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Original Intent and the Bankruptcy Power: What Were They Thinking?

Michael S. Schreiber¹

On March 1, 2004, the United States Supreme Court will hear oral argument in *Tennessee Student Assistance Corp. v. Hood*.² The narrow issue before the Court is whether a debtor's action against a State, to determine whether a student loan may be discharged³ violates State sovereign immunity from suit as contemplated by the United States Constitution's eleventh amendment.⁴

1. Assistant Adjunct Professor of Law, Benjamin N. Cardozo School of Law/Yeshiva University. This article is an outgrowth of research I performed assisting Laurence J. Kaiser, Esq., a member of the New York bar, in the preparation of the *Brief in Support of Respondent for Amicus Curiae The Commercial Law League of America* filed in the Supreme Court on December 29, 2003. 2 DePaul Bus. & Commercial. L.J. __ (2004). Mr. Kaiser's assistance in the preparation of this article is greatly appreciated. I also wish to extend my gratitude to my student, Florence Yee, who assisted with the research for this article.

2. *Hood v. Tennessee Student Assistance Corp.*, 2000 WL 33965623 (Bankr. W.D. Tenn. Jul. 24, 2000) (denying TSAC's motion to dismiss undue hardship discharge complaint on the ground of state sovereign immunity), *aff'd* 262 B.R. 412 (B.A.P. 6th Cir. 2001), *aff'd*, 319 F.3d 755 (6th Cir. 2003), *cert. granted sub nom* *Tenn. Student Assistance Corp. v. Hood*, __ US __, 124 S. Ct. 45, 156 L. Ed. 2d 703 (Sept. 30, 2003).

3. Bankruptcy Reform Act, Pub. L. 95-598, § 523(a)(8) (1978), as amended, 11 U.S.C. § 523(a)(8) (2003) (the "Bankruptcy Code"). Section 523(a)(8) provides that a student loan made, insured, guaranteed or funded, in whole or in part, by a governmental unit or program may not be discharged unless a discharge is necessary to prevent undue hardship to the debtor and the debtor's dependants.

4. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment preserves the States' sovereign immunity and protects them from private suits. *See Alden v. Maine*, 527 U.S. 706 (1999). Congress cannot use its Article I powers to authorize private suits against the States to enforce federal law absent consent by the State or consent in the "Plan of the Convention." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991). In a number of recent decisions, the Supreme Court has invalidated a variety of Congressional enactments that permitted private suits against the States. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (private suits under the ADEA); *Fed. Mar. Comm'n v. S. C. State Ports Auth.*, 535 U.S. 743 (2002) (private actions before the Federal Maritime Commission); *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (private actions under the ADA); *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (private suits under the Trademark Remedy Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (private action under the Lanham Act). *Alden v. Maine*, 527 U.S. 706 (1999) (private suits under the FLSA); *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (private suits by Indian tribes).

The Court may depend, at least in part, on its determination of the original "Plan of the Convention." However, the Framers left very little in the way of direct evidence of their "original intent" concerning the Bankruptcy Power. Accordingly, the Court may need to rely more on secondary evidence to determine the understanding and intentions of the Framers when they drafted the Plan of Convention vesting Congress with the power to enact uniform laws on the subject of bankruptcies.

This article explores what the delegates to the Constitutional Convention knew about bankruptcy⁵ and what their reasonable expectations must have been at the time the Bankruptcy Clause was proposed and ratified. By examining the legislative environment within the fledgling States, and the background of the Framers, I hope to demonstrate that the Framers must have anticipated that the creation of a federal bankruptcy power would necessarily encroach on State sovereignty, particularly in the area of discharge.

I. IT'S THE ECONOMY. . .

The financial difficulties facing the newly founded United States have been documented elsewhere.⁶ By the end of the war for independence, the Congress had issued approximately \$200,000,000 in currency and the States had issued a similar amount. Congress had also sold between \$60 and \$70,000,000 in loan certificates and borrowed approximately \$12,000,000 from European sources. The massive issues of new currency resulted in steep depreciation: currency had fallen in value to 1/100 of par. At the same time, prices were escalating because of large-scale government purchases (resulting in the issuance

The issue can be more broadly stated as whether States' sovereign immunity has been waived with respect to Congress' bankruptcy power under the United States Constitution, Art. 1, § 8, cl. 4. The consequences of a decision favoring State's sovereign immunity in *Hood* will be systemic. For example, if State sovereign immunity has not been waived with respect to the federal bankruptcy power, the value of property sold free and clear of liens would be lessened because a State may claim that its liens are not affected by Section 363 of the Bankruptcy Code. The value of an assignment of an executory contract would be undermined if a party to the contract is a State that refuses to acknowledge the application of Section 365 of the Bankruptcy Code. A debtor would find it difficult, if not impossible to prove a plan is feasible, as required by Section 1129 of the Bankruptcy Code if a State can later claim that its claims were not subject to the reorganization.

5. "Bankruptcy" and "insolvency" were generally treated as interchangeable terms in the States. See Charles Warren, *Bankruptcy in United States History*, 7 (Harvard Univ. Press 1935) (reprinted by De Capo Press 1972) ("Nowhere in the States, other than Pennsylvania, however, does there seem to have been the clear line of demarcation which existed in England between a bankruptcy system and an insolvency system. . .").

6. See BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 169-70* (Harvard Univ. Press 2002).

of more currency). Businesses and individuals faced rampant inflation, currency devaluation, disruption of foreign trade, increasing imports, decreasing exports, the scarcity of cash, competition from British manufacturers at home and abroad, and British efforts to collect pre-war debts.

The extent to which debt loomed large in the public eye can be gleaned from a review of State legislation in the late 1770's and the 1780's. In addition to authorizing ever increasing amounts of public debt, virtually all of the State legislatures enacted legislation to address the foundering economy. These efforts included legislation (i) approving, and frequently amending, official amortization schedules, (ii) setting, and often extending, debt moratoriums⁷, (iii) prohibiting the practice of hoarding necessities by speculators and sales by public auction. State tender laws were passed requiring creditors to accept payment in currency at face value. Alternatively, some states compelled creditors to accept real estate or other property instead of currency.

