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Rethinking Antebellum Bankruptcy

Rafael I. Pardo
Washington University in St. Louis School of Law, pardo@wustl.edu

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Bankruptcy law has been repeatedly reinvented over time in response to changing circumstances. The Bankruptcy Act of 1841—passed by Congress to address the financial ruin caused by the Panic of 1837—constituted a revolutionary break from its immediate predecessor, the Bankruptcy Act of 1800, which was the nation's first bankruptcy statute. Although Congress repealed the 1841 Act in 1843, the legislation lasted significantly longer than recognized by scholars. The repeal legislation permitted pending bankruptcy cases to be finally resolved pursuant to the Act's terms. Because debtors flooded the judicially understaffed 1841 Act system with over 46,000 cases, the Act's administration continued into the 1860s, thereby allowing further development of the law. Importantly, the system operated at a time when the role of the business of slavery in the national economy was increasingly expanding. This Article focuses on two postrepeal episodes involving legal innovation under the Act to demonstrate how an expanded periodization of its duration yields fresh insights into understanding the interaction between federal bankruptcy law and slavery: (1) the judicial constitutional settlement of voluntary bankruptcy relief, part of which occurred through a case involving a bankrupt enslaver; and (2) the practice pursuant to which some federal district courts empowered assignees—the federal court officials appointed to administer property surrendered by bankrupts in 1841 Act cases—to operate a bankrupt's business before liquidating it, as evidenced by certain cases involving plantation owners who sought relief under the Act.

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INTRODUCTION

The U.S. Constitution grants Congress the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[1] The constitutional text does not provide much guidance on the enumerated power's limits, other than indicating that any law enacted pursuant to that clause must be "on the subject of Bankruptcies" and must be "uniform . . . throughout the United States."[2] The Framers likewise did not help out on this front, leaving a scant record on the topic,[3] albeit one strewn with clues about the

1. U.S. CONST. art. I, § 8, cl. 4.

2. *Id.*; *see also* Cont'l Illinois Nat'l Bank & Tr. Co. of Chi. v. Chi., R.I. & P. Ry. Co., 294 U.S. 648, 669-70 (1935) (stating that the bankruptcy power's "limitations have never been explicitly defined, and any attempt to do so now would result in little more than a paraphrase of the language of the Constitution without advancing far toward its full meaning").

3. *See, e.g.*, PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 17 (Beard Books 1999) (1974) ("Very

clause's meaning and scope.[4] Consequently, some of our understanding of the federal bankruptcy power has been based on the Supreme Court's pronouncements on the matter.[5]

At times, the Court has relied on prior bankruptcy innovations by Congress when evaluating the constitutionality of subsequent bankruptcy legislation,[6] emphasizing the Bankruptcy Clause's robustly dynamic nature—that is, capable of temporal and contextual adaptation.[7] For example, in its 1935 decision holding that a provision of the Bankruptcy Act of 1898 (the "1898 Act")[8] governing railroad reorganizations constituted a law on the subject of bankruptcies,[9] the Court examined how Congress had repeatedly innovated when

little is known about the bankruptcy deliberations at the constitutional convention.."); Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 369 (2006) (noting "[t]he absence of extensive debate over the text of the Bankruptcy Clause or its insertion" into the Constitution); *cf.* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1100, at 4 (Boston, Hilliard, Gray & Co. 1833) ("The brevity, with which this subject [i.e., the bankruptcy power] is treated by the Federalist, is quite remarkable.").

4. *See* Kurt H. Nadelmann, *On the Origins of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 218 (1957) (arguing that "[c]loser examination of [James] Madison's *Notes of Debates* [*in the Federal Convention*] . . . furnishes additional information [about the Bankruptcy Clause]—information of great interest").

5. *Cf.* F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 109 (1919) ("The decisions and practice of the Supreme Court of the United States in defining and putting into operation the decree of the *Constitution* in regard to a uniform system of legislation for the condition of bankruptcy have withstood the assaults of partisans of every interpretation."). *See generally* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 43–51 (1995) (discussing major constitutional issues that have arisen with respect to the Bankruptcy Clause).

6. Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit has suggested that the Bankruptcy Clause, by virtue of its specific nature, generally does not invite constitutional contestation. *See* Diane P. Wood, *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. REV. 1079, 1105 (2005) ("Debate over [the Constitution's] meaning is inevitable whenever something as specific as the Bankruptcy Clause or the Titles of Nobility Clause is not at issue."). *See generally* Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101, 113, 116 n.57, 117, 128 tbl.6 (1997) (finding that, among the 611 certiorari petitions to the Supreme Court that were filed from the 1978 Term through the 1995 Term by petitioners who paid the filing fee and "that raised an issue under the Bankruptcy Code or related points of statutory or constitutional law," only 5.1% (31 of 611) of the petitions involved constitutional law issues).

7. *But cf.* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1410 (2017) ("Three decades ago, the Supreme Court began to suggest that a federal statute's novelty could be evidence that the statute exceeded the scope of Congress's delegated powers or violated the Tenth Amendment."). Legal scholarship from the late 1800s and early 1900s discussed the Bankruptcy Clause's dynamic capacity. *See, e.g.*, JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES § 393, at 343 (Edmund H. Bennett ed., Boston and New York, Houghton, Mifflin & Co. 10th ed. 1888); Samuel Williston, *The Effect of a National Bankruptcy Law Upon State Laws*, 22 HARV. L. REV. 547, 553 (1909); NOEL, *supra* note 5, at 85.

8. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979).

9. *See* Cont'l Illinois Nat'l Bank & Tr. Co. of Chi. v. Chi., R.I. & P. Ry. Co., 294 U.S. 648, 667 (1935).

designing prior bankruptcy systems.[10] The Court described those innovations as "radically progressive" and "far-reaching," noting that the judiciary had deemed all of them to fall within the constitutional limits of the bankruptcy power.[11] The Court further stressed how the innovations "demonstrate[d] in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day."[12] The Court thus posited a story in which Congress and the federal courts had worked in tandem to expand the bankruptcy power's reach over time.[13] Three years later, the Court reaffirmed its account of the dynamic bankruptcy power when stating, "the subject of bankruptcies is incapable of final definition. The concept changes."[14]

A central theme in the history of bankruptcy law as a federal legal institution has been its repeated reinvention in response to financial crises. Traditional accounts link the economic dislocation caused by the Panics of 1797, 1837, 1857, and 1893 to the bankruptcy systems created by Congress in 1800, 1841, 1867, and 1898.[15] Furthermore, these accounts characterize the development of bankruptcy law as having occurred in fits and starts: Congress repealed

10. *See id.* at 670–71.

11. *Id.* at 671.

12. *Id.*

13. *See id.* at 670 ("[T]he nature of this power and the extent of it can best be fixed by the gradual process of historical and judicial 'inclusion and exclusion.'"); *id.* at 671 ("From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."). *But see* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 500 (1996) (noting that "courts and scholars have concluded that the boundaries of the Bankruptcy Clause are constantly expanding to meet the new demands and forms of commercial and business development," but rejecting that conclusion, arguing "that 'the subject of Bankruptcies' has remained stable, even as the means of addressing the subject of bankruptcies have changed"); *cf.* RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 31–32 (2017) (finding that the Supreme Court has tended to narrowly interpret the bankruptcy power in its decisions involving the constitutionality or application of the Bankruptcy Code). Because federal bankruptcy law has always been judicially administered, the executive branch has been mostly sidelined with regard to policymaking in this field. *See* Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 394–401, 445–51 (2012).

14. Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513 (1938). The Court recently quoted its prior statement in *Wright* when discussing Congress's broad authority under the Bankruptcy Clause. *See* Siegel v. Fitzgerald, 142 S. Ct. 1770, 1779 (2022).

15. *See* David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 323 (1999); *cf.* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 9 (Beard Books 1999) (1935) (stating that "every [U.S.] bankruptcy law has been the product of some financial crisis or business depression"). The economic dislocation caused by the Civil War has also been linked to the 1867 Act. *See, e.g.*, ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR 15–21 (2004); COLEMAN, *supra* note 3, at 24; NOEL, *supra* note 5, at 124; Tabb, *supra* note 5, at 14.

the Bankruptcy Act of 1800 (the "1800 Act") in 1803, the Bankruptcy Act of 1841 (the "1841 Act" or the "Act") in 1843, and the Bankruptcy Act of 1867 (the "1867 Act") in 1878,[16] once the economic turmoil prompting each act had receded.[17] On the other hand, Congress did not repeal the 1898 Act until 1979.[18] The prevailing conceptual framework thus describes bankruptcy law's "path to permanence" as having involved significant periods of time during which the bankruptcy power lay dormant.[19]

This dormancy framework needs to be reconceptualized. Each statute that repealed the nineteenth-century bankruptcy acts contained a savings clause,[20] which provided that any bankruptcy cases pending when repeal took effect would remain undisturbed and be resolved pursuant to the terms of the repealed legislation.[21] Accordingly, federal bankruptcy legislation continued to apply to ongoing matters related to pre-existing cases. When one accounts for these matters, the intervals involving exercise of the bankruptcy power expand, coupled with a concomitant contraction of the power's dormancy periods.

This reconceptualization should change how we understand bankruptcy law's development, particularly with respect to the 1841 Act. That legislation marked a revolutionary shift in the design of bankruptcy law, reorienting the government's response to financial failure as one primarily directed to helping debtors rather than creditors.[22] Although scholars have acknowledged this dramatic reorientation,[23] they have downplayed the Act's importance, conceiving of the law as a minor blip due to its quick repeal by Congress a mere thirteen months after it took effect.[24] But such underemphasis is unwarranted: As a result of the savings clause in the repeal legislation,

16. *See infra* note 40.

17. *See* Skeel, *supra* note 15, at 322–23; *see also* Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 333 (1994) (stating that "previous bankruptcy statutes had floated to enactment on the passing waves of popular demand that attended financial panics, to be repealed upon the return of prosperity").

18. *See infra* notes 43–44 and accompanying text.

19. *See infra* notes 37–49 and accompanying text. I borrow the phrase "path to permanence" from DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 23 (2001).

20. *See generally Saving Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost. . . . Also termed *savings clause*.").

21. *See infra* notes 50–51 and accompanying text.

22. *See, e.g.*, Cont'l Illinois Nat. Bank & Tr. Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 670–71 (1935); Rafael I. Pardo, *On Bankruptcy's Promethean Gap: Building Enslaving Capacity into the Antebellum Administrative State*, 48 FORDHAM URB. L.J. 801, 837–46 (2021).

23. *See, e.g.*, Tabb, *supra* note 5, at 17.

24. *See infra* note 42 and accompanying text.

administration of the 1841 Act bankruptcy system would continue into the 1860s.[25]

Importantly, that system operated at a time when the business of slavery was ever-expanding and becoming an increasingly dominant market activity with a crucial role in the commercialization of the nation's economy.[26] Prior to 2018, no published scholarship had systematically analyzed the relationship between federal bankruptcy law and slavery during the antebellum era.[27] Since then, my research on the topic has revealed multiple facets of this relationship as it developed in the 1841 Act bankruptcy system.[28] That work shows how the federal government, through the Act, became the owner and seller of enslaved Black Americans,[29] provided direct economic support to financially distressed slave traders,[30] restructured financially distressed assets involved in the domestic slave trade,[31] and engaged in residual policymaking with racially harmful effects.[32] Modern bankruptcy law's first forebear[33] was thus forged in the crucible of slavery.

Though perhaps not readily apparent from the foregoing brief description of my prior work, one of my major goals has been to contest conventional wisdom about legal innovation under the 1841 Act by recovering the forgotten history about bankruptcy and slavery. This has required repositioning the *location* of some of the innovation from the North to the South and the *means* of some of the innovation from the statute and judicial opinions to administration of the Act by federal courts and their officials. While also following these lines of analytical inquiry, this Article seeks to expand the *periodization* of innovation by more emphatically taking account of and giving due weight to the Act's continued development subsequent to its repeal.[34]

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

26. *See* Rafael I. Pardo, *Federally Funded Slaving*, 93 TUL. L. REV. 787, 811–15 (2019).

27. *See* Rafael I. Pardo, *Bankrupted Slaves*, 71 VAND. L. REV. 1071, 1094–98 (2018) (discussing the literature gap).

28. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

29. Pardo, *supra* note 27. *See generally* Pardo, *supra* note 22, at 835–56 (arguing that the 1841 bankruptcy system entailed nationalization of bankrupts' assets).

30. Pardo, *supra* note 26.

31. Pardo, *supra* note 22.

32. Rafael I. Pardo, *Racialized Bankruptcy Federalism*, 2021 MICH. ST. L. REV. 1299.

33. *See* Pardo, *supra* note 22, at 810 ("[T]he emphasis on debtor relief is one of the primary through-lines linking the [1841 Act and the 1978 Bankruptcy Code], notwithstanding subsequent amendments to the Code that have sought to make forgiveness of debt less expansive. This conceptual continuity justifies general comparisons between the two systems.").

34. *See generally* Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863 (2011) ("One of

This Article proceeds as follows. Part I explores the persistence of the 1841 Act bankruptcy system—notwithstanding the Act's repeal—by discussing the wide array of historical sources that corroborate this account and identifying the factors that contributed to the system's continued operation into the 1860s. Rather than providing a survey of myriad postrepeal episodes involving legal innovation under the Act, Parts II and III instead focus on two significant ones to demonstrate how an expanded periodization yields fresh insights into understanding the interaction between federal bankruptcy law and slavery. Part II discusses the judicial constitutional settlement of voluntary bankruptcy relief—that is, the federal judiciary's determinations that the 1841 Act's provisions enabling individuals to obtain relief from their debts of their own accord and without creditor consent (something that prior federal bankruptcy law had never permitted) were constitutionally valid. Relevantly, the court decisions comprising the judicial settlement process included a federal circuit court's postrepeal ruling on the constitutionality of the 1841 Act in a case involving a bankrupt enslaver.[35] Part III discusses the practice pursuant to which some federal district courts empowered assignees, who were the federal court officials appointed to administer property surrendered by bankrupts in 1841 Act cases,[36] to operate a bankrupt's business before liquidating it, as evidenced by certain cases involving plantation owners who sought relief under the Act. This Article concludes that these historical episodes add to the growing body of evidence that demands a critical assessment of the antebellum-era relationship between the federal bankruptcy law and slavery.

I. THE 1841 ACT'S LONG SHADOW

This Part addresses three matters. Section I.A deconstructs bankruptcy historiography's oft-repeated claim that the nineteenth

the greatest services that a historian can perform is to identify and define a particular time period so that we can grasp its distinctive features. Another great service is to apply critical scrutiny to that definition in order to highlight and counteract the distortions that periodization inevitably creates."). For an example of prior work in which I have briefly discussed the significance of the 1841 Act's post-repeal administration by federal courts, see Pardo, *supra* note 32, at 1318.

