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Racialized Bankruptcy Federalism

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ABSTRACT

Notwithstanding the robust national power conferred by the U.S. Constitution's Bankruptcy Clause, the design and administration of federal bankruptcy law entails choices about the extent to which nonbankruptcy-law entitlements will remain undisplaced. When such entitlements sound in domestic nonfederal law (i.e., state or local law), displacing them triggers federalism concerns. Considerations regarding the relationship between the federal government and the nation's smaller political subdivisions might warrant preserving nonfederal-law entitlements even though their displacement would be authorized pursuant to the bankruptcy power. But such considerations might also suggest replacing those entitlements with bankruptcy-specific ones. Some scholarship has theorized about the principles that should govern the balancing of bankruptcy federalism concerns, though without considering the implications of race. Other scholarship has critically examined how federal bankruptcy law, which is facially neutral, has nevertheless been designed and administered in ways that are racially biased, though without considering the implications of federalism.

This Article offers a preliminary exploration of the origins of racialized bankruptcy federalism—that is, federalism policymaking in bankruptcy with racially harmful effects. Looking back to modern bankruptcy law's first forebear, the 1841 Bankruptcy Act, the Article analyzes how the U.S. District Court for the Eastern District of Louisiana promulgated a rule that replaced creditors' state-law

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entitlements to enslaved collateral with federal public control of the enslaved in cases under the Act. Not only did this rule routinely impose on enslaved Black Americans the trauma of forced sale by the federal government, it also frequently enriched federal officials without providing any pecuniary benefit to a bankrupt's general unsecured creditors. This Article concludes with a brief commentary on the Supreme Court's January 2021 decision in City of Chicago v. Fulton*, arguing that, especially when viewed from a historical perspective, race matters in determining how bankruptcy federalism ought to be operationalized.*

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INTRODUCTION

On November 29, 1842, the Bank of Louisiana received a show-cause order issued by Judge Theodore H. McCaleb of the U.S. District Court for the Eastern District of Louisiana.[1] The court had scheduled a hearing for the morning of December 8, 1842, to determine whether to authorize the sale of certain property that Brisbane Marshall from Bayou Sara in West Feliciana Parish had surrendered as a condition of seeking a discharge of debts under the Bankruptcy Act of 1841 (the

1. *See* Answer of Bank of La. to Rule of Assignee, *In re* Marshall, No. 376 (E.D. La. Dec. 8, 1842) [hereinafter Bank of Louisiana Answer] (located in U.S. Dist. Court for the E. Dist. of La., *Bankruptcy Act of 1841 Case Files, 1842–1843*, Records of District Courts of the United States, Record Group 21, National Archives at Kansas City, Missouri [hereinafter EDLA Case Files]).

"1841 Act" or "Act").[2] Marshall's asset schedule accompanying his bankruptcy petition included an entry for "one Negro Boy named Dick aged 57 years subject to mortgage favoring Bank [of] Louisiana," whom Marshall valued to be worth $800.[3] Nearly three months after the start of Marshall's bankruptcy case, Myer M. Cohen, a prominent New Orleans attorney and enslaver,[4] filed a petition in the Eastern District's federal district court on behalf of William H. White,[5] the assignee whom Judge McCaleb appointed to administer and liquidate Marshall's surrendered estate.[6] White sought the court's approval to conduct a public auction where Dick, as well as a warehouse and lot at the Bayou Sara landing, would be sold for cash, arguing "that it w[ould] be for the benefit of the said estate and of all parties having interest therein."[7]

2. *See id.*; Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

3. Schedule B, *In re* Marshall, No. 376 (E.D. La. Aug. 29, 1842) (located in EDLA Case Files, *supra* note 1).

4. *See* Elizabeth Gaspard, *The Rise of the Louisiana Bar: The Early Period, 1813–1839*, 28 LA. HIST. 183, 194 (1987); Bertram W. Korn, *Benjamin Levy: New Orleans Printer and Publisher*, 54 PAPERS BIBLIOGRAPHICAL SOC'Y AM. 221, 230 (1960); M.M. Cohen, New Orleans Ward 3, Orleans Parish, Louisiana Census of Population, *Sixth Census of the United States, 1840*, at 125 [stamped], l.5 (located in Records of the Bureau of the Census, Record Group 29, National Archives at Washington, D.C.) (indicating that Cohen's household included one enslaved male and two enslaved females), *microformed on* Microfilm Publ'n No. M704, Roll 133 (Nat'l Archives & Recs. Admin.) (accessed through ANCESTRYLIBRARY, https://www.ancestrylibrary.com (last visited Mar. 14, 2022)). Cohen also served as one of the Eastern District's bankruptcy commissioners, *see, e.g.*, Account of M.M. Cohen C.B., *In re* Zebriskie, No. 417 (E.D. La. n.d.) (located in EDLA Case Files, *supra* note 1), and he successfully defended the constitutionality of the 1841 Act before the U.S. Circuit Court for the Eastern District of Louisiana, *see* *Constitutionality of the Bankrupt Law*, DAILY PICAYUNE (New Orleans), Apr. 25, 1843, at 2.

5. Petition of Wm H. White Assignee of B. Marshall, *In re* Marshall, No. 376 (E.D. La. Nov. 24, 1842) [hereinafter White Petition] (located in EDLA Case Files, *supra* note 1).

6. *See* Bankruptcy Decree and Order Appointing Assignee, *In re* Marshall, No. 376 (E.D. La. Oct. 10, 1842) (located in U.S. Dist. Ct. for the E. Dist. of La., *Bankruptcy Act of 1841 Provisional and Discharge Decrees, 1842–1843*, at 28 [handwritten], Records of District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas) [hereinafter EDLA Decree Book]).

7. White Petition, *supra* note 5; *see also* Schedule B, *supra* note 3 (including entry for "One House & Lot Fronting upon Parish St. at the Bayou Sara Landing subject to a Mortgage favour of R Mumford," valued at $3,000). Although White's petition did not specify public auction as the method pursuant to which the requested sale would be conducted, published notices about the sale did so. *See, e.g.*, NEW-ORLEANS COM. BULL., Dec. 29, 1842, at 4.

Cohen's filing prompted the court to issue its order instructing the Bank of Louisiana to appear at the hearing on the proposed sale and to show cause that would preclude the court from authorizing White

> to erase and cancel all the mortgages, judgments and liens recorded in favor of certain creditors of said Estate, so that he may convey a clear and unencumbered title to any purchaser thereof, reserving to such creditors all their rights in law to the proceeds of the sale of the said property.[8]

Levi Pierce, the bank's attorney (and also Louisiana's Secretary of State), filed an answer to the court's order on the hearing date, reporting that the bank's president and directors "consent to the sale of the property & slave mortgaged to them but upon condition that it be for <u>cash</u>—otherwise they oppose [the assignee's petition] and except to the Jurisdiction of the Court."[9] Given that White had initially proposed a cash-only sale, the bank's answer did not present any obstacle to the court's approval of the sale petition. On January 4, 1843, the Eastern District's federal marshal sold Dick at Banks Arcade—one of New Orleans's main commercial exchanges for auctioning enslaved Black Americans—to Robinson Mumford, free of the bank's mortgage, for $150.[10]

The all-or-nothing ultimatum made by the Bank of Louisiana in its answer—that is, either adherence to the bank's demands or else a full-blown attack on the federal district court's power to authorize a sale affecting the bank's state-law entitlements to the mortgaged property—highlights one of the perennial issues that bankruptcy policymaking has confronted since the nineteenth century: how federal bankruptcy law should treat debtor property securing a creditor's claim. Lawrence Ponoroff and F. Stephen Knippenberg have observed that, "in its most fundamental sense, bankruptcy, whether in its liquidation or reorganization mode, represents nothing less than a wholesale and compulsory readjustment of contractual

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8. Bank of Louisiana Answer, *supra* note 1.

9. *Id.*; *see* NEW ORLEANS DIRECTORY FOR 1842, at 325 (New Orleans, Pitts & Clarke 1842).

10. *See* Account Sales, *In re* Marshall, No. 376 (E.D. La. Jan. 4, 1843) (located in 1 U.S. Dist. Ct. for the E. Dist. of La., *Bankruptcy Act of 1841 Sales Record Books, 1842–1853*, at 203 [handwritten], Records of District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas [hereinafter EDLA Sales Books]); NEW-ORLEANS COM. BULL., *supra* note 7; Rafael I. Pardo, *On Bankruptcy's Promethean Gap: Building Enslaving Capacity into the Antebellum Administrative State*, 48 FORDHAM URB. L.J. 801, 857–74 (2021). Mumford was likely the same individual who had a mortgage on Marshall's warehouse and lot in Bayou Sara. *See supra* note 7.

obligations and realignment of property interests."[11] While that observation points to the robust national power conferred by the U.S. Constitution's Bankruptcy Clause,[12] Congress and the courts must nonetheless make choices about the extent to which entitlements arising under domestic nonfederal law (i.e., state and local law) remain undisplaced in the design and administration of federal bankruptcy law.[13] The resulting balance determines whether bankruptcy more resembles an institution tending to preserve nonfederal-law entitlements or rather an institution tending to replace them with bankruptcy-specific ones.[14] Whether the former is preferable to the latter turns on the normative commitments that inform one's views about a properly functioning bankruptcy system.[15] While the devil is in the details, the general consensus has been that bankruptcy law cannot effectively implement a collectivized proceeding that operates for the benefit of all of a debtor's creditors if individual creditors can unilaterally opt out of the process.[16] Courts that administered the 1841

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11. Lawrence Ponoroff & F. Stephen Knippenberg, *The Immovable Object Versus the Irresistible Force: Rethinking the Relationship Between Secured Credit and Bankruptcy Policy*, 95 MICH. L. REV. 2234, 2271 (1997) (footnote omitted).

12. U.S. CONST. art. I, § 8, cl. 4.

13. *See, e.g.*, G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L.J. 227, 240 (2000); Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 CARDOZO L. REV. 1805, 1807, 1820 (2004); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1066 (2002); Ponoroff & Knippenberg, *supra* note 11, at 2265. For evidence that members of Congress who designed the 1841 Act system made conscious choices both to preserve and to displace nonfederal-law entitlements in bankruptcy, see, for example, CONG. GLOBE, 27th Cong., 1st Sess. 240 (1841) (statements of Sens. John Macpherson Berrien, Jabez W. Huntington, and Robert J. Walker).

14. *See* Cole, *supra* note 13, at 241 ("By deferring to nonbankruptcy substantive law, bankruptcy preserves both the vertical and horizontal separation of powers that currently characterizes such law, and promotes the jurisdictional competition that flows from the horizontal separation of sovereigns. Bankruptcy, then, can be viewed as federalist *to the extent that its rules are merely procedural* and directed at solving the problem of the common pool. Bankruptcy ceases to be federalist where it is comprised of rules that result in a departure from the substantive result that would inhere outside of the bankruptcy environment.").

15. *Cf.* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 2–3 (1986) ("In analyzing bankruptcy law, as with any other body of law, it helps to start by identifying first principles. Those principles can then be developed by defining their potential operation in the existing social, economic, and legal world to identify precisely what bankruptcy law should encompass, how it can accomplish its goals, and the constraints on its ability to do so.").

16. *See id.* at 16–17 ("The single most fruitful way to think about bankruptcy is to see it as ameliorating a common pool problem created by a system of individual creditor remedies. Bankruptcy provides a way to override the creditors' pursuit of

Act understood this,[17] and so too have courts administering our present-day Bankruptcy Code.[18]

The potential dispute that loomed over the proposed sale in *Marshall* was essentially about whether the federal government should control debtor property securing a creditor's claim once that property had made its way into the federal bankruptcy forum.[19] More than that, Dick's coerced involvement in *Marshall* due to his enslavement and his enslaver's financial failure illustrates one way in which the 1841 Act system, modern bankruptcy law's first forebear,[20] would give root to federalism policymaking in bankruptcy with racially harmful effects—a concept that I term "racialized bankruptcy federalism."

This Article tells the story of how federal administrators of the 1841 Act system in the Eastern District of Louisiana configured the system, in at least one crucial respect, as a racialized federal institution. Part I describes the baseline set of entitlements that antebellum Louisiana law bestowed on mortgage creditors and then explains how some of these creditors enjoyed protections that enabled them to maintain control of enslaved collateral. To put a face on the history of how the 1841 Act created an opportunity for the law's administrators to displace these rights and replace them with federal control of the enslaved,[21] Part II recounts two episodes involving

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their own remedies and to make them work together."); *id.* at 18 ("[T]o say that bankruptcy is designed to solve a common pool problem is not to tell us how to design the rules that do that well.").

17. *See, e.g.*, *Ex parte* Christy, 44 U.S. (3 How.) 292, 319–20 (1845) (Story, J.).

18. *See, e.g.*, Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 114 (1st Cir. 1994); Mar. Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1207 (3d Cir. 1991) (citing JACKSON, *supra* note 15, at 7–19). The Bankruptcy Code is codified at 11 U.S.C. §§ 101–1532.

19. *Cf.* Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 795 (2004) ("Nearly every country in the world has a legal regime devoted to the process of recovery and distribution of value following a general default by a debtor in business. In the United States, we have both a public and a private regime that may govern the recovery process. The public regime is bankruptcy and the private regime is secured credit.").

20. *See* Pardo, *supra* note 10, at 809–11.

21. Scholars who have analyzed the mortgaging of enslaved persons generally have not accounted for how this financial practice had the potential to intersect with federalism issues. *See, e.g.*, RICHARD HOLCOMBE KILBOURNE, JR., DEBT, INVESTMENT, SLAVES: CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA, 1825–1885 (1995); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 121–31 (1996); Edward E. Baptist, *Toxic Debt, Liar Loans, Collateralized and Securitized Human Beings, and the Panic of 1837*, *in* CAPITALISM TAKES

Francis B. Conrad, an Eastern District assignee appointed in the 1841 Act case of George Botts, a bankrupt enslaver. Part III examines how the Eastern District's racialized bankruptcy federalism was not foreordained, but was rather the product of a set of choices. Part IV then offers evidence suggesting that this federalism policymaking opened the door to racialized bankruptcy profiteering by federal officials. This Article concludes with a brief commentary on the Supreme Court's January 2021 decision in *City of Chicago v. Fulton*,[22] demonstrating that the historical episode identified in this Article has resonance in our present-day federal bankruptcy system.