The magnitude of the financial distress facing the States is illustrated by the number of short-lived acts passed by the States to prohibit the distillation of alcohol. These anti-distillation acts were not prompted by religious convictions or some other belief in temperance. They were enacted to prevent the use of grain to make alcohol instead of bread at a time of frequent food shortages.

These enactments, and others, addressed the economy generally, but did little to provide specific relief for distressed debtors and their creditors. In the absence of bankruptcy legislation, the remedy an unpaid creditor had against an insolvent debtor was the threat of debtors' prison.⁸

The convergence of a distressed economy and a system of imprisoning debtors proved to be inefficient and uneconomic. Imprisonment

7. See, e.g., *An ACT to prevent the Commencement of Suits for the Recovery of Debts, for the Time, and on the Conditions therein mentioned*, Laws of South Carolina, Chap IX (Feb. 26, 1782) (suspending the commencement of suit for any debt until ten days after the next meeting of the Assembly, except upon oath before a magistrate that the debtor intends to flee or secrete assets).

8. In many States collection actions could be commenced by the issuance of a writ of attachment or *capias ad respondendum*. These writs authorized the sheriff to arrest the debtor and hold him in jail pending hearing unless the debtor was able to produce security or bail. Upon receiving judgment, a creditor could also obtain a writ of *capias ad satisfaciendum*, authorizing the imprisonment of the non-paying judgment debtor.

There were few, if any, actual "debtors' prison" maintained by the States in the late 1700's. Debtor's shared the prisons with convicted criminals. Unlike criminals, however, debtors were required to pay for their own room and board while in prison. Where the debtor could not pay, he could be supported by family or friends, or a creditor could pay the charge and add it, at interest, to the existing obligation.

for debt may have granted creditors some visceral satisfaction, but it did not result in payment from insolvent debtors, and the prisons filled with debtors. It was generally recognized in most states that some relief was necessary for the protection of creditors and debtors alike.

II. STATE INSOLVENCY LAWS

Most State legislatures experimented with forms of insolvency or bankruptcy relief,⁹ which varied from State to State. Insolvency laws of the late 1770's and 80's consisted of a patchwork of public and private acts producing disparate results from State to State. These laws varied in scope, derivation, and effect. Similarly varied was the frequency with which some States addressed the issue.

Some bankruptcy laws provided relief for debtors owing debts above or below certain thresholds. Others provided relief for debtors willing to assign all of their property for the benefit of their creditors. Private acts typically provided relief for individual debtors who did not qualify under existing insolvency statutes. Some provided merely for the discharge of the debtor's person from confinement, while others provided for discharge of the underlying debts.

Some States merely incorporated and relied upon insolvency laws existing in England as of July 4, 1776, while some incorporated insolvency legislation enacted during the Colonial period. Some States repeatedly turned their attention to insolvency issues passing, reviving, repealing, and amending a variety of insolvency acts.

Despite the variety, there are certain common themes that bind these legislative initiatives and that are applicable to the question of State sovereignty. One theme is the necessity for providing an honest debtor with a discharge: either physically discharging the debtor from confinement for debt, or financially discharging the debtor from his or her debts, or both.¹⁰

Another theme is that in almost every case, an honest debtor was discharged from "all" or "any" debt, without regard to whether such debts were owed to the State, a municipality thereof, or a sister State.

9. See *supra* note 5 regarding the use of the terms "bankruptcy" and "insolvency."

10. Story, Joseph, *Commentaries on the Constitution of the United States*, 3 vols. § 1101 (Boston, 1833):

it may be stated, that the general object of all bankrupt and insolvent laws is, on the one hand, to secure to creditors an appropriation of the property of their debtors *pro tanto* to the discharge of their debts . . . ; and, on the other hand, to relieve unfortunate and honest debtors from perpetual bondage to their creditors, either in the shape of unlimited imprisonment to coerce payment of their debts, or of an absolute right to appropriate and monopolize all their future earnings.

Id.

In some States, the discharge of debts owed to the State was expressly authorized. In very few instances was the discharge of a debt owed to the State expressly exempted from discharge.

A. *Bankruptcy in New York*

New York, like other states, experimented with various types of bankruptcy relief and procedures for obtaining such relief. In the five year period leading up to ratification of the Constitution, New York passed no fewer than six bankruptcy statutes. In the space of five years, New York (i) provided for the discharge of debtors imprisoned before April 1784,¹¹ (ii) extended that relief to debtors imprisoned after April 1784, (iii) further extended relief to debtors, without regard to whether they were imprisoned, so long as they were willing to subject themselves to the requirements of the act,¹² (iv) further extended discharge relief to any debtor owing less than fifteen pounds,¹³ (v) repealed the insolvency act,¹⁴ and (vi) enacted more comprehensive legislation providing discharge relief.¹⁵

The Act of April 1784 discharged debts of those debtors who were imprisoned for debt at the time of passage. To obtain discharge, the debtor needed to (i) file a petition in court, together with an account and inventory of his estate and an explanation of the causes of his imprisonment, (ii) publish a notice for three successive weeks in “the public newspapers of this State,” (iii) attend a meeting of creditors, held before the Court, and (iv) take an oath swearing that the accounts and inventories were true and correct. If the debtor’s oath and accounts were not timely controverted or, if after hearing, the Court determined any such controversy in the debtor’s favor, the debtor would assign all of his or her possessions to a creditor, creditors, or such person appointed by the Court, to be liquidated and distributed *pro rata* among creditors.¹⁶

11. *An Act for the Relief of Insolvent Debtors within this State*, New York, 7th Sess., Chap. 34 (Apr. 17, 1784).

12. *An Act to revive and amend an act entitled “An act for the relief of insolvent debtors within this State,”* New York, 8th Sess., Chap. 14 (Nov. 24, 1784); *An Act for the relief of insolvent debtors*, New York, 9th Sess., Chap. 34 (Apr. 13, 1786).

