Law, 1984 Cmnd. 9175, (hereinafter "Government White Paper").

ment accepted the need to create a new insolvency practitioner's profession, which the *Times* agreed would "give creditors confidence in the persons they appoint to administer insolvent estates and to reduce the amount of supervision required by the DTI."[137] Observers lauded the new procedures that might save companies and they welcomed measures that would punish directors for not taking full responsibility for the financial circumstances of their companies. Consumers got relatively little out of the White Paper. The Government had no intention of surrendering its high priority for unpaid taxes and unremitted social security withholdings.

The Bill was introduced in the House of Lords for its First Reading in December 1984 and set down for its second reading, when actual debate would begin, in mid-January 1985. Lord Lucas, a junior minister in the Department of Trade and Industry, led[138] for the Government, supported by Lord Cameron, the Lord Advocate. Labour's leader was Lord Bruce, a Scottish accountant. Debate proceeded through all clauses of the Bill until early April, and while both sides agreed with the general principles of the legislation, there was sharp disagreement over two matters. On both, the Government suffered an unaccustomed defeat.[139]

First, the Government had announced in its White Paper that it intended to compel directors to be more vigilant about the financial situation of their companies. If companies were in financial difficulty, directors should take steps to obtain new capital, cooperate with creditors to reorganize, or voluntarily go into liquidation. If they failed to take these steps, and the company was forced into bankruptcy, then they would be automatically disqualified from acting as directors of any other company for three years (although they could apply to the court for relief).[140] The business community attacked this provision and with the support of insolvency practitioners, prevailed upon Parliament to remove the provision for automatic disqualification and to leave the possibility of disqualification up to the discretion of a court.[141] Second, the Government enjoyed a high priority in the collection of unpaid taxes from insolvent companies. In the House of Lords, this special position won no favor, except from Government benches. After a long debate, the opposition passed an amendment to limit the Government's priority.[142]

Following the bill's third reading in the House of Lords, it was sent to the House of Commons. After debate on the general principles, the bill was sent to a Standing Committee of Members of Parliament (MPs), who worked

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[137] THE TIMES, March 1, 1984, 23.

[138] "Led" means Lord Lucas was the main proponent of the legislative view of the Government.

[139] *See* RESCUING BUSINESS, *supra* note 2, at 122.

[140] Cork Report, *supra* note 126, at Ch. 2.

[141] *See* RESCUING BUSINESS, *supra* note 2, at 244-302.

[142] *See* RESCUING BUSINESS, *supra* note 2, at 122.

their way through it, clause by clause, before returning it amended to the full House for a third reading. The Standing Committee functions somewhat like a subcommittee of Congress and is composed in proportion to the number of seats each party holds in the Commons.[143] Unlike its American counterpart, however, there is no opportunity for interested groups or individuals to make formal representations to the committee itself. These must all be made indirectly through members of the Standing Committee who may then raise concerns on behalf of others. The bill went back to the House of Lords, where debate was relatively limited. After a record 1,200 or more amendments, most of which were quite inconsequential, the bill passed in both Houses and received Royal Assent on October 30, 1985.

2. *The Professions*

Professionals championed the cause and pressed the government forward, advising one side of the House or the other. The small group of professionals who sat at the center of the bankruptcy reform circles were integrally connected to major, sustained initiatives by the leading societies of lawyers, accountants, and insolvency practitioners.[144]

a. Lawyers

Representations from the legal profession were coordinated through the Joint Working Party in Insolvency Law of the Law Reform Committees of the Law Society and the General Council of the Bar.[145] The Law Society had a committee on insolvency in place from the mid-1970s.[146] The Joint Working Party overlapped with lawyers who had worked on the draft European Economic Council Bankruptcy Convention and the Justice group on personal bankruptcy.[147] Operating autonomously from the general leadership of the Bar Council and the Law Society, the lawyers focused on technical aspects of the law and produced sixty briefs for the Cork Committee on recommended reforms.[148] Reports from the Joint Working Party were also directed to the Department of Trade and Industry and the lawyers' counterpart in the accountancy profession. Except for some individual efforts, the Working Party did not transform itself into a lobbying or pressure group after the Cork Report. Its political posture remained low.[149]

[143]*See* RESCUING BUSINESS, *supra* note 2, at 122.

[144]*See* RESCUING BUSINESS, *supra* note 2, at 131-33.

[145]*See* RESCUING BUSINESS, *supra* note 2, at 131.

[146]*See* RESCUING BUSINESS, *supra* note 2, at 131.

[147]*See* RESCUING BUSINESS, *supra* note 2, at 131.