I. THE SHADOW OF MORTGAGE RIGHTS OVER STATE JUDICIAL SALES IN ANTEBELLUM LOUISIANA

One of the titles of the Louisiana Civil Code of 1825 (the "Civil Code"), which was in effect when the 1841 Act system began its operations, consisted entirely of provisions devoted to the creation, recording, and enforcement of mortgages.[23] The Louisiana Code of Practice of 1825 (the "Practice Code"), which applied in civil cases, also included provisions relating to mortgage enforcement.[24] The remainder of this Part explains how these provisions worked in tandem

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COMMAND: THE SOCIAL TRANSFORMATION OF NINETEENTH-CENTURY AMERICA 69 (Michael Zakim & Gary J. Kornblith eds., 2011); Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J.S. HIST. 817 (2010); Bonnie Martin, *Silver Buckles and Slaves: Borrowing, Lending and the Commodification of Slaves in Virginia Communities*, *in* NEW DIRECTIONS IN SLAVERY STUDIES: COMMODIFICATION, COMMUNITY, AND COMPARISON 30 (Jeff Forret & Christine E. Sears eds., 2015); Bonnie Martin, *Neighbor-to-Neighbor Capitalism: Local Credit Networks and the Mortgaging of Slaves*, *in* SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT 107 (Sven Beckert & Seth Rockman eds., 2016); Sharon Ann Murphy, *The Financialization of Slavery by the First and Second Banks of the United States*, 87 J.S. HIST. 385 (2021). *But cf.* CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA (2021) (analyzing how contests between the British Parliament and local governments over the institutional authority to regulate debtor–creditor relationships in colonial America played a significant role in making slavery a cornerstone of the thirteen colonies' credit system).

22. 141 S. Ct. 585 (2021).

23. *See* LA CIV. CODE bk. III, tit. XXII (1825) (current version at LA CIV. CODE ANN. bk. III, tit. XXII (2021)); Act of Aug. 19, 1841, ch. 9, § 17, 5 Stat. 440, 449 (providing an effective date of February 1, 1842) (repealed 1843).

24. The Civil Code required mortgages to be judicially enforced. *See* LA. CIV. CODE art. 3361 (current version at LA. CODE CIV. PROC. ANN. art. 3721–3723 (2021)). The Code of Practice, in turn, set forth rules governing the execution of judgments. *See* LA. CODE PRAC. pt. I, tit. II, ch. 6 (1825) (repealed 1960).

to greatly influence whether certain mortgage creditors' enslaved collateral would be sold.

The Civil Code established the mortgage as a legal mechanism to protect a creditor from the risk of nonpayment of a debt by giving the creditor (1) an interest in certain property of the debtor to secure repayment of the debt and (2) the power to have that property seized and sold when the debtor failed to pay—that is, a power contingent on the debtor's default.[25] The Code differentiated between contractual mortgages (i.e., "conventional mortgages") and noncontractual mortgages, the latter type arising either by operation of law upon the occurrence of statutory conditions specified in the Code (i.e., "legal mortgages") or as a result of a judgment (i.e., "judicial mortgages").[26] Mortgages could attach only to four enumerated categories of property, one of which was enslaved persons.[27] While conventional mortgages extended only to property of the debtor existing at the time when the mortgage was granted,[28] legal and judicial mortgages reached the debtor's present and future property.[29] By virtue of this temporal distinction, conventional mortgages qualified as "special mortgages," whereas legal and judicial mortgages qualified as "general mortgages."[30] This categorization had substantive

25. *See* LA. CIV. CODE art. 3249, 3245 (current versions at LA. CIV. CODE ANN. art. 3278–3280).

26. *See id.* art. 3254 (enumerating the categories of conventional, legal, and judicial mortgages) (current version at LA. CIV. CODE ANN. art. 3284); *id.* art. 3257 (defining conventional mortgage) (current version at LA. CIV. CODE ANN. art. 3287); *id.* art. 3279 (defining legal mortgage) (current version at LA. CIV. CODE ANN. art. 3299, 3301); *id.* art. 3280 ("No legal mortgage shall exist, except in the cases determined by the present Code.") (current version at LA. CIV. CODE ANN. art. 3301); *id.* art. 3289 (defining judicial mortgage) (current version at LA. CIV. CODE ANN. art. 3299–3300).

27. *See id.* art 3256 (current version at LA. CIV. CODE ANN. art. 3286). The other categories were (1) "[i]mmovables [i.e., real property] subject to alienation, and their accessories considered likewise as immovables," (2) "[t]he usufruct of the same description of property [i.e., immovables subject to alienation] with its accessories, during the time of its duration," and (3) "[s]hips and other vessels." *Id.* Notably, the Civil Code also defined enslaved persons as immovables. *See id.* art. 461 ("Slaves, though moveables by their nature, are considered as immoveables, by the operation of law."), *invalidated by* U.S. CONST. amend. XIII, § 1.

28. *See* LA. CIV. CODE art. 3275–3276 (current version at LA. CIV. CODE ANN. art. 3292).

29. *See id.* art. 3288, 3296 (current version at LA. CIV. CODE ANN. art. 3303).

30. *See id.* art. 3255 ("Mortgage, with respect to the manner in which it binds property, is divided into general mortgage and special mortgage. General mortgage is that which binds all the property, present and future, of the debtor. Special mortgage is that which binds only certain specified property.") (current version at LA. CIV. CODE

implications for mortgage enforcement, as will be discussed further below.[31]

The Civil Code provided that all mortgages would be effective against third parties only upon compliance with the Code's recording formalities.[32] That effectiveness protected a mortgage creditor if the debtor disposed of the mortgaged property or if the property ended up subject to a subsequent mortgage. The Code gave the mortgage creditor the right to make a claim against third parties who acquired the mortgaged property, requiring them either to pay the debt secured by the property or to permit the property's sale so that the mortgage creditor could be paid from the sale proceeds.[33] If the third party failed to cooperate, the mortgage creditor could proceed against the third party pursuant to "the action of mortgage,"[34] with the goal of compelling the forced seizure and sale of the mortgaged property.[35] The Code also granted priority to the mortgage creditor's claim against the mortgaged property over subsequent rival claims by creditors against the same property, including mortgage claims.[36] The effectiveness of a mortgage against third parties, while initially lasting ten years, could be continued over successive ten-year periods if the mortgage creditor recomplied with the Code's recording requirements before the mortgage's current effective period expired.[37]

With these protections for mortgage creditors in mind, one can begin sketching the advantages that they enjoyed with respect to a defaulting debtor. First, consider a mortgage creditor who did not face

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ANN. art. 3283, 3285). In one instance, the Civil Code provided for a legal mortgage that qualified as a special, rather than general, mortgage. *See id.* art. 3285 ("When either of the parents of a minor shall cause to be adjudicated to him the property which he possessed in common with the minor, the property thus adjudged remains tacitly and specially mortgaged in the minor's favour, for the payment of the price of adjudication and interest, reckoning from the day on which it was adjudged.") (current version at LA. CODE CIV. PROC. ANN. art. 4361–4363 (2021)).

31. *See infra* notes 41–44 and accompanying text.

32. *See* LA. CIV. CODE art. 3314, 3317 (current version at LA. CIV. CODE ANN. art. 3338).

33. *See id.* art. 3360, 3362–3364 (current versions at LA. CIV. CODE ANN. art. 3307; LA. CODE CIV. PROC. ANN. art. 2701, 2703, 3741, 3743).

34. *Id.* art. 3361 (current version at LA. CODE CIV. PROC. ANN. art. 3741).

35. *See id.* art. 3363–3365, 3368 (current versions at LA. CODE CIV. PROC. ANN. art. 2701, 2703, 3741, 3743).

36. *See id.* art. 3360 (current version at LA. CIV. CODE ANN. art. 3307). For the Civil Code's temporal rules specifying when a mortgage claim was deemed to have effect against third parties, see *id.* art. 3319–3322 (current version at LA. CIV. CODE ANN. art. 3347–3350).

37. *See id.* art. 3333 (current version at LA. CIV. CODE ANN. art. 3357, 3364).

any rival claims against the mortgaged property. If the creditor anticipated that the proceeds from the property's sale would cover the defaulted payment obligation and sale costs, presumably the creditor would enforce its rights in the mortgaged property—whether in possession of the debtor or a third party—through judicial process, as required by the Civil Code.[38] If, on the other hand, the creditor expected that the sale proceeds would be insufficient to discharge the payment obligation, the creditor could hold off on enforcing its mortgage rights, with the hope that the mortgaged property would increase in value over time to a point exceeding the amount of the defaulted obligation (including accumulated interest). Of course, the mortgage creditor pursuing such a strategy would also have to account for ongoing costs associated with monitoring the mortgaged property and for the opportunity cost of not immediately liquidating the property and reinvesting the sale proceeds. Whether or not a waiting strategy would be optimal, the fact remains that the mortgage creditor would have had a choice.[39]

Second, consider a mortgage creditor who did face rival claims against the mortgaged property. Some of those rival claimants could have been nonmortgage creditors who obtained money judgments against their debtors in state court and subsequently sought to have those judgments satisfied from their debtors' property by having the relevant parish sheriff seize and sell it at public auction pursuant to the writ of *fieri facias*.[40] Other rival claimants could have included competing mortgage creditors who sought to judicially enforce their mortgage rights in the same property that was subject to the mortgage creditor's claim. When facing nonmortgage and mortgage rival claimants, creditors with special mortgages, which almost exclusively were contractual mortgages,[41] enjoyed enhanced protection under the Practice Code. If a special mortgagee was not the seizing creditor and had a claim superior to that of the seizing creditor (although perhaps subordinate to other mortgage claims against the property), the property's sale would be prohibited if the winning bid at the public auction proved to be insufficient to pay all of the special mortgage claims superior to the seizing creditor's claim.[42] By contrast, this

38. *See id.* art. 3361 (current version at LA. CODE CIV. PROC. ANN. art. 3721).

39. Other factors likely would have affected the mortgage creditor's decision-making calculus, including relational and reputational concerns.

40. *See* LA. CODE PRAC. art. 641–642, 664, 680 (1825) (repealed 1960).

41. *See supra* notes 26, 30 and accompanying text.

42. *See* LA. CODE PRAC. art. 683–684, 706. If the special mortgagee was the seizing creditor and had the superior claim to the seized property, the special

limitation did not apply if the mortgage creditor instead had a general mortgage claim (i.e., one arising from a legal or judicial mortgage) against the seized property with a higher rank than the seizing creditor's claim. If there were no special mortgage claims against the seized property with a higher rank than the seizing creditor's claim, the property could be sold regardless of the amount of the winning bid.[43] The general mortgagees with superior claims, however, did retain the right, subject to certain limitations, to pursue the property in the purchaser's hands via hypothecary action.[44]

Accordingly, even when facing rival claimants, special mortgagees of a sufficiently high rank had the luxury of adopting a waiting strategy for enforcing their rights against a defaulting debtor's mortgaged property, secure in the knowledge that any judicial sale of such property that did not occur at their behest would be finalized only if the purchase price proved to be sufficient to pay their mortgage claims in full. General mortgagees of a sufficiently high rank, though not enjoying such protections, could take comfort in knowing that a judicial sale would not impair their rights against the mortgaged property. Finally, any mortgage creditor with the superior claim to the mortgaged property could, as a practical matter, dictate the timing of the property's seizure and sale by enforcing its mortgage rights before any rival subordinate mortgage claimant sought to do so.[45] Administration of the 1841 Act in the Eastern District, however, upended this state of affairs when mortgaged property made its way into the bankruptcy forum.

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mortgagee could demand that the property be sold, even if the sale price proved to be insufficient to satisfy all mortgages on the property. *See id.* art. 685. The purchaser would receive the property free and clear of all mortgages, including the special mortgage under which the disposition had been made. *See id.* art. 708. Discharge of that special mortgage would occur whether the special mortgagee's claim was fully or partially paid. *See* LA. CIV. CODE art. 3374 (setting forth the grounds on which "[m]ortgages are extinguished," including "[b]y the extinction of the debt for which the mortgage was given" as well as "[b]y the extinction of the mortgagor's right") (current version at LA. CIV. CODE ANN. art. 3319); Offutt v. Hendsley, 9 La. 1, 11 (1835) (stating that judicial foreclosure of mortgage discharges the mortgage, even if the purchase price is less than the outstanding secured debt, unless the purchaser is the mortgage debtor). Nothing in the Practice Code appeared to require deviation from this outcome when the seizing creditor had a general mortgage superior to all other mortgages on the seized property. *See* LA. CODE PRAC. art. 683–685, 706–708.

43. *See* LA. CODE PRAC. art. 683–684, 706–708.

44. *See id.* art. 679, 709–710, 715.

45. *See supra* notes 41–44 and accompanying text.

II. FEDERAL CONTROL OF THE ENSLAVED IN *IN RE BOTTS*

Although it was the start of the weekend, New Orleans attorney Francis B. Conrad found himself urgently scrambling on Saturday, February 25, 1843. Just a month earlier, the U.S. District Court for the Eastern District of Louisiana had appointed him to manage and liquidate the assets of George A. Botts,[46] one of the Crescent City's slave traders whose financial failure had prompted him to seek relief under the 1841 Act.[47] Soon thereafter, and over a period of nearly three weeks, Conrad had doggedly been tracking down property that Botts owned but failed to disclose at the start of his bankruptcy case. That Saturday morning, Conrad finally found an opportunity to secure the property, but he needed a judge's help to do so.[48] Fortunately, Congress had mandated that the federal district courts would "be deemed always open" for purposes of administering the 1841 Act.[49] And so, Conrad sought to enlist the power of the federal government that weekend, hoping to finally end the hunt that had preoccupied him for the better part of the month.

After drafting an emergency petition addressed to Judge McCaleb,[50] Conrad likely raced to the court from his office in the French Quarter, located just off of Canal Street at 29 Exchange Place.[51] That trip would not have taken very long: The U.S. Custom House, in which the court was located, was three streets away heading toward the Mississippi River.[52] Once "being duly sworn" by the court's clerk,

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46. Bankruptcy Decree and Order Appointing Assignee, *In re* Botts, No. 545 (E.D. La. Jan. 27, 1843) (located in EDLA Decree Book, *supra* note 6, at 185 [handwritten]).

47. Petition of George Ann Botts to Be Declared Bankrupt & to Be Discharged from All His Debts, *In re* Botts, No. 545 (E.D. La. Dec. 24, 1842) (located in EDLA Case Files, *supra* note 1); *see also* Rafael I. Pardo, *Federally Funded Slaving*, 93 TUL. L. REV. 787, 842–43 (2019) (discussing Botts's involvement in the slave trade).

48. Petition of Assignee to Be Put in Possession, *In re* Botts, No. 545 (E.D. La. Feb. 25, 1843) [hereinafter Conrad Petition] (located in EDLA Case Files, *supra* note 1).

49. Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 445 (repealed 1843).

50. Conrad Petition, *supra* note 48.

51. *See* NEW-ORLEANS DIRECTORY FOR 1842, at 88 (New Orleans, Pitts & Clarke 1842).

52. *See* BENJAMIN MOORE NORMAN, NORMAN'S NEW ORLEANS AND ENVIRONS 89 (Matthew J. Schott ed., La. State Univ. Press 1976) (1845); *Norman's Plan of New Orleans & Environs, 1845*, LIBR. OF CONG., https://www.loc.gov/resource/g4014n.ct000243/ [https://perma.cc/3Y3K-NQC9] (last visited Mar. 14, 2022).