13. *An act for the relief of insolvent debtors, with respect to the imprisonment of their persons*, New York, 10th Sess., Chap. 98 (Apr. 20, 1787).

14. *An act to repeal the act, entitled “An act for the relief of insolvent debtors.”* New York, 11th Sess., Chap. 29 (Feb. 8, 1788).

15. *An act for the relief of debtors with respect to the imprisonment of their persons*, New York, 12th Sess., Chap. 24 (Feb. 13, 1789).

16. The Debtor was permitted to retain “the necessary wearing apparel and bedding of the said debtor, his wife and children, and family immediately under her care. . . .” The assignee was

“[I]mmediately” upon the debtor’s assignment of assets, the debtor received an order of discharge from the Court. The discharge directed the “sheriff gaoler, or keeper of such prisoner” to discharge him or her from prison. The Act further provided that the discharge constituted a “final[] release[] from all debts contracted, and all judgments obtained before that time, so far as they effect his or her imprisonment, or his or her or their personal property.” The discharged debtor was not “liable to be sued or arrested or to have their lands or tenements, goods or chattels . . . thereafter inherit[ed] or acquire[d], seized by virtue or in consequence thereof.” Finally, the Act provided that a debtor sued for “any debts accrued before the passing of this act . . . may plead the general issue, and give this act, and the special matter in evidence.”¹⁷

The Act of April 1784 only applied to debtors actually imprisoned at the time of the Act’s passage. The Act of November 1784, extended relief to those persons actually imprisoned on account of debt as of November 24, 1784, and to nine individuals who were not actually in confinement but were identified by name; *provided, however*, that no discharge would issue for these nine individuals unless two thirds of their respective creditors consented.¹⁸

The Act of April 1784 did not distinguish between debts owed to general creditors and lenders and debts owed to the State. There was no exclusion for debts owed to the State of New York (or any sister State), for taxes, fines or penalties. On the other hand, the Act of November 1784 provided that “no person who has been employed in any public department as quartermaster commissary or purchaser either under the United States or under this State, shall be discharged . . . unless he proves . . . that his public accounts are settled.”¹⁹ If the term “debt”, as used in the Acts of April and November 1784 does not include debts due to the State, the proviso in the Act of November 1784 would be mere surplus. Rules of statutory construction prohibit such a result and require a determination that the New York Assembly believed that “debt” included “debt due to the State” unless otherwise indicated.

required to publish notice allowing creditors a six-month opportunity to file claims for a portion of the distribution.

17. Act of April 1784.

18. *Id.* The Act of November 1784 also provided for interim distributions, and contained detailed provisions governing the qualifications, duties and satisfaction of fees and expenses of the estate’s assignee. *Id.*

19. *Id.* This provision may be construed as a predicate for discharge; however, it must also be conceded that it at least implies that obligations to the State are debts.

The advantages of the discharge soon led the New York Assembly to extend it to all debtors and not just those wasting in debtor's prison. Finding that "insolvent debtors, who in order to obtain a general discharge, are willing to deliver up all their effects to their creditors, are often prevented from doing it by a few of them, *to the great prejudice of the rest, and to the injury of trade.*" New York passed the Act of April 1786. The Act of April 1786 extended the benefit of the discharge to any insolvent debtor who obtained the consent of three quarters of his creditors.²⁰

Unlike the Act of November 1784, the Act of April 1786 did not make any reference to "public accounts." Instead it provided generally for all creditors to prove their debts, whether due or to become due, and allowed the discharge of all such debts without discriminating as to their character.

The Act of April 1787, extended discharge relief to smaller debtors. It provided that any person imprisoned for debt "not exceeding in the whole the sum of fifteen pounds exclusive of costs" shall be discharged from prison by the sheriff, gaoler, or keeper of the gaol "upon notice of this act." The Act of April 1787 did not provide for discharge of the underlying debt, but it was self-enabling and did not require any court process to release a debtor from prison.²¹ The Act did not exempt debts due to the State.

In 1788, the New York Assembly repealed the April 1784 Act because it "has been productive of much mischief, and there is great reason to suppose that wicked men have been guilty of the most fraudulent practices to obtain those benefits which the legislature intended only for the innocent and unfortunate."²² Nevertheless, a year later, the Assembly was back in the insolvency business.

The Act of 1789 provided for the discharge of debtors from prison, though it did not discharge the obligation for the underlying debts. It also granted creditors the option of holding up a debtor's discharge by paying the debtor a sum of up to four shillings a week as determined

20. As with the prior Acts, the Act of April 1786 required the debtor to file an account and take an oath as to its truth, and to deliver his or her assets to an assignee for liquidation and distribution to creditors.

21. Under the prior Acts, a debtor might need to obtain a lawyer, seek the issuance of writs from one court or another, publish notice, attend one or more hearings, and defend against charges that he had secreted assets. This process was obviously too cumbersome, costly, or time-consuming to be effective in the case of a debtor imprisoned on account of a relatively small sum.

22. Act of April 1788.

by the Court.²³ It did not, however, distinguish between debts owed to private and public creditors.

B. *Bankruptcy in Massachusetts*

By act dated June 4, 1775, Massachusetts made applicable to debtors the bankruptcy law of England as enacted in the year 1749.²⁴ Thereafter, Massachusetts responded to the State's various financial crises with a series of acts suspending the collection of private debts.²⁵

In 1787, Massachusetts enacted a general insolvency statute.²⁶ The Act provided for the discharge from prison of insolvent debtors.²⁷ Under the Act, a debtor could be discharged from prison by making an oath that his estate was insufficient to support himself in prison, and that he had not conveyed away any property contrary to the interests of his creditors. The discharge only released the debtor from prison. It did not release the debtor from his obligations to pay the underlying debt.²⁸

C. *Bankruptcy in Pennsylvania*

Pennsylvania has left what is perhaps the most extensive record of legislative enactments regarding insolvency during the years immediately following the Colonies' independence.