[148]Papers, Insolvency Law Review Committee, Public Record Office, File BT 260, Kew, London.

[149]UK Interviews 90:11, 91:08, 91:01. *See also supra* note 19 for explanation of interview citation method. *See* RESCUING BUSINESS, *supra* note 2, at 131 n.96.

b. Accountants

The accounting profession, too, used a peak working group, the Consultative Committee of Accountancy Bodies (CCAB), to coordinate all representations of the main accounting bodies.[150] The members of the CCAB group on insolvency covered the spectrum of specialties from receiverships and corporate insolvency to personal insolvency. The CCAB divided into subcommittees and prepared an extensive set of submissions to the Cork Committee and the Department of Trade and Industry.[151] Their involvement spanned the entire reform process through the Government White Paper and the parliamentary debates, where they advised Neville Trotter, an MP who was also an insolvency practitioner.[152]

The accountants' interests centered on the professionalization of insolvency practice.[153] Since both the government and the Cork Committee were intent on regulating insolvency work, the accountants had a powerful incentive to ensure that they would have access to this work and that current practitioners could qualify. At the same time, they also had some interest in excluding other professions, such as the lawyers, from competing in what could be a lucrative field of practice. But their representations far exceeded pecuniary interests. Said one leader of the CCAB:

> The professional interests differed in breadth from interest groups: our interest, the accountancy bodies and the IPA's (Insolvency Practitioners' Association) interest, was right across the board in insolvency. And looking at the other people here, the bankers, the Inland Revenue—very capable people—but they were interested in a certain aspect and not the whole scene. We were interested in the whole scene.[154]

c. Insolvency Practitioners

The peak accountancy body overlapped heavily with the Insolvency Practitioners' Association (IPA), an association of licensed and unlicenced accountants who specialized in bankruptcy and insolvency.[155] The IPA had formed as a professional association immediately before the series of insol-

[150] The CCAB included the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Ireland, the Institute of Chartered Accountants of Scotland, the Chartered Association of Certified Accountants, the Institute of Cost and Management Accountants, and the Chartered Institute of Finance and Accountancy.

[151] *See* Rescuing Business, *supra* note 2, at 131.

[152] UK Interviews 91:02, 91:03. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 132 n.98.

[153] *See* Rescuing Business, *supra* note 2, at 132.

[154] UK Interview 91:02. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 132 n.99.

[155] *See* Rescuing Business, *supra* note 2, at 132.

vency reforms in which it expected to register a voice.[156] In the politics of insolvency, the overlap was so complete that "the representations were often written by the same people and the same committee (for the respective organizations). They were almost word for word the same. There was no divergence really between the views of the IPA and the views of the CCAB."[157] In fact, said a leader of both, "I found myself appearing twice and saying the same thing twice (for the respective groups)."[158]

Nevertheless, for the political mobilization of accountants, it made good tactical sense to multiply influence through representations to government by several overlapping organizations. The accountancy bodies included many insolvency practitioners who were not IPA members and whose interests should be represented, and unlicensed accountants would not have been represented without the IPA. Moreover, there was significant advantage for the somewhat marginalized insolvency practitioners to borrow the prestige of the established accounting bodies, for traditionally the chartered accountants were the premier accountancy body in the country and the government regularly asked their opinion.

d. Judges

The virtual absence of judges from the reform process in England represents the biggest difference between bankruptcy politics in the U.S. and Britain. Judges adhere to a longstanding tradition that proscribes collective action on prospective legislation.[159] The Judges of the Chancery Division made some limited contributions in response to a request from the Cork Committee, and there were personal contacts between barristers on the Cork Committee and their judicial colleagues, but these were limited in scope. No formal representations of any magnitude occurred at any point.[160]

However, the Lord Chancellor's Department had much to say about Cork's proposals for the creation of a specialized Insolvency Court.[161] English judges could wage a quiet campaign to maintain the court system they preferred. Whereas American judges were compelled to debate in open congressional hearings the merits of proposed changes in the American judiciary, their English counterparts were spared any appearance of politics. Inside the Government the Lord Chancellor simply informed his cabinet colleagues and

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[156] *See* Rescuing Business, *supra* note 2, at 456-506.

[157] UK Interviews 91:02, 91:03, 90:14. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 132 n.100.

[158] UK Interviews 91:02, 91:03, 90:14. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 132 n.100.

[159] *See* Rescuing Business, *supra* note 2, at 133.

[160] UK Interview 91:14. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 133 n.102.