N.R. Jennings, Conrad attested in writing at the end of the petition that its facts were true "to the best of his knowledge & belief," subscribing to the declaration with his signature.[53] Having thus filed the petition, nothing was left for Conrad to do but await the court's decision on his requested relief. All of which begs the question: What circumstances made seizure of Botts's previously undisclosed assets so pressing that Conrad could not wait until Monday to present the petition?

Possibly vexed by having his weekend disturbed, especially after having dealt with another emergency request by Conrad in Botts's case the day before,[54] Judge McCaleb may have asked himself the same question when handed Conrad's petition. The answer, however, would have quickly revealed itself. Conrad first informed the court that Botts owned eleven enslaved individuals whom he had "placed a short time prior to the decree of Bankruptcy . . . in charge of one Augustin Pugh of the Parish of Assumption, to be by him kept Subject to the order of Said Botts."[55] As for the urgency of the matter, Conrad asserted

> [t]hat within a few hours past Petitioner has been informed that said Bankrupt has taken said slaves, or a portion of them from the custody of said Pugh, and is bringing them to New Orleans on board of a Steam Boat hourly expected to arrive, for the purpose of selling the same or of removing them beyond the reach of Petitioner or the creditors of said Bankrupt.[56]

These circumstances made time of the essence, prompting Conrad to argue "that in protection of the rights of the Creditors of the Bankrupt it is necessary that Petitioner should have possession of said slaves," which could be accomplished only if Judge McCaleb issued an order to the Eastern District's federal marshal, Algernon Sidney Robertson, "directing him to take possession of said slaves, if found within this district to be by him kept until further order of this Court."[57]

To corroborate his account, Conrad submitted to the court a letter sent to him by Pugh, written by the latter fifteen days earlier.[58] Pugh

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53. Conrad Petition, *supra* note 48.

54. *See infra* notes 67–74 and accompanying text.

55. Conrad Petition, *supra* note 48.

56. *Id.*

57. *Id.*

58. Letter from Augustin Pugh to F.B. Conrad (Feb. 10, 1843) (exhibit to Conrad Petition, *supra* note 48). Pugh indicated that Conrad's letter to him was dated February 6, 1843 (i.e., a Monday), but that he did not receive it until the morning of February 10th. Pugh explained the circumstances surrounding his delayed response to Conrad's letter as follows:

> It came by the Armstrong on Tuesday but through the negligence of our post master in whose care it was left I did not get it until this morning and

detailed Botts's scheme to conceal the eleven enslaved individuals from his creditors:

> As regards G.A. Botts negroes he brought me Eleven about the 20th of December last for which negroes if I liked them I was to take and pay him for in March 1844 at the prices for which such negroes were selling in N. Orleans at that time. . . . They were brought to me by Mr Botts the time mentioned above and are subject to Mr Botts order.[59]

Conrad's averments and Pugh's letter proved sufficient to generate a quick response from Judge McCaleb. He issued his order on the same day that Conrad filed the petition, instructing Robertson to take custody of the eleven enslaved individuals.[60] Despite this haste, the federal marshal failed to intercept them when they arrived in New Orleans, probably aboard the steamboat John Armstrong.[61] Perhaps taking advantage of the wharf's chaotic tumult,[62] Botts arranged to transport them to the remote outpost of La Balize, where the Mississippi River's Southeast Pass spilled into the Gulf of Mexico.[63] Mindful of the court's order, Robertson sent one of his deputies in pursuit, who incurred thirteen dollars' worth of expenses in his attempt

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> that as the boat was passing my house on her way to N. Orleans consequently too late to give you the information sought as soon as you wished.

Id.

59. *Id.* On the violence experienced by enslaved persons held by Pugh, see Augustin Pugh, *Enslaved Runaway Advertisement*, DAILY PICAYUNE (New Orleans), Sept. 22, 1847, at 3 ("$20 REWARD—Will be given to whoever will arrest and confine in jail my negro man JOHN BAPTISTE . . . . He ran off from my plantation in March last . . . . On examination he will be found to have been severely whipped.").

60. *See* Conrad Petition, *supra* note 48.

61. When Conrad initially contacted Pugh by letter at the start of February 1843 inquiring about the eleven enslaved individuals whom Botts had sought to conceal, that letter made its way to Pugh "by the Armstrong." Letter from Augustin Pugh to F.B. Conrad, *supra* note 58. Odds are that Pugh's reference was to the steamboat John Armstrong, which traveled Bayou Lafourche, a waterway passing through Assumption Parish, where Pugh lived. *See* E.M. Streck, *Letter to the Editor*, BATON ROUGE GAZETTE, Oct. 15, 1842, at 2; MORSE'S NORTH AMERICAN ATLAS (New York, Harper & Bros. 1842), https://www.loc.gov/item/map54000295/; Letter from Augustin Pugh to F.B. Conrad, *supra* note 58. The Armstrong was one of seven steamboats reported to have arrived in New Orleans on February 25, 1843. *Marine News: Port of New Orleans*, DAILY PICAYUNE (New Orleans), Feb. 26, 1843, at 3.

62. *See, e.g.*, Daret v. Gray, 12 La. Ann. 394, 395 (1857) ("The testimony shows . . . that it is customary to examine the tickets of the passengers and search for secreted negroes only after leaving the wharf at New Orleans, on account of the crowd and on account of the intrusion of persons at the departure of the steamships . . . .").

63. For further discussion on the outpost of La Balize, see CÉCILE VIDAL, CARIBBEAN NEW ORLEANS: EMPIRE, RACE, AND THE MAKING OF A SLAVE SOCIETY 49–50 (2019).

"to sequestrate" the eleven enslaved individuals on February 28, 1843.[64]

While this episode played out, Conrad confronted yet another urgent predicament involving a different group of enslaved individuals belonging to Botts, though disputedly so.[65] Importantly, this dilemma had much greater potential to adversely affect Conrad's control of the enslaved, not only in Botts's case, but also in pending and future 1841 Act cases for which he and others served or would serve as assignees. To be sure, other assignees had to contend with bankrupt enslavers who, in anticipation of seeking relief under the Act, attempted to place the enslaved individuals held by them beyond the reach of creditors.[66] But that problem paled in comparison to the other crisis that Conrad had to tackle.

The day before Conrad petitioned for the seizure of the eleven enslaved individuals who ended up whisked away to La Balize, he had implored Judge McCaleb to issue an injunction against the sheriff of Iberville Parish, Gustave Rousseau, and the Citizens' Bank of Louisiana.[67] Pursuant to a writ of seizure and sale requested by the bank and issued by the state's Fourth Judicial District Court on January 20, 1843,[68] the sheriff had seized a plantation and "a certain number of slaves thereto attached,"[69] which he was on the verge of selling.[70] That pivotal moment arrived after the property's ownership had exchanged hands various times over the course of several years.

Botts and his associate, Abner Robinson from Lafourche Interior Parish, had purchased the plantation and ninety-nine enslaved persons from the Citizens' Bank on January 31, 1840, for $75,000.[71] To secure

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64. *See* A/C Geo. A Botts $232.75 F B Conrad Assignee, *In re* Botts, No. 545 (E.D. La. Sept. 14, 1844) (located in EDLA Case Files, *supra* note 1).

65. *See infra* notes 71–84 and accompanying text.

66. *See, e.g.*, Rafael I. Pardo, *Bankrupted Slaves*, 71 VAND. L. REV. 1071, 1075–77 (2018).

67. *See* Petition of F.B. Conrad Assignee for an Injunction, *In re* Botts, No. 545 (E.D. La. Feb. 24, 1843) [hereinafter Injunction] (located in EDLA Case Files, *supra* note 1).

68. *See id.*; Petition of the Citizens Bank for the Sale of Certain Property, *In re* Botts, No. 545 (E.D. La. Oct. 19, 1843) [hereinafter Citizens' Bank Petition] (located in EDLA Case Files, *supra* note 1).

69. *See* Answer of the Citizens Bank to the Petition of F.B. Conrad Assignee, *In re* Botts, No. 545 (E.D. La. May 11, 1843) [hereinafter Citizens' Bank Answer] (located in EDLA Case Files, *supra* note 1).

70. *See* Injunction, *supra* note 67.

71. *See* Citizens' Bank Petition, *supra* note 68. The transaction was much more complex than the description provided. For a copy of the act of sale, see Transcript of Record at 15–28, Citizens Bank of La. v. Tucker, 6 Rob. 443 (La. 1844)

repayment of the purchase price, the two enslavers granted the bank a mortgage on the purchased property.[72] Later that year, Robinson sold his interest in the property to Botts, who assumed Robinson's liability to the bank.[73] Botts allegedly remained the property's owner until October 25, 1842, when he sold it to Seth Botts, who assumed George's liability to Citizens' Bank.[74]

However, when George commenced his 1841 Act case on Christmas Eve that year, his schedule of assets included the Iberville Parish plantation and the enslaved persons "attached to the same," of whom there were only thirty-seven in total at that point according to his account.[75] A few days before the Fourth Judicial District Court issued its writ of seizure and sale, Seth Botts enlisted William Y. Lewis, a New Orleans notary public, to execute an act rescinding Seth's purchase of the property from George and revesting its ownership in him.[76] In future litigation against Conrad, the Citizens' Bank would unsuccessfully argue "that neither the said Seth Botts nor the said G.A. Botts had then a right to execute such an act to the prejudice of the [bank], and that as to [the bank] it [was] null and void, it being intended to defraud [the bank] of [its] legal rights."[77]

But months before that opportunity arose, Conrad's petition for an injunction declared that "Seth Botts has, to the knowledge of said Citizens' Bank of Louisiana, no interest whatever in the said property, having transferred and conveyed all interest, *if any in fact he ever had therein*, to the said George A. Botts, which said conveyance was duly recorded according to the law and prior to the said proceedings of the said Citizens' Bank."[78] The assignee then argued that the bank's state-law rights to seek the property's liquidation had been supplanted when George Botts commenced his 1841 Act case, observing that "said

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(No. 5,432), http://dspace.uno.edu:8080/xmlui/handle/123456789/20605. For a summary of the transaction, see *Citizens Bank*, 6 Rob. at 444–45.

72. *See* Citizens' Bank Answer, *supra* note 69.

73. *See id.*

74. *See id.*

75. Assets of George Ann Botts, *In re* Botts, No. 545 (E.D. La. Dec. 24, 1842) (located in EDLA Case Files, *supra* note 1). Botts estimated the plantation to be worth $63,000, which he described as "containing about twenty one hundred superficial acres in full cultivation as a cotton plantation having on it a dwelling house, stables, granaries & all other necessary buildings, with a cotton gin house & two gin stands, about 20 horses & mules, cattle, hogs & all necessary agricultural instruments, corn for the season, etc. etc., estimated at $30 an acre." *Id.*

76. *See* Citizens' Bank Answer, *supra* note 69.

77. *See id.*

78. Injunction, *supra* note 67 (emphasis added).

property had been surrendered by him to his Creditors, previously to said seizure, formed a part of the assets on his schedule, and could not be seized by a creditor pending said proceedings."[79] Federal law mandated that the property "be disposed of for the benefit of all his Creditors in the due course of administration under his Bankruptcy," according to Conrad.[80] He predicted that the sheriff's sale would "expose said property to great sacrifice and the interests of the mass of [George Botts's] creditors to material prejudice and injury."[81]

Given the irreparable harm that the Citizens' Bank's unilateral action would inflict on the compulsory collective proceeding designed by Congress to resolve debtors' financial failure,[82] Conrad urged "[t]hat the authority of this Court should be interposed in protection of the rights of said Creditors, and to prevent the sale of said property, and to order the same to be delivered to Petitioner as the property of said Bankrupt, to be by Petitioner administered according to law."[83] Persuaded by the assignee's arguments, Judge McCaleb enjoined the Citizens' Bank and Sheriff Rousseau from selling the property and further ordered the federal marshal to place it in the assignee's possession.[84]

The common denominator to the twin crises faced by Conrad was his attempt to obtain control of enslaved persons in whom Botts had an ownership interest. The assignee's lack of control, however, stemmed from distinct factors. One instance involved the bankrupt enslaver's eve-of-bankruptcy scheme, initiated four days before he commenced his 1841 Act case, to keep his enslaved property physically removed from the federal district court's sphere of power. The other instance involved a financial institution's efforts to exert control over the enslaved pursuant to the bargained-for rights—recognized by and enforceable under state law—that it had obtained, nearly two years before the enslaver filed for bankruptcy relief, through an arms-length transaction that conferred the highest-ranking mortgage on the property.[85] The latter instance presented the more

79. *Id.*

80. *Id.*

81. *Id.*

82. *Cf., e.g.*, *Ex parte* Foster, 9 F. Cas. 508, 513 (Story, Circuit Justice, C.C.D. Mass. 1842) (No. 4,960) (stating that "the bankrupt act has for its object and policy a distribution of all the assets of the debtor equally among all his creditors").

83. Injunction, *supra* note 67.

84. *See id.*

85. *See* Certificate of Mortgages, *In re* Botts, No. 545 (E.D. La. July 20, 1843) (located in EDLA Case Files, *supra* note 1). For the rights under state law that a mortgage creditor enjoyed against mortgaged property when the mortgage was a

formidable threat to an assignee's ability to manage and sell a bankrupt's property, including enslaved persons.

Undoing schemes involving the concealment of assets obviously entailed risks and costs. But the overwhelming majority of 1841 Act cases commenced by bankrupt enslavers likely did not involve such schemes given the severe consequences for bankrupts who engaged in such behavior. Any bankrupt who failed to "bona fide surrender all his property, and rights of property," would not be entitled to receive a discharge of debts.[86] Along similar lines, the Act required a petitioning debtor to "verif[y] by oath, or, if conscientiously scrupulous of taking an oath, by solemn affirmation," the information provided in the schedules filed with the court.[87] Omitting information from an asset schedule could also result in denial of discharge.[88] Accordingly, one would expect most debtors who had concealed assets not to have sought relief under the Act in the first instance. And as for the few who did, they risked liquidation of their nonconcealed assets (and their concealed assets if recovered by the assignee) and rejection of their request to have their prebankruptcy debts discharged.[89]

On the other hand, Louisiana debtors routinely encumbered their property with contractually valid mortgages. State law authorized and extensively regulated these garden-variety commercial transactions.[90] In the absence of any irregularities or noncompliance with legal formalities, the claims of creditors against property mortgaged in their favor had priority over third-parties with subsequent competing claims to the same property. In other words, mortgage creditors expected to enjoy superior rights to the property when it came to sorting out the fallout from a debtor's default. The prevalence of mortgaged property coupled with widespread financial distress undermining the ability of debtors to meet their payment obligations generated ripe conditions for mortgaged property securing defaulted payment obligations to flood into the 1841 Act system. When dealing with mortgage creditors, assignees knew that the stakes were especially high for establishing dominance over the property. If such creditors were given the means to avoid the federal bankruptcy forum by virtue of their interests in a bankrupt's property, assignees would have a significantly

special mortgage and also the highest ranking of all the mortgages on the property, see *supra* note 42.

86. *See* Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. 440, 443 (repealed 1843).

87. *Id.* § 1, 5 Stat. at 441.