Like New York, the benefits of the insolvency laws of Pennsylvania were conferred by an assortment of public and private acts. The private acts typically authorized the application of a more general insolvency act to identified individuals who, for one reason or another, had

23. Such sums could be used by the debtor to pay room and board while in prison. If such amounts were not paid by the creditor every week, the debtor could seek release from jail under expedited process. The Act of 1789 discriminated between large and small debtors and authorized creditors to commence involuntary bankruptcy proceedings.

24. See "An Act for reviving and continuing sundry Laws that are expired and near expiring," Mass. Laws, Chap. V (June 4, 1775) (incorporating the act of 22 George II entitled "An Act for the Ease of Prisoners for Debt"). Similar statutes incorporating British laws were enacted after July 4, 1776 in Vermont, Connecticut, and other states.

25. See, e.g., "An Act for Suspending the Laws for the Collection of Private Debts, under Certain Limitations," Mass. Laws, Chap. XVI (Nov. 15, 1786) (suspending collection of private debts in specie for a period of eight months, but permitting the satisfaction of debt out of real or personal property).

26. "An act for the Relief of Poor Prisoners who are Committed by Execution for Debt," Mass. Laws, Chap III (Nov. 19, 1787).

27. Id. The debtor was required to give notice to creditors including out-of-State creditors (by filing a notice with the Clerk of the Court or Justice).

28. New Hampshire provided similar relief for its debtors. See "An Act in Addition to an Act Intituled "An act for the Care and Relief of Prisoners for Debt." N.H. (Jan. 3, 1784).

been unable to obtain a discharge under existing laws.²⁹ By December 1784, the private petitions on which these acts were founded had become sufficiently numerous that the legislature saw fit to pass a more generally applicable statute.³⁰

The Act of December 1784 expressly provided for the discharge of debtors who were unable to pay debts due to the State government. The Act expressly provides that the Courts of Common Pleas “shall and may grant relief unto all persons confined as aforesaid, for debt (other than for fines and forfeitures, for crimes and misdemeanors) due to the Commonwealth.”³¹ A virtually identical statute passed the legislature the following year, containing the identical provision for discharge of debts due to the Commonwealth.³²

In September 1785, the legislature of the Commonwealth enacted one of the first “modern” insolvency laws.³³ The Bankruptcy Act of September 1785, provided for the commencement of a case upon the filing of a petition by creditors and proof of an act of bankruptcy by the debtor. A panel of commissioners was given responsibility for

29. See, e.g., *An ACT for the Relief of John Amiel, an Insolvent Debtor, Confined in the Old Goal of the City and County of Philadelphia*,” Penn. Laws Chap. XIII (Apr. 13, 1782) (directing the release and discharge of debtor in conformity with the “several Acts of Assembly now in Force in this Commonwealth, for the Relief of insolvent Debtors, not owing more than One Hundred and Fifty Pounds to one Person”); *An Act for the Relief of John Senseigh, an Insolvent Debtor, Confined in the Goal of Lancaster County*,” Penn. Laws Chap. XLI (Nov. 18, 1782) (same); *An ACT for the Relief of Joseph Judson, James Robinson and James Lees, Insolvent Debtors, Confined in the Old Goal of the City and County of Philadelphia*,” Penn. Laws Chap. LX (Mar. 17, 1783) (same); *An ACT for the Relief of John Klein, an Insolvent Debtor, Confined in the Goal Lancaster County*,” Penn. Laws Chap. XCV (Sept. 24, 1783) (same); *An ACT for the Relief of Joseph Judson, Shem Thompson and Lawrence Powell, Insolvent Debtors, Confined in the Old Goal of the City and County of Philadelphia*,” Penn. Laws Chap. XCII (Sept. 24, 1783) (same); *An ACT for the Relief of Andrew Trumbower, an Insolvent Debtor, Confined in the Goal of Newtown, in the County of Bucks*,” Penn. Laws Chap. C (Sept. 25, 1783) (same); *An ACT for the Relief of John Long, John McFadden, Daniel Drais, Mary Currie, and Elizabeth Carnaghan, Insolvent Debtors, Confined in the Old Goal of the City and County of Philadelphia*,” Penn. Laws Chap. CXLII (Apr. 1, 1784) (same); *An ACT for the Relief of Henry Eberle, an Insolvent Debtor, Confined in the Goal of Lancaster County*,” Penn. Laws Chap. LX (Apr. 1, 1784) (same).

30. “*An Act for the Relief of Insolvent Debtors, Now Confined in the Several Gaols of this Commonwealth*,” Penn. Laws, Chap. CLXVII (Dec. 20, 1784).

31. *Id.*

32. “*An Act for the Relief of Insolvent Debtors, Now Confined in the Several Gaols of this Commonwealth*,” Penn. Laws, Chap. CXCIV (Mar. 30, 1785).

33. “*An act for the Regulation of Bankruptcy*,” Penn. Laws, Chap. CCXXX (Sept. 16, 1785), amended by “*An Act, Containing a Supplement to the Acts Made for the Relief of Insolvent Debtors and also Granting Relief to Felons Unable to Make Restitution of Stolen Goods*,” Penn. Laws, Chap. LXV (Feb. 28, 1787) (extending the discharge provisions of prior laws to debts incurred for restitution), “*An Act to Amend an Act Entitled, ‘An Act for the Regulation of Bankruptcy’*,” Penn. Laws, Chap LXXIX (Mar. 15, 1787) (repealing residency requirements), and “*A Supplement to the Several Acts of Assembly for the Relief of Insolvent Debtors*,” Penn. Laws, Chap XXX (Mar. 20, 1789).

considering the creditors' petition, collecting and liquidating the debtor's estate, and granting discharge certificates to all bankrupts "who shall surrender and conform as by this Act is directed."³⁴ The effect of the certificate was that "such bankrupt shall be discharged from *all* debts owing at the time he did become bankrupt."³⁵

While generally applicable only to debtors engaged in trade or commerce, the September 1785 Act also discharged from prison "all persons who are or shall be held in execution for debt or demand (other than for fine or forfeiture due to the Commonwealth)."³⁶ Such relief was limited to those persons who could not be proceeded against as a bankrupt under the terms of the act. Such debtors were instead granted relief in accordance with the act of February 14, 1730.³⁷

The Act of 1785, granted to the honest commercial debtor a discharge from prison as well as a discharge from all debts. This discharge was not limited to private debts owed to individual creditors. By the terms of the Act, the discharge extended to debts owed to the Commonwealth. With respect to debtors not engaged in trade or commerce, the discharge was limited to a personal discharge from confinement, but extended to all confinement for debt, including those debts due to the Commonwealth, other than those for fines or forfeitures.