35. The term "bankrupt" under the 1841 Act referred to a debtor whom a federal court had decreed to be eligible to seek a discharge of debts. *See infra* notes 136–140 and accompanying text. Congress stopped using the term in federal bankruptcy legislation when it enacted the Bankruptcy Code. *See* H.R. REP. NO. 95-595, at 310 (1977) ("The general term debtor is used . . . as a means of reducing the stigma connected with the term bankrupt."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6267; *see also* 11 U.S.C. § 101(13) ("The term 'debtor' means person or municipality concerning which a case under this title has been commenced.").

36. *See* Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 442 (repealed 1843); Pardo, *supra* note 22, at 814.

century's first three bankruptcy acts (i.e., the 1800, 1841, and 1867 Acts) lasted briefly and that the 1898 Act ushered in a new era that finally made federal bankruptcy law a permanent feature of the nation's legal landscape. Section I.B sets forth the descriptive argument that the 1841 Act had a significantly longer life than recognized by historians: first, by identifying the wide range of nonobscure published sources (i.e., court opinions, federal legislative documents, newspaper notices of 1841 Act proceedings) that have always evidenced the Act's persistence; and second, by explaining how the federal judiciary's lack of capacity to expeditiously process 1841 Act cases and their related proceedings, coupled with the savings clause in the Act's repeal legislation, allowed the Act to endure. The case-management crisis confronted by federal district courts under the Act puts into sharp relief the importance of consulting the legal archive and its manuscript court records in order to construct an accurate chronology of the 1841 Act's duration.

A. The Standard Account of Nineteenth-Century Bankruptcy Law's Intransience

When discussing the history of federal bankruptcy law, scholars routinely describe such legislation as having been ephemeral up until the end of the nineteenth century,[37] at which point Congress passed the 1898 Act.[38] From the start of government under the Constitution on March 4, 1789,[39] up to passage of the 1898 Act, Congress established three distinct federal bankruptcy systems pursuant to the 1800 Act, the 1841 Act, and the 1867 Act, each time repealing the legislation in

37. *See, e.g.*, COLEMAN, *supra* note 3, at 18; SKEEL, *supra* note 19, at 3–4; Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 757 (2000); G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 AM. BANKR. L.J. 227, 245 (2000); Jonathan C. Lipson, *Debt and Democracy: Towards A Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 630 (2008); Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. REV. 993, 1004 n.39 (1995); Sauer, *supra* note 17, at 291; Skeel, *supra* note 15, at 321–22 & 322 n.6; Amir Shachmurove, *Last Rites and Licit Resurrections: The Problematic Pillars of Section 546(a)'s Oft-Presumed Preemption of Non-Bankruptcy Statutes of Repose*, 30 AM. BANKR. INST. L. REV. 141, 167 (2022); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 326 (1991).

Courts have also described the 1898 Act's predecessors as fleeting legislation. *See, e.g.*, Cent. Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 386 & n.3 (2006) (Thomas, J., dissenting); *In re* Ultra Petroleum Corp., 624 B.R. 178, 196 n.4 (Bankr. S.D. Tex. 2020), *aff'd*, Ultra Petroleum Corp. v. Ad Hoc Comm. of Opco Unsecured Creditors (*In re* Ultra Petroleum Corp.), 51 F.4th 138 (5th Cir. 2022).

38. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979).

39. *See* Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 403 (2017).

relatively short order.[40] When measured from each act's effective date up to, but not including, its effective repeal date, the 1800 Act lasted approximately three and a half years;[41] the 1841 Act lasted approximately one year and one month;[42] and the 1867 Act lasted approximately eleven and a half years.[43] In stark contrast, the 1898 Act bankruptcy system endured like no other before it, lasting eighty-one and a quarter years before its replacement in 1979 with the Bankruptcy Code system,[44] which has continuously operated since then.[45] Viewed from this perspective, one might be tempted to classify the Bankruptcy Clause's dormancy and operative periods as follows:[46]

40. 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; Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

41. *See infra* Table 1. Congress passed the 1800 Act on April 4, 1800, 2 Stat. at 19, but delayed its effective date to June 1, 1800, *see* § 1, 2 Stat. at 19–20.

42. *See infra* Table 1. Congress passed the 1841 Act on August 19, 1841, 5 Stat. at 440, but delayed its effective date to February 1, 1842, *see* § 17, 5 Stat. at 449; *see also* Pardo, *Federally Funded Slaving*, *supra* note 26, at 809 n.120 (discussing effective date of 1841 Act).

43. *See infra* Table 1. Congress passed the 1867 Act on March 2, 1867. *See* 14 Stat. at 517. Although Congress delayed the effective date of core aspects of the Act, including the commencement of cases, to June 1, 1867, Congress nonetheless provided that the Act would "commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval." § 50, 14 Stat. at 541. Finally, Congress delayed the 1867 Act's effective date of repeal to September 1, 1878. *See* 20 Stat. at 99.

44. *See infra* Table 1. Congress passed the 1898 Act on July 1, 1898. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1979). Other than delaying the effective date of the Act with respect to the commencement of voluntary and involuntary cases, Congress provided that the Act would "go into full force and effect upon its passage." § 71a, 30 Stat. at 566.

45. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532). Although enacted on November 6, 1978, Congress delayed the Bankruptcy Reform Act's effective date to October 1, 1979, subject to certain exceptions. *See* § 402(a), 92 Stat. at 2682. None of those applied to the Act's provision repealing the 1898 Act. *Compare* § 402(b)–(e), 92 Stat. at 2682 (identifying Bankruptcy Reform Act provisions with effective dates different than the Act's default effective date, none of which was section 401), *with* § 401(a), 92 Stat. at 2682 ("The Bankruptcy Act [of 1898] is repealed."). Accordingly, the Bankruptcy Reform Act's effective date was also the 1898 Act's effective date of repeal.

46. The concept of Bankruptcy Clause dormancy can be traced back to nineteenth-century legal commentary. *See, e.g.*, STORY, *supra* note 3, § 1103, at 8; *The Late Bankrupt Law of the United States.*, 3 PA. L.J. 1, 1 (1844). Modern legal commentary has continued to refer to the concept. *See, e.g.*, Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 CARDOZO L. REV. 1805, 1807 (2004); Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 380 (2014).

TABLE 1
A TRADITIONAL CONCEPTUALIZATION OF THE
BANKRUPTCY CLAUSE'S DORMANCY AND OPERATIVE PERIODS

Period	**Start Date**	**End Date**	**Duration**
First Dormancy Period	03/04/1789	06/01/1800	4,106 days
1800 Act System	06/01/1800	12/19/1803	1,296 days
Second Dormancy Period	12/19/1803	02/01/1842	13,924 days
1841 Act System	02/01/1842	03/03/1843	395 days
Third Dormancy Period	03/03/1843	03/02/1867	8,675 days
1867 Act System	03/02/1867	09/01/1878	4,201 days
Fourth Dormancy Period	09/01/1878	07/01/1898	7,243 days
1898 Act System	07/01/1898	10/01/1979	29,676 days
Bankruptcy Code System[47]	10/01/1979	TBD	16,071 days

The four dormancy periods identified in Table 1 totaled 33,948 days, or approximately 93 years; whereas the three operative periods predating the 1898 Act totaled 5,892 days, or approximately 16 years. Unsurprisingly, scholars who have looked at nineteenth-century federal bankruptcy law through this lens have made statements like, "For over a century after the Constitution, . . . the Bankruptcy Clause remained largely unexercised by Congress."[48] Or put another way, traditional historical accounts repeatedly emphasize that congressional repeal of the pre-1898 bankruptcy acts wiped federal bankruptcy law off the books.[49] But such accounts are misleading.

47. The duration listed in Table 1 for the Bankruptcy Code system is measured from October 1, 1979, up to (but not including) October 1, 2023. Of course, this period will continue to expand so long as the Code remains in effect.

48. Tabb, *supra* note 5, at 13; *see also* THOMPSON, *supra* note 15, at 18 (stating that Congress "had exercised [the bankruptcy power] only sporadically over the nearly eighty years since the ratification of the Constitution").

49. *See, e.g.*, Brubaker, *supra* note 37, at 757; Tabb, *supra* note 5, at 13; Mann, *supra* note 37, at 1004 n.39; *cf.* John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303, 315–16 (2003) (book review) ("The 1841 legislation lasted for an even shorter time than the 1800 Act. . . . Federal bankruptcy legislation would not be enacted again until 1867 . . . . That legislation would last until 1878. Twenty more years would pass before Congress again enacted bankruptcy legislation in 1898. *This time the legislation stuck; we have had federal bankruptcy legislation ever since*." (emphasis added) (footnotes omitted)). In prior work, I too mischaracterized the effect of repeal of one of the pre-1898 bankruptcy acts. *See* Pardo, *supra* note 27, at 1073 (describing the 1800 Act bankruptcy system as "a roughly three-year experiment that began in 1800 and ended in 1803").

None of the pre-1898 bankruptcy systems immediately shut down when Congress repealed the legislation establishing them. Rather, each system's repeal act provided that any bankruptcy cases pending when repeal took effect would remain undisturbed and be resolved pursuant to the system's original establishing legislation.[50] While no new bankruptcy cases could be commenced once repeal took effect, the savings clauses of the repeal acts signified that federal bankruptcy legislation would remain on the books and continue to apply to ongoing matters related to pre-existing cases.[51] The duration of federal bankruptcy law would thus be a function of the scope of such matters.

B. The 1841 Act's Persistence

Contrary to assertions by scholars regarding the immediate disappearance of the 1841 Act upon its repeal,[52] the legislation had significant longevity due to the large volume of cases filed within the narrow window of time for doing so. Notwithstanding Congress's quick repeal of the 1841 Act following its delayed effective date,[53] debtors inundated that bankruptcy system seeking to take advantage of the legislation's generous relief.[54] Over 46,000 cases were filed,[55] a number far exceeding case filings under the 1800 Act, which likely totaled

50. *See* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 (repealing 1800 Act system); Act of Mar. 3, 1843, ch. 82, 5 Stat. 614 (repealing 1841 Act system); Act of June 7, 1878, ch. 160, 20 Stat. 99 (repealing 1867 Act system).

51. For an example of ongoing matters relating to an 1800 Act case, see *In re Morris*, 17 F. Cas. 785 (E.D. Pa. 1837) (No. 9,825). For an example of ongoing matters relating to an 1867 Act case, see *Strang v. Bradner*, 114 U.S. 555 (1885).

52. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861, at 126 n.24 (2005); SKEEL, *supra* note 37, at 32; WARREN, supra note 15, at 85; Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 365–66 (2013); Shachmurove, supra note 37, at 167; Tabb, *supra* note 37, at 353. None of the these works mentions the savings clause of the 1841 Act's repeal legislation.

Edward Balleisen's seminal work on the 1841 Act, while noting the repeal legislation's savings clause, nonetheless adheres to the traditional conceptualization of the Bankruptcy Clause's operative and dormancy periods. *See* EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 102, 123. To be sure, he acknowledges that the Act had legacy effects. *See, e.g., id.* at 132–33. But he does not account for the ways in which the 1841 Act system continued operating into the 1860s.

53. *See supra* note 42 (discussing 1841 Act's delayed effective date); *supra* Table 1 (indicating that Congress passed the act repealing the 1841 Act system 395 days after it went into effect).

54. *See* Pardo, *supra* note 27, at 1083; Pardo, *supra* note 31, at 841.

55. *See* Rafael I. Pardo, *Documenting Bankrupted Slaves*, 71 VAND. L. REV. EN BANC 73, 86 tbl.1 (2018). The annualized filing rate of 1841 Act cases appears to have been significantly greater than that for 1867 Act cases. *Cf. Summary of Events. United States. Bankrupt Law.*, 13 AM. L. REV. 367, 371 (1879) ("According to statistics given in the Boston *Commercial Advertiser*, the number of bankruptcies filed under the late bankrupt law, from the time it went into operation, June 1, 1867, to Aug. 31, 1876, was 103,005 . . . .").

around 1,000.[56] Because of the savings clause in the legislation repealing the 1841 Act,[57] administration of the Act's bankruptcy system would carry on into the 1860s.[58]

1. Evidence from Published Sources

Although the most voluminous evidence of the 1841 Act's long shadow can be found in the legal archive,[59] scholars who have written about the history of bankruptcy law might not have had the means or time (or maybe even inclination) to conduct archival research. Even so, it is hard to comprehend why bankruptcy historiography has continued to bandy about claims exaggerating the Act's demise when a variety of published sources undermining that narrative—specifically, court opinions, federal legislative documents, and newspaper notices of 1841 Act proceedings—have been sitting in plain sight, readily available to researchers for quite some time.[60]

56. *See* Karen Gross et al., *Ladies in Red: Learning from America's First Female Bankrupts*, 40 AM. J. LEGAL HIST. 1, 23–24 (1996) (estimating a minimum of 914 cases filed under the 1800 Act, exclusive of missing figures for cases filed in New Hampshire, which "could have been sizable," and reporting 230 cases as the maximum number of cases filed in any of the states for which figures were obtained). Notably, Gross et al. do not provide any statistics for 1800 Act cases from Kentucky, New Jersey, Ohio, South Carolina, and Tennessee, despite having visited the National Archives regional facilities covering those states. *See id.* at 7 n.34, 23 n.118, 24 n.120. All of these states, except Ohio, had been admitted to the Union before the 1800 Act, and Ohio was admitted during the period when 1800 Act cases could be commenced. *See List of U.S. States by Date of Admission to the Union*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_U.S._states_by_date_of_admission_to_the_Union [https://perma.cc/2CJR-VKAA] (last edited July 18, 2023, 00:13 UTC); *supra* Table 1 (setting forth the 1800 Act's effective and repeal dates). Also, the number of 1800 Act case filings reported by Gross et al. for the Districts of Maryland and New York differ from those reported by other researchers. *Compare* Gross et al., *supra*, at 24 (reporting that 58 and 166 cases were filed under the 1800 Act in, respectively, the Districts of Maryland and New York), *with* PETER CHARLES HOFFER ET AL., THE FEDERAL COURTS: AN ESSENTIAL HISTORY 92–93 (2016) (reporting that 55 and 131 cases were filed under the 1800 Act in, respectively the Districts of Maryland and New York).

57. *See generally In re* Howes, 12 F. Cas. 715 (D. Vt. 1843) (No. 6,788) (discussing the effect of the savings clause in the 1841 Act repeal legislation).

58. *See infra* notes 67–79, 88 and accompanying text. In prior work, although recognizing that the savings clause in the 1841 Act's repeal legislation extended the Act's operation, *see* Pardo, *Bankrupted Slaves*, *supra* note 27, at 1122 & n.282, I mischaracterized "the entire period of the 1841 Act's operative effect" by reference to the Act's effective date and its repeal date, *id.* at 1106; *see also* Pardo, *supra* note 55, at 75 (same).