88. *See id.* § 4, 5 Stat. at 443; Conrad v. Prieur, 5 Rob. 49, 54 (La. 1843).

89. *See, e.g.*, Pardo, *supra* note 66, at 1075.

90. *See supra* Part I.

diminished and weakened role when administering a bankrupt's surrendered assets. It should therefore come as no surprise that Conrad was willing to pick a fight with a behemoth like the Citizens' Bank, which was chartered in 1833 by Louisiana and capitalized with $12 million raised through the sale of state-guaranteed bonds collateralized by mortgages on plantations and the enslaved.[91]

III. RACIALIZED BANKRUPTCY FEDERALISM IN THE EASTERN DISTRICT

Having considered the two episodes from Botts's case, it is worth taking a step back to assess the scope and significance of the problem represented by the litigation between Conrad and the Citizens' Bank—namely, control in federal bankruptcy cases of enslaved persons subject to a mortgage. During the era of U.S. antebellum slavery, the nation generally operated without a federal bankruptcy system, with two exceptions: the systems established by the Bankruptcy Act of 1800 (the "1800 Act") and the 1841 Act.[92] Neither system achieved permanence, inasmuch as any legislative program can do so given the possibility of eventual repeal.[93] That said, the 1841 Act's reach far exceeded that of the 1800 Act "by virtue of (1) making the relief available to a much larger class of individuals, (2) allowing individuals to seek such relief voluntarily, and (3) having operative effect at a time when the nation consisted of more states (including ones that permitted slavery) and more people."[94] Moreover,

91. *See* HOWARD BODENHORN, STATE BANKING IN EARLY AMERICA: A NEW ECONOMIC HISTORY 254 (2003). It should be noted that, at the time of the litigation between Conrad and the Citizens' Bank in Botts's case, the financial institution itself was in dire financial straits. *See id.* at 259.

92. Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

93. By way of comparison, the nation has continuously had a federal bankruptcy system in effect since 1898. *See* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978); Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101–1532).

94. Pardo, *supra* note 66, at 1082. As a formal matter, the 1800 Act provided that bankruptcy cases could only be commenced by creditors against debtors (i.e., involuntary relief from the debtor's perspective). *See* § 2, 2 Stat. at 21. *But cf.* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 223 (2002) ("Although in form involuntary, in substance the 1800 Act could also be wielded by debtors. . . . [M]any of the filings were clearly collusive or cooperative, the result of insolvent debtors enlisting sympathetic creditors to sue out commissions of bankruptcy against them.").

although Congress quickly repealed the 1841 Act, debtors inundated that bankruptcy system during the thirteen months prior to the Act's repeal, seeking to take advantage of the legislation's generous relief. Over 46,000 cases were commenced,[95] which starkly contrasts to the fewer than 1,000 cases under the 1800 Act.[96] Importantly, when Congress repealed the 1841 Act, it provided that any bankruptcy cases then pending would remain unaffected and could "be continued to . . . final consummation."[97] As a result, administration of the 1841 Act system would carry on into the following decade.[98]

Bankruptcy law thus occupied a prominent place on the dockets of the federal district courts, which Congress tasked to administer the 1841 Act system,[99] over a period straddling the two decades in which the debate over slavery reached a fevered pitch and crescendoed into the Civil War. Of course, the issue of states' rights loomed large in this debate. But what may not be immediately obvious is that the creation and implementation of the 1841 Act system upended the balance of power between the federal and state governments in a way that affected the U.S. slavery complex.

In order to receive a bankruptcy discharge, debtors who sought relief under the Act had to surrender all of their property and property rights—with the exception of a limited amount of exempt property meant to support debtors and, if applicable, their families—existing as of the date that the federal district court decreed them to be bankrupts and therefore eligible to request a discharge of debts.[100] The court's entry of such a decree had the effect of creating an estate consisting of a decreed bankrupt's prebankruptcy, nonexempt property, which in turn became property of the bankruptcy trust, a federal instrumentality.[101] Congress's system for resolving financial distress under the 1841 Act accordingly entailed the nationalization of bankrupts' assets.[102] Notably, thirteen of twenty-six states permitted slavery during the window of time when debtors could commence

95. *See* Rafael I. Pardo, *Documenting Bankrupted Slaves*, 71 VAND. L. REV. EN BANC 73, 86 tbl.1 (2018).

96. *See* Karen Gross, Marie Stefanini Newman & Denise Campbell, *Ladies in Red: Learning from America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1, 24 (1996).

97. *See* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

98. *See* Pardo, *supra* note 66, at 1122.

99. *See* Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 445 (repealed 1843).

100. *See id.* §§ 3–4, 5 Stat. at 442–43.

101. *See* Pardo, *supra* note 10, at 811–56.

102. *See id.* at 855–56.

bankruptcy cases under the Act.[103] In that subset of states whose legal regimes classified enslaved Black Americans as property, some financially distressed enslavers sought relief under the Act, with the result that the federal government became the owner of their enslaved property.[104]

By virtue of the preemptive effect of the U.S. Constitution's Supremacy Clause,[105] the 1841 Act bankruptcy system stood poised to displace significant swaths of state law regulating debtor–creditor relationships.[106] A particularly concerning issue arose whenever a bankrupt surrendered property subject to a lien securing a creditor's right to repayment of a debt owed by the bankrupt. In those instances, federal district courts had to decide how the secured creditor's state-created interest in the surrendered property should be treated pursuant to the federal 1841 Act.

That the federal courts would be placed in a position to ask and answer this question is quite significant. During this time period, state statutes generally established the rights of a creditor with a lien on a debtor's property.[107] As such, the limited jurisdiction of federal courts constrained their opportunity to adjudicate matters relating to such

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103. *See* Rafael I. Pardo, *Financial Freedom Suits: Bankruptcy, Race, and Citizenship in Antebellum America*, 62 ARIZ. L. REV. 125, 153 n.195 (2020).

104. *See* Pardo, *supra* note 66, at 1099–1105.

105. *See* U.S. CONST. art. VI, cl. 2.

106. *See, e.g.*, *Ex parte* Eames, 8 F. Cas. 236, 237 (Story, Circuit Justice, C.C.D. Mass. 1842) (No. 4,237); Beach v. Miller's Testamentary Ex'rs, 15 La. Ann. 601, 602 (La. 1860); *Ex parte* Ziegenfuss, 24 N.C. (2 Ired.) 463, 465 (1842). *See generally* Pardo, *supra* note 47, at 819–21 (discussing federalism concerns surrounding the 1841 Act).

107. *See, e.g.*, R.L. CARUTHERS & A.O.P. NICHOLSON, A COMPILATION OF THE STATUTES OF TENNESSEE 497–98 (Nashville, James Smith 1836) (setting forth provisions regulating the rights of mortgage creditors); C.C. CLAY, A DIGEST OF THE LAWS OF THE STATE OF ALABAMA 255–56 (Tuscaloosa, Marmaduke J. Slade 1843) (same); V.E. HOWARD & A. HUTCHINSON, THE STATUTES OF THE STATE OF MISSISSIPPI 341–50 (New Orleans, E. Johns & Co. 1840) (same); PRESTON S. LOUGHBOROUGH, A DIGEST OF THE STATUTE LAWS OF KENTUCKY 143–44 (Frankfort, Albert G. Hodges 1842) (same); THE REVISED STATUTES OF THE STATE OF MISSOURI 409–10 (Saint Louis, Chambers & Knapp 3d ed. 1841) (same); Stefan A. Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and Prospectus*, 42 IOWA L. REV. 155, 165–72 (1957) (discussing historical development of state statutes regulating the rights of judicial lien creditors). *But see, e.g.*, Act of May 15, 1820, ch. 107, § 2, 3 Stat. 592, 592–93 (granting the federal government "a lien upon the lands, tenements, and hereditaments" of delinquent revenue officers and their sureties in order to secure repayment of the amount due to the United States) (current version at 31 U.S.C. §§ 3541–3542), *construed in* Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

rights. To be sure, federal circuit courts had original but nonexclusive jurisdiction over diversity cases—that is, civil suits between citizens from different states in which the amount in controversy exceeded $500.[108] Diversity jurisdiction populated federal dockets with some cases involving lien-creditor rights, such as a mortgagee's right to pursue a deficiency action against a mortgagor.[109] But when deciding these types of cases, federal circuit courts ordinarily would have deferred to the state statutes and judicial decisions regulating and interpreting lien-creditor rights.[110] Accordingly, up until passage of the 1841 Act, the federal judiciary did not wield much power when dealing with the state-created rights of lien creditors.

At first glance, the 1841 Act appeared to protect such rights. The legislation provided that it did not "annul, destroy, or impair . . . any liens, mortgages, or other securities on property" that were valid under state law and undisplaced by specific provisions of the Act.[111] Various federal district courts interpreted this provision to generally preclude assignees from selling mortgaged property free of its encumbrances. For example, the U.S. District Court for the District of South Carolina opined that the provision clearly reflected Congress's "intention . . . that such mortgages should be protected as privileged liens."[112] In a letter to Secretary of State Daniel Webster commenting on the operation of the 1841 Act in the District of Delaware, U.S. District Court Judge Willard Hall expressed similar views on the practice in his district, lamenting that the Act did not give assignees a more robust sale power and recommending that Congress amend the statute to that effect.[113] Finally, assignee notices of asset sales in 1841 Act cases suggest that other federal district courts likewise adhered to this

108. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (current version at 28 U.S.C. § 1332).

109. *See, e.g.*, Omaly v. Swan, 18 F. Cas. 689 (Story, Circuit Justice, C.C.D. Mass. 1824) (No. 10,508). A deficiency action is one "to recover the difference between a mortgage debt and the amount realized on foreclosure." *Deficiency Suit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

110. *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1531–36 (1984).

111. *See* Act of Aug. 19, 1841, ch. 9, § 2, 5 Stat. 440, 442 (repealed 1843).

112. Yeadon v. Planters' & Mechs.' Bank, 30 F. Cas. 793, 794 (D.S.C. 1843) (No. 18,130).

113. *See* Letter from Willard Hall, U.S. Judge, Dist. of Del., to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 20, 1842), *in* S. DOC. NO. 27-19, at 15–16 (1842).

view.[114] In the District of Georgia, for example, Mordecai Myers announced in an 1843 notice that "[o]n Tuesday the 17th January next, at 11 o'clock, A.M. I will sell in front of the Court House, in the City, five Negroes, viz: Lavina, Susan, Robert, Mary & George, the property of Rufus K. Evans, a decreed bankrupt—said negroes *sold subject to a mortgage*."[115]

The Act, however, did give assignees the "full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage . . . , upon any property, real or personal, . . . and to tender a due performance of the conditions thereof."[116] The U.S. District Court for the District of South Carolina took the view that, absent the mortgage creditor's consent, the only option available to the assignee to remove a mortgage from a bankrupt's surrendered property would be to exercise the redemption power expressly granted by the Act—specifically, by paying the mortgage creditor the balance of the debt owed to it.[117] Alternatively, if the creditor consented, "the court [could] order a sale of mortgaged premises, where the creditor applies to the court for that purpose, and that, under the decree ordering such sale, a good, valid, and sufficient legal title to the premises may be made to pass to the purchaser."[118] Pursuant to the bankruptcy rulemaking authority granted to the federal district courts by the Act,[119] the U.S. District Court for the District of Kentucky promulgated a series of rules that implemented an approach

114. *See, e.g.*, *Assignee's Sale*, INDEP. MONITOR (Tuscaloosa, Ala.), July 20, 1842, at 3 ("By virtue of the law in such case provided, will be sold . . . the interest of [Matthew] Duffee in the following negroes, *subject to the mortgage of the Bank of Alabama, and the lien of an execution thereon, held by the said Bank*, viz; Tom, Pierce, Fred, Bird, Frank, Mary, Dolly, Jane, Liddy, Nancy, Tom and Jane." (emphasis added)); *Sale in Bankruptcy*, SOUTHRON (Jackson, Miss.), July 30, 1845, at 4 ("I will sell . . . the following described property, surrendered in bankruptcy by Miles Luster, *subject to certain liens* as he states in his schedule, to wit: . . . the following negro slaves: Lydia, Hannah, Bob, Esther, Randal, Caroline, Alfred, Jim, America and Liza." (emphasis added)).

115. *Bankrupt Sale*, MACON GA. TELEGRAPH, Jan. 17, 1843, at 4 (emphasis added).

116. *See* § 11, 5 Stat. at 447.

117. *See Yeadon*, 30 F. Cas. at 794; *see also, e.g.*, *In re Black* Assignee Notice, S. PATRIOT (Charleston, S.C.), Feb. 20, 1843, at 3 ("[N]otice is hereby given that I have applied to the Court for authority to redeem and discharge a Mortgage for 4200 dollars, with interest thereon from the first day of January 1842, of a lot on the north side of Society street, with a three story wooden dwelling house and out-buildings thereon, . . . and to tender a due performance thereof, with the payment of the costs of a Chancery suit now pending for the foreclosure of the same.").

118. *Yeadon*, 30 F. Cas. at 794–95.

119. *See* § 6, 5 Stat. at 445–46.

akin to the District of South Carolina's, relying on a mortgage creditor's consent as the means for enabling an assignee's sale of mortgaged property free of its encumbrances.[120] For example, W.S. Pilcher announced in an 1843 notice that, "[b]y authority of the United States Kentucky District Court, sitting in bankruptcy, as assignee in James S. Speed's case, No. 100, *by agreement of the mortgagees and assignee*, I will sell, by public auction, . . . three Slaves, surrendered to me in bankruptcy in the above case."[121]

Given that the 1841 Act did not expressly provide an assignee with the unilateral power to sell mortgaged property free and clear of its encumbrances, one would think that this omission spelled the demise for an assignee's attempt to do so. But that legal issue turned out to be complicated and contested, as demonstrated by the experience in the Eastern District of Louisiana.[122]

Exercising its residual policymaking authority to address this statutory gap,[123] the Eastern District's federal district court adopted an approach that constituted a muscular flexing of federal power at the expense of state law.[124] The court promulgated a rule that, upon the court's granting an order approving an assignee's petition to sell a bankruptcy estate's property, the court's order would

> *ipso facto annul the mortgages, liens, and privileges existing on the property ordered to be sold*; and the recorders of the mortgages shall, on the presentation of such order, cancel all inscriptions existing on their records against such property, and the mortgages, liens, and privileges shall attach

120. *See* S. DOC. NO. 27-19, at 129–32 (1842).

121. *Sale in Bankruptcy*, LOUISVILLE DAILY J., Jan. 10, 1843, at 2 (emphasis added).

122. The discussion that follows in *infra* notes 123–126 and accompanying text is excerpted, with some revisions, from Pardo, *supra* note 66, at 1154–55.

123. *See* Pardo, *supra* note 10, at 849–53 (discussing the residual policymaking authority of federal courts under the 1841 Act); *see also* 37 CONG. GLOBE, 37th Cong., 3d Sess. 223 (1863) (statement of Rep. Roscoe Conkling) ("We had a [bankruptcy] law in 1841, voluntary and compulsory in its theory, but so empty and incomplete that, standing by itself, it could hardly be executed at all. Indeed, the judges were driven to turn legislators, and to help it out by vigorous construction, and by cumbrous and interminable rules.").