[161] *See* Rescuing Business, *supra* note 2, at 133.

the Department of Trade and Industry that he rejected Cork's proposal for a new insolvency court and the matter went no further.[162] Of course, parliamentary amendments might have been proposed that an Insolvency Court be established. More than one peer or MP expressed regrets during the parliamentary debates that the Government had not seen fit to incorporate a specialized court system in its bill.[163] However, the Lord Chancellor had taken this proposal off the agenda following Cork, and none brought it back.

3. *Professional Struggles*

Like its American counterpart, the English reforms also precipitated professional politics over jurisdictional rights in each of the three domains.

a. Jurisdictional Disputes Between State and Private Professions[164]

The most notable episode across the public-private boundary occurred when a conflict broke out between civil servants and private practitioners, the government and reformers, over where mundane bankruptcy work should be carried out. Whereas the Brookings Report and the Bankruptcy Commission had advocated the partial "nationalization" of some bankruptcy work, the English reforms moved in just the opposite direction.

Mrs. Thatcher's Conservative Government came to power in 1979 committed to reduce the role of the state in the economy and to stimulate private solutions to public problems.[165] Shortly after the Conservatives formed the government, a senior civil servant wrote to the Cork Committee, which was well along in its deliberations, and informed it:

> You will know that the Government is examining many possible ways of reducing the size of the Civil Service; and with the objective of cutting manpower in mind, the Secretary of State is bound to consider the extent to which it is now necessary, and will be desirable in the future, to devote so much official time . . . to the duties currently imposed by the bankruptcy legislation.[166]

The Cork Committee had already decided that it wanted to shift some significant numbers of mundane cases out of the Insolvency Service and into the hands of private professional trustees who would be monitored by the courts. Irritated by the need to report prematurely and partially, the Committee nevertheless responded to the Government by releasing an Interim

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[162] *See* Rescuing Business, *supra* note 2, at 133.
[163] *See* Rescuing Business, *supra* note 2, at 133.
[164] *See* Rescuing Business, *supra* note 2, at 381-400.
[165] *See* Rescuing Business, *supra* note 2, at 381.
[166] Insolvency Law Review Committee, September 19, 1979, ¶ 6-7.

Report which announced this intention.[167] The same day the Government released that Report, it also took the unusual step of publishing a "Green" discussion paper of its own, where it took a much more radical step.[168] The Government proposed to privatize personal bankruptcy administration so that private practitioners would take responsibility for discovering and obtaining a debtor's assets, interviewing the debtor, going through the debtor's records, making inquiries of creditors, advising the debtor on the preparation of court papers, and filing a report with the courts. The Government believed this would reduce some 570 jobs within the Insolvency Service and save the public purse up to £3 million a year.[169]

This recommendation produced unusual jurisdictional politics. It became clear that the Government's recommendation was not only supported by the civil servants in the Insolvency Service (who had drafted the Green Paper), but opposed by ordinary practitioners who rejected the prospect of new work.[170] Why? The civil servants responsible for drafting the Green Paper had a clear logic. They were hopelessly overburdened. Government staffing did not keep up with demand and salaries in the government lagged far behind those in the private sector. A simple expedient—moving work out of the government and into the market—would solve several problems simultaneously. It would reduce their work load; it would enable them to focus on more complex and more interesting corporate cases, especially where there were issues of fraud or malfeasance; and it would lessen the pressure on their recruitment drives. In fact, it immediately became apparent that the civil service itself was internally divided for the principal mid-level union of civil servants, the Institution of Professional Civil Servants, vigorously attacked the Green Paper's recommendations, arguing that the public interest would not be well served by this loss of government oversight and regulation.[171]

The Cork Committee, too, in its final Report, rejected the extremity of the Government's proposals on several grounds, most notably, that in one country after another "creditors were originally given the primary responsibility for administering the process"[172] and this led initially to "scandal and abuse,"[173] and eventually to the introduction of various levels of official control in the public interest. Comparative and historical experience argued for a

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[167]*See* Rescuing Business, *supra* note 2, at 383.

[168]*See* Rescuing Business, *supra* note 2, at 386.

[169]Insolvency Review Committee, Bankruptcy: Interim Report of the Insolvency Law Review Committee, HMSO, 1980, Cmnd. 7968, (hereinafter "Interim Cork Report"); Insolvency Review Committee, Bankruptcy: A Consultative Document, 1980, Cmnd. 7967, (hereinafter "Government Green Paper").

[170]*See* Rescuing Business, *supra* note 2, at 395-96.

[171]*See* Rescuing Business, *supra* note 2, at 395-96.

[172]*See* Cork Report, *supra* note 126, at 161-65.