59. *See, e.g.*, Rafael I. Pardo, *Financial Freedom Suits: Bankruptcy, Race, and Citizenship in Antebellum America*, 62 ARIZ. L. REV. 125, 177 (2020) (describing National Archives collection of 1841 Act case files from the Eastern District of Louisiana).

60. For example, Charles Warren's *Bankruptcy in United States History*, which was first published in 1935, has a citation that includes the fifteen cases heard by the Supreme Court between 1848 and 1865 that involved the 1841 Act. *See* WARREN, *supra* note 15, 178 n.50. Warren, however, erroneously refers to this group as consisting of fourteen cases (i.e., *Houston v. City Bank of New Orleans* and "the thirteen other cases decided under the Act of 1841 from 1848 to 1865"). *Id.* at 87.

First, consider some court opinions highlighting that the 1841 Act system, and thus the Bankruptcy Clause, continued operating through the 1850s and into the 1860s. During the 1850s, the Supreme Court and federal circuit courts issued published opinions that resolved disputes relating to the 1841 Act's operation, including (1) the scope and effect of a discharge under the Act,[61] (2) the power of federal circuit courts to annul or vacate discharges granted by federal district courts under the Act,[62] (3) the Act's limitations period for suits brought by and against the assignee,[63] (4) the scope and effect of the Act's provision vesting the bankrupt's property interests in the assignee,[64] and (5) the Act's provision granting an assignee the power to recover a bankrupt's prebankruptcy property transfers.[65] State supreme courts likewise issued published opinions resolving similar matters during this time period.[66]

And while surely an outlier, the Supreme Court's decision in *Clark v. Hackett* on January 27, 1862,[67] merits some discussion given

61. Lathrop v. Stuart, 14 F. Cas. 1185, 1186 (C.C.D. Ohio 1850) (No. 8,113) (per curiam); Tiernan v. Woodruff, 23 F. Cas. 1206, 1207–08 (C.C.D. Mich. 1852) (No. 14,028) (per curiam); Bush v. Person, 59 U.S. (18 How.) 82, 83-85 (1856). For an opinion issued by a federal district court in the 1850s regarding the effect of discharge under the Act, see *United States v. Zerega*, 28 F. Cas. 804, 805–06 (S.D.N.Y. 1856) (No. 16,786).

One of the Supreme Court's mid-1840s decisions on the scope and effect of a discharge under the Act alludes to how such decisions, though issued subsequent to the Act's repeal, could nonetheless have wide-reaching substantive impact due to the Act's continuing operation. In *Chapman v. Forsyth*, the Court examined the interplay of the Act's eligibility and discharge provisions. *See* Chapman v. Forsyth, 43 U.S. (2 How.) 202, 207–08 (1844); *see also infra* notes 267–269 and accompanying text (discussing *Chapman*). Justice McClean, writing for the unanimous Court, observed, "These questions are far less important than they would have been had the bankrupt law not been repealed. *But they are still important as affecting a large class of citizens and to a large amount*." *Id.* at 207 (emphasis added).

62. Com. Bank of Manchester v. Buckner, 61 U.S. (20 How.) 108 (1858).

63. Carr v. Hilton, 5 F. Cas. 137, 137 (Curtis, Circuit Justice C.C.D. Me. 1853) (No. 2,437); Pritchard v. Chandler, 19 F. Cas. 1347, 1347–48 (Curtis, Circuit Justice C.C.D. Mass. 1855) (No. 11,436); Clark v. Hackett, 5 F. Cas. 874, 878–79 (Clifford, Circuit Justice C.C.D.N.H. 1859) (No. 2,823), *aff'd*, 66 U.S. (1 Black) 77 (1862).

64. *Pritchard*, 19 F. Cas. at 1347; Barron v. Newberry, 2 F. Cas. 937, 940 (McLean, Circuit Justice, C.C.N.D. Ill. 1857) (No. 1,056).

65. Buckingham v. McLean, 54 U.S. (13 How.) 151, 165 (1852).

66. *See, e.g.*, Flournoy v. Newton, 8 Ga. 306 (1850) (validity and enforcement of 1841 Act discharge); Chambers v. Neal, 52 Ky. (13 B. Mon.) 256 (1852) (same); Porter v. Duglass, 27 Miss. 379 (Miss. Err. & App. 1854) (same); Ashley v. Robinson, 17 Ala. 339 (1856) (same); Bush v. Cooper, 26 Miss. 599 (Miss. Err. & App. 1853) (scope and effect of 1841 Act discharge); Hall v. Sewell, 9 Gill 146 (Md. 1850) (assignee's power to recover a bankrupt's prebankruptcy property transfers); Tucker v. Daly, 48 Va. (7 Gratt.) 330 (1851) (same); Pike v. Lowell, 32 Me. 245 (1850) (Act's limitations period for suits brought by and against the assignee); Warren v. Homestead, 33 Me. 256 (1851) (scope and effect of the Act's provision vesting the bankrupt's property interests in the assignee); Hackett v. Kendall, 23 Vt. 275 (1851) (same); Smith v. Chandler, 69 Mass. (3 Gray) 392 (1855) (same); Streeter v. Sumner, 31 N.H. 542 (1855) (same); Galbraith v. Fisher, 22 Pa. 406 (1853) (assignee's power to sell bankrupt's property free and clear of liens).

67. 66 U.S. (1 Black) 77 (1862).

the dollar amounts at stake. The case involved Ferdinand Clark, who had been granted a discharge under the 1841 Act in December 1844 by the U.S. District Court for the District of New Hampshire,[68] and William Y. Hackett, whom the court appointed in May 1851 as a successor to John Palmer, the original assignee in the case,[69] due to the latter's death.[70] The dispute between the parties involved Clark's claim against the Republic of Mexico for the illegal seizure of the schooner *Louisiana*'s cargo.[71] Clark's original asset schedule filed in his 1841 Act case omitted this claim, which he subsequently disclosed in an amended schedule in the most rudimentary way conceivable and only after receiving his discharge.[72] Importantly, Clark had been prosecuting the claim before he sought relief under the Act, and he withheld this information from Palmer, who sold all of Clark's assets at public auction in April 1845 to Clark's sister for a mere two dollars.[73] Five days later, Clark purchased his former assets from her, including the claim,[74] which he successfully prosecuted, ultimately obtaining an astronomical net award of $69,429.04,[75] which was made on April 15, 1851.[76]

The award triggered a series of events leading to Hackett's appointment the following month as successor assignee.[77] From that point forward, Clark and Hackett spent more than a decade litigating over who had title to the award. The Supreme Court weighed in on multiple occasions, both times deeming Clark's bankruptcy estate to be

68. *See* Clark v. Clark, 58 U.S. (17 How.) 315, 316–17 (1855).

69. *See* Clark v. Hackett, 5 F. Cas. 874, 876 (Clifford, Circuit Justice C.C.D.N.H. 1859) (No. 2823), *aff'd*, 66 U.S. (1 Black) 77 (1862).

70. *See Clark*, 58 U.S. (17 How.) at 320. Generally speaking, an 1841 Act discharge generally relieved bankrupts from personal liablity from their pre-bankruptcy debts. *See infra* notes 155–156 and accompanying text.

71. *See id.* at 319.

72. *See id.*

73. *See id.* at 319–20; *Clark*, 5 F. Cas. at 876.

74. *Clark*, 5 F. Cas. at 876.

75. This would be approximately $2,740,000 in 2022 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 – Present*, MEASURINGWORTH, https://www.measuringworth.com/calculators/uscompare [https://perma.cc/C8WV-P3ES]. 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 $46.9 million in 2022 dollars. *See id.*

76. *See Clark*, 58 U.S. (17 How.) at 315. The Court clearly viewed Clark's conduct with regard to the claim to be an abuse of the bankruptcy process. *See id.* at 320 ("From the obscurity of the schedule, and the concealment of the evidences of a right of property from the assignee and the creditors, we feel satisfied that the bankrupt intended to rid himself of his debts, and to secure to himself the effects in dispute by contrivance, and that part of the contrivance was a purchase in the name of his sister, for his own benefit.").

77. *See id.* at 320.

the true owner.[78] With the Court's second decision in January 1862, almost two decades after the 1841 Act's repeal, Hackett at last had a clear path as the bankruptcy estate's representative to distribute the award proceeds to creditors in Clark's bankruptcy case, subject to the supervision and control of the U.S District Court for the District of New Hampshire.[79]

Readers might be inclined to dismiss the *Clark* litigation saga as an aberration. To be clear, my descriptive claim is not that the case represents a critical mass of 1841 Act proceedings that spilled over into the 1860s. Rather, the point is that the *Clark* case represents incredibly low-hanging fruit, ripe for the taking, that should have spawned multiple lines of inquiry. At a minimum, prior scholars writing on the history of bankruptcy law should have easily uncovered Supreme Court decisions administering the Act well beyond its repeal date.[80] That discovery, in turn, should have raised flags that such evidence was merely the tip of the proverbial iceberg: Published opinions have always constituted a fraction of the orders churned out by courts in carrying out their routine work,[81] and the federal judiciary's administration of the 1841 Act was no different.[82] So alerted, that should have prompted scholars to dig further elsewhere. That digging should have eventually revealed to them the federal government's statistical reports on 1841 Act cases, two of which were published several years after the Act's repeal.[83] Those reports reveal that many cases had yet to be brought to final resolution as of the late 1840s.[84] Given the Act's various notice

78. *See Clark*, 58 U.S. (17 How.) at 322; Clark v. Hackett, 66 U.S. (1 Black) 77, 79 (1862).

79. *See Clark*, 66 U.S. (1 Black) at 78–79.

80. *See, e.g.*, Bush v. Person, 59 U.S. (18 How.) 82 (1856); Com. Bank of Manchester v. Buckner, 61 U.S. (20 How.) 108 (1858); Cleveland Ins. Co. v. Reed, 65 U.S. (24 How.) 284 (1861); Banks v. Ogden, 69 U.S. (2 Wall.) 57 (1865).

81. *See, e.g.*, David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007).

82. For a relevant example given this Article's focus, a Westlaw search of the Federal Cases database indicates that Judge Theodore McCaleb issued thirty-seven published opinions during his lifetime. Judge McCaleb presided over the 877 cases filed under the 1841 Act in the Eastern and Western Districts of Louisiana—more specifically, 763 in the former and 114 in the latter. *See infra* Appendix Table A1. Not a single one of his published opinions pertained to the 1841 Act. In its entirety, the Westlaw search query was as follows: "adv: allfeds: JU(mccaleb) & DA(bef 1865)."

83. *See* S. DOC. NO. 27-19 (1842); H.R. DOC. NO. 29-223 (1846); H.R. DOC. NO. 29-99 (1847). For a discussion of how some scholars who mined the legal archive nonetheless failed to uncover some of these statistical reports, see Pardo, *supra* note 58, at 79–81.

84. For example, in reporting 1841 Act case statistics for the Southern District of New York, the federal district court's clerk stated, "The estates are not yet closed in many cases. Some assets, no doubt, yet remain to be realized, and some dividends are yet to be made." H.R. DOC. NO. 29-223, at 8 n.**. Similarly, in reporting 1841 Act case statistics for the Eastern District of Louisiana, the federal district court's clerk stated, "There are many matters in bankruptcy unsettled, and reports of assignees and commissioners yet to be made." H.R. DOC. NO. 29-99, at 7 n.§.

requirements,[85] that revelation should have prompted a search of antebellum newspapers for bankruptcy notices, of which there are many from the 1850s,[86] some involving quite significant matters.[87] And that discovery should have encouraged exploration of the legal archive, which reveals instances of ongoing administration of 1841 Act cases during the 1860s.[88]

85. *See, e.g.*, Act of Aug. 19, 1841, ch. 9, § 7, 5 Stat. 440, 446 (noting that, with regard to "all petitions by any bankrupt for the benefit of this act, . . . notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court at least twenty days before the hearing thereof") (repealed 1843); § 10, 5 Stat. at 447 (requiring "notice of . . . dividends and distribution to be given in some newspaper or newspapers in the district, designated by the court, ten days at least before the order therefor is passed").

86. *See, e.g.*, *In re Warren* Notice, NASHVILLE UNION (Tenn.), July 21, 1852, at 3 (announcing dividend distribution in 1841 Act case from the Middle District of Tennessee); *In re Lynah* Notice, CHARLESTON DAILY COURIER (S.C.), June 4, 1853, at 4 (announcing dividend distribution in 1841 Act case from the District of South Carolina); *Sale by Assignee in Bankruptcy*, ST. LOUIS GLOBE-DEMOCRAT (Mo.), June 24, 1854, at 1 (announcing asset sale in 1841 Act case from the District of Missouri); *In re Clark* Notice, PORTLAND HERALD PRESS (Me.), Apr. 6, 1858, at 4 (announcing dividend distribution in 1841 Act case from the District of Maine); *Assignee's Sale in Bankruptcy*, DAILY EXCHANGE (Baltimore), June 2, 1859, at 3 (announcing asset sale in 1841 Act case from the District of Maryland).

87. For example, Wydham Kemp, the assignee in the 1841 Act case of John L. Hudgins in the Eastern District of Virginia, arranged for publication of a notice announcing, "I have deposited the sum of twenty-one thousand dollars in the Bank of Virginia, at Richmond, to the credit of the Court in this case, and that the said Court, after ten days, will pass an order for a dividend and distribution thereof, among the creditors of the said John L. Hudgins." *In re Hudgins* Notice, RICHMOND ENQUIRER, May 13, 1859, at 1. The amount deposited by Kemp would be approximately $763,000 in 2022 dollars according to a conservative estimate of relative value based on changes in the CPI. *See* Williamson, *supra* note 75. If estimating relative value based on changes in per capita GDP, this amount would be approximately $11.1 million in 2022 dollars. *See id.*

88. *See, e.g.*, Petition of Assignee to Sell, *In re* Case, No. 13 (E.D. La. June 28, 1860) (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]); Case Minutes, *In re* Green, No. 655 (W.D. Mo. Mar. 24, 1866) (located in U.S. Dist. Court for the W. Dist. of Mo., *Bankruptcy Act of 1841 Record Book, June 1842–February 1866*, at 444–45 [handwritten], Records of District Courts of the United States, Record Group 21, National Archives at Kansas City, Missouri [hereinafter WDMO Record Book]) (scheduling asset sale in 1841 Act case for May 5, 1866).