Pennsylvania continued to enact private bankruptcy bills on behalf of individual creditors making petition therefore.³⁸ Of these private acts, arguably the most interesting for purposes of this case are three private acts enacted between March and September 1789.³⁹ Each of these Acts expressly allowed the discharge of a debt owing by a private citizen to the Commonwealth. The debtors named in these three

34. *Id.* § XXIV.

35. *Id.* (emphasis supplied).

36. *Id.* § XXXIX.

37. *Id.*

38. See *An act for the Relief of Isaac Wynn, Philip Buckius, John Harmar, Adam Alberger, Edward Dickinson, George Knox, Charles Brown, Elias Rosa, Harman Courter, Dennison Hume, Thomas Harrison, William Ritchie and Cato Hill; Insolvent Debtors, Confined in the Gaol of the City and County of Philadelphia*, Penn. Laws, Chap LXII (Dec. 28, 1786); *An Act for the relief of James Parker, an Insolvent Debtor, Confined in the Gaol of the City and County of Philadelphia*, Penn. Laws, Chap. CLIV (Mar. 29, 1788); *An Act for the Relief of Henry Cleland Baker, Joseph Richard Robeson, Benjamin Burton and Robert Hunter, Insolvent Debtors, Confined in the Gaol of the City and County of Philadelphia*, Penn. Laws, Chap IV (Nov. 22, 1788).

39. See *An Act for the relief of Robert Beatty and Benjamin Moore, insolvent Collectors, Confined in the Gaols of Cumberland and Dauphin Counties*, Penn. Laws, Chap. XVIII (Mar. 18, 1789); *An Act for the Relief of Paul Hausman, an Insolvent Debtor, Confined in the Gaol of the County of Lancaster*, Penn. Laws, Chap. CXIII (Sept. 13, 1789) (same relief for tax collector of Mannor township); *An Act for the Relief of James Pettigrew, an Insolvent Debtor in the County of Northampton, Confined in the Gaol of Said County*, Penn. Laws, Chap. L (Sept. 11, 1789).

Acts had each been imprisoned for "nonpayment of monies by them received in the collection of public taxes, which from a variety of misfortunes they have been rendered unable to pay."⁴⁰ Each of these debtors was nevertheless accorded "relief with equal and like effect, and upon like terms and conditions, as to imprisonment of their persons, as is by the laws of the State afforded to insolvent debtors, in cases of debt by them owing to private parties."⁴¹

D. *Bankruptcy in Maryland*

The Maryland General Assembly, like the legislature of Pennsylvania, was besieged by petitioners seeking the passage of private acts authorizing their discharge. Maryland's private enactments of the 1780's generally provided for the confined debtor to be discharged from all debts upon their surrender, for the satisfaction of creditors, all of their real and personal property and the taking of an oath proclaiming that the debtor had not conveyed any property in derogation of the creditors' rights. Such discharges extended to release the person of the debtor from confinement and to discharge all and every debt and debts, due and owing from him, provided that such discharge did not extend to any real or personal property (i) owned by the debtor at the time of discharge, or (ii) thereafter inherited by the debtor.⁴²

Eventually, Maryland, like Pennsylvania and New York, passed a generally applicable insolvency law. In 1787, Maryland's General Assembly enacted "*An Act respecting insolvent debtors.*"⁴³ The 1787 Act provided for the discharge from "all debts due or contracted before the date of such deed."⁴⁴ As in Pennsylvania, the Maryland discharge did not extend to property subsequently received by the debtor through inheritance or devise.

The Act of May 1787 expressly provided for the submission of claims by the State.⁴⁵ Section 17 of the Act directed that notice be given to "the attorney-general, and to the treasurer of the western

40. *Id.*

41. *Id.*

42. See "*An Act for the Relief of Martin Bulger, a Languishing Prisoner in Baltimore County Gaol,*" Md. Laws, Chap XXV (Nov. 1781); "*An Act for the Relief of John Gray (hatter), a Languishing Prisoner in Baltimore County Gaol,*" Md. Laws, Chap X (Nov. 1782); "*An Act for the Relief of Edward Hardadine, a Languishing Prisoner in Queen-Anne's County Gaol,*" Md. Laws, Chap XV (Nov. 1782); "*An Act for the Relief of Duncan Campbell and James Burney, Languishing Prisoners in Talbot County Gaol,*" Md. Laws, Chap XXVII (1784).

43. Md. Laws, Chap. XXXIV (May 25, 1787).

44. *Id.* § III.

45. *Id.* § XVII.

shore” and that the right of the State, if any to a preference of payment would be preserved. However, no section of the Act exempted such debts from the discharge granted by Section III.

The Act of May 1787 was not long lived. In 1788, it was repealed by “*An act to repeal an act, entitled, An act respecting insolvent debtors, and to revive another act, entitled, An act for the relief of insolvent debtors.*”⁴⁶ By its terms, the Act of 1788 repealed the Act of 1787 and revived an act passed March 23, 1774, which act was to continue in force until the end of the next session of the assembly.⁴⁷

E. Bankruptcy in Other States

The experience in other States was at least as varied as the experience of New York, Pennsylvania, Maryland, and Massachusetts. Virginia does not appear to have enacted Bankruptcy legislation prior to 1789.⁴⁸ South Carolina enacted a variety of measures for the relief of insolvent debtors.⁴⁹ Vermont adopted the laws of England in force as of October 1, 1760, so long as they were “not repugnant to the Constitution or to any Act of the Legislature of this State.”⁵⁰ New Hampshire allowed debtors to be discharged from prison.⁵¹ Connecticut enacted private insolvency acts for the benefit of named individuals.⁵²

46. Md. Laws, Chap X (May 27, 1788).

47. *Id.* § III.