[173]*See* Cork Report, supra note 126, at 161-65.

public official who stood apart from debtors and creditors, who had no financial interests of any kind in the outcome, and who was competent and impartial. "It has been increasingly accepted that the public interest is involved in the proper administration of bankruptcy."[174]

All practitioners' groups opposed the extreme measures proposed in the Green Paper, although, like the Cork Committee, they, too, could see some merit in the shifting of certain classes of individual bankruptcies into the private market, where insolvency practitioners, with minimal court involvement, would work on voluntary arrangements for repayment of debt while holding creditors at bay.[175] It was also apparent that much of the work the government sought to off-load on the private sector was simply unattractive to the practitioners who led the professional associations. Such work was low-paying, routine, messy, and unappealing. It did not at all accord with the bid by insolvency practitioners for enhancing the status of their profession. It served the interest of that class of part-time or less experienced insolvency practitioners which professional elites were seeking to drive out of insolvency practice.

Thus, the jurisdictional politics of professions inside and outside the state became confounded with notions of public interest, government expenditure, and government ideology. The Government's final defeat on this issue cannot be reduced to jurisdictional politics alone, for there was a principled and practical reason to reject the Government's proposals. Yet neither can it be understood without recognizing the irony that, at the same time, there were professional leaders within the state and professionals in the market who struggled over the same issue—a mutual desire to rid themselves of a particular type of work. Ultimately the professionals in the market prevailed.

b. Jurisdictional Issues Within the State[176]

Compared to the American reforms, there were no dramas inside the English judiciary and few strains between the judicial and executive branches. The only issue that was mildly debated was a proposal by the Cork Committee to create a specialized insolvency court.

It was a central premise of English reformers that as much insolvency work be kept away from the courts—and lawyers—as possible.[177] In the course of his efforts to formulate an English response to European initiatives on bankruptcy, Cork and his colleagues had developed a fundamental antipathy to what they viewed as the central pathology of Continental modes of handling corporate reorganization—the proclivity of lawyers to rush into

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[174] *See* CORK REPORT, *supra* note 126, at 161-65.
[175] *See* RESCUING BUSINESS, *supra* note 2, at 397-98.
[176] *See* RESCUING BUSINESS, *supra* note 2, at 456-70.
[177] *See* RESCUING BUSINESS, *supra* note 2, at 456-57.

court. Said Cork, "We are nearer Europe than America, and the whole of insolvency at that time in Europe was appallingly badly done, and it's all done by lawyers in the court. We were more frightened of that, the EEC, than we were of adopting the American system."[178] This was not simply a matter of insolvency practitioners' instinctive desire to keep work away from lawyers, but also the fear that "lawyers have the habit of rushing off to court," and when they get there judges tend to be cautious.[179]

Yet courts must be involved in serious cases, and if so, then it made sense to do so in a rational system where jurisdictions were clear, judges were competent, and action was swift. The Cork Committee therefore proposed setting up a dedicated Insolvency Court for all England and Wales with technically competent judges.[180] Various kinds of cases would be shifted out, up, or down in the system: some mundane cases would shift out of the judiciary to the civil service; more important individual and corporate cases would move to higher courts where they were assured of more competent treatment; less important cases would be handled at lower levels.[181]

In any event, neither the Government's White Paper nor its Insolvency Bill incorporated this recommendation.[182] Late in the parliamentary debates, the Government contended that the Cork Report had not made a compelling case for specialized courts.[183] However, several members of the reform committee believed that the Lord Chancellor, whose department presided over the judiciary, had simply vetoed the concept.[184] Inherent conservatism might be one explanation. A principled opposition to specialization on the bench is another. Yet a further explanation is more pragmatic. Every government department was under great pressure to get rid of staff and reduce costs. Since the Cork Committee could not guarantee that the new court would reduce costs, it was simply politically inexpedient for the Lord Chancellor to take such a risk.[185]

c. Jurisdictional Issues in the Market

The English bankruptcy reforms exemplify a rare case of a modern profession at the moment of its inception. We discussed earlier the lamentable state of English insolvency practice—an occupation that was essentially un-

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[178] *See* Rescuing Business, *supra* note 2, at 457.

[179] UK Interview 91:07. *See also supra* note 19 for explanation of interview citation method. *See* Rescuing Business, *supra* note 2, at 457 n.1.

[180] *See* Rescuing Business, *supra* note 2, at 460.

[181] Cork Report, *supra* note 126, at 980, 985-88, 994, 1001-17.

[182] *See* Rescuing Business, *supra* note 2, at 467.