When the 1841 Act took effect, Missouri was composed of a single federal judicial district. *See* Act of Mar. 16, 1822, ch. 12, 3 Stat. 653 (current version at 28 U.S.C. § 105). In 1857, however, Congress divided the District of Missouri into the Eastern and Western Districts of Missouri. *See* Act of Mar. 3, 1857, ch. 100, §1, 11 Stat. 197, 197 (current version at 28 U.S.C. § 105). In so doing, Congress provided "[t]hat all suits and other proceedings of whatever name or nature now pending in the district court of the United States for the present district of Missouri, shall be tried and disposed of in the district court for said western district." § 3, 11 Stat. at 197. The district reorganization thus had the effect of assigning pending 1841 Act cases and proceedings to the Western District of Missouri. Accordingly, some citations in this Article to 1841 Act cases originally commenced in the District of Missouri involve references to the Western District of Missouri as the geographical jurisdiction of the federal district court administering the case.

2. The 1841 Act System's Case-Management Crisis

The 1841 Act system's persistence might, at first blush, be surprising. But, upon further consideration, it really isn't. A bankruptcy case can spawn multiple disputes among many different litigants, such that the number of bankruptcy matters to be resolved by a court can exponentially explode as case filings increase.[89] Contemporary commentary on the 1841 Act not only recognized this dynamic,[90] but also highlighted that the federal district courts, whom Congress primarily tasked with administering the Act,[91] had insufficient capacity to expeditiously clear bankruptcy matters from their dockets.[92] During the roughly thirteen-month period when bankruptcy cases could be commenced under the 1841 Act (the "1841 Act case-filing period"),[93] each federal district court consisted solely of one judge.[94] Moreover, for five of the eight states at that time consisting of multiple federal judicial districts, Congress designated only a single judgeship for each of those

89. *See* Pardo & Watts, *supra* note 13, at 392–94, 411–13; *cf. In re* James Wilson Assocs., 965 F.2d 160, 166 (7th Cir. 1992) ("A bankruptcy proceeding . . . is often a conglomeration of separate adversary proceedings that, but for the status of the bankrupt party which enables them to be consolidated in one proceeding, would be separate, stand-alone lawsuits."). *See generally* Troy A. McKenzie, *Bankruptcy and the Future of Aggregate Litigation: The Past As Prologue?*, 90 WASH. U. L. REV. 839, 842 (2013) ("Bankruptcy law . . . is the oldest, most enduring, and most far-reaching form of procedural aggregation in use in the United States.").

90. *See The Bankrupt Law*, 4 L. Rep. 403, 406 (1842) ("It is to be remembered that each case in bankruptcy is not a single law suit, but of itself *a brood of lawsuits.* Every bankruptcy estate is rife with contracts, broken, or partially formed—liens, mortgages, conflicting and intricate claims, and liabilities, and all other elements of litigation . . . .").

91. Within the federal judicial system, subject to the geographical exceptions of the District of Columbia and the federal territories, the 1841 Act granted the district courts exclusive original jurisdiction over (1) cases commenced under the Act and (2) most proceedings in those cases. *See* Act of Aug. 19, 1841, ch. 9, §§ 6–7, 16, 5 Stat. 440, 445–446, 448 (repealed 1843). The district courts and circuit courts, however, had concurrent original jurisdiction over certain litigation involving assignees. *See id.* § 8, 5 Stat. at 446. Looking beyond the federal judicial system, state courts also had concurrent original jurisdiction over certain proceedings in cases under the Act. *See, e.g.*, Peck v. Jenness, 48 U.S. (7 How.) 612, 625–26 (1849) ("Instead of drawing the decision of the case into the District Court, the act sends the assignee in bankruptcy to the State court where the suit is pending, and admits its power to decide the cause."); *see also* Mitchell v. Great Works Mill. & Mfg. Co., 17 F. Cas. 496, 500 (Story, Circuit Justice, C.C.D. Me. 1843) (No. 9,662) ("It was not necessary to say, that the courts of the United States should possess exclusive jurisdiction. It was only necessary to say, that they should possess full jurisdiction, and to leave to the state courts the exercise of any concurrent jurisdiction, which they could or might right-fully maintain.").

92. *See, e.g.*, *The Bankrupt Law*, *supra* note 90, at 406; *Duties of the Judges in Bankruptcy. Imposition by Bankrupts*, STAUNTON SPECTATOR, & GEN. ADVERTISER (Va.), June 23, 1842, at 2, https://chroniclingamerica.loc.gov/lccn/sn84024719/1842-06-23/ed-1/seq-2 [https://perma.cc/A9GC-LQTP].

93. *See supra* Table 1 (setting forth the 1841 Act's effective and repeal dates). There appears to have been a split of authority on the issue of whether a bankruptcy petition filed on the day of the 1841 Act's repeal was untimely and thus ineffective to commence a case. *See In re* Welman, 29 F. Cas. 681, 681, 684 (D. Vt. 1844) (No. 17,407).

94. *See infra* Appendix Table A1.

five states. This meant that a single judge would administer the Act across multiple districts within the given state.[95] Finally, notwithstanding subsequent legislation by Congress to reorganize a state's federal judicial district or districts that existed during the 1841 Act case-filing period,[96] no federal district court would have multiple judgeships during the peak period involving final resolution of the 1841 Act cases that were pending at the time of the Act's repeal.[97]

That a surge of bankruptcy cases would swamp the federal district courts once the 1841 Act took effect should not have been a great surprise to anyone at the time. The politics surrounding the Act made it abundantly clear that many debtors—though far short of the hyperbolic numbers mentioned by legislators—were eager for such a relief measure.[98] For example, when the New Orleans Chamber of Commerce lobbied Congress in January 1841 to enact federal bankruptcy legislation, the organization referred to the "[t]housands of industrious and enterprising citizens, who ha[d] been bowed down to the earth by the commercial derangements of the past three years."[99]

95. The eight states were Alabama, Louisiana, Mississippi, New York, North Carolina, Pennsylvania, Tennessee, and Virginia. New York, Pennsylvania, and Virginia were each composed of two federal judicial districts, and each district within those states had a different judge. *See infra* Appendix Table A1.

96. *See, e.g.*, Act of Feb. 13, 1845, ch. 5, 5 Stat. 722 (consolidating the Eastern and Western Districts of Louisiana into the District of Louisiana) (current version at 28 U.S.C. § 98); Act of Aug. 11, 1848, ch. 151, § 1, 9 Stat. 280, 280 (dividing the District of Georgia into the Northern and Southern Districts of Georgia) (current version at 28 U.S.C. § 90).

97. *Compare* Buckingham v. McLean, 54 U.S. 151, 167 (1852) ("It is somewhat remarkable that this question should be presented for the first time for the decision of this court after the law has been so long repealed, and nearly all proceedings under it terminated."), *with The U.S. District Courts and the Federal Judiciary*, FED. JUD. CTR., https://www.fjc.gov/history/courts/u.s.-district-courts-and-federal-judiciary [https://perma.cc/BZC9-GY5T] ("The U.S. District Court for New York in 1812 became the first in the nation with two judgeships, but in 1814 Congress divided the state into two judicial districts, each with a single judge. Congress did not create another permanent second judgeship for a district court until 1903 when it authorized an additional judgeship for the Southern District of New York.").

98. *See* WARREN, *supra* note 15, at 69 ("[T]he Presidential campaign [of 1840] was fought and won by the Whigs; and in it the bankruptcy bill was made one of their party issues. In fact, their opponents claimed that the political influence of the 400,000 bankrupts in the country may have turned the scale in five States having 89 electoral votes, in which there were 900,000 voters and in which there was only a Whig majority of 18,000 votes—among these States being New York, Maine, and Pennsylvania."); David Beesley, The Politics of Bankruptcy in the United States, 1837–1845, at 104 (Aug. 1968) (unpublished Ph.D. dissertation, University of Utah) (on file with author) ("Whatever reasons pushed the Whigs to force a vote on the measure in the face of certain defeat in the House, it is probable that one had to do with the pressure exerted from their constituents at home. It has been estimated that there were nearly a half-million insolvent debtors in the country in 1840, with their numbers being chiefly concentrated in the states of New York, Massachusetts, Michigan, Mississippi, and Louisiana."). *See generally* Pardo, *supra* note 26, at 815–23 (discussing the politics leading to passage of the 1841 Act).

99. Memorial of the Chamber of Com. of New Orleans, Praying the Passage of a General Bankrupt Law, to the United States Senate and House of Representatives (Jan. 6, 1841), *in* S. DOC. NO. 26-44, at 2 (1841).

Similarly, a group of St. Louis citizens pleaded that such legislation "would impart life and energy to, and inspire with hope, thousands who are now desponding and depressed under the weight of accumulated misfortunes, from which it is impossible for them ever to extricate themselves."[100] President John Tyler, who ultimately signed the Act into law, alluded to the "large numbers of . . . fellow-citizens with hopeless insolvency" in his June 1841 message to the House of Representatives accompanying a probankruptcy memorial signed by approximately 3,000 New York City residents.[101]

Not only did members of Congress widely anticipate the tsunami of bankruptcy filings that would ensue once the 1841 Act system began operating, then-Senator James Buchanan warned his colleagues in a speech opposing the Act that, "for want of the necessary judicial machinery,"[102] bankruptcy matters would overwhelm the federal district courts with the corresponding effect of bringing their nonbankruptcy dockets to a grinding halt:

> Then what provision had the present bill made to discharge half a million bankrupts, the number which its friends assert exist at present in the United States? None whatever, except to cast this burden upon the district courts of the United States, which, in the large commercial cities, where the cases of bankruptcy must chiefly be heard, had already as much business as they could conveniently transact. These courts could not transact all this business, if there were half a million bankrupts to be discharged, within the next twenty years. Sir, unless you establish new courts, and increase your judicial force at least ten fold, it is vain for you to pass the present bill. Without this, the law can never be carried into effect. The moment it goes into operation these unfortunate bankrupts will rush eagerly to the district courts in such numbers, as to arrest all other judicial business.[103]

Buchanan's alert proved to be prescient. The skeleton crew of judges superintending the 1841 Act system could not keep up with the flood of bankruptcy cases. Contemporary commentary perceptively grasped the nature of the federal district courts' workload crisis precipitated by the Act:

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100. Memorial of a Number of Citizens of St. Louis, Missouri, Praying the Passage of a General Bankrupt Law, to the United States Senate and House of Representatives (Jan. 15, 1841), *in* S. DOC. NO. 26-81, at 1 (1841).

101. Message from John Tyler, U.S. President, to U.S. House of Representatives (June 30, 1841), *in* 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, at 1907, 1908 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897).

102. CONG. GLOBE, 27th Cong., 1st Sess. app. at 206 (1841) (statement of Sen. Buchanan).

103. *Id.*

> By the requirement of the statute, petitions, and all hearings on petitions—on contested debts—for and against the debtors discharged—for compromises of claims—for sales of property—applications for, and payments of, money by the assignees, and all jury trials, (except as *to the act* of bankruptcy,) on every [1841 Act] case arising in the state of Massachusetts, must be had before the district court in Boston. . . . Thus, to the present duties of the district court in Massachusetts, consisting of a single judge, will be added a distinct burden, far greater, of itself, than that borne by all the judges of any court in the commonwealth.[104]

Echoing this commentary, the federal district court judges did not hesitate to express their consternation when responding to a letter sent to them by Secretary of State Daniel Webster pursuant to a Senate resolution adopted on December 13, 1842, seeking feedback from those administering the 1841 Act.[105] For example, U.S. District Court Judge Isaac Pennybacker from the Western District of Virginia wrote that "[t]he business of the courts has been greatly increased by [the Act]" and further noted that, "[t]o judges living at a distance from the place or places at which the business is transacted, the courts being deemed to be always open, and the business immense, the operation of the law is very onerous."[106] U.S. District Court Judge Samuel Betts of the Southern District of New York made the point more forcefully, noting that the zero-sum nature of time allocation meant that the court's nonbankruptcy docket would fall by the wayside, thus creating a recipe for disaster:

> [U]nless the courts can be, in some degree, relieved of the administration of the bankrupt act, all other judicial business must be

104. *The Bankrupt Law*, *supra* note 90, at 406. A debtor seeking relief under the Act first would file a bankruptcy petition and then, after being declared a bankrupt by the court, would file a petition requesting a discharge of debts. *See* Act of Aug. 19, 1841, ch. 9, §§ 1, 4, 5 Stat. 440, 441, 443 (repealed 1843). For a sense of the burden that review of these filings could impose on the court, consider the observations of U.S. District Court Judge Andrew Judson from the District of Connecticut: "Since the 1st day of February, 1842, and up to this day, there have been presented within this district about *fourteen hundred applications*, all of which, at three distinct periods of their progress, pass though my hands and under my personal examination." Letter from Andrew T. Judson, U.S. J., Dist. of Connecticut, to Daniel Webster, Sec'y of State (Dec. 24, 1842), *in* S. DOC. NO. 27-19, at 29, 30 (1842). When ranking the thirty-eight federal judicial districts in which 1841 Act cases were commenced by total cases per district, the District of Connecticut was in the top half. *See infra* Appendix Table A1.

105. *See* CONG. GLOBE, 27th Cong., 3d Sess. 46 (1842); Letter from Daniel Webster, Sec'y of State, U.S. Dep't of State, to the U.S. Senate (Dec. 27, 1842), *in* S. DOC. No. 27-19, at 1.

106. Letter from Isaac Samuels Pennybacker, U.S. J., W. Dist. of Virginia, to Daniel Webster, Sec'y of State (Dec. 26, 1842), *in* S. DOC. N. 27-19, at 55, 56. For purposes of administering the 1841 Act, Congress mandated that the federal district courts would "be deemed always open." § 6, 5 Stat. at 445.

> left unattended to. More than an entire half of the time is devoted by the district court here to bankrupt cases, and that is insufficient to dispose of them as fast as they arise. This is so now, when the contestations bear an inconsiderable proportion in number (about one to twenty) to the cases presented.
>
> . . . .
>
> I feel it owing to myself to add, that although I have endeavored to apply the most assiduous diligence to all branches of my duties, and have been actually sitting and hearing causes every day of business since the first of February last (with an intermission of about two weeks in mid-summer), it has not been within my power to dispose of the bankrupt business and the law and admiralty cases pressing upon the court for trial and decision.
>
> This difficulty must continue to augment, and will soon become a great evil, in regard to the rights and interests of suitors, as well as those of the Government.[107]

As we have seen, Congress failed to provide the federal judiciary with the necessary workforce to deal with this problem.[108] The federal district courts accordingly had to confront their case-management crisis with very limited tools at their disposal—the primary one being the bankruptcy rulemaking authority granted to them under the Act.[109] For example, the U.S. District Court for the District of South Carolina promulgated a rule that almost exclusively prioritized the court's bankruptcy docket,[110] and the U.S. District Court for the District of

107. Letter from Samuel R. Betts, U.S. J., S. Dist. of New York, to Daniel Webster, Sec'y of State (Dec. 19, 1842), *in* S. DOC. N. 27-19, at 7, 11.