48. See 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, App. 259-60 (Philadelphia 1803) (Rothman Reprints, 1969), quoted at http://press-pubs.uchicago.edu/founders/documents/a1_8_4_bankruptcys3.html (“The English statutes of Bankruptcy have never been regarded as in force [in Virginia]; and the manner in which the commerce of the colony was conducted before the revolution, by no means seemed to favour their adoption. . . . But, how necessary soever, bankrupt laws may be in great commercial countries, the introduction of them into such as are supported chiefly by agriculture, seems to be an experiment which should be made with great caution.”); but see *Fleming v. Diggs*, Virginia Colonial Decisions, 878 (Apr. 1732) (referring to an insolvency act passed by the Assembly in 1726).

49. See, e.g. “*An Act To Revive and Continue, for the Time Herein Mentioned, the Several Acts and Clauses of Acts, of the General Assembly of this Colony, Therein Particularly Mentioned, and to Appropriate Certain Penalties; and to Confirm the Powers of Commissioners of Roads, Paths, Bridges, Creeks, Causeys and Water Passages,*” (Laws of South Carolina) (April 11, 1776) (adopting the bankruptcy law in force in Great Britain); “*An Act to Alter and Amend an Act for the More Effectual Relief of Insolvent Debtors,*” Laws of South Carolina (Mar. 11, 1786).

50. See “*An Act Adopting the Common and Statute Law of England,*” Laws of Vermont (June 21, 1782).

51. See *An ACT in addition to an act, intitled “An act for the care and relief of prisoners for debt,”* Laws of New Hampshire (June 3, 1784).

52. See *Mortimer v. Caldwell*, County of Middlesex, *July Term 1786* (applying a private insolvency act).

III. WHO WERE THE FRAMERS?

The Constitutional Convention was attended by 55 delegates, almost all of whom were well-educated, men of means.⁵³ Practically all of them had experience in colonial and state government.⁵⁴ Eight of them had been governors and the majority had held county and local offices.⁵⁵ Thirty-five of them were lawyers or had legal training.⁵⁶ Thirteen were businessmen, merchants or shippers.⁵⁷ Six of them were land speculators and eleven of them speculated in securities on a large scale.⁵⁸ Sixteen of them had lived or worked in more than one state or colony.⁵⁹

The following is intended to highlight only the most pertinent legal, commercial, or political experience of the 55 delegates in the years leading up to the Constitutional Convention.⁶⁰ Only a very few delegates lacked such experience.⁶¹

A. *The New York Delegation*

New York was represented at the Constitutional Convention by Alexander Hamilton, John Lansing, Jr., and Robert Yates. Hamilton had studied law and maintained a law office in New York City, and, in 1787, served in the New York Assembly. Lansing maintained a lucrative law practice and was considered quite wealthy. He served six

53. The Founding Fathers: A Brief Overview, U.S. National Archives & Records Administration, http://www.archives.gov/national_archives_experience/constitution_founding-fathers_overview.html (Dec. 31, 2003) [hereinafter "Archives"]. In addition to general background, the cited URL contains links to more detailed biographical information concerning each of the 55 delegates to the Convention.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Archives, *supra* note 53.

60. The information contained in the following sections is all gleaned from the Archives, *supra* note 53, and from pages linked therefrom. Of the 55 delegates, Ellsworth, W. Houston, Pierce, Martin, Gerry, Strong W. C. Houston, Lansing, Yates, Davie, Martin, Mason, McClurg Randolph and Wythe did not sign the Constitution. However, whether a particular delegate signed the Constitution is not particularly relevant to the analysis advanced herein. Arguably, the delegates who opposed the Constitution had more reason to object to the breadth of the Bankruptcy Clause than those who voted in favor of it.

61. William Houston of Georgia, came from a prominent family, had served as member of the Royal Government of the Colony and had received some legal training in England. Virginia's George Washington was a planter and active in politics, though he did not serve in the state legislature and does not appear to have had formal legal training. Virginia's James McClurg was a medical doctor. Though it is probable these men had some awareness of existing bankruptcy laws, nothing in their occupations appears to give rise to a presumption that they should have been familiar with them.

terms in the New York Assembly from 1780-84, 1786, and 1788. He served the last two terms as Speaker of the Assembly. Yates was a distinguished jurist. Admitted to the New York bar in 1760, Yates was appointed to the Supreme Court of New York in 1777 "and presided as its chief justice from 1790 through 1798."

B. *The Pennsylvania Delegation*

Pennsylvania was represented at the Constitutional Convention by Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, and Gouverneur Morris. Clymer served in the Pennsylvania legislature from 1780-82 and from 1784-88. Fitzsimons served in that body from 1786-89. In 1785, Franklin became president of the Supreme Executive Council of Pennsylvania.

Ingersoll maintained a distinguished legal practice and held a variety of public positions. He was a member of the Philadelphia common council in 1789, and attorney general of Pennsylvania from 1790-99 and 1811-17.

Mifflin served in the legislature from 1779-79, 1785-88 and 1799-1800. In 1788 he succeeded Franklin as president of the Supreme Executive Council.

Gouverneur Morris obtained his law degree in 1771 and was active in politics in New York, Pennsylvania, Congress, the Constitutional Convention, and the federal government for most of his adult life.

Robert Morris sat in the legislature from 1776-81, 1785-86, and also served in the Continental Congress. Among other things, Morris founded the Bank of North America, served as Superintendent of Finance under the Articles of Confederation and declined an appointment to be the first Secretary of the Treasury under the Constitution.⁶²

Wilson, also a lawyer, was another wealthy land speculator. In 1781, he became a director of the Bank of North America.