[183] *See* Rescuing Business, *supra* note 2, at 467.

[184] *See* Rescuing Business, *supra* note 2, at 469.

[185] UK Interviews 91:14, 91:17, 91:08, 90:09. *See also supra* note 19 for explanation of interview citation method. Of course, the reasoning is more complex, for there are strong principled reasons within the English judiciary in favor of generalist judges. *See* Rescuing Business, *supra* note 2, at 469 n.32.

regulated. It encompassed, at the high end, fully licensed professional accountants who specialized in insolvencies, at the low end, unscrupulous "cowboys," and, in between, large numbers of unlicensed practitioners, generalists or nonspecialists. Since this occupation was akin to an unincorporated territory without its indigenous law-and-order regime, without consistent or comprehensive regulation, and thus without any encompassing standards of competence or ethics, it led to several baleful effects.

Since neither competence nor probity could be assured by a self-regulating profession, this did not bolster confidence in creditors or debtors, especially when parties to insolvencies were outside major metropolitan centers or were not dealing with established accounting or insolvency firms. Further, for a government that was insistent on invigorating the market, it was imperative that the market itself be "cleaned up." With an increased probability that businesses would fail as the government encouraged more entrepreneurialism, it was also critical that an occupation be put in place that could shepherd faltering businesses through financial difficulties and that would do so competently and ethically. The shift towards a culture of corporate rehabilitation similarly demanded a profession capable of turning companies around.

Reform of insolvency practice was a cornerstone of the Cork Committee's Report to the Government.[186] The Committee recommended formation of a new profession—an insolvency practitioners' profession—which would have all the accoutrements of established professions—educational and training programs, formal standards of admission, minimum years of experience, accounting rules, codes of ethics, and self-regulatory mechanisms.[187] A minimum standard of competence for insolvency practitioners could be guaranteed for courts, management, and creditors.[188] In other words, a change in the status of insolvency practitioners from "corporate undertakers" to "company doctors" could be smoothed by the guarantees implicit in professional status and self-regulation.

The Government, too, was committed to creation of a profession in the private market that espoused disinterestedness.[189] Following a classic English model, the Government proposed that a profession be created by statute—in this case the Insolvency Act—and be self-regulating. It did, however, add one or two twists. Since the Government was also hostile to professional monopolies that created scarcity of professional services and artificially boosted costs of services, the Government insisted that its Department of Trade and Industry also have the capacity to admit suitably qualified

[186] *See* Rescuing Business, *supra* note 2, at 465-66.

[187] *See* Rescuing Business, *supra* note 2, at 424, 434-35.

[188] *See* Rescuing Business, *supra* note 2, at 434-35.

[189] *See* Rescuing Business, *supra* note 2, at 435-37.

candidates to the profession.[190] In this way, the Government could turn on and off the spigot that adjusted how many people entered the profession.

The new model of professionalism was very complex. Rather than create a single, unified professional body, all the normal functions of such a body—admissions, examinations, code of ethics, discipline, continuing education—were delegated to no less than seven professional associations as well as the Department of Trade and Industry.[191] The bodies were expected to coordinate themselves so that there was uniformity across bodies.

Two intriguing jurisdictional outcomes, with far reaching effects on the division of labor, were produced by this legislation. First, the new profession excluded from practice approximately two-thirds of the individuals who had previously acted as insolvency practitioners, but whose qualifications or experience were not deemed sufficient to meet the standards of the new profession.[192] While these disenfranchised practitioners sought to mobilize against the legislation, they had little success.[193] They faced a daunting problem of collective mobilization, since they were widely scattered across the country. They had no formal association, of any consequence, of their own. Most did bankruptcy work as a minor aspect of their professional work and thus had less incentive to mobilize. Thus, the legislation snatched from them an entire sphere of work.

Second, a modest debate broke out within the circles of experienced practitioners, this time amongst different professions. Sir Kenneth Cork himself and the Government were in favor of broadening insolvency practice beyond the accounting profession. Early in the Cork Committee's deliberations a decision was taken that "in the future administrators, liquidators, etc., would be professional men," but without creating a monopoly that confined receiverships to a single profession, such as accounting.[194] In certain circumstances it seemed possible, even desirable, that lawyers and even surveyors could qualify. In principle, this might have opened up a political debate among professions. Indeed, there were low key exchanges among the professional bodies,[195] but they were muted with the expectation that if lawyers and

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[190]*See* Rescuing Business, *supra* note 2, at 437-41.