124. *Cf.* Thomas E. Plank, *The Erie Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 636 (2004) ("[F]ederal courts in bankruptcy play a significant role—perhaps the most significant of all federal courts—in adjudicating state law issues. The way federal courts in bankruptcy adjudicate these state law issues seriously affects the ultimate allocation of power between states and the federal government.").

> to the proceeds of the sale in the same manner, to the same extent, and with the same effect, as to the property sold.[125]

Accordingly, irrespective of creditor consent, the Eastern District's federal district court fashioned a rule that would wipe out a creditor's mortgage on a bankrupt's surrendered property and transfer it to the sale proceeds from that property. And while the court also promulgated a rule that would generally give mortgage creditors the power to dictate the sale terms for their collateral,[126] such a rule was tantamount to coerced consent. Put another way, mortgage creditors in the Eastern District did not have the choice to opt out of the bankruptcy process and instead exercise their state-law rights in their mortgage collateral.

These rules met resistance from various quarters within the Eastern District. For example, George W. Boyd, one of Elizabeth Norton's mortgage creditors, argued in her 1841 Act case that the federal district court had "no authority, under the law, to adopt or enforce [the mortgage erasure] rules," characterizing them as "against the law and void."[127] He further contended that, by virtue of his status as a mortgage creditor, he "was not bound in law to submit his claims to the judgment or decision of th[e] court, in bankrupt sitting."[128] Another example involved the Orleans Parish Recorder of Mortgages,[129] Dennis Prieur. The state officer challenged the federal district court's order instructing him to erase the prebankruptcy mortgages recorded on property sold in Thomas Banks's 1841 Act case by Francis Conrad (i.e., the same assignee from Botts's case).[130] The Louisiana Supreme Court rejected Prieur's argument, holding that the federal district court "acted within the scope of its jurisdiction, and had full authority to make the order, which it did, to the Recorder of Mortgages, and that the latter, in the performance of his official duties, was bound to obey such order, and erase the mortgage in question."[131] A considered judgment aimed at cooperative federalism,[132] the court's

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125. Transcript of Record at 94, Houston v. City Bank of New Orleans, 47 U.S. (6 How.) 486 (1847) (No. 144) (emphasis added).

126. *See id.*

127. Transcript of Record at 19, Nugent v. Boyd, 44 U.S. (3 How.) 426 (1845) (No. 158) [hereinafter *Nugent* Record Transcript].

128. *Id.*

129. *See* LA. CIV. CODE art. 3349–3351 (1825) (current versions at LA. CIV. CODE ANN. art. 3346 (2021); LA. STAT. ANN. § 9:5208 (2021)).

130. *See* Conrad v. Prieur, 5 Rob. 49, 50–51 (La. 1843).

131. *Id.* at 56.

132. *See Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "cooperative federalism" as the "[d]istribution of power between the federal

majority opinion sought to bolster Congress's exercise of the federal bankruptcy power to create a compulsory collective proceeding for resolving the financial failure.[133]

With the backing of the federal and state judiciary, the Eastern District's assignees used the federal district court's mortgage-erasure rule to sell enslaved individuals free of encumbrances, many of which had been created by bankrupt enslavers to secure debts owed to Louisiana's banks.[134] In the case of Widow Benjamin Bossie from St. John the Baptist Parish, P.R. Gaillard sold ten enslaved persons free of the Union Bank of Louisiana's mortgage.[135] In the case of Antoine Maurin from New Orleans, Francis Conrad sold ten enslaved individuals free of the City Bank of New Orleans's mortgage and four enslaved individuals free of the Exchange and Banking Company of New Orleans's mortgage, all of whom were living on plantations in Natchitoches Parish.[136] Returning to Botts's case, Conrad ended up selling forty enslaved individuals on the Iberville Parish plantation free of the Citizens' Bank mortgage, adhering to the sale terms demanded by the bank, albeit conducting the sale approximately nine months after the bank had sought to do so through state judicial process.[137] And in the case of John S. Armant from St. James Parish, J.B.C. Armant sold forty-four enslaved persons free of the mortgages of the Citizens' Bank, the Commercial Bank of New Orleans, the

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government and the states whereby each recognizes the powers of the other while jointly engaging in certain governmental functions").

133. *See Conrad*, 5 Rob. at 55–56 ("This right which the mortgagees have in the property vested in the assignee, is evidenced under our law by an inscription, or registry on the books of the Recorder of Mortgages, which, unless erased, would prevent the sale of the bankrupt's property, and, consequently, the settlement of the estate.").

134. For an analysis of how property banking in Louisiana (and other Southern states) institutionalized mortgaging of the enslaved, see, for example, BODENHORN, *supra* note 91, at 250–60; CALVIN SCHERMERHORN, THE BUSINESS OF SLAVERY AND THE RISE OF AMERICAN CAPITALISM, 1815–1860, ch. 4 (2015).

135. *See* Petition of Assignee to Sell Estate of Bankrupt, *In re* Bossie, No. 221 (E.D. La. Oct. 10, 1842) (located in EDLA Case Files, *supra* note 1).

136. *See* Petition to Sell, *In re* Maurin, No. 437 (E.D. La. Feb. 16, 1844) (located in EDLA Case Files, *supra* note 1).

137. *See* Rule on Assignee, *In re* Botts, No. 545 (E.D. La. Jan. 23, 1844) (located in EDLA Case Files, *supra* note 1); Citizens' Bank Petition, *supra* note 68. Recall that the state judicial sale enjoined by Judge McCaleb was imminent in February 1843. *See supra* notes 67, 84 and accompanying text. The federal bankruptcy sale took place on November 11, 1843. *See* Account Sales, *In re* Botts, No. 545 (E.D. La. Nov. 14, 1843) (located in 2 EDLA Sales Books, *supra* note 10, at 258 [handwritten]).

Consolidated Association of Planters of Louisiana, the Louisiana State Bank, and the Union Bank of Louisiana.[138]

These are just some of the many examples in the Eastern District's 1841 Act cases illustrating how, in a significant federal judicial district, the distribution process under the Act replaced creditors' state-law entitlements to enslaved collateral with federal public control of the enslaved.[139] Viewed through this lens, a more nuanced account emerges of the interaction between secured credit and bankruptcy policy in the legal regime established by the Act,[140] one that reveals a waypoint in the historical through-line involving the

138. *See* Case Minutes, *In re* Armant, No. 688 (E.D. La. June 29, 1843) (located in 3 U.S. Dist. Ct. for the E. Dist. of La., *Bankruptcy Act of 1841 Minutes, 2/1843–1/1861*, at 255–57 [handwritten], Records of District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas).

139. *See* Pardo, *supra* note 103, at 149 (noting that the Eastern District was home to New Orleans, which was the nation's third-most-populous city and which had the nation's largest slave market and one of the nation's largest money markets, if not the largest, at the time of the 1841 Act). The District of Maryland also appears to have been one where assignees could sell a bankrupt's surrendered property free of its encumbrances without the consent of affected lien creditors. *See* Wilson v. Turpin, 5 Gill 56, 56–57, 59 (Md. 1847). On the eve of the 1841 Act, Baltimore was the nation's second-most-populous city and played a central role in the interregional slave trade that took place between the Upper and Lower South. *See* U.S. BUREAU OF THE CENSUS, POPULATION OF THE 100 LARGEST URBAN PLACES: 1840 (June 15, 1998), https://www2.census.gov/library/working-papers/1998/demo/pop-twps0027/tab07.txt [https://perma.cc/T52C-Y52H]; FREDERIC BANCROFT, SLAVE TRADING IN THE OLD SOUTH 121–22 (Univ. of S.C. Press 1996) (1931) (providing examples of the slave trade between Baltimore and New Orleans); SCHERMERHORN, *supra* note 134, at 33–68 (same).

140. For example, in his work on the 1841 Act, Edward Balleisen, repeatedly suggests that mortgage creditors generally did not have to worry about having their state-law entitlements displaced by the Act. *See* EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 108 (2001) ("Secured creditors remained essentially unmoved by the 1841 act, because it specifically preserved liens valid under state law unless debtors created them as a means of giving preferences in contemplation of bankruptcy. If creditors of defaulting debtors held mortgages on real estate or furniture, they could foreclose on the property; *bankruptcy courts had no claim on such assets*. . . . Secured creditors rarely found themselves inconvenienced by the operation of the Bankruptcy Law. They simply took advantage of liens to satisfy their claims." (emphasis added)); *id.* at 153 ("[M]ost real estate surrendered by bankrupts was heavily mortgaged, giving the mortgagor [sic] a lien against the property. Unless the buyer of a mortgaged property was willing to redeem the mortgage, the holder of the bond could foreclose on the farm, town lot, or plot of wilderness, obliterating any legal claim of the bankrupt or a subsequent purchaser.").

direct subordination of Black Americans by federal institutions regulating the bankruptcy sphere.[141]

And yet, this is not the end of the story. Rather, another complexity, which the next Part explores, must be taken into account: When administering the Act, federal officials at times, if not often, profited without providing any benefit to the bankrupt's general unsecured creditors, thereby severely undermining a distributional process that Congress hoped would effectuate, among other things, "[p]rompt and ready action, without heavy charges or expenses, . . . in directing the sales at such times and in such a manner as should best subserve the interests of all concerned."[142]

IV. RACIALIZED PROFITEERING IN THE EASTERN DISTRICT'S 1841 ACT CASES

In 1847, N.R. Jennings, the clerk for the Eastern District's federal district court, reported statistics on the district's 1841 Act cases to Secretary of State James Buchanan.[143] The report emphasized that the mortgaged property sold in the district's bankruptcy cases generated paltry returns for junior mortgagees and, for that matter, general unsecured creditors.[144] The report also listed a dizzying array of the types of administrative expenses arising from 1841 Act cases:

> the costs of suits instituted by the assignees, the commissions to the assignees, the commissions to the marshal for the sale of property, the fees

141. *Cf.* Aaron Hall, *Slavery and Emancipation in the Federal Courts*, *in* FED. JUDICIAL CTR., APPROACHES TO FEDERAL JUDICIAL HISTORY 45, 57 (Gautham Rao, Winston Bowman & Clara Altman eds., 2020) ("[I]t would seem that federal courts' regulation of a subject of such enormous conflict and consequence for seven decades signifies a particular institutional capacity. Indeed, this record on slavery suggests that a revised understanding of federal courts might be brought into the new history of the American state.").

142. *Ex parte* Christy, 44 U.S. (3 How.) 292, 321 (1845) (Story, J.).

143. *See* H.R. DOC. NO. 29-99, at 7 (1847). The Department of State had requested such reports from all federal court clerks pursuant to an information-gathering resolution adopted by the House of Representatives in 1844. *See* H.R. DOC. NO. 29-223, at 1–2 (1846).

144. *See* H.R. DOC. NO. 29-99, at 7 n.† ("In the schedules of many of the largest bankruptcies, the mortgage property constituted almost the entire amount surrendered. This is embraced in the estimate of the aggregate amount surrendered, making the sum total appear very large; whereas the property realized by the assignees, to be divided among the ordinary creditors, was comparatively very small."); *id.* at 7 n.‡ ("[A]s before stated, beyond the mortgage property very little, in proportion to the large amount surrendered, was left to be divided among ordinary creditors, or those not holding the first mortgages.").

> of the commissioners, the fees allowed to the attorneys of the bankrupts and of the assignees, advertisements, fees of the clerk, and publications prior to discharge.[145]

When the sale of mortgaged property generated such expenses, one of the Eastern District's local bankruptcy rules required that they be paid prior to making distributions from the sale proceeds to any creditors, including those who originally had mortgage claims against the liquidated property.[146]

Pulling back the curtain on the Eastern District's aggregate statistics by investigating the individual cases on which those statistics are based reveals a disturbing pattern: The district's assignees engaged in the practice of using the federal government's power to conduct negative-equity sales of enslaved Black Americans who had been mortgaged by their bankrupt enslavers—that is, sales that did not generate proceeds exceeding the amount of the administrative expenses and mortgage claims to which the proceeds were subject. While the bankrupt's general unsecured creditors did not receive any benefit from negative-equity-value sales, the federal officials who conducted them almost always came out ahead. The remainder of this Part first provides an account of the institutional dynamics underlying these sales and then presents a detailed picture of federal officials' self-enrichment through this activity.[147]

A. The Eastern District's Bankruptcy Profiteering Network

In his work on the 1841 Act, Edward Balleisen has observed that "the bankruptcy system provided hundreds of court officials and dozens of newspapers with substantial income,"[148] much of that

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145. *Id.* at 7 n.§.

146. *See Nugent* Record Transcript, *supra* note 125, at 18 (setting forth excerpt of some bankruptcy rules promulgated under the 1841 Act by the Eastern District's federal district court, including one indicating that, as between administrative expenses arising from the sale of mortgaged property and a mortgage claim against the property, the former would have priority in the property's sale proceeds).

147. The discussion that follows in *infra* notes 148–176, 199 and accompanying text is excerpted, with some revisions, from Pardo, *supra* note 66, at 1141–45, 1157.

148. BALLEISEN, *supra* note 140, at 139. Some contemporary federal legislators anticipated this outcome. *See, e.g.*, *Astounding Facts*, LE COURRIER DE LA LOUISIANNE (New Orleans), Aug. 23, 1841, at 3 (reporting that, during the debate on the bankruptcy bill on August 10, 1841, "[Representative John] Pope said the bill should be entitled 'An act for the benefit of lawyers, commissioners, assignees, clerks, marshals, and their dependents.' These would be the persons who would make the most of it . . . .").

income being derived from the proceeds of liquidated estate property,[149] which would subsequently be paid out in one form or another (e.g., assignee commissions, court fees) to those involved in the administration of bankruptcy estates.[150] The rise of this profiteering network within the bankruptcy system reflected, according to Balleisen, "the capacity of America's capitalist culture to extend the entrepreneurial impulse—to find, even in the very occurrence of commercial catastrophe, the raw materials for profit."[151]

In the abstract, availing oneself of economic opportunities created by legal systems may be all very well and good. But when the "raw materials for profit"[152] are human beings, we need to assess quite differently what was happening in the antebellum bankruptcy system. As Thomas Russell has argued in his work on court-ordered sales of the enslaved under state law in antebellum South Carolina, the courts there "operated much like commission-merchant firms," with a profit motive driving the work of the judicial system.[153] Ultimately, those courts came to represent "a statewide auctioneering firm . . . that coordinated a large assembly of sheriffs, masters in chancery, ordinaries, and other state officials . . . who . . . drew profit from sales [of the enslaved] by operation of law."[154]

The 1841 Act gave the U.S. District Court for the Eastern District of Louisiana and its officials "a visible and prominent role in constituting and ordering slave auctions."[155] Bankruptcy sales of the enslaved required the concerted action of various participants in the bankruptcy system—the federal district court, assignees, and federal

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149. *Cf.* BALLEISEN, *supra* note 140, at 151 ("Of all the economic opportunities created by the 1841 Bankruptcy Law, those with the greatest potential lay with the property relinquished by bankrupts.").