C. *The Connecticut Delegation*

The Connecticut delegation included Oliver Ellsworth, a state attorney general and served for six terms as representative to the Continental Congress. He was also one of the five men who supervised Connecticut's wartime expenditures.

62. Morris speculated heavily in real estate, currency, and public debt issues which were ultimately his downfall. Morris spent the years 1798-1801 in debtors' prison in Philadelphia, finally obtaining his release under the provisions of the federal Bankruptcy Act of 1800.

By 1749, William Samuel Johnson, another member of the Connecticut delegation, had already become a wealthy lawyer with an established commercial practice. Johnson served in the Connecticut Assembly from 1761 to 1771.

Roger Sherman was admitted to the bar in 1754 and thereafter had a distinguished political and judicial career, serving as an associate judge of the Connecticut Supreme Court and both houses of the Connecticut legislature. He was a successful merchant and a treasurer of Yale College.

D. *The Delaware Delegation*

Delaware's delegation to the Convention consisted of Richard Bassett, George Read, Gunning Bedford, Jr. John Dickinson, and Jacob Broom.

Richard Bassett was a successful lawyer and planter with homes in Delaware and Maryland. Prior to 1789, he served in both houses of the Delaware legislature. Gunning Bedford, Jr. served as Delaware's attorney general from 1784 to 1789, as well as distinguishing himself in the state legislature, council and the Continental Congress. Jacob Broom, a merchant engaged in shipping, imports, and real estate served in the state legislature from 1784-86 and in 1786. John Dickinson was a prominent lawyer. Among other accomplishments, he served as president of Delaware's Supreme Executive Council in 1781 and as president of Pennsylvania from 1782-85. George Read was a prominent attorney who, among other achievements, served as speaker of the legislative counsel during the years of the revolutionary war and from 1782-88, and sat as a judge of the court of appeals in admiralty cases.

E. *The Georgia Delegation*

The Georgia delegation to the Constitutional Convention was made up by William Few, Abraham Baldwin, William Houston and William L. Pierce.

Abraham Baldwin was a practicing lawyer who sat in the assembly in 1785 and in the Continental Congress. William Few, also a lawyer, had served in Georgia's provincial congress, assembly, and in the Continental Congress. William Leigh Pierce was a merchant engaged in the import-export trade. In 1787, Pierce went bankrupt.

F. *The Maryland Delegation*

Maryland's delegation to the Convention included Daniel Carroll, Daniel of St. Thomas Jenifer, John F. Mercer, James McHenry and Luther Martin.

Daniel Carroll served in the Maryland senate in the 1780's. Daniel of St. Thomas Jenifer served as president of the State senate from 1777-80 and held the position of State revenue and financial manager from 1782-85. Luther Martin was admitted to practice law in 1771 and was appointed State attorney general in 1778. John Francis Mercer served in the Virginia House of Delegates in 1782 and from 1785-86. James McHenry served in the Maryland Senate from 1781-86.

G. *The Massachusetts Delegation*

Massachusetts' delegation to the Convention consisted of Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong.

Elbridge Gerry was a successful merchant engaged in the family export business. His responsibilities in the Continental Congress included financial matters and until 1779 he sat on and sometimes presided over the board regulating Continental finances. In 1786, he took a seat in the state legislature.

Nathaniel Gorham served as a representative in the state legislature from 1780-87 and as speaker of the lower house in 1781, 1782, and 1785. He also served as a judge of the court of common pleas from 1785-96, and sat on the Governor's council from 1788-89. Rufus King practiced law and was a member of the Massachusetts legislature from 1783-85. Caleb Strong, also a lawyer, served as a judge of the Massachusetts General court and as a county attorney from 1776 to 1800. In 1783, he declined an appointment to the State's Supreme Court.

H. *The New Hampshire Delegation*

The New Hampshire delegation to the Constitutional Convention consisted of Nicholas Gilman and John Langdon.

Nicholas Gilman worked in his father's general store. John Langdon was engaged in the mercantile business. In 1775, Langdon became speaker of the New Hampshire assembly, where he served as speaker from 1777-81. In 1784, and again in 1788, he was elected to the state senate and in 1785 as the State's chief executive.

I. *The New Jersey Delegation*

The New Jersey delegation to the Convention was made up by David Brearly, William Livingston, William Paterson, Jonathan Dayton, and William C. Houston.

David Brearly, another lawyer, served as chief justice of the New Jersey Supreme Court from 1779-89. Jonathan Dayton was a lawyer and land speculator who sat in the state assembly in 1786-87. William C. Houston was admitted to the bar and served as clerk of the New Jersey Supreme Court commencing in 1781. William Livingston was a lawyer. William Patterson, also a lawyer, was state attorney general from 1776-83. From 1783-87 he engaged in private practice.

J. *The North Carolina Delegation*

North Carolina was represented at the Convention by William Blount, William Richardson Davie, Richard Dobbs Spaight, Hugh Williamson, and Alexander Martin.

William Blount served in the North Carolina legislature from 1780-84 and 1788-90, where he also served as speaker. William Richardson Davie, a lawyer, sat in the North Carolina legislature from 1786-98. Alexander Martin started his career as merchant and later served as justice of the peace, deputy king's attorney and judge. He served in the legislature from 1778-82, 1785, and 1787-88 where he was speaker every year except 1778-79. He served as governor of the State from 1781 through 1785.

Richard Dobbs Spaight, Sr. served in the legislature from 1781-83 and 1785-87. He became speaker in 1785. Hugh Williamson was variously a licensed minister, professor of mathematics, astronomer, and medical doctor. He was elected to the State legislature in 1782.

K. *The South Carolina Delegation*

South Carolina's delegation to the Convention consisted of John Rutledge, Charles Pinckney, Charles Cotesworth Pinckney, and Pierce Butler.

Pierce Butler served in the legislature through most of the 1780's. Charles Pinckney, a lawyer, served in the state legislature from 1779-80, 1786-89 and 1792-96. Charles Cotesworth Pinckney was a lawyer and sat in the state legislature from 1778-82.