[191]These were the Chartered Association of Certified Accountants, The Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, The Institute of Chartered Accountants of Ireland, The Insolvency Practitioners' Association, The Law Society of Scotland, and the Law Society of England. Insolvency Act 1986, section 391, and The Insolvency Practitioners (Recognized Professional Bodies) Order 1986 (S.I. 1986, No. 1764).

[192]*See* Rescuing Business, *supra* note 2, at 449.

[193]*See* Rescuing Business, *supra* note 2, at 449-53.

[194]Insolvency Review Committee, Minutes, March 1, 1977; Insolvency Review Committee, Minutes, March 24, 1977; Insolvency Review Committee, Minutes, June 14, 1978. Public Record Office, File BT 260.

[195]*See* Rescuing Business, *supra* note 2, at 494-96.

surveyors were to be admitted to the new profession there would be few of them and they would have to meet the exacting requirements that were more readily met by accountants. Once the Act obtained Royal Assent, in fact, very few non-accountants did rush to occupy a part of this new occupational terrain.[196] In part that was a consequence of the relative difficulty of qualifying. However, it also resulted from a muted threat by accounting firms: if law firms that received legal business from insolvency firms also threatened to compete with insolvency firms for the insolvency work, the accounting firms would no longer retain them for legal work.[197]

Thus at once the new provisions of English insolvency law increased the qualifications and regulatory standards of insolvency practitioners and widened, in theory, the range of occupations that might qualify, but the move effectively banished a majority of those at the lower end of insolvency practice.

IV. THE MANIFESTATIONS OF PROFESSIONAL POWER

Rescuing business was a central motif of the reforms in both countries. Rescuing business requires competent and trustworthy practitioners. Since practitioners themselves have strong interests in substantive and administrative elements of the law, it is not surprising that alongside the struggles that occurred over property rights were potential and actual struggles over jurisdictional rights. Indeed, the latter wove through the entire process, affecting not only the fortunes of professionals, but the form of bankruptcy administration itself—who did it, how they did it, what responsibilities were devolved upon them, and at what cost. Moreover, those responsibilities affected the substantive law for parties as diverse as American bankers and English politicians. They made it clear that their acceptance of stronger corporate rehabilitation regimes, and their preparedness to yield ground on some of their property rights depended directly on the competency and powers and probity of the occupations that undertook the work.

Nevertheless it is imperative not to imagine that a crude instrumentalism of professional self-interest explains the changes in jurisdictional rights that came about because of the reforms. Of course, expansion of jurisdictional rights was heavily sponsored by American bankruptcy judges and by the higher echelons of English insolvency practitioners. Yet both reform initiatives demonstrate that governments or states have interests of their own which may or may not coincide with professional aspirations. The Congressional reformers had no doubts that a greatly enhanced capacity for company reorganizations demanded many of the incentives that professionals them-

[196] *See* Rescuing Business, *supra* note 2, at 495-96.
[197] *See* Rescuing Business, *supra* note 2, at 494-96.

selves were advocating. The case is even more strongly evident for England where professional realignment was driven by more than government acquiescence to professionalization "from below." The conversion of British liquidators into "company doctors," reflected Mrs. Thatcher's project of market reform as much as the monopolistic instincts of quasi-professionals. We have shown that insolvency practitioners joined with lawyers and the financial industry to urge some form of licensing on bankruptcy specialists. However, the Conservative Government insisted on the need for accredited professionals to deal with the company failures that accompanied the Government's shake-up of English industry. Moreover, for privatization to succeed, the Government had to convince the public that expert professionals and competent directors would safeguard investments. Not only did they press for professionalization of insolvency practitioners, but they loaded responsibilities onto the professionals to monitor directors. To ensure that professional monopolies were not exploited, the Government insisted on keeping a hand in the supply and regulation of practitioners. Consequently, the state's interest in rehabilitation of companies demanded state-led construction of an expert profession, albeit aided and abetted by one segment of the profession itself. Moreover, the professionalization of insolvency practitioners allowed the government to exact new duties, or heightened vigilance to old duties, of corporate directors.

Changes in jurisdictional rights can by impelled by business. In the United States, the new power given courts to "cramdown"[198] settlements on discordant creditors assumed the victory of bankruptcy judges to upgrade the quality of recruits and the jurisdiction of their courts. Indeed, the willingness of bankers to impair their rights through cramdown depended directly on the guarantee that modernized courts, with expert, broad jurisdiction could bring a level of economic rationality to bankruptcy law that had been missing.

Out of these jurisdictional struggles emerged two models of professional development in bankruptcy, each of which had a strong impact on the capacity to rescue business. The bankruptcy reforms thus demonstrate two substantially contrasting ways to constitute professionalism in the market.