108. *See supra* notes 93–97. That said, the 1841 Act generally did not permit appeals of decisions made by the federal district courts in cases under the Act. *See infra* Section II.B. Obviously, this accelerated-finality mechanism reduced, to some extent, the amount of work that would have been imposed on the federal district courts had their decisions been subject to reversal on appeal. *See* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1088 n.93 (1994) (noting that the 1841 Act's "jurisdictional scheme placed the highest possible priority on efficient administration of bankruptcy cases, at obvious cost in uniform and orderly development of the principles of bankruptcy law"); *cf.* Furlough v. Cage (*In re* Technicool Sys., Inc.), 896 F.3d 382, 385 (5th Cir. 2018) ("Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.").

109. *See* Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 445–46 (stating that "it shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceeding, in all matters of bankruptcy") (repealed 1843).

110. *See* BANKR. D.S.C. R. 7 (1842) ("Proceedings in bankruptcy will have the precedence of all other business in the District Court except actions for seamen's wages, motions to re-deliver or

Kentucky promulgated a series of rules that referred a variety of bankruptcy matters to a master in chancery.[111] These measures, however, merely represented tweaks at the margins, as indicated by the 1841 Act's persistence.[112]

* * *

Having established the persistence of the 1841 Act bankruptcy system, this Article now turns to two examples demonstrating the need to account for and give due weight to the 1841 Act's postrepeal development. Part II discusses one of the Act's significant legal innovations (if not *the* most significant): permitting debtors to obtain bankruptcy relief voluntarily and without creditor consent. This concept, while taken for granted today, was constitutionally contested at the time. Scholarly treatment of voluntary bankruptcy's judicial constitutional settlement has produced competing accounts about when this occurred. No account, however, has sufficiently analyzed postrepeal developments regarding the issue. Doing so creates a more accurate periodization of the settlement question and reveals that this legal issue, like others arising under the Act, could intersect with slavery, as evidenced by manuscript court records related to certain litigation over the Act's constitutionality.

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discharge vessels or property under attachment or seizure, or the examination or bailing of persons arrested upon criminal charges.") (repealed).

111. *See, e.g.*, BANKR. D. KY. R. CXXXVII, CXCI, CC, CCI (1842) (repealed), *reprinted in* S. DOC. NO. 27-19, at 109, 119, 124, 128 (1842). *See generally* Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 469 n.12 (1958) ("Rule XXIX of the Federal Equity Rules of 1822 made provision for the reference of matters to a master 'to examine and report thereon.' The revised rules of 1842 re-enacted this rule in an expanded form . . . ." (citations omitted)). The 1841 Act granted federal district courts the authority to appoint commissioners to perform certain duties under the Act, such as receiving proof of debts. *See* § 5, 5 Stat. at 445. The bankruptcy rules promulgated by the U.S. District Court for the District of Kentucky also referred a variety of bankruptcy matters to commissioners. *See, e.g.*, BANKR. D. KY. R. XXXVII–XXXIX, LXXVIII, CIV, CVI, *reprinted in* S. DOC. NO. 27-19, at 93, 99, 103. Accordingly, the court's rules involving a master in chancery represented an expansion of the adjunct workforce for managing bankruptcy dockets.

112. I do not mean to suggest that the federal district courts' case-management innovations under the 1841 Act did not have substantive significance. To the contrary, we witness the antebellum-era iteration of bankruptcy-docket influence on the federal judiciary's institutional development. *See* HOFFER ET AL., *supra* note 56, at 92 (stating that 1800 Act cases "demonstrated that the federal courts could play a vital role in the nation's business"); THOMPSON, *supra* note 15, at 33 (describing how 1867 Act case filings placed significant pressure on federal district courts' dockets, such that "bankruptcy played a central role with respect to the influence and operations of the lower federal courts during Reconstruction"); M. SUSAN MURNANE, BANKRUPTCY IN AN INDUSTRIAL SOCIETY: A HISTORY OF THE BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO 15 (2014) ("Bankruptcy case loads [under the 1898 Act] were enormous from the beginning. The need for effective and efficient administration, together with periodic episodes of bankruptcy fraud, spurred the development of judicial management controls. The institutional development of bankruptcy within the judicial system accelerated rationalization of the judiciary as a whole.").

Part III discusses a legal innovation that has never been associated with the 1841 Act: granting the court official tasked with administering a bankruptcy estate's assets the power to operate a debtor's business in a liquidation case. While the Act lacked a specific provision to this effect, some bankruptcy cases involved plantation owners, which created the opportunity for federal court officials to actively manage and wind down those enterprises while profiting from the business of slavery, sometimes over periods extending well beyond the Act's repeal date. Examining the manuscript court records from one such case spotlights federal courts' institutional capacity to regulate slavery pursuant to the 1841 Act.

II. VOLUNTARY BANKRUPTCY'S JUDICIAL CONSTITUTIONAL SETTLEMENT

To understand why the concept of voluntary bankruptcy was constitutionally contested, one must first consider the transition effectuated by the 1841 Act in prescribing the persons who could seek bankruptcy relief and the means for doing so.[113] The Act represented a seminal moment in reorienting federal bankruptcy law as a mechanism for debtor relief, shifting the focus away from its origins primarily as a creditor-collection device.[114] Under the 1800 Act, creditors determined if and when bankruptcy proceedings were to be instituted against their debtors,[115] and the legislation narrowly limited the type of individual who could be declared a bankrupt.[116] In stark contrast, the 1841 Act

113. The discussion that follows in *infra* notes 114–119 and accompanying text is excerpted, with some revisions, from Pardo, *supra* note 27, at 1083–85.

114. *See, e.g.*, Cont'l Illinois Nat. Bank & Tr. Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 670 (1935); *see also, e.g.*, CONG. GLOBE, 27th Cong., 1st Sess. 324 (statement of Rep. Trumbull) ("Under this law [i.e., the Senate bill that became the 1841 Act], the discharging of the debtor was the principal thing aimed at, and the surrender of his property was merely an incident. In former bankrupt laws, the object was the surrender of the property, and the discharge of the debtor was the incident.").

115. 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* Act of Apr. 4, 1800, ch. 19, §§ 1–2, 2 Stat. 19, 21–22 (repealed 1803). *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."); Tabb, *supra* note 5, at 14 ("Only creditors, upon proof of the debtor's commission of an act of bankruptcy, could initiate a bankruptcy [case under the 1800 Act]. Debtors, however, apparently were often able to persuade a friendly creditor to bring a case." (footnotes omitted)).

116. The 1800 Act's involuntary bankruptcy scheme applied only to a "merchant, or other person residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or

permitted "[a]ll persons whatsoever, residing in any State, District or Territory of the United States, owing debts" to seek relief voluntarily,[117] while subjecting only a narrow class of individuals to the threat of involuntary bankruptcy proceedings.[118] Accordingly, the 1841 Act rendered the overwhelming majority of debtors immune from being forced into bankruptcy, free to initiate the process for obtaining forgiveness of debt on their own terms. The introduction of voluntary bankruptcy relief on such a wide scale constituted a radical departure from prior bankruptcy law, both within and outside of the United States.[119]

But this innovation was not without controversy. Legislators raised constitutional objections to the concept of voluntary bankruptcy relief in the debates surrounding the 1841 Act.[120] For example, on January 25, 1841, when presenting the New Orleans Chamber of Commerce's memorial requesting Congress to enact bankruptcy legislation,[121] Senator John Calhoun "said that while he took pleasure in [doing so], his own opinions on the subject were unchanged. He believed that the passage of a voluntary bankrupt law by the Federal Government, would be unconstitutional."[122] Such claims were based on the following oversimplified version of a three-part argument: (1) any law providing for voluntary relief from debts constituted an insolvency law; (2) an insolvency law was substantively distinct from a bankruptcy law, which only pertained to *involuntary* relief (i.e., a creditor-initiated case); and (3) because the Bankruptcy Clause limited Congress to enacting "Laws on the subject of Bankruptcies,"[123] an insolvency law fell beyond the scope of the bankruptcy power.[124]

marine insurer" who committed one of the acts of bankruptcy enumerated in the statute. § 1, 2 Stat. at 20–21.

117. Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 441 (repealed 1843). Debtors who petitioned to be deemed bankrupts under the Act had to "declare themselves to be unable to meet their debts and engagements." *Id.* Put another way, the Act imposed a debtor's insolvency declaration as a statutory precondition to voluntary relief. *See In re* Dodge, 7 F. Cas. 785, 786 (S.D.N.Y. 1842) (No. 3,946a).

118. *See* § 1, 5 Stat. at 441–42 (providing for involuntary bankruptcy proceedings under a limited set of circumstances against merchants, retailers of merchandise, bankers, factors, brokers, underwriters, and marine insurers).

119. For comparative example, English bankruptcy law first allowed voluntary bankruptcy for merchants in 1844 and for nonmerchants in 1861. Tabb, *supra* note 37, at 353–54.

120. *See, e.g.*, WARREN, *supra* note 15, at 72 ("In the House, there was great opposition [to the Senate bill that became the 1841 Act], based on diverse grounds . . . Some Democrats believed the voluntary section unconstitutional.").

121. *See supra* note 99 and accompanying text.

122. CONG. GLOBE, 26th Cong., 2d Sess. 124 (1841) (statement of Sen. Calhoun).

123. U.S. CONST. art. I, § 8, cl. 4.

124. *See, e.g.*, CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 138 (Paul A. Freund ed., 1974); BALLEISEN, *supra* note 52, at 109.

Whatever the merits of the argument,[125] several uncontroverted points bear mentioning. First, none of the Supreme Court's cases involving the 1841 Act decided the constitutionality of its voluntary relief provisions.[126] Second, Congress did not debate whether voluntary bankruptcy relief was constitutional when enacting the 1867 Act,[127] which provided for such relief.[128] And third, in addressing a constitutional challenge to the 1898 Act, the Supreme Court proclaimed in 1902 that the constitutionality of voluntary bankruptcy relief had already been settled.[129] These points beg the key question of when voluntary bankruptcy's constitutional settlement occurred.

Diverging scholarly accounts regarding the timing of voluntary bankruptcy's constitutional settlement point to a Goldilocks problem: Some describe that settlement as having occurred either (1) shortly after the 1841 Act's repeal on March 3, 1843;[130] (2) over a gradual period of time that concluded before the Thirteenth Amendment's ratification in 1865;[131] or (3) after the Amendment's ratification.[132] Depending on the historical record, it may be that the first account dates the settlement too early and the third account dates the settlement too late, but that the second account dates the settlement "just right." The scales tip in favor of this conclusion when approaching the problem through the lens of the 1841 Act's extended duration and incorporating evidence from the legal archive into the analysis.

125. More than two decades before the 1841 Act, when deciding whether states could enact debt-relief laws in the absence of federal bankruptcy legislation, Chief Justice Marshall, writing for a unanimous Supreme Court, deemed both insolvency and bankrupt laws to fall within the scope of the Bankruptcy Clause. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193–95 (1819) (Marshall, C.J.). When the Supreme Court proclaimed in 1902 that the constitutionality of voluntary bankruptcy relief had already been settled, it extensively quoted Chief Justice Marshall's *Sturges* opinion. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186–87 (1902).

Justice Story, who is credited as one of the principal drafters of the 1841 Act, *see* 2 LIFE AND LETTERS OF JOSEPH STORY 407 (Boston, William M. Story ed., Charles C. Little & James Brown 1851), deemed the distinction between insolvency and bankruptcy laws to be constitutionally irrelevant: Both fell within the scope of the Bankruptcy Clause according to his 1833 *Commentaries on the Constitution of the United States*. *See* STORY, *supra* note 3, § 1106, at 10. An 1841 bankruptcy treatise took a similar view, relying in part on Story's *Commentaries*. *See* J.B. STAPLES, THE GENERAL BANKRUPT LAW 4–5 (New York, John S. Voorhies 1841).

126. *See* WARREN, *supra* note 15, at 86–87.

127. *See id.* at 87.

128. *See* Act of Mar. 2, 1867, ch. 176, § 11, 14 Stat. 517, 521 (repealed 1878).

129. *See Hanover*, 186 U.S. at 187 ("The conclusion that an act of Congress establishing a uniform system of bankruptcy throughout the United States is constitutional, although providing that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions, is really not open to discussion.").

130. *See, e.g.*, Tabb, *supra* note 37, at 350–51.

131. *See, e.g.*, WARREN, *supra* note 15, at 86–87.

132. *See* Joseph E. Simmons, Note, *Reconstructing the Bankruptcy Power: An Originalist Approach*, 131 YALE L.J. 306 (2021).

To answer the judicial constitutional settlement question, one needs to identify the interpreters of the Bankruptcy Clause during this period and determine the legitimacy and priority of their interpretations. As we will see, when Congress created the 1841 Act system, it designed it in such a way that both the federal and state judiciaries would play an outsized role in administering the Act,[133] and would thus have ample opportunity to pass on its constitutionality. Significantly, however, the Supreme Court's institutional role—though not that of the Justices—would be circumscribed.

A. First-Instance Decision-Making and Enforcement

On the question of voluntary bankruptcy relief under the 1841 Act, federal district courts were almost exclusively the first-instance decision-makers,[134] with state trial courts and federal circuit courts sharing responsibility to enforce the relief granted by the federal district courts.[135] Debtors could voluntarily access the bankruptcy forum by filing a petition with the district court located in the federal judicial district where they resided or had their principal place of business at the time of filing the petition.[136] In the bankruptcy petition, debtors would request that the district court issue a decree declaring them to fall within the class of individual eligible to pursue the relief available under the Act.[137] Debtors' eligibility for a bankruptcy decree hinged on the satisfaction of certain conditions—specifically, (1) "declar[ing] themselves to be unable to meet their debts and engagements,"[138] and (2) financial disclosures regarding their liabilities and assets.[139] The district courts would declare debtors who complied with these conditions to be bankrupts under the Act.[140]

After obtaining a bankruptcy decree, bankrupts could petition the district court for a discharge.[141] Bankrupts had to satisfy several conditions to qualify for such relief. First, they had to surrender all their

133. *See generally* Pardo, *supra* note 22, at 851 ("[W]hen designing the 1841 Act bankruptcy system, Congress could have sought to build on the agency-administered program for discharging debt that existed at the time [in the Department of Treasury]. But instead, Congress chose to create a judicially administered system.").

134. *See* Com. Bank of Manchester v. Buckner, 61 U.S. (20 How.) 108, 116–17, 120 (1858).

135. The discussion that follows in *infra* notes 136–145 and accompanying text is excerpted, with some revisions, from Pardo, *supra* note 26, at 829–32.

136. § 7, 5 Stat. at 446.

137. *See* § 1, 5 Stat. at 441.