150. *See* Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 446 ("[T]he [federal district] courts shall, from time to time, prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons, for services under this act, or any other on the subject of bankruptcy; which fees shall be as low as practicable, with reference to the nature and character of such services.") (repealed 1843). For a description of the fees paid to court clerks, bankruptcy assignees, and federal marshals and the payments made to newspapers for publishing legal notices in connection with 1841 Act cases, see BALLEISEN, *supra* note 140, at 137–39.

151. BALLEISEN, *supra* note 140, at 136.

152. *Id.*

153. Thomas D. Russell, *South Carolina's Largest Slave Auctioneering Firm*, 68 CHI.-KENT L. REV. 1241, 1273 (1993).

154. *Id.* at 1275.

155. Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law in Slave Sales and a Conceptual Reevaluation of Slave Property*, 18 CARDOZO L. REV. 473, 477 (1996).

marshals, among others. Similar to the antebellum South Carolina courts, the Eastern District's federal district court operated like a slave auctioneering firm. Writing on the role of judges and court officials in court-ordered sales of the enslaved, Russell has observed that we cannot consider the former "merely complicit bystanders in the institution of slavery" given that "they occupied managerial roles" in structuring and supervising such sales.[156] Rather, judges, with the help of court officials, "strengthened and legitimized the institution of slavery."[157]

Looking to the Eastern District, those primarily responsible for orchestrating the bankruptcy slave trade were Judge McCaleb and the group of individuals who served as assignees in the cases involving enslaved persons surrendered by their bankrupt enslavers. Judge McCaleb, a Mississippian educated at Phillips Exeter Academy and Yale College,[158] received a commission to serve as the only U.S. District Judge for both the Eastern and Western Districts of Louisiana on September 3, 1841, having been nominated by President Tyler on the first of that month.[159] He remained the Eastern District's federal district judge through 1861,[160] resigning his position upon Louisiana's secession from the Union, and thereby signaling that "he embraced the Confederate cause."[161] Given the length of his tenure on the federal bench, he directed the district's bankruptcy slave trade for its entire duration, from April 1842 through February 1853.[162]

Judge McCaleb, of course, could not operate autonomously in directing bankruptcy sales of the enslaved. Rather, others had to prompt him into action. Those who did were the bankruptcy assignees tasked with the duty to liquidate the Eastern District's bankruptcy estates that included enslaved Black Americans. Among the district's assignees were some noteworthy persons, such as James R. Jennings,

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156. *Id.*

157. *Id.* at 479.

158. *See* Paul Brosman, *The First Hundred Years*, 22 TUL. L. REV. 543, 544 (1948); *see also* NATHANIEL CHEAIRS HUGHES JR., YALE'S CONFEDERATES: A BIOGRAPHICAL DICTIONARY 137 (2008).

159. *See McCaleb, Theodore Howard*, FED. JUD. CTR., https://www.fjc.gov/history/judges/mccaleb-theodore-howard [https://perma.cc/Q58F-FCX] (last visited Mar. 14, 2022). When Congress organized Louisiana into two federal judicial districts in 1823, it authorized only a single judgeship to serve both districts. *See* Act of Mar. 3, 1823, ch. 44, § 1, 3 Stat. 774, 775.

160. *See* McCaleb, *supra* note 159.

161. Brosman, *supra* note 158, at 544.

162. *See* Pardo, *supra* note 66, at 1122.

the deputy clerk of the federal district court,[163] and Thomas Slidell, who would ultimately serve as chief justice of the Louisiana Supreme Court from 1853 to 1855.[164] But perhaps the most noteworthy of them all was Judah Phillip Benjamin, who would "emerge as the most prominent New Orleanian of his century,"[165] serving as one of Louisiana's U.S. Senators,[166] declining a nomination to serve on the U.S. Supreme Court,[167] and serving as Attorney General, Secretary of War, and Secretary of State for the Confederacy at different points during the Civil War.[168]

We thus witness that leading members of the Eastern District's legal community served as bankruptcy assignees, which lends further support to Balleisen's observation that "[t]he remuneration attached to most of the offices in the [1841 Act] bankruptcy system made them highly sought after positions, creating opportunities for federal judges to create patronage networks."[169] To create such a patronage network, Judge McCaleb clearly tapped into the elite professional network that existed and would continue to develop among those whom he appointed as assignees. For example, prior to the Act, Benjamin collaborated with Slidell in 1834 to compile a digest of decisions by the Louisiana Supreme Court.[170] And in the 1850s, Benjamin's law partners were Edward A. Bradford and William C. Micou,[171] both of

163. *See* NEW-ORLEANS BEE, Feb. 22, 1843, at 1 (setting forth numerous bankruptcy notices with James R. Jennings listed as "Dep'y Clerk of the U.S. District Court" or "Dy. Clerk of the U.S. District Court"); *see also* H.R. DOC. NO. 29-223, at 37 (1846) (excerpting a letter by N.R. Jennings, the clerk of the U.S. District Court for the Eastern District of Louisiana, dated July 17, 1846, which mentions "James R. Jennings, the former deputy clerk of this court").

164. *See* JUDITH KELLEHER SCHAFER, SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA 44 (1994).

165. ROBERT DOUTHAT MEADE, JUDAH P. BENJAMIN: CONFEDERATE STATESMAN 44 (1943).

166. *See id.* at 86.

167. *See id.* at 84–85.

168. *See id.* at 161, 208, 235.

169. BALLEISEN, *supra* note 140, at 139.

170. *See* MEADE, *supra* note 165, at 37.

171. *See id.* at 85.

whom had also served as Eastern District assignees,[172] and had also been nominated to serve on the U.S. Supreme Court.[173]

In thinking about Judge McCaleb's and the Eastern District assignees' roles in the district's bankruptcy slave trade, we need to know how the 1841 Act choreographed their actions in order to better understand their respective complicities. The Act did not specify the conditions pursuant to which the assignee was to sell estate property, instead merely instructing that "it . . . [was] the duty of the court to order and direct a collection of the [estate's] assets, and a reduction of the same to money, . . . consistently with a due regard to the interests of the creditors."[174] Accordingly, Congress granted the federal district courts wide latitude in structuring bankruptcy asset sales—in terms of time, place, and manner—so long as the arrangements comported with the best interests of the creditors in achieving liquidation and distribution of the bankruptcy estate.[175] Exercising his residual policymaking authority, Judge McCaleb promulgated a rule that, while recognizing the court's ultimate authority to approve assignee sale petitions, nonetheless deferred in the first instance to the business judgment and expertise of assignees in structuring sales that would maximize asset values for the benefit of creditors.[176] Despite this rule, evidence from the district's 1841 Act cases strongly suggests that assignees instead prioritized their pecuniary self-interest.

B. Evidence of Racialized Profiteering in the Eastern District

Daina Ramey Berry's scholarship has comprehensively analyzed how, by virtue of being "people and property, multiple sets of values encompassed [the enslaved] and were placed on their

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172. *See, e.g.*, Bankruptcy Decree and Order Appointing Assignee, *In re* Egan, No. 543 (E.D. La. Jan. 27, 1843) (appointing E.A. Bradford as assignee) (located in EDLA Decree Book, *supra* note 6, at 183 [handwritten]); Account Sales, *In re* Richardson, No. 112 (E.D. La. Oct. 31, 1842) (identifying "Wm. C. Micou" as "assignee of the Estate of John Richardson") (located in 1 EDLA Sales Books, *supra* note 10, at 174 [handwritten]).

173. *See* MEADE, *supra* note 165, at 84–85.

174. Act of Aug. 19, 1841, ch. 9, § 10, 5 Stat. 440, 447 (repealed 1843).

175. *Cf.* Pardo, *supra* note 10, at 833 ("[F]ederal courts expressly referred to an assignee's . . . duty to augment the estate when exercising their unique powers.").

176. *See Nugent* Record Transcript, *supra* note 127, at 18 (reproducing Eastern District bankruptcy rule providing that an assignee's sale petition "in all cases, [had to] be accompanied by a schedule, which shall contain . . . a suggestion of the terms and conditions, the time and place of the sale, which, in the assignee's opinion, shall be most suitable for the interest of the *conditions*").

bodies."[177] Her framework identifies the soul, appraisal, market, and ghost values of the enslaved.[178] The soul value represented an internal assessment by the enslaved of their self-worth based on "conceptions of self in spaces that denied it."[179] Appraisal, market, and ghost values, on the other hand, involved external assessments.[180] Appraisal values "were projected values that planters, doctors, traders, and others attributed to enslaved people based on their potential work output."[181] Market values were the function of "a sale price for [the enslaved's] human flesh, negotiated in a competitive market."[182] Finally, ghost values represented "the price tag affixed to deceased enslaved bodies in post-mortem legal contestations or as they circulated through the domestic cadaver trade."[183] By incorporating internal and external assessments, Berry's valuation framework "allows us to consider enslaved people as human beings and tradable goods, without divorcing one from the other."[184]

Applying Berry's valuation framework to negative-equity sales of the enslaved in 1841 Act cases can help us understand the interconnected dynamics that accounted for racialized profiteering in that context.[185] When assignees sought to sell enslaved persons who were subject to mortgages, we might imagine two species of appraisal values that influenced assignees' decision-making: the *equity value* and the *commission value* of the enslaved. To determine whether the sale would generate proceeds for the benefit of unsecured creditors, assignees would have to compare (1) the appraisal value of the enslaved to (2) the amount of mortgage debt secured by the enslaved and the expected administrative costs associated with the sale. Only when the former exceeded the latter would the assignee conclude that the enslaved had *positive-equity value*. Conversely, when the latter exceeded the former, the assignee would conclude that the enslaved

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177. DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION 6 (2017).

178. *See id.* at 6–7.

179. *Id.* at 6.

180. *See id.* at 7.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Cf. id.* at 4 ("Enslaved people represented an exchangeable commodity in the eyes of traders, enslavers, and doctors. By exploring the web of relations among these groups of people, we find that the financial value of human chattel touched every facet of their lives.").

had *negative-equity value*, thus making a sale unwarranted from the vantage of an assignee evaluating the situation as a fiduciary for all of the bankrupt's creditors.[186] On the other hand, for assignees solely focused on earning a commission from the sale of the enslaved, assignees would have compared (1) the appraisal value of the enslaved to (2) the expected administrative costs associated with the sale.[187] When the former equaled or exceeded the latter, the assignee would be assured of receiving a commission, thereby leading him to conclude that the enslaved had a *commission value*.

When the Eastern District's assignees arranged for the sales of enslaved persons subject to mortgages, and in the process relied on the robust federal power of the district's mortgage-erasure rule to enhance the sales price paid for the enslaved,[188] it appears that the assignees were focused on commission value, rather than equity value. It should be emphasized that this is a tentative finding based on a preliminary look at the district's 1841 Act case files and that further investigation is required before reaching a firm conclusion.[189] That said, the uncovered pattern points to a system that facilitated racialized profiteering.

Table 1 below sets forth information from thirteen sales of mortgaged enslaved persons in twelve of the Eastern District's 1841 Act cases. While existing research has not identified every bankruptcy sale of both mortgaged and nonmortgaged enslaved persons in the district, that research has identified 101 sales across 88 cases, which

186. *See generally* Pardo, *supra* note 10, at 822 (explaining why "a bankruptcy assignee's duties [under the 1841 Act] would have been understood to be fiduciary").

187. Recall that the administrative expenses of such a sale would be paid before mortgage claims against the sale proceeds. *See supra* note 146 and accompanying text.

188. Successful bidders at the bankruptcy sale would acquire *unencumbered* ownership of the enslaved, thus alleviating concerns of post-sale collection efforts by former mortgage creditors.

189. The 1841 Act manuscript court records, located in various regional facilities of the U.S. National Archives and Records Administration, have not been made publicly available as digitized sources. In connection with my prior work on bankruptcy sales of the enslaved, *see* Pardo, *supra* note 66, I had the opportunity to digitize some of the sources on which that research was based. Unfortunately, those digitized records do not extensively overlap with the research on racialized profiteering presented in this Article. I intend to continue this research upon the reopening of the archives, which have generally been closed to the public since March 2020 due to the COVID-19 pandemic. *E.g.*, Nat'l Archives & Recs. Admin., NARA Notice 2020-104, Guidelines for Eventual Reopening (Apr. 24, 2020); Nat'l Archives & Recs. Admin., NARA Notice 2022-004, Updated NARA Reentry and Post-Reentry Plan (Oct. 1, 2021).

likely constitute a significant majority of such sales.[190] Accordingly, the information in Table 1 is derived from approximately 13% of the previously identified sales and approximately 14% of the previously identified cases. Table 1 lists (1) the court-assigned case number; (2) the assignee who arranged the sale; (3) the date of the sale; (4) the number of enslaved persons sold; (5) the value of the enslaved persons, if listed, in the bankrupt enslaver's asset schedule filed with the court; (6) the amount of mortgage debt secured by the enslaved persons; and (7) the amount of proceeds generated by the sale.[191]

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190. *See* Pardo, *supra* note 66, at 1119–20; *see also* Pardo, *supra* note 95, at 98–103 (discussing limitations regarding the quantitative data collected to document bankruptcy sales of the enslaved in the Eastern District's 1841 Act cases).

191. With one exception, the data reported in Table 1 for the case number, assignee, sale date, number of sold enslaved persons, and the amount of sales proceeds have been obtained from the bankruptcy sales record books maintained by the Eastern District's federal marshal (the "Eastern District sales books"). *See, e.g.*, Account Sales, *In re* Norton, No. 203 (E.D. La. Aug. 12, 1842) (located in 1 EDLA Sales Books, *supra* note 10, at 103 [handwritten]). *See generally Bankruptcy Act of 1841 Sales Record Books, 1842–1853*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4513390 [https://perma.cc/43SQ-5GHC] (last visited Mar. 14, 2022) ("This series contains records of land, stock, household furnishings, and personal possessions which were sold to satisfy the claims of creditors. The information given in each entry includes the case number, the name of the petitioner, a description of the property sold, the names of the purchasers, and the date of the sale."); Pardo, *supra* note 95, at 91–103 (discussing the Eastern District sales books); Pardo, *supra* note 66, at 1115–19 (same). The Eastern District sales books do not contain a report for the sale in *In re Nathan* (case number 620) identified in Table 1. The above-referenced data for that sale were obtained from documents filed in the case by the assignee. *See* Petition of Assignee for Sale, *In re* Nathan, No. 620 (E.D. La. June 8, 1843) (located in EDLA Case Files, *supra* note 1); Report of Assignee, *In re* Nathan, No. 620 (E.D. La. Mar. 20, 1844) (located in EDLA Case Files, *supra* note 1).