The English model proceeded via professionalization—it sought to upgrade the ethics and quality of workers who presided over liquidations and reorganizations. The reformers and government chose the classic approach of licensing professionals through statutory mandate. But since this was a government also wary of professional monopolies, it created a peculiar hybrid of a profession that kept the government's hand in the formulation and enforcement of professional ethics, and maintained its capacity to adjust the rate of

[198]"Cramdown" refers to a bankruptcy court's power to force all creditors to accept a reorganization plan that some classes of creditors may have rejected. *See* RESCUING BUSINESS, *supra* note 2, at 512.

admissions into the profession, the better to forestall the artificial creation of scarcity in the supply of services. The American solution utilized new incentives in the market. By changing the basis on which bankruptcy lawyers could be paid, and allowing their fees to rise dramatically, the Bankruptcy Code modified incentives to let the market for legal services take care of itself. Higher fees, it was thought, would attract better lawyers. Better lawyers could more readily take advantage of the new opportunities to reconstruct failing companies. Reconstituting the market for legal services indirectly would rescue companies at a higher rate.

It is critical also to recognize that professional mobilization extended far beyond a championing by professionals of their own status and powers. Professional activism was expressed through the entire substance of the reforms in three ways: first, through statutory confirmation; second, through invention; and third, through repudiation.

Professionals endorsed the confirmation in statutory law of numerous innovations they had spearheaded in everyday practice. The concepts of cramdown[199] and setoff[200] that had emerged in American practice, and had been accepted by some courts, now entered the statute with broader, clarified application. Retention of title, or Romalpa clauses,[201] used by trade suppliers to protect their assets, had been accepted by some English courts and were now integrated in qualified form into insolvency statutes. Finally, the emergence of a specialized circle of highly accomplished insolvency practitioners in English insolvency practice—a de facto profession—was codified and institutionalized within the framework of a newly created profession.

Pure invention also manifested itself through the creativity of professionals involved in the reforms. The newly created occupation of insolvency practitioners, while not entirely the creature of professionals, nevertheless bore the strong imprint of the leading practitioners who crafted the Cork Report. The Ten Percent Fund, in which a proportion of the assets of an estate would be kept aside for unsecured assets, was an invention of two English lawyers.[202] While not adopted, it nevertheless altered the course of English bargaining and increased the pressure on banks to make concessions that would benefit weaker creditors. "Wrongful trading," the provision that would make directors personally liable for the debts of their companies if they continued trading after the companies were technically insolvent,

[199] *See* Rescuing Business, *supra* note 2, at 512.

[200] *See* Rescuing Business, *supra* note 2, at 512. "Setoff" refers to a form of security in which those of a debtor's assets held by a third party (government, financial institution, trading corporation) may be applied to offset the claim of a creditor indebted to the aforementioned third party.

[201] A "Romalpa clause," eponymous of the Romalpa Aluminum insolvency case, refers to a contractual device to establish retention of title. *See* Rescuing Business, *supra* note 2, at 527.

[202] *See* Rescuing Business, *supra* note 2, at 513.

sprung from the fertile minds of English barristers.[203] So, too, did the notion of specialized Insolvency Courts, though that idea failed to be included in the legislation by the Government. Notions of "adequate protection"[204] and "indubitable equivalent"[205] similarly arose from the imaginations of American lawyers and judges.

Statutory sanction or repudiation of practice was evident on both sides of the Atlantic. When consolidating three chapters on corporate reorganization into one, the new United States Code precluded "title shopping."[206] Lawyers and accountants led the assault on the unfair practices of utilities to use their monopoly position in the market to demand debt repayment before other creditors.[207] In England, creation of the new profession of insolvency practitioners essentially repudiated the claims to work of some two-thirds of unqualified or occasional practitioners of liquidations before 1986.

Professionals' engagement in the reforms can be qualitatively distinguished from those of other principal players. More than any other participants, the central professional players in the reforms had in common a systemic view of bankruptcy law as a whole. They tried to understand the entire puzzle of the ways that several hundred sections and pages of statutory language, supplemented by even more rules, fitted together or not. In their private deliberations and public formulations they sensed how variations in the practice of one or another provision would throw out of balance a general solution or introduce distortions into effective implementation of law. Some significant part of their discussions took the form of mental experiments—trial efforts to think through the ramifications of abolishing floating charges[208] in insolvency, rejecting retention of title, ridding the law of all state priorities, and abolishing setoff. By apprehending the "big picture," and in appreciating the interconnectedness of bankruptcy law, professionals could in principle articulate and pursue a general interest, distinct from the parochial interests of many of the other groups.