138. *Id.*

139. *See id.* These financial disclosures were to be "verified by oath" or alternatively "by solemn affirmation" if the debtor were "conscientiously scrupulous of taking an oath." *Id.*

140. *See id.*

141. *See* § 4, 5 Stat. at 443.

property existing as of the date of the bankruptcy decree, with the exception of a limited amount necessary to support themselves (and, if applicable, their spouses and children).[142] Second, bankrupts had to comply with all orders issued by the court and all of the 1841 Act's requirements.[143] Finally, bankrupts had to fall outside a particular class of individual, defined mostly by reference to a limited set of circumstances relating to a bankrupt's fraud or misconduct in connection with the bankruptcy case.[144] The Act required federal district courts to grant a discharge certificate to bankrupts who satisfied these discharge-eligibility rules.[145]

At any stage in the procedural sequence for resolving requests for voluntary bankruptcy relief—that is, from bankruptcy petition to bankruptcy decree to discharge petition to discharge decree—the federal district court judge could rely on a procedural mechanism, specific to all matters in 1841 Act cases, to shift certain aspects of first-instance decision-making to the federal circuit court.[146] Specifically, the 1841 Act provided that "the district judge [could] adjourn any point or question arising in any case in bankruptcy into the circuit court for the district, in his discretion, to be there heard and determined."[147]

142. *See* §§ 3–4, 5 Stat. at 442–43.

143. *See* § 4, 5 Stat. at 443.

144. *See id.* at 443–44; *see also* § 2, 5 Stat. at 442 (precluding a court from granting a discharge to a voluntary bankrupt who had made a preferential transfer to a creditor under certain circumstances "unless the [discharge] be assented to by a majority in interest of those of his creditors who have not been so preferred"); § 12, 5 Stat. at 447 (precluding a court from granting a discharge if the bankrupt had previously received a discharge in a prior case, unless the proceeds from the liquidation of the bankrupt's estate were sufficient to pay all creditors seventy-five percent of their claims).

145. § 4, 5 Stat. at 443. Although the 1841 Act enabled creditors to prevent the court from granting bankrupts a discharge if "a majority, in number and value, of the creditors" who had proved their debts filed at the discharge hearing "their written dissent to the allowance of a discharge," *id.* at 444, bankrupts could overcome that roadblock by proving that they had conformed to the Act's requirments and followed the district court's orders in the case, *see infra* notes 163–166 and accompanying text. For a discussion of the modern-day distinction between "bankruptcy eligibility rules" and "discharge eligibility rules," 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, 416–17 (2005).

146. *See generally* Jonathan Remy Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 S. CAL. L. REV. 733, 736–37 (2021) ("The circuit courts were created by the Judiciary Act of 1789; one circuit court was established in each federal judicial district (with the exception of the districts of Maine and Kentucky). While the circuit courts enjoyed limited appellate jurisdiction over the district courts (which were also products of the 1789 Act), they were primarily courts of first instance with a substantial grant of original jurisdiction." (footnotes omitted)).

147. § 6, 5 Stat. at 445. For an example of bankruptcy rules promulgated by a federal district court regarding the adjournment mechanism, see BANKR. D.N.C. R. 19, 21 (1842) (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NORTH CAROLINA 5 (Fayetteville, Edward J. Hale 1842) [hereinafter N.C. BANKRUPTCY RULES].

For an example particularly relevant to voluntary bankruptcy's constitutional settlement, the federal district court judge might very well adjourn into the circuit court the question of whether the 1841 Act was constitutional when considering a bankrupt's discharge petition,[148] which is precisely what Judge Thomas B. Monroe of the U.S. District Court for the District of Kentucky did in *Nelson v. Carland*.[149] Importantly, from the time that the 1841 Act took effect on February 1, 1842, until 1869, the federal circuit courts convened in the federal judicial districts as two-judge panels consisting of (1) the Supreme Court Justice assigned to the circuit within which the federal judicial district was located and (2) the federal district court judge from the district in which the circuit court convened.[150] As such, when Judge Monroe in *Nelson* adjourned various questions into the U.S. Circuit Court for the District of Kentucky, including that of the 1841 Act's constitutionality, he sat on the two-judge panel with Circuit Justice John Catron.[151] But the Supreme Court in *Nelson* ultimately held that a federal district court judge could not sit as a member of the circuit court upon questions that the judge had adjourned to that court pursuant to the 1841 Act.[152] The Court's ruling thus had the effect of making the Justice assigned to the relevant circuit as the only first-instance decision-maker with respect to certain matters under the Act. Moreover, as discussed below,[153] the *Nelson* ruling would significantly curtail the Supreme Court's appellate review of first-instance decision-making under the Act.[154]

Turning to first-instance enforcement of voluntary bankruptcy relief, an 1841 Act discharge encompassed nearly all types of prebankruptcy debts,[155] thus representing a very robust form of relief.

148. For an example of the adjournment of other questions by a federal district court into a federal circuit court pursuant to the 1841 Act, see *Ex parte Christy*, 44 U.S. (3 How.) 292, 294–95 (1844).

149. *See* Nelson v. Carland, 42 U.S. (1 How.) 265, 265 (1843); *id.* at 266 (Catron J., dissenting).

150. *See* Nash & Collins, *supra* note 146, at 737–39.

151. *See Nelson*, 42 U.S. (1 How.) at 265 (1843); Transcript of Record at 1, Nelson v. Carland, 42 U.S. (1 How.) 265 (1843) (No. 74) [hereinafter *Nelson* Record Transcript].

To differentiate between scenarios in which a Justice sat on the Supreme Court or on the federal circuit court, this Article uses the term "Justice" for the first scenario and the term "Circuit Justice" for the second scenario.

152. *See id.* at 265.

153. *See infra* notes 172–178 and accompanying text.

154. *Cf. Nelson*, 42 U.S. (1 How.) at 276–77 (Catron, J., dissenting) ("I cannot, therefore, bring my mind to the belief that the revising power of this court was intended to be cut off. And, as the most expeditious and convenient mode of revision was by a division of opinion, I think Congress intended that should be the mode.").

155. *See* § 4, 5 Stat. at 444 (providing that the "discharge and certificate, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and

This relief, however, was not self-executing: While the Act cut off a creditor's ability to recover discharged debts as a personal liability of the bankrupt,[156] the bankrupt had to plead the discharge as an affirmative defense when a creditor sought to judicially collect any such debt.[157] Those judicial collection efforts could have been brought by the creditor as an original civil action either in a state court or a federal circuit court,[158] but in the latter forum only if the amount in controversy exceeded $500 and diversity of citizenship existed between the creditor and the bankrupt.[159] Also, if the collection action was commenced in a state court by a creditor who was a citizen of that state, and if the bankrupt was a citizen of a different state and the amount in controversy exceeded $500, the bankrupt could petition the state court to remove the action to the federal circuit court for the district in which the action originated.[160] As such, two-judge panels consisting of a federal district court judge *and* a Supreme Court Justice would play a role, at the trial level,[161] in enforcing the relief granted to voluntary bankrupts by federal district court judges under the 1841 Act.[162]

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other engagements of such bankrupt, which are provable under this act"). The Supreme Court interpreted the Act to except from discharge any debt resulting from defalcation by the debtor while acting as a public officer or in a fiduciary capacity. *See infra* notes 257–258 and accompanying text. Additionally, some courts appear to have been split on the issue of whether an 1841 Act discharge included debts owed to government creditors. *See* Pardo, *supra* note 27, at 1087 n.78.

156. *See, e.g.*, Peck v. Jenness, 48 U.S. (7 How.) 612, 623 (1849); Bush v. Person, 59 U.S. (18 How.) 82, 84 (1856).

157. *See* § 4, 5 Stat. at 444 (providing that the "discharge and certificate . . . shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever"). The defense would be waived if not properly raised, thus negating the benefit of discharge with respect to the collecting creditor. *See, e.g.*, Fellows v. Hall, 8 F. Cas. 1132, 1133 (C.C.D. Mich. 1843) (No. 4,722) (per curiam).

158. *See, e.g.*, Stiles v. Lay, 9 Ala. 795, 795 (1846) (describing procedural posture of original civil action brought in state court to collect a debt, which the defendant alleged had been discharged in his 1841 Act case); Chapman v. Forsyth, 43 U.S. (2 How.) 202, 206 (1844) (describing procedural posture of original civil action brought in federal circuit court to collect a debt, which the defendant alleged had been discharged in his 1841 Act case).

159. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. In 1801, Congress reduced the amount-in-controversy requirement to $400. *See* Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89, 92. But repeal of the Judiciary Act of 1801 restored the requirement to an amount exceeding $500. *See* Judiciary Act of 1802, §§ 1, 3, 2 Stat. 132, 132. The next time that Congress amended this amount was in 1887. *See* Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552–53.

160. Judiciary Act of 1789, § 12, 1 Stat. at 79. In 1801, Congress reduced the amount-in-controversy requirement for removal to an amount exceeding $400. *See* Judiciary Act of 1801, § 13, 2 Stat. 89, 92–93. But repeal of the 1801 Judiciary Act restored the requirement for removal to an amount exceeding $500. *See* Judiciary Act of 1802, §§ 1, 3, 2 Stat. at 132. The next time that Congress amended this amount was in 1887. *See* § 2, 24 Stat. at 553.

161. *See supra* note 150 and accompanying text.

162. *See, e.g.*, Chapman v. Forsyth, 43 U.S. (2 How.) 202, 206 (1844) ("This was an action of assumpsit for the proceeds of 150 bales of cotton, shipped to and sold by defendants as the property

B. Appellate Review of First-Instance Decision-Making and Enforcement

As this Section explains, the appellate structure of the 1841 Act system gave Supreme Court Justices, whether in their individual capacities on the federal circuit courts or in their collective capacity on the Court, a limited set of opportunities to review trial-level decisions involving the Act, including those related to the grant and enforcement of debt discharges in voluntary cases. The Act expressly provided for appeal from the federal district court to the federal circuit court in only one instance: if the district court refused to grant the bankrupt a discharge.[163] When that occurred, the bankrupt could respond by demanding a jury trial in the district court.[164] If the jury found that the bankrupt had "made a full disclosure and surrender of all his estate, as . . . required [by the 1841 Act], and ha[d] in all things conformed to the directions thereof, the court [was obligated to] make a decree of discharge, and grant a certificate."[165] If, however, the jury ruled against the bankrupt, the bankrupt could appeal to the circuit court and elect to have the matter "heard and determined by said court summarily, or by a jury."[166] The Act did not make any provision for either the bankrupt or a creditor to appeal the circuit court's decree to the Supreme Court.[167] In sum, the Act did not provide for appeal from a district court's decree *granting* the bankrupt a discharge or from a circuit court's decree either *granting* or *denying* the bankrupt a discharge; but the Act did provide for appeal from a district court's decree *denying* the bankrupt a discharge to the circuit court, whose decree would be deemed final.[168] Although the Act did not specify, for appeals where the bankrupt

of the plaintiff the defendants being factors. The defendant, Forsyth, pleaded that he had been duly discharged as a bankrupt, on his own voluntary petition. A replication was filed, to which there was a demurrer. The suit was brought in the Circuit Court for the district of Kentucky . . . ."). In the case below, the two-judge panel of the U.S. Circuit Court for the District of Kentucky consisted of Justice John Catron and Judge Thomas Bell Monroe. Recall that this was the same two-judge panel that the Supreme Court deemed to be improperly convened in *Nelson v. Carland*. *See supra* notes 151–152 and accompanying text.

163. *See* Nelson v. Carland, 42 U.S. (1 How.) 265, 267–68 (1843) (Catron, J., dissenting) (stating that, under the 1841 Act, "no appeal to the Circuit Court was allowed, save in a single case: that of a refusal to finally discharge the bankrupt from his debts").

164. *See* Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. 440, 443–44 (repealed 1843).

165. *Id.* at 444.

166. *Id.*; *see also Nelson*, 42 U.S. (1 How.) at 268 ("If the discharge is objected to by the creditors, and the District Court refuses it, the debtor may then demand a trial by jury, and try the matter over again: if the jury decides against him also, he may then appeal to the Circuit Court, and there elect to submit the matter a third time, either to the court, or to another jury; and this finding is conclusive, whether by the court or a jury.").

167. *See Nelson*, 42 U.S. (1 How.) at 268.

168. *See id.*

elected the circuit court, rather than a jury, to hear and determine appeal of a discharge denial,[169] the federal district court judge presumably did not participate in the appeal,[170] thereby giving the circuit court's Justice complete appellate authority over the matter.[171]

Based on the foregoing, when it came to decrees issued by the federal district court regarding bankrupts' requests for relief, the 1841 Act provided an extremely narrow avenue of appeal to the federal circuit court and nothing more. But that is not to say that another avenue of appellate review was not theoretically available regarding such matters when the 1841 Act system first began operating. Recall that the Act permitted a federal district court to "adjourn any point or question arising in any case in bankruptcy into the circuit court for the district . . . to be there heard and determined."[172] As discussed above, the federal circuit court usually sat as a two-judge panel consisting of a federal district court judge and a Supreme Court Justice.[173] Importantly, in 1802, Congress amended the Judiciary Act of 1789 to provide that if the circuit court sitting as a two-judge panel disagreed about how to resolve a question presented to it, then upon the request of either party, the court could certify the matter to the Supreme Court for review and final decision.[174]

Given that the 1841 Act authorized the federal district court to adjourn questions arising in bankruptcy cases into the circuit court for the district, a potential path to Supreme Court review of such questions

169. *See supra* note 166 and accompanying text.

170. *See* SWISHER, *supra* note 124, at 141 (noting that Circuit Justice Catron "sat alone" when deciding *In re Klein*, 14 F. Cas. 716 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865), which involved an appeal of a district court's order denying a discharge to a voluntary bankrupt under the 1841 Act); *cf.* Act of Apr. 28, 1802, ch. 31, § 5, 2 Stat. 156, 158 (stating that "in all cases which, by appeal . . . , are or shall be removed from a district to a circuit court, judgment shall be rendered in conformity to the opinion of the judge of the supreme court presiding in such circuit court").

171. *See Nelson*, 42 U.S. (1 How.) at 268 ("No appeal is allowed to this court from the decree of the Circuit Court [granting or denying the bankrupt an 1841 Act discharge] . . . . Such is the unanimous opinion of my bretheren now present; and which opinion I concur."). Relative to the number of 1841 Act case filings, the opportunities for a Justice to hear such an appeal would have been infrequent. Two documents issued by the House of Representatives several years after repeal of the 1841 Act report various bankruptcy case statistics by federal judicial district, including summary tables compiling the statistics for each individual district included in the respective reports. *See* H.R. DOC. NO. 29-99, at 8 (1847); H.R. DOC. NO. 29-223, at 30–31 (1846). Combined, the reports set forth statistics for twenty-seven of the thirty-eight districts existing at the time of the Act within the nation's twenty-six states and the District of Columbia. *See* Pardo, *supra* note 55, at 75–76. The House documents indicate that courts in those districts granted discharges to 33,944 individuals and denied discharges to 896 individuals. *See* H.R. DOC. NO. 29-99, at 8; H.R. DOC. NO. 29-223, at 30–31. For a discussion of the deficiencies in these statistical reports, including coverage gaps and inaccuracies, see Pardo, *supra* note 55, 76–83.

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

173. *See supra* note 150 and accompanying text.

174. *See* Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159–61.

might have been pursuant to the federal circuit court's issuance of a certificate of division to the Court. But as discussed above, just slightly more than a year after the Act took effect, and less than a month before Congress repealed it, the Court held in *Nelson v. Carland* that the federal district court judge who adjourned an 1841 Act question into the circuit court for the district could not sit as a member of that court when it considered the adjourned question.[175] Accordingly, with regard to adjourned 1841 Act questions, the circuit court would consist solely of the Justice assigned to the circuit court in question, thereby precluding the possibility of any division of opinion.[176] Without a division of opinion, the certificate of division was not available as a method for obtaining Supreme Court review of adjourned 1841 Act questions,[177] thereby giving the individual Justices in their circuit-court capacity complete and final authority over such matters.[178]

175. *See supra* note 152 and accompanying text. The Court decided *Nelson* on February 7, 1843. *See* ANNE ASHMORE, U.S. SUP. CT., DATES OF SUPREME COURT DECISIONS AND ARGUMENTS 2 (2018), https://www.supremecourt.gov/opinions/datesofdecisions.pdf [https://perma.cc/LMT5-E692]. The 1841 Act took effect on February 1, 1842, and Congress repealed the Act on March 3, 1843. *See supra* Table 1.

176. *See* Nelson v. Carland, 42 U.S. (1 How.) 265, 267 (1843) (Catron, J., dissenting) ("If the district judge cannot be a member of the court on the hearing of the adjourned question, then no division of course can take place.").

177. *See id.* at 265 (stating that "points adjourned [under the 1841 Act] cannot be brought before this court by a certificate of division"). A cynical view of the Court's ruling in *Nelson* would be that the majority seized the opportunity to preemptively cut off a flood of 1841 Act matters that otherwise could have made their way onto the Court's docket. *See* SWISHER, *supra* note 124, at 276 ("Through most of the Taney period members of the Court and their friends in Congress worked at the task of relieving the Court of the pressure of an ever expanding load of work."); *cf. Nelson*, 42 U.S. (1. How.) at 268 (Catron, J., dissenting) ("[M]y brethren think it equally clear, that no adjourned question can be brought here by a division of opinion: it follows, this court has no revising power over *the numerous and conflicting constructions of the bankrupt law*." (emphasis added)).

178. *See id.* (stating that the federal circuit court's ruling on an adjourned 1841 Act question would be "conclusive upon the district judge").

Justice Catron's dissenting opinion in *Nelson* described a legal landscape rife with circuit splits over interpretations of the Act and provided as an example the issue of whether a debtor who owed debts resulting from defalcation while acting as a public officer or in a fiduciary capacity was eligible for relief under the Act. *See id.* at 268. Noting that the rule in the Eighth Circuit was that such debtors were ineligible for relief, Justice Catron proceeded to describe the rule's effect as follows: "It has excluded from applying great numbers in the eighth and other circuits, who would have been admitted had they applied in circuits where the law is construed otherwise." *Nelson*, 42 U.S. (1. How.) at 268. Of course, the world of circuit splits referred to by Justice Catron was the one that existed prior to the Court's decision in *Nelson*, when federal district court judges and Circuit Justices sat together on a two-judge panel when deciding questions in 1841 Act cases adjourned into the federal circuit court by the federal district court. Post-*Nelson*, when deciding such questions, the Circuit Justice would sit alone when deciding such questions on the circuit courts for all federal judicial districts within the federal circuit assigned to the Justice. If a Circuit Justice encountered the same legal question when sitting on the different circuit courts across the various districts within the circuit, the Justice presumably would rule consistently and without any interference from the federal district court judge. If, as Justice Catron described, circuit-wide

On the other hand, the Supreme Court did have jurisdiction to review certain matters relating to first-instance enforcement of voluntary bankruptcy relief by federal circuit courts and state courts. Recall that the federal circuit courts had the opportunity to preside over civil actions to collect debts exceeding $500, provided that diversity of citizenship existed between the parties.[179] For those actions where the amount in controversy (exclusive of costs) exceeded $2,000, the parties could appeal the federal circuit court's final decrees and judgments to the Supreme Court on writ of error.[180] Alternatively, for all debt-collection actions over which the circuit courts had jurisdiction, there existed the possibility of review by the Supreme Court of a question certified to it by a divided two-judge panel of the circuit court.[181] Finally, because the Supreme Court's appellate jurisdiction could be invoked on writ of error in cases where the highest court of a state invalidated a federal statute or ruled against a right or exemption claimed by a party under federal law,[182] the Supreme Court could potentially review a decision by a state's highest court that either (1) held the 1841 Act's voluntary relief provisions to be unconstitutional or (2) ruled against a former bankrupt's discharge plea pursuant to the Act. Accordingly, the Court would end up reviewing certain 1841 Act matters related to first-instance enforcement of voluntary bankruptcy relief.[183]

law developed pre-*Nelson*, then the *Nelson* majority opinion supercharged the ability of the Justices in their circuit-court capacity to establish circuit-wide law. Accordingly, both the pre- and post-*Nelson* legal landscapes regarding adjourned questions under the Act undermine the claims that "the original circuit courts were never understood to create their own law in either the weak or the strong sense" and that "[i]t wouldn't be until the federal judiciary included independently staffed intermediate courts of appeals that the concept of 'circuit law' could take root." Thomas B. Bennett, *There Is No Such Thing As Circuit Law*, 107 MINN. L. REV. 1681, 1689 (2023).

179. *See supra* notes 158–159 and accompanying text.

180. *See* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84. Along similar lines, for matters in equity cases where the amount in controversy (exclusive of costs) exceeded $2,000, the parties could appeal the federal circuit court's final decrees and judgments to the Supreme Court on writ of error. *See* Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244.

181. *See supra* note 174 and accompanying text; *cf.* Nash & Collins, *supra* note 146, at 741 ("Insofar as civil cases were concerned, certification similarly allowed the Court to take review of circuit court cases that it would not otherwise have been able to review after a final judgment. That was because certification did not have an amount-in-controversy requirement that would otherwise have to have been satisfied as a precondition to obtaining Supreme Court review of circuit court civil judgments.").

182. *See* Judiciary Act of 1789, § 25, 1 Stat. at 85–87.

183. The Federal Judicial Center has erroneously suggested otherwise. *See* Jake Kobrick, *The Certificate of Division*, FED. JUD. CTR., https://www.fjc.gov/history/spotlight-judicial-history/certificate-division [https://perma.cc/TD2X-X6KJ] ("The ruling [by the Supreme Court in *Nelson v. Carland*] made a certificate of division in a bankruptcy case impossible and, because the Court lacked appellate jurisdiction over bankruptcy cases, *eliminated the only potential method for the Court to review bankruptcy issues* . . . ." (emphasis added)).

C. Composite Constitutional Settlement

The different ways in which matters involving the 1841 Act's voluntary relief provisions could make their way before the Justices—either in their individual capacities when sitting as members of the federal circuit courts or in their collective capacity when sitting on the Supreme Court—raise several questions. Did the Justices actually consider such matters? If so, did any entail either a direct or an indirect ruling on the Act's constitutionality? Finally, what weight should be given to any such rulings?

As discussed below, the Justices considered, in both their individual and collective capacities, matters regarding granted and denied discharges in voluntary cases under the Act. In so doing, they directly and indirectly ruled on the constitutionality of such relief. Determining the weight that should be given to their rulings requires adopting an analytical framework that quantitatively and qualitatively assesses them in their totality. It is beyond the scope of this Article to construct such a framework or to argue that any existing framework that might be applied to this question would provide the correct answer. Instead, this Article looks to the contemporary framework formulated in *Lalor v. Wattles*, which the Illinois Supreme Court decided during its 1846 December Term.[184] As discussed below, the court determined that the 1841 Act's voluntary relief provisions were constitutional based on its prediction of what the U.S. Supreme Court's holding on the issue would have been given the Justice's decisions in their individual circuit-court capacities up to that point in time, a framework that I refer to as "composite constitutional settlement." My use of the *Lalor* framework is not meant to suggest that it is definitively apt for resolving the constitutional settlement issue. Rather, my argument is that applying the framework to matters both prior and subsequent to the *Lalor* decision and accounting for U.S. Supreme Court decisions that indirectly addressed the Act's constitutionality further bolster the conclusion that the constitutionality of the Act's voluntary relief provisions had been judicially settled by 1860. The remainder of this Section discusses these rulings and then applies the *Lalor* framework to them.

1. Rulings by the Justices and Circuit Justices

First and foremost, it bears emphasizing that the rulings discussed in this Section most likely do not constitute the universe of

184. Lalor v. Wattles, 8 Ill. (3 Gil.) 225 (1846).

direct or indirect decisions by the Justices on the constitutionality of voluntary bankruptcy under the 1841 Act. Some of these rulings do not appear in any reporters, but rather exist in the form of archival manuscript court records. Given the breadth and depth of such materials, future research will likely uncover additional rulings. That said, the scope of the evidence presented here, which consistently affirmed the constitutionality of voluntary bankruptcy relief, indicates that additional findings would likely move the needle further in favor of this Article's story of composite constitutional settlement.

a. Prerepeal Rulings

On October 13, 1842, the U.S. Circuit Court for the Eastern District of Pennsylvania issued its decision in *In re Irwine*, which involved a statutory-interpretation question regarding one of the 1841 Act's discharge-eligibility provisions—specifically, the one precluding a federal district court from granting a discharge to a voluntary bankrupt who had made a preferential transfer to a creditor under certain circumstances, unless a majority in interest of the bankrupt's unpreferred creditors assented to such relief.[185] The U.S. District Court for the Eastern District of Pennsylvania had adjourned the question into the circuit court, which sat as a two-judge panel consisting of Judge Archibald Randall and Circuit Justice Henry Baldwin, who authored the circuit court's opinion.[186] Based on its interpretation of the Act's provision, the circuit court ruled that Irwine was ineligible for a discharge absent the assent of the majority of his unpreferred creditors.[187] Not only did Justice Baldwin rule that the Act conditionally

185. *See In re* Irwine, 13 F. Cas. 125, 125 (Baldwin, Circuit Justice, C.C.E.D. Pa. 1842) (No. 7,086). The Act's provision requiring creditor assent to a voluntary bankrupt's discharge with respect to bankrupts who had made preferential transfers to creditors under certain circumstances should not be confused with the Act's generally applicable creditor-dissent provision, which bankrupts could overcome upon establishing their conformity to the Act's requirements and the federal district court's orders in the case. *See supra* note 145. Accordingly, subject to the narrow exception of bankrupts who made certain preferential transfers, the Act did not require bankrupts to obtain creditor consent as a condition to discharge. *See, e.g.*, *In re* Klein, 14 F. Cas. 716, 718 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865); MANN, *supra* note 13, at 39.

186. *See Irwine*, 13 F. Cas. at 129. My claim that the federal circuit court sat as a two-judge panel is based on the fact that Justice Baldwin began his opinion by stating, "*We are of opinion* that the evident meaning of the law is asserted by the counsel against discharge." *Id.* at 129 (emphasis added). Note that *Nelson v. Carland* had yet to make its way before the Supreme Court. *See infra* notes 189–194 and accompanying text. Accordingly, there was no binding precedent requiring Justice Baldwin to sit as the sole member of the circuit court when deciding *Irwine*. Given that the *Irwine* court sat as a two-judge panel, it suggests that Justice Baldwin at that time took the view that a federal district court judge could sit on the circuit court to consider a question that he had adjourned into the court pursuant to the Act. Apparently, Justice Baldwin changed his mind, as evidenced by the fact that he joined the *Nelson* majority opinion.

187. *Id.* at 131.

entitled Irwine to voluntary bankruptcy relief, he prefaced his ruling with an exposition on the constitutionality of this legal innovation:

> The present bankrupt law is an anomaly in legislation; the provision for voluntary bankruptcy, is in effect, the adoption of the insolvent laws of the states, but with an entire new and most important feature, the petitioner becomes entitled to a complete discharge from all his debts, whereas an insolvent law only secures his person from arrest. In this particular, congress have exercised power expressly prohibited to the states by the constitution of the United States, and not granted by it to congress, otherwise than by the express power "to establish uniform laws on the subject of bankruptcies throughout the United States." To this power there is no limitation, and consequently it is competent to congress to act on the whole subject of bankruptcy with a plenary discretion. Hence they may give to the discharge what effect they please, and in consequence may not only impair, but extinguish the obligations and the contracts of a bankrupt. *Whatever doubts may exist as to the sound policy or justice of doing this on the application of the debtor, the power being the same to provide for one case as another, must be considered to be equally constitutional, whether the proceeding is on behalf of debtor or creditor*. Congress have adopted a system which embraces both classes of cases, under the belief that the state of the country required it, and so far as they have authorized the discharge of a debtor on his own petition, the law must be executed by the appropriate court . . . .[188]

The following month, on November 24, 1842, the U.S. Circuit Court for the District of Kentucky, sitting as a two-judge panel consisting of Judge Thomas Monroe and Circuit Justice John Catron, divided on various questions that Monroe had adjourned into the circuit court upon considering William Nelson's discharge petition under the Act.[189] The first and most crucial question pertained to the constitutionality of the Act's voluntary relief system:[190]

> 1st. Are the provisions of the act of Congress, to establish an uniform system of bankruptcy, of August, 1841, which authorizes the courts to declare any persons resident in the United States, irrespective of his occupation, owing debts as therein mentioned, on his own petition, in

188. *Id.* at 130 (emphasis added).

189. *See Nelson* Record Transcript, *supra* note 151, at 1–2; *Nelson* 42 U.S. (1 How.) 265, 267 (1843) (Catron, J., dissenting in part).

190. The certificate of division transmitted from the circuit court to the Supreme Court in *Nelson v. Carland* consisted of four questions. *See Nelson* Record Transcript, *supra* note 151, at 1–2. In his dissent from the Court's majority opinion, Justice Catron only mentioned the first certified question. *See Nelson*, 42 U.S. (1 How.) at 266, 268–69.