Debtors who sought relief under the 1841 Act were required to file "an accurate inventory of . . . [the debtor's] property, rights, and credits, of every name, kind and description, and the location and situation of each and every parcel and portion thereof." Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 441 (repealed 1843). The data reported in Table 1 for the scheduled values of the sold enslaved persons have been obtained from the asset schedules filed by the bankrupt enslavers in the corresponding cases. *See, e.g.*, Schedule of L.G. Sassinot, *In re* Sassinot, No. 153 (E.D. La. Apr. 4, 1842) (located in EDLA Case Files, *supra* note 1).

Finally, the data in Table 1 for the amounts of debt secured by mortgages on the sold enslaved persons have been obtained from a variety of documents filed in the corresponding bankruptcy case. *See, e.g.*, Petition of Th. Barbancey Assignee Praying for an Order of Sale, in the Matter of L.G. Sassinot, *In re* Sassinot, No. 153 (E.D. La. June 2, 1842) (located in EDLA Case Files, *supra* note 1) (indicating that the enslaved persons to be sold were "hypothecated for the sum of $5079.38, in favor of various mortgagees"). It should be noted that some of the amounts of secured debt listed in Table 1 *understate* the actual amounts because of information gaps in the

Both the equity value and commission value of the enslaved were a function of the enslaved's appraisal value.[192] Whether or not assignees routinely relied upon the values listed in bankrupts' asset schedules, the fact of the matter is that these valuations were readily available to the assignees and that some of them expressly relied on this information when petitioning Judge McCaleb to authorize a sale of the enslaved.[193] Of the nine sales in Table 1 for which asset-schedule valuations were available, seven involved valuations that were less than the total amount of mortgage debt secured by the enslaved persons. For these seven sales, the assignees should have been placed on high alert that the enslaved likely had negative-equity value. For the two sales where the asset-schedule valuations exceeded the total amount of mortgage debt, the assignees would have noted that any positive-equity value of the enslaved would be reduced by the administrative costs taxed on the sale proceeds. Moreover, if the bankrupts had been overly optimistic with their asset-schedule valuations, any remaining positive-equity value would quickly become negative-equity value. Even if there were a learning curve for the assignees, experience over time should have revealed to them (and, for that matter, to Judge McCaleb) that a bankrupt's surrendered property routinely sold for less than its scheduled value, as was the case for all nine sales in Table 1 for which such valuations were available.

Despite the warning signs of negative-equity sales, the assignees forged ahead with Judge McCaleb's blessing. For all thirteen sales, the proceeds proved to be insufficient to pay all of the mortgage claims, meaning that general unsecured creditors received no distribution from the sale (nor, for that matter, did any junior mortgagees). All of this suggests that, when deciding whether to request a sale of mortgaged enslaved persons, the assignees were focused on commission value. For example, when Judah Benjamin petitioned

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reviewed records. *See, e.g.*, Rule to Shew Cause Why Certain Mortgages Should Not Be Raised, *In re* Gonzales, No. 206 (E.D. La. July 30, 1842) (specifying the amounts of secured principal, but failing to specify the amounts of secured interest and costs, though making general reference to them). In those instances, the higher actual amounts of secured debt would only strengthen the conclusion that the assignees were focused on commission value, rather than equity value, when arranging the sales identified in Table 1. *See infra* notes 192–200 and accompanying text.

192. *See supra* notes 185–187 and accompanying text.

193. *See, e.g.*, Petition of W.H. White, Assignee of Gobet, to Sell Slave Maria, *In re* Gobet, No. 145 (E.D. La. May 19, 1842) (located in EDLA Case Files, *supra* note 1) (indicating property to be sold as "Slave Maria, valued (on Insolvent's Schedule) $1000").

Judge McCaleb for an order to sell (1) "William aged about 40 yrs coachman & waiter," (2) "Beckey aged about 28 yrs washer & domestic," (3) "Ben aged about 23 yrs servant," (4) "George Washington aged about 31 yrs servant," (5) "Suzette aged about 45 yrs servant," and (6) "her daughter Josephine aged about 13 yrs servant,"[194] Benjamin would have known that Asher Moses Nathan, their bankrupt enslaver, had listed their collective value on his asset schedule as $6,400.[195] And subsequent to filing the sale petition, Benjamin would learn from the Recorder of Mortgages that these six enslaved individuals were subject to mortgage claims totaling $89,438.61, as evidenced by his petition to Judge McCaleb to erase and cancel those mortgages.[196]

TABLE 1
SAMPLE OF EASTERN DISTRICT BANKRUPTCY SALES
OF THE ENSLAVED INVOLVING MORTGAGE ERASURE

Case Number	**Assignee**	**Sale Date**	**Enslaved Persons**	**Schedule Value**	**Secured Debt**	**Sale Proceeds**
3	Joseph Reynes	04/11/1842	1	--	152.00	145.00
153	Theophile Barbancey	07/21/1842 08/22/1842	5	4,990.87	5,079.38	2,165.00
206	Eugene Macarty	08/03/1842	4	2,850.00	2,199.33	1,727.00
60	R.H. Brunet	08/11/1842	1	--	18,774.52	455.00
203	Richard Nugent	08/12/1842	5	3,700.00	2,800.00	1,290.00

194. Petition of Assignee for Sale, *In re* Nathan, No. 620 (E.D. La. June 8, 1843) (located in EDLA Case Files, *supra* note 1).

195. *See* Schedules A & B, *In re* Nathan, No. 620 (E.D. La. Jan. 16, 1843) (located in EDLA Case Files, *supra* note 1); *cf.* Petition of Assignee for Sale, *supra* note 194 (noting that "said Asher M. Nathan at the time of his Bankruptcy was seized and possessed of" William, Beckey, Ben, George Washington, Suzette, and Josephine, among other property).

196. *See* Petition to Erase & Cancel the Mortgages, *In re* Nathan, No. 620 (E.D. La. Sept. 20, 1843) (located in EDLA Case Files, *supra* note 1).

Case Number	Assignee	Sale Date	Enslaved Persons	Schedule Value	Secured Debt	Sale Proceeds
239	Joseph B. Marks	09/12/1842	2 1	1,500.00 600.00	7,623.75 4,265.27	950.00 400.00
56	Lucien Hermann	10/21/1842	1	1,000.00	1,320.00	400.00
464	Thomas Slidell	03/08/1843	3	--	29,430.16	750.00
545	Francis B. Conrad	11/14/1843	40	22,850.00	36,826.26	10,000.00
620	Judah P. Benjamin	11/29/1843	6	6,400.00	89,438.61	2,680.00
668	Arnold Bodin	12/11/1843	1	300.00	2,409.07	55.00
672	Judah P. Benjamin	12/27/1843	1	--	541.66	23.00

It strains credulity to conclude that Benjamin and Judge McCaleb envisioned a scenario that would produce a positive-equity sale under these set of circumstances.[197] The likely explanation for the sale in *In re Nathan* is that it represented yet another step by Judge

197. The historical record reveals that Judge McCaleb was quite capable of taking into account concerns arising from the administration of assets with negative-equity value. In one case, he denied an assignee's request to set aside a sheriff's execution sale of a bankrupt's mortgaged real estate, partly justifying his ruling pursuant to a cost-benefit analysis that emphasized the pecuniary harm that would be suffered by the mortgage creditor and the bankruptcy estate. *See* Nugent v. Boyd, No. 1174 (C.C.E.D. La. Jan. 30, 1844) ("It is quite clear that the liens and mortgages which are valid under the state law must be protected by the District Court of the United States, sitting in bankruptcy, and it will not be pretended that the creditor at whose instance the property in question was sold would not have been entitled, under any and all circumstances, to the proceeds of that property to satisfy the amount alleged to be due him. What benefit would then accrue to the general creditors of the bankrupt by the interference of this court in a matter which seems to have been fairly and finally adjudicated? While I am well satisfied that no good would arise from such an interference, I am equally well satisfied that great injustice would be done both to the mortgage creditor and to the estate of the bankrupt, by subjecting both unnecessarily to additional costs and expenses."), *as reprinted in Nugent* Record Transcript, *supra* note 127, at 21, *and aff'd*, 44 U.S. (3 How.) 426 (1845).

McCaleb to solidify his patronage network, in this instance by paving the way for Benjamin to receive a 5% commission on the sales proceeds of the enslaved, which ultimately amounted to $134.[198] The large degree of negative-equity value in the remaining twelve sales detailed in Table 1 lends further support to the story of racialized profiteering. If that account is accurate, it signifies that the U.S. District Court for the Eastern District of Louisiana used its residual policymaking authority to promulgate a local bankruptcy rule that displaced state-law property rights and that, when applied in the context of bankruptcy sales of the enslaved, further entrenched the federal government's involvement in the domestic slave trade,[199] thereby allowing federal officials to enrich themselves by imposing the trauma of forced sale on enslaved Black Americans like William, Beckey, Ben, George Washington, Suzette, and her daughter Josephine.[200]

CONCLUSION

The episode of racialized bankruptcy federalism identified in this Article establishes an important historical context for examining applications of bankruptcy federalism that have harmed Black Americans over time. Adrienne Davis has argued that, in order to address the harms produced by antebellum America's enslavement regime, we should conceptualize "black slavery as a case of unfinished

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198. *See* Report of Assignee, *In re* Nathan, No. 620 (E.D. La. Mar. 20, 1844) (located in EDLA Case Files, *supra* note 1). This amount would be approximately $4,840 in 2020 dollars according to a conservative estimate of relative value based on changes in the Consumer Price Index (CPI). *See* Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1790 to Present*, MEASURINGWORTH, https://www.measuringworth.com/calculators/uscompare/ [https://perma.cc/9UJX-WGR5] (last visited Mar. 14, 2022). At the other end of the spectrum, if estimating relative value based on changes in per capita gross domestic product (GDP), this amount would be approximately $101,000 in 2020 dollars. *See id.*

199. If, for example, the Eastern District's federal district court had determined that the 1841 Act limited an assignee to redeeming mortgaged property before it could be sold, one can imagine that the district's assignees would have foregone that right in the Table 1 cases given the redemption cost-benefit calculus. *See supra* note 117 and accompanying text. Instead, they would have allowed the mortgage creditors to exercise their rights in the collateral outside of the bankruptcy forum. In turn, this would have reduced the degree of the federal government's involvement in the domestic slave trade.

200. For a discussion of the trauma suffered by enslaved Black Americans sold through the 1841 Act system, see Pardo, *supra* note 66, at 1131–40, 1146–51.

transitional justice," which demands that society, among other things, "remake fundamental institutions."[201] Given that the nation's legal landscape has included continuously operating bankruptcy systems since 1898,[202] and given that those systems have granted relief to millions of debtors,[203] one would be hard-pressed to argue that bankruptcy is not a fundamental U.S. institution. Moreover, that institution's first forebear, the 1841 Act system, was deeply involved in and bolstered the domestic slave trade.[204] Accordingly, part and parcel of remaking today's bankruptcy system should involve eradicating racialized bankruptcy federalism,[205] even if doing so merely represents treating a symptom (rather than preventing a cause) of systemic racism.[206]

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201. Adrienne Davis, *Reparations and the Slave Trade*, 101 AM. SOC'Y INT'L L. PROC. 285, 287 (2007).

202. *See supra* note 93.

203. *See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 137 tbl.5-1, 188 tbl.7-1 (2001).

204. *See generally* Pardo, *supra* note 66 (analyzing the ownership and sale of enslaved Black Americans by the federal government through the 1841 Act system); Pardo, *supra* note 47 (analyzing the direct financial support of financially distressed slave traders by the federal government through the 1841 Act system); Pardo, *supra* note 10 (analyzing how the federal government restructured Banks Arcade, a premier commercial exchange in New Orleans for auctioning enslaved Black Americans, through the 1841 Act system).

205. *Cf.* A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 960–61 (2006) [hereinafter Dickerson, *Bankruptcy Reform*] ("[W]hether Congress enacted BAPCPA [i.e., the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23] knowing or hoping that it would have disproportionately negative effects on minorities is largely irrelevant given this country's checkered racial past. *The racialist economic patterns caused by historical social and institutional practices and habits make it imperative that politicians and scholars consider whether facially neutral laws have racially disparate effects and avoid enacting or revising laws that perpetuate economic racial disparities*. Congress failed to do this when it enacted BAPCPA. One hopes that the next time members of Congress consider revising bankruptcy laws, they will remember that race matters." (emphasis added)); A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1256 (2020) ("[T]he main goal of this Essay is to propose group-based reparations that redress ongoing and persistent problems (like the racial wealth gap and racial health disparities) that can be traced back to slavery or the Jim Crow era.").

206. *Cf.* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 23–24 (paperback ed. 1999) ("Bankruptcy involves failures that manifest themselves in economic terms but that are not purely economic failures. Money is the stand-in for larger failures—failures of particular industries, or failures in the health care system, the social welfare system, the tort system, the commercial and personal lending system, and the educational system. . . . Looked at as society's mechanism for addressing these many failures, bankruptcy becomes a receptacle for

Bankruptcy is generally understood to have two goals: providing a debtor relief from overburdensome debt and creating a collective proceeding pursuant to which the debtor's limited resources will be distributed to creditors.[207] The former goal "represents a substantive bankruptcy policy designed to upset nonbankruptcy entitlements."[208] In contrast, when operationalizing the second goal, "bankruptcy is justified in overriding nonbankruptcy rights [only when] those rights interfere with the group advantages associated with creditors acting in concert."[209] To do otherwise would create a system potentially incentivizing creditors with bankruptcy-specific entitlements to engage in the type of self-interested behavior that the collective proceeding seeks to eliminate in the first instance.[210]

These bankruptcy federalism principles do not necessarily foreclose the possibility of simultaneously analyzing the Bankruptcy Code through a racial lens. In one of the pioneering and seminal works on the role of race in bankruptcy, A. Mechele Dickerson argues that white debtors under the Code likely receive greater benefits than minority debtors due to the manner, whether conscious or unconscious, in which the Code has been drafted by Congress and applied by courts.[211] While observing that "there is no reason to believe

some of society's most weighty problems."). *But cf.* Anthony J. Casey, *Consumer Bankruptcy Pathologies: Comment*, 173 J. INSTITUTIONAL & THEORETICAL ECON. 197, 200–01 (2017) ("Nonbankruptcy problems should generally be addressed through nonbankruptcy solutions. It is rarely the case that the best solution to these problems is to focus only on individuals and companies who have opted to use bankruptcy to deal with financial distress. . . . [I]f parking tickets in Chicago have a disparate racial effect, the best solutions will almost certainly be targeted at fundamental racial inequalities either in the city or in the parking enforcement itself, rather than at Chapter 13.").

207. *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 413–14 (2005).

208. JACKSON, *supra* note 15, at 225.

209. *Id.* at 26.

210. *See id.* at 21 ("[E]stablishment of new entitlements in bankruptcy conflicts with the collectivization goal. Such changes create incentives for particular holders of rights in assets to resort to bankruptcy in order to gain for themselves the advantages of those changes, even when a bankruptcy proceeding would not be in the collective interest . . . . These incentives are predictable and counterproductive because they reintroduce the fundamental problem that bankruptcy law is designed to solve: individual self-interest undermining the interests of the group.").