Moreover, a sentiment of lawmaking craft suffused this process, an effort to solve problems by the most elegant means. This aesthetic of law reform and the concept of parsimony are well illustrated by reformers' efforts to

[203] *See* Rescuing Business, *supra* note 2, at 511, 528.

[204] *See* Rescuing Business, *supra* note 2, at 514.

[205] *See* Rescuing Business, *supra* note 2, at 514.

[206] *See* Rescuing Business, *supra* note 2, at 528.

[207] *See* Rescuing Business, *supra* note 2, at 528.

[208] "Floating charges" refer to an English security procedure in which a creditor has a claim against the debtor's assets but which is not attached to a particular piece of collateral during the operation of the company as a going concern. Upon the company's insolvency, the secured claim which had "floated" over the changing assets then fixes on those assets currently owned by the company. The creditor appoints a receiver (since 1986, an administrative receiver) to enforce security and obtain payment. *See* Rescuing Business, *supra* note 2, at 511.

unify individual and corporate bankruptcies, so far as possible, with similar underlying principles of accountability, responsibility, financial reconstruction, and the like. Thus for many reformers, the lawmaking offered an occasion to impose intellectual order, to dispel contradiction and inconsistency, and to formulate an efficient legal means to a desirable economic and social outcome.

Professional engagement in bankruptcy reforms possessed a civic element that must be recognized. It is true that when faced with problems of practice, professional reformers reflected the power of their own socialization by formulating solutions consistent with their professionalized perspectives on the world. Lawyers produced legal options. Accountants sought autonomy from legal institutions. Judges welcomed discretion. It would be implausible to expect that professional education and community would have them do any less. It is equally clear that some of the practitioners inside the reform circles empathized with the subjects of their lawmaking. Their moral sensibilities were offended by the exploitation of hapless consumer creditors. Their sense of equity was aggrieved by cavalier actions taken by powerful creditors that blithely destroyed businesses and lives. Their sense of institutional efficiency was offended by unnecessarily cumbersome and destructive procedures that inadvertently destroyed what might have been saved.

Thus, from the professions' vantage point, civic commitment, systemic thinking, and ideals of craft jostled with jurisdictional politics that left their mark on the distribution of property rights and the administrative capacities of both systems to rescue business.

CONCLUSION

We find that the ability of professions to exercise lawmaking power in an area such as bankruptcy law increases significantly when agenda setting, inventing and drafting new laws, and legislative politicking takes place underneath the wider horizon of political debate. Politics take place at two levels: when it is above the political horizon, it activates all the forces and counterforces of the political system and thus imports into technical or financial law reform a much wider set of issues than pertain to the substantive and administrative core of the reform itself; this also activates classic patterns of oppositionalism. When it is below the political horizon, it is not widely debated; it does not stir public controversy; it does not activate usual interest group polarities and conflicts; and it does not trigger instinctive party political opposition. Below the horizon, professions can exert much more influence, and they do so characteristically by insisting that their contributions are technical, expert, and neutral and thus do not warrant the scrutiny that might otherwise focus upon them.

Our research has found that, for the most part, the 1978 United States Bankruptcy Code and the 1986 English insolvency reforms took place below the political horizon, and for that reason professions had an extraordinary influence on the outcomes. Indeed, it is not too much to say that less than twenty professionals in each country had a determinative effect on the shape of reforms.

How far can the British and American experiences be generalized to other legislative reform efforts, and particularly bankruptcy reform efforts, in the United Kingdom and the United States respectively? We suspect they cannot be generalized very far. The United States and British reforms took place in peculiar circumstances. There had been no sweeping reforms for almost seventy-five or one hundred years. The reforms had little to do with party ideology, although political ideology infused significant elements of the English legislation, as we have seen. The laws did not trigger conventional class conflicts, such as those between labor and management, even though both management and labor participated in the reform process in both countries. Neither did the reforms engage the public in controversy, except perhaps for the proposed English Government sanctions against company directors. For all these reasons, the lawmaking was able to take place underneath the political horizon. Consequently, the influence of professionals was disproportionate because they were able to maintain a technical, neutral stance far from the public eye. Given the subsequent developments in bankruptcy law in both countries, and the prominence that it has achieved in subsequent notable cases, it is unlikely that these circumstances of relatively invisible lawmaking will be reproduced in the foreseeable future. As a result, it is unlikely the bankruptcy professionals in either country will exert the degree and relative proportion of influence they evidenced in the 1978 Code and 1986 Insolvency Act.