> the mode there prescribed, a bankrupt; and to, thereafter, upon the proceedings, and on conditions therein prescribed, adjudge and decree him fully discharged of all his debts, and award him a certificate thereof, without the concurrence of all or some portion of his creditors, constitutional and valid enactments; or are said provisions of the statute, or any of them, in contravention of the Constitution of the United States, or without its authority, and void?[191]

Notably, Judge Monroe and Circuit Justice Catron quite likely engaged in strategic voting to obtain the Supreme Court's review of the constitutional question: Although the circuit court's certificate of division did not specify Judge Monroe's and Circuit Justice Catron's individual votes,[192] the historical record strongly suggests that both believed the 1841 Act's voluntary relief provisions to be constitutional when the certificate issued,[193] which would mean that one of them voted strategically in order to fabricate the tie vote required to bring the case before the Supreme Court.[194] This matters because failing to account for this state of affairs results in a distorted picture about judicial reactions to the Act's novelty.[195]

More than a month before the Supreme Court's decision on February 7, 1843, dismissing *Nelson* for lack of jurisdiction,[196] Judge Monroe responded on December 25, 1842, to Secretary of State Webster's letter seeking feedback from those administering the Act.[197] Judge Monroe provided a thorough account extolling the virtues of the 1841 Act system and applauding its innovation in departing from the English model of involuntary bankruptcy relief conditioned on creditor

191. *Nelson* Record Transcript, *supra* note 151, at 1.

192. *See id.* at 2 ("Thereupon, on consideration hereof, said questions and points of law so stated, and adjourned from the district court, the judges of this court [i.e., the U.S. Circuit Court for the District of Kentucky] are divided and opposed in opinion upon each of said questions.").

193. *See id.* at 1–2.

194. *Cf.* Nash & Collins, *supra* note 146, at 735 ("[B]ecause Supreme Court jurisdiction over certified questions was mandatory, Justices could strategically cast votes in the circuit courts in order to create a division that would then trigger mandatory review by the Court. Indeed, there is historical evidence that Justices did just that, sometimes even going so far as to announce that the circuit court division was pro forma—that is, a mere pretense of division in order to obtain Supreme Court review. Certification by division thus provides an example of a form of discretionary docket control (by individual Justices) more than a century before the Supreme Court was commonly understood to have gained such authority." (footnote omitted)).

195. For an example of legal scholarship that has produced such a distortion, see *infra* note 219.

196. *See Nelson*, 42 U.S. (1 How.) at 266; *see also supra* notes 175–178 and accompanying text (discussing the holding in *Nelson v. Carland*).

197. *See* Letter from Thomas Bell Monroe, U.S. J., Dist. of Kentucky, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 25, 1842) [hereinafter Monroe Letter], *in* S. DOC. NO. 27-19, at 144; *see also supra* note 105 and accompanying text (discussing Secretary Webster's letter).

consent.[198] He opined that "[t]he mode adopted by the statute, of allowing the voluntary bankrupt to proceed openly upon his own petition, [wa]s decidedly preferable" to the English model,[199] which he described as "unfit to our system or country."[200] Judge Monroe concluded that "[n]o sufficient cause ha[d] been found in the operations of the [1841 Act] in Kentucky to induce the suggestion of any other alteration of its provisions prescribing the conditions and directing the mode of allowing the discharge."[201] Nothing in Judge Monroe's letter suggested that the Act's voluntary relief provisions suffered from constitutional infirmity.

Available evidence further suggests that Justice Catron likely deemed voluntary bankruptcy to be constitutional when the *Nelson* circuit court transmitted its certificate of division to the Supreme Court. In his dissent from the Court's majority opinion, Justice Catron explained the underlying dynamics that motivated the certificate:

> In the case of William Nelson, the question occurred in the [U.S. Circuit Court for the District of Kentucky], whether the bankrupt law was unconstitutional and void, or otherwise. It was adjourned, as already stated, into the Circuit Court by the district judge; and there the judges were opposed in opinion, and certified the question to this court for its decision. This was done at the instance of the bar of St. Louis; the district judge of Missouri having pronounced the bankrupt act a mere insolvent law; such as was never contemplated by the framers of the Constitution, and therefore void.[202]

Justice Catron's reference to the ruling by the U.S. District Court for the District of Missouri was specifically to Judge Robert Wells's opinion in *In re Klein*,[203] which was issued on September 17,

198. *See* Monroe Letter, *supra* note 197, *in* S. DOC. NO. 27-19, at 147–51. In 1847, the Supreme Court rejected the idea that the scope of the bankruptcy power was limited to the type of bankruptcy system in effect in England when the Constitution was adopted. *See* Waring v. Clarke, 46 U.S. (5 How.) 441, 458-59 (1847).

199. Monroe Letter, *supra* note 197, *in* S. DOC. NO. 27-19, at 149.

200. *Id.* at 147.

201. *Id.* at 147–48.

202. *Nelson*, 42 U.S. (1 How.) at 268–69 (Catron, J., dissenting).

203. Immediately after referring to the Missouri federal district court's decision, Justice Catron proceeded to quote it extensively—though without referring to it by name—in his dissenting opinion. *Compare id.* at 269–276, *with In re* Klein, 14 F. Cas. 719, 719–22 (D. Mo. 1842) (No. 7,866), *rev'd*, 14 F. Cas. 716 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865). When Circuit Justice Catron subsequently overruled the district court's decision in *Klein* on appeal, he noted that he had extensively quoted it in his *Nelson* dissenting opinion. *See Klein*, 14 F. Cas. at 716 ("I am relieved from setting forth at any length the opinion of the district judge, because this has been already done, in an opinion delivered by me in the supreme court of the United States at its last term . . . .").

1842,[204] and held that the 1841 Act's voluntary relief provisions were unconstitutional.[205] In that case, Edward Klein, the voluntary bankrupt, appealed the district court's order denying his discharge to the U.S. Circuit Court for the District of Missouri.[206] At the time, the federal judicial districts in Kentucky, Missouri, and Tennessee constituted the Eighth Circuit,[207] to which Justice Catron had been assigned as Circuit Justice.[208] Accordingly, *Klein* presented an opportunity for Circuit Justice Catron, sitting by himself, to decide the constitutionality of the 1841 Act's voluntary relief provisions,[209] less than two months before he and Judge Monroe sitting on the Circuit Court for the District of Kentucky would issue their certificate of division on the same question in *Nelson*.[210] But Circuit Justice Catron held off from doing so, instead opting for a strategy that would settle the constitutionality question in one fell swoop: a decision by the Supreme Court on the matter.

Judge Wells's *Klein* decision had a seismic effect for all who had sought voluntary relief under the Act in Missouri. As recounted by Justice Catron, "[p]ursuant to the opinion, decrees were entered, dismissing the first cases presented for final discharges in the district of Missouri; and some twelve hundred more, depending in that court, w[ould] be dismissed, unless the decrees [we]re reversed which ha[d] been entered."[211] In addition to recognizing the high stakes involved in the *Klein* litigation, Circuit Justice Catron clearly knew that his decision in that appeal would be unreviewable by the Supreme Court.[212] On the other hand, if he could identify a case in which he and a federal

204. *See* Case Minutes, *In re* Klein, No. 38 (D. Mo. Sept. 17, 1842) (located in WDMO Record Book, *supra* note 88, at 98 [handwritten]) [hereinafter *Klein* Case Minutes].

205. *Klein*, 14 F. Cas. at 730.

206. *See Klein*, 14 F. Cas. at 716; *see also Klein* Case Minutes, *supra* note 204 ("Wherefore and for the reasons aforesaid It is ordered that the [discharge] petition of the said Edward Klein be dismissed. Whereupon the said Edward Klein by his said Solicitor moved the Court for an appeal to the Circuit Court of the United States in & for the District of Missouri, which is granted him, and the clerk of this Court directed to make out the record & transmit the same to the clerk of said Circuit Court.").

207. Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176 (current version at 28 U.S.C. § 41).

208. *See Circuit Allotments: Eighth Circuit*, FED. JUD. CTR., https://www.fjc.gov/history/courts/circuit-allotments-eighth-circuit [https://perma.cc/9GD5-G4Y3].

209. *See supra* notes 169–171 and accompanying text (discussing appellate jurisdiction of federal circuit court to review denial of 1841 Act discharge by the federal district court). Klein elected the federal circuit court, rather than a jury, to hear and determine his appeal. *See Klein*, 14 F. Cas. at 716 ("The ground of this judgment the circuit court is called upon to revise.").

210. *See supra* notes 179–181 and accompanying text (discussing certificate of division issued by the federal circuit court in *Nelson*).

211. *Nelson*, 42 U.S. (1 How.) at 277.

212. *Cf. Nelson*, 42 U.S. (1 How.) at 267 (stating that "[n]o appeal is allowed to this court [i.e., the Supreme Court] from the decree of the Circuit Court" deciding an appeal of the district court's or district court jury's determination denying a discharge to a bankrupt under the 1841 Act).

district court judge would divide in opinion on the constitutional question, the certificate of division would open the door for the Court to review and definitively decide the matter. From Justice Catron's perspective, *Nelson* was just the case for doing so, as evidenced by his self-referential remarks in *Nelson* immediately following his description of the fallout from Judge Wells's *Klein* decision: "It was thought, by the circuit judge, due to the county at large, and to the parties concerned, that this important question should meet with the speedy decision of this court; and therefore it was brought here."[213] But as already discussed,[214] and contrary to Justice Catron's expectations,[215] the *Nelson* majority ruled that a federal district court judge could not sit on the federal circuit court when it considered questions that had been adjourned into it by the federal district court pursuant to the Act, which made the certificate of division transmitted by the *Nelson* circuit court improper, thereby warranting dismissal of the case for lack of jurisdiction.[216]

213. *Id.* at 276. At first blush, Justice Catron's reference to the "county at large" might lead a reader to wonder whether he meant "*country* at large," especially because of his concern over nonuniform applications of the Act across federal judicial districts. *See id.* ("So far from being 'a uniform system of bankruptcy,' in its administration, it has become, by the various and conflicting constructions put upon it, little more uniform than the different and conflicting state insolvent laws."). But recall that the St. Louis bar, in reaction to Judge Wells's *Klein* opinion, urged the U.S. Circuit Court for the District of Kentucky in *Nelson* to issue a certificate of division on the constitutional question. *See supra* note 202 and accompanying text. Accordingly, Justice Catron's reference to the "county at large" may very well have been to St. Louis County. When Circuit Justice Catron decided the *Klein* appeal in 1843, he confirmed that he had attempted to use the *Nelson* case as the mechanism for resolving the constitutional question and so too the *Klein* appeal. *See Klein*, 14 F. Cas. at 716 ("I am relieved from setting forth at any length the opinion of the district judge, because this has been already done, in an opinion delivered by me in the supreme court of the United States at its last term, when an attempt was made to bring the present question before that court *to have it decided for the purposes of this case*." (emphasis added)).

214. *See supra* notes 152–154, 175–178 and accompanying text.

215. *See Nelson*, 42 U.S. (1 How.) at 276–77 (Catron, J., dissenting) ("I think Congress intended, by the 6th section of the bankrupt law, to give the district judge the power to adjourn questions into the Circuit Court, 1. For the purpose of obtaining the aid and assistance of the circuit judge; and, 2. To make up a division of opinion on great questions, so that the decision of the Supreme Court might be had. This was contemplated by Congress; or it was intended that in no bankrupt case should this court have a revising power, although in every district in the United States the law might be differently construed: and the wildest prediction could hardly have exceeded the reality. . . . I cannot, therefore, bring my mind to the belief that the revising power of this court was intended to be cut off. And, as the most expeditious and convenient mode of revision was by a division of opinion, I think Congress intended that should be the mode.").

216. *See id.* at 265–66 (majority opinion). The *Nelson* majority opinion appears to have left a bitter taste in Justice Catron's mouth, as evidenced by his remarks in a case before the Court the following year also involving the 1841 Act. *See Ex parte* Christy, 44 U.S. (3 How.) 292, 323 (1844) (Catron, J., concurring in the judgment and dissenting in part) ("I therefore think we should refrain from expressing any extra-judicial opinion on the present occasion; we did so in *Nelson v. Carland*, a case involving the constitutionality of the bankrupt law, and I then supposed most properly, by the majority of the court, who thought we had no jurisdiction: a more imposing

Given that Circuit Justice Catron subsequently held the 1841 Act's voluntary relief provisions to be constitutional in the *Klein* appeal,[217] and given that his *Klein* opinion was appended at his behest to his *Nelson* dissenting opinion in the *United States Reports*,[218] it is clear that he orchestrated the *Nelson* certificate of division hoping to get the Court to declare that voluntary bankruptcy was constitutional. And because Judge Monroe had elsewhere demonstrated his firm belief in the legitimacy of that concept, it is evident that whichever judge voted on the *Nelson* circuit court against the Act's constitutionality did so strategically, not sincerely believing in that view.[219]

application, requiring an opinion, could not have been presented, as twelve hundred cases depended on the decision of the District Court of Missouri, which was opposed to the constitutionality of the law; and to revise it the case was brought here." (citation omitted)).

217. *See Klein*, 14 F. Cas. at 719.

218. Carl Swisher provides a detailed account regarding Justice Catron's publication request to the Supreme Court Clerk, William Carroll, who ended up involving the *Reports* editor, Benjamin Howard, in the matter: Catron asked that his *Klein* opinion appear in the *Reports*, whether (1) in an appendix, (2) immediately following his *Nelson* dissenting opinion, or (3) anywhere else deemed appropriate; but he also allowed for the possibility that publication of the *Klein* opinion might be inappropriate and should thus be omitted from the *Reports*. *See* SWISHER, *supra* note 124, at 141–42. If one consults volume 42 of the *Reports*, the Court's order in *Nelson* is followed by a small horizontal line in the center of the page, below which appears the following sentence in a smaller font than the *Nelson* opinions and order: "While this volume was in press, we received the following opinion delivered by Judge Catron in his judicial district, which we insert as being of general interest." 42 U.S. 277, 277 (1843). Justice Catron's *Klein* opinion subsequently follows, also in a smaller font than the *Nelson* opinions and order, albeit with the running header "Nelson v. Carland" at the top of each page. *See id.* at 277–81.

It should be clear from Swisher's account and from the placement and formatting of the *Klein* opinion that it was not substantively part of the Court's multiple opinions in *Nelson*. For that matter, the Court did not subsequently treat it as such. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902) (noting that the circuit court's opinion in *Klein* was "reported in a note to *Nelson v. Carland*"). Moreover, the "we" reference appearing twice in the note following the Court's order in *Nelson* is presumably to Carroll and Howard (i.e., the Court's clerk and the *Reports* editor). Nonetheless, scholars have misinterpreted what Catron's *Klein* opinion in the *Reports* represents. For example, after noting that the Court dismissed the *Nelson* case for lack of jurisdiction, Charles Warren writes, "Justice Catron, however, filed a strong dissenting opinion on the merits and upheld the validity of the law, and later in the Circuit on an appeal of the *Klein Case* reversed Judge Wells' decision." WARREN, *supra* note 15, at 86. This claim is patently wrong. Justice Catron's *Nelson* dissenting opinion only addressed the jurisdictional issue before the Court. *See Nelson*, 42 U.S. (1 How.) at 266–69, 276–77 (Catron, J., dissenting). It appears that Warren failed to notice that Catron's *Klein* opinion was distinct from his *Nelson* dissenting opinion. For another example, Keith Whittington attributes the note following the Court's order in *Nelson