John Rutledge was a wealthy lawyer and plantation owner. He was president of the lower house of the State legislature from 1776-78, 1782, and 1784-90. He was elected governor in 1779. He also served as judge of the State Chancery Court (1784).

L. *The Virginia Delegation*

Virginia's delegation to the Convention consisted of John Blair, John Madison, Jr., George Washington, George Mason, James McClurg, Edmund J. Randolph, and George Wythe.

John Blair, a lawyer, served as judge and chief judge of the General Court commencing in 1778 and in 1780 was elected to Virginia's high chancery court. Among many other positions, John Madison sat in the State House of Delegates from 1776-77 and 1784-86. George Mason was one of the richest planters in Virginia as well as a county court justice. Mason was among the opponents of the new Constitution whose concerns about the reach of federal judicial power led to the enactment of the eleventh amendment. Edmund Randolph, a lawyer, became governor of Virginia in 1786. George Wythe, a lawyer, served as speaker of the Virginia House of Delegates in 1777 and for 28 years, commencing in 1777, as chancellor of the high court of chancery.

IV. WHAT DID THEY KNOW, AND WHEN DID THEY KNOW IT?

In light of their legal practice and extensive experience in commercial, legislative, or judicial affairs there can be little doubt that the 55 delegates to the Constitutional Convention were intimately familiar with the Nation's economic difficulties and its varied responses thereto. Most, if not all of them, would have been familiar with the bankruptcy laws of England, as well as the various private and public acts for the relief of debtors that had been enacted in their own or other States. In particular, the delegates from the more industrial states, such as New York, Pennsylvania, and Massachusetts, would have been aware of the rapid development of the law in the preceding five years.

It could not have been lost on the delegates that the assignment to Congress of the power to enact uniform laws on bankruptcy was particularly broad. As demonstrated above, various states had experimented with various forms of bankruptcy relief. These experiments included voluntary and involuntary proceedings, discharge of debts and discharge of individuals from debtors' prisons, limiting relief to particular classes of debtors such as merchants, limiting relief to the beneficiaries of private acts, distinguishing between unsecured and secured debts, and authorizing the discharge of debts owed to the States.

While there was little or no debate, there was also no effort made to limit the types of bankruptcy relief that Congress could authorize under the Bankruptcy Power. As lawyers, legislators, or financial

leaders, the delegates to the Convention had to be aware that the bankruptcy power Congress granted to Congress could extend at least as far as any bankruptcy power previously exercised by the States. Congress could authorize a discharge of all debtors, or only those debtors who were imprisoned for debt, only those debtors engaged in trade, or only those debtors with debts in excess of certain amounts. It could provide for the discharge of all “honest” debtors, it could leave discharge open to approval by a certain number of creditors, or not provide for discharge at all. It could provide for discharge from prison or discharge of debts, or both, and it could provide for the discharge of State debts.

More importantly, the majority of delegates, must have been aware that a federal discharge would necessarily involve an invasion of State Sovereignty on at least two levels. At a minimum the delegates must have understood that a federal power to grant a discharge interfered with the State’s police powers. Even if the federal power was not exercised to prohibit future collection efforts, it could be used to authorize the issuance of orders directing the release of debtors from State prisons.

The delegates to the Convention must have also been aware that a federal bankruptcy power, if not expressly limited, could permit Congress to enact legislation such as had been previously enacted in the States, including the discharge of obligations owed to the States and the discharge of debtors from State prisons. As well-educated, jurists, businessmen, and members of their state legislatures, the delegates would have been aware that the Bankruptcy Power could extend to the discharge of debts owed to the States. Yet no effort was made to limit the Bankruptcy Power to prevent such an outcome.

Bankruptcy relief in the States was generally left to the discretion of the courts. Accordingly, the delegates would have assumed that the federal Bankruptcy Power would also be exercised largely by State or Federal Courts. Further, because it would be necessary to enforce those powers, it could not have been lost on the delegates that the States might be hauled into federal courts, either to defend a refusal to release a debtor from debtor’s prison, or to prove and collect their claims against a debtor’s estate. The failure of any of the delegates to insist upon protection from discharge of State claims is indicative of their acquiescence to a waiver of sovereignty that must, of necessity, be implicit in the bankruptcy power.

V. CONCLUSION

At the time of the Convention, several of the States had recently enacted comprehensive bankruptcy legislation, and several others had experience with private acts for the relief of insolvents or with the application of existing British insolvency laws. At least two States had recently passed legislation providing expressly for the application of the bankruptcy laws to debts owed to the States. In granting Congress the power to enact "uniform laws on the subject of bankruptcies," the delegates are presumed to be aware of existing law, and thus presumed to have understood that laws enacted under a federal bankruptcy power could extend at least as far as any bankruptcy law previously passed by the States. It can be assumed that the members of the Convention were familiar with insolvency practice in their own States, the meaning of the discharge, and the extent to which such laws had operated.⁶³

It was in this context that the Framers met in 1789 to draft the new constitution. It was at least foreseeable that Congress could under the new Bankruptcy Power authorize the federal discharge of a State prisoner or the discharge of a debt due a State. Such a law would entail an exercise of federal sovereignty that was wholly inconsistent with the concept of state sovereignty over its prisons, its police powers, and its ability to collect its debts. Yet, no effort to prevent these results appears to have been made either at the Convention or in connection with ratification.

Having failed to place a limitation on this power, the States cannot claim that they had intended to preserve a sovereign immunity that was plainly antithetical to the power they must have known was being granted by the bankruptcy clause.

For these reasons, it appears that the Plan of the Convention implicitly waived States' sovereign immunity from suit insofar as it relates to the Bankruptcy Power. Any contrary conclusion rejects not only the history of bankruptcy legislation leading up to the ratification of the Constitution, but the enforcement mechanism of the very power that the Convention ceded to Congress.

63. There is no evidence that appears to rebut the presumption that the delegates, or the overwhelming majority of them were aware of the laws in force at the time the Convention drafted the Constitution.