211. *See* A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1726, 1771–72 (2004). For additional analyses regarding racially biased Code provisions, see Abbye Atkinson, *Race, Educational Loans, & Bankruptcy*, 16 MICH. J. RACE & L. 1 (2010); Abbye Atkinson, *Modifying Mortgage*

courts that interpret ambiguous provisions of the Code . . . intend to discriminate against racial minorities,"[212] she nonetheless urges that they should "adopt a more pluralist view when interpreting the Code."[213] More specifically, they should "consciously consider the racial impact of their decisions . . . [and] commit to using the Code to achieve substantive racial justice" in order to "better provide fairer and more just benefits to financially strapped Americans of all races."[214]

Dickerson's clarion call to the judiciary dovetails with the theory that Congress has delegated to federal courts the authority to engage in residual policymaking when administering the Bankruptcy Code.[215] The exercise of residual policymaking authority in bankruptcy by the federal judiciary should seek to produce outcomes that do not have racially harmful effects and that, to the extent possible, are in harmony with bankruptcy federalism principles. Of course, an outcome that has racially harmful effects and that also sacrifices bankruptcy federalism principles represents a highly disconcerting exercise of residual policymaking authority. On this front, consider the Supreme Court's January 2021 decision in *City of Chicago v. Fulton*.[216]

Just over 175 years after Dick's racial subordination by the federal government in *In re Marshall*,[217] Robbin L. Fulton, a woman of color from Chicago and a single mother of a preschooler, sought relief under Chapter 13 of the Bankruptcy Code on January 31, 2018, in the U.S. Bankruptcy Court for the Northern District of Illinois.[218]

Discrimination in Consumer Bankruptcy, 57 ARIZ. L. REV. 1041 (2015); Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917 (2017); Dickerson, *Bankruptcy Reform*, *supra* note 205.

212. Dickerson, *supra* note 211, at 1772.

213. *Id.* at 1773.

214. *Id.* at 1775–76.

215. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 460 (2012) ("Our current court-centered system of bankruptcy administration is truly exceptional in many ways. Two federal administrative agencies, which split their authority along geographic lines, operate within the bankruptcy sphere but lack the authority to set policy at the heart of the Bankruptcy Code. Moreover, Congress has delegated to the courts, rather than either administrative agency, the power to fill gaps in the Code and thus to set bankruptcy policy.").

216. 141 S. Ct. 585 (2021).

217. *See supra* notes 1–10 and accompanying text.

218. Brief for Respondents at 7, City of Chicago v. Fulton, 141 S. Ct. 585 (2021) (No. 19-357); Joint Appendix at 64, 148, 150, *Fulton*, 141 S. Ct. 585 (No. 19-357). The court opinions related to Fulton's bankruptcy case do not discuss her race. The profile picture from her *Facebook* page is one of a woman of color. *See* Robbin Fulton, FACEBOOK, https://www.facebook.com/robbin.fulton (last visited Dec. 31, 2021). Michael Miller, one of the attorneys who represented Fulton before the

One of the financial pressures that she faced at that time was an approximately $4,000 debt owed to the City of Chicago for unpaid parking tickets and nonmoving violations that her ex-husband had incurred from his use of her 2015 Kia Soul.[219] She only learned of these infractions the month before her bankruptcy filing when the City impounded the vehicle on Christmas Eve because of the outstanding debt, which she did not have the ability to repay, thereby precluding the City's release of the vehicle.[220]

Significantly, Chicago's municipal code granted the City a lien on Fulton's car to secure repayment of the debt.[221] By virtue of this status, the City resisted Fulton's requests and litigation to have the Kia Soul returned to her.[222] With diametrically opposed views as to whether the Bankruptcy Code compelled return of the car,[223] the parties ended up litigating the issue all the way up to the Supreme Court, which unanimously held in an 8–0 decision by Justice Samuel Alito that the City's retention of Fulton's car did not run afoul of the Code's provision prohibiting an entity from exercising control over property of a bankruptcy estate.[224]

Supreme Court, see Brief for Respondents, *supra*, at 53, confirmed in response to my inquiry that Fulton is a woman of color, *see* Telephone Interview with Michael A. Miller, Supervising Attorney, The Semrad Law Firm LLC (Oct. 18, 2021). For evidence corroborating that the above-referenced *Facebook* profile corresponds to Robbin Fulton from the *Fulton* case, compare Fulton, *supra* (providing her employer's name, which is unique), with Official Form 1061 (Schedule I: Your Income) at 1, *In re* Fulton, Ch. 13 Case No. 18-02860 (Bankr. N.D. Ill. Jan. 31, 2018), ECF No. 1 (providing the same unique employer name).

219. *See* Brief for Respondents, *supra* note 218, at 7.

220. *See id.* For a description of the City's authority pursuant to its municipal code to impound vehicles for unpaid fines and penalties, see Brief for Petitioner at 10–11, *Fulton*, 141 S. Ct. 585 (No. 19-357).

221. *See In re* Fulton, 926 F.3d 916, 920, 928–29 (7th Cir. 2019), *vacated and remanded*, *Fulton*, 141 S. Ct. 585; *see also* CHI. ILL., MUNICIPAL CODE ch. 9-92, § 80(f) (2021) ("Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle.").

222. *See In re Fulton*, 926 F.3d at 920–21, 928.

223. *See id.* at 922 ("The main question before us is whether the City is obligated to return a debtor's vehicle upon her filing of a Chapter 13 bankruptcy petition, or whether the City is entitled to hold the debtor's vehicle until she pays the fines and costs or until she obtains a court order requiring the City to turn over the vehicle.").

224. *See Fulton*, 141 S. Ct. at 588–89, 592.

Because the Code does not define what it means for an entity "to exercise control" over property of a bankruptcy estate,[225] *Fulton* presented the Court with a prime opportunity to exercise residual policymaking authority. Unfortunately, the Court's decision produced an outcome that had a racially harmful effect and that sacrificed bankruptcy federalism principles.

First, consider the claim that the Court sacrificed bankruptcy federalism principles. The nonfederal-law entitlement at issue in *Fulton* was the City's continued possession of impounded vehicles belonging to Fulton and other individual debtors at the time that they commenced their Chapter 13 cases.[226] The Code provision at issue that threatened to displace that entitlement was the automatic stay, which simultaneously seeks to effectuate bankruptcy law's twin goals of debtor relief and a collectivized proceeding for creditors.[227] Not only did the Court in *Fulton* recognize the dual functions of the automatic stay,[228] Justice Alito unmistakably emphasized the debtor-protection function by starting the Court's opinion with a proposition of law on that very point.[229]

Given that the core substantive policy of debtor relief warrants displacement of nonfederal-law entitlements when they interfere with

225. *See* 11 U.S.C. § 362(a)(3) (providing that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act . . . to exercise control over property of the estate"); *id.* § 101 (setting forth definitions applicable throughout the Code and not including one for the phrase "exercise control"). The City fell within the Code's definition of an entity. *See id.* § 101(15) (defining "entity" to include a "governmental unit"); *id.* § 101(27) (defining "governmental unit" to include a "municipality"); *id.* § 101(40) (defining "municipality" as a "political subdivision or public agency or instrumentality of a State").

226. *See Fulton*, 141 S. Ct. at 589 ("In the case before us, the city of Chicago (City) impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Court of Appeals affirmed all of the judgments in a consolidated opinion.").

227. *See* Rafael Ignacio Pardo, Comment, *Bankruptcy Court Jurisdiction and Agency Action: Resolving the* NextWave *of Conflict*, 76 N.Y.U. L. REV. 945, 947–48 (2001).

228. *See Fulton*, 141 S. Ct. at 589 ("The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others.").

229. *See id.* ("When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum.").

that goal,[230] and given that the exercise of such entitlements are anathema to the bankruptcy system when they undermine its goal of a collective proceeding,[231] the Court should have been inclined to rule against the City on bankruptcy federalism principles. The City's continued possession of the vehicles jeopardized the debtors' ability to generate the income necessary to fund their Chapter 13 repayment plans (e.g., by denying the debtors a reliable means of transportation to work).[232] In turn, the prospect of a confirmable plan pursuant to which the debtors would seek to make payments to their creditors in order to obtain a discharge would be threatened,[233] thus harming both the debtors and their creditors. Nonetheless, the Court exercised its residual policymaking authority to preserve the City's nonfederal-law entitlement to maintain possession of the debtors' vehicles.

Notably, in all of the cases below, which were subsequently consolidated on appeal, the bankruptcy court ruled the opposite way, holding that the City had run afoul of the Code's prohibition by refusing to return the debtors' vehicles; and the U.S. Court of Appeals for the Seventh Circuit upheld those rulings.[234] Moreover, the circuit split that prompted the Supreme Court to hear *Fulton* consisted of four courts of appeals favoring displacement of the nonfederal-law

230. *See supra* note 208 and accompanying text.

231. *See supra* note 209 and accompanying text.

232. *See Fulton*, 141 S. Ct. at 593 (Sotomayor, J., concurring); *see also* 11 U.S.C. § 1322(a)(1) (providing that a Chapter 13 plan "shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan"); *In re* Fulton, 926 F.3d 916, 920, 926–27 (7th Cir. 2019) ("The City's argument that it will be overburdened with responding to Chapter 13 petitions is ultimately unavailing; any burden is a consequence of the Bankruptcy Code's focus on protecting debtors and on preserving property of the estate for the benefit of all creditors. It perhaps also reflects the importance of vehicles to residents' everyday lives, particularly where residents need their vehicles to commute to work and earn an income in order to eventually pay off their fines and other debts. It is not a reason to permit the City to ignore the automatic stay and hold captive property of the estate, in contravention of the Bankruptcy Code." (footnote omitted)), *vacated and remanded*, *Fulton*, 141 S. Ct. 585.

233. *See* 11 U.S.C. § 1307(c)(1)–(5) (providing for conversion or dismissal of a Chapter 13 case "for cause," including "unreasonable delay by the debtor," "nonpayment of [certain required] fees and charges," "failure to file a plan timely," "failure to commence making timely payments," and "denial of confirmation of a plan . . . and denial of a request made for additional time for filing another plan or a modification of a plan"); *id.* § 1325 (setting forth confirmation requirements for a Chapter 13 Plan); *id.* § 1328(a) (providing for Chapter 13 discharge "after completion by the debtor of all payments under the plan").

234. *See Fulton*, 141 S. Ct. at 589.

entitlement and two others favoring its preservation.[235] In other words, the weight of authority leading up the Court's decision tilted decidedly in favor of an approach that, consistent with bankruptcy federalism principles, championed debtor relief over creditors' nonfederal-law entitlements while simultaneously protecting the integrity of a collectivized proceeding.

Worse yet, not only could the Court have plausibly ruled the other way,[236] it was well aware that its holding would have racially harmful effects,[237] as evidenced by the following passage from Justice Sotomayor's concurrence:

> Drivers in low-income communities across the country face similar vicious cycles: A driver is assessed a fine she cannot immediately pay; the balance balloons as late fees accrue; the local government seizes the driver's vehicle, adding impounding and storage fees to the growing debt; and the driver, now without reliable transportation to and from work, finds it all but impossible to repay her debt and recover her vehicle. Such drivers may turn to Chapter 13 bankruptcy for a "fresh start." But without their vehicles, many debtors quickly find themselves unable to make their Chapter 13 payments. The cycle thus continues, *disproportionately burdening communities of color* and interfering not only with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities.[238]

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235. *See id.* at 589–90, 590 n.1

236. *Cf. Fulton*, 141 S. Ct. at 590 ("We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents.").

237. These racially harmful effects had been extensively reported on by the press before the *Fulton* case reached the Court. *See, e.g.*, Melissa Sanchez & Sandhya Kambhampati, *Driven into Debt: How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA ILLINOIS & MOTHER JONES (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/ [https://perma.cc/W73Y-2JFK]. Amicus briefs filed in *Fulton* called the Court's attention to this reporting. *See, e.g.*, Brief of the American Civil Liberties Union, the American Civil Liberties Union of Illinois, the Cato Institute, the Fines and Fees Justice Center, the Institute for Justice, the R Street Institute, and the Rutherford Institute as Amici Curiae in Support of Respondents at 11 n.4, 27 n.77, 29 n.94, *Fulton*, 141 S. Ct. 585 (No. 19-357) (citing Sanchez & Kambhampati, *supra*); Brief for Amici Curiae National Consumer Bankruptcy Rights Center, National Association of Consumer Bankruptcy Attorneys, and Legal Aid Chicago in Support of Respondents at 22, *Fulton*, 141 S. Ct. 585 (No. 19-357) (same).

238. *Fulton*, 141 S. Ct. at 593–94 (Sotomayor, J., concurring) (emphasis added) (footnote omitted) (citations omitted) (quoting Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007)); *see also* Edward R. Morrison & Antoine Uettwiller, *Consumer Bankruptcy Pathologies*, 173 J. INSTITUTIONAL & THEORETICAL ECON. 174, 194 (2017) ("This paper presents new evidence—drawn from cases filed in Cook County, Illinois—that raises questions about patterns and pathologies documented in

Fulton thus represents a particularly disturbing type of residual policymaking—one producing racially harmful effects while improperly treating nonfederal-law entitlements.

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Under the 1841 Act, the U.S. District Court for the Eastern District of Louisiana robustly asserted the bankruptcy power to craft a mortgage-erasure rule that would displace creditors' state-law entitlements, arguably to promote a collectivized proceeding. But as applied to enslaved collateral, evidence exists that the rule did not benefit the creditor collective and, in the process, imposed great harm on Black Americans at the hands of federal officials. In its 2021 *Fulton* decision, the Supreme Court opted not to robustly apply a Bankruptcy Code provision intended to promote debtor relief and to protect the creditor collective, instead preserving a creditor's local-law entitlement at the cost of not only harming a debtor of color and her creditors, but also similarly situated debtors and their creditors given the opinion's wide-reaching effect. Of course, the comparison of just two points in time cannot establish a pattern of racial subordination driven by inconsistent applications of bankruptcy federalism principles. But it is imperative to ascertain whether such a pattern does exist. This Article has initiated that project by setting the stage for future research that might chart a historical through-line involving harms to Black Americans and other minorities as a result of federalism choices in bankruptcy.

the consumer bankruptcy literature. . . . Our data suggest that, at least in Cook County, Illinois, these pathologies are largely driven by a subsample of consumers for whom Chapter 13 is an avenue for bargaining with state and local governments. These consumers have accumulated fines, usually parking tickets, and are at risk of having their licenses or vehicles (or both) seized by the government. In these cases, the government has a 'hostage taking' power that few creditors possess: It can seize property . . . that is valueless to the government or any other party, but is highly valuable to the consumer because it reduces the cost of commuting to work, especially for people with limited access to mass transit. . . . *It appears that African Americans are particularly vulnerable to this hostage-taking*. They account for well over fifty percent of people with tickets and other fines. Consumers in this category exhibit the 'pathologies' commonly associated with Chapter 13." (emphasis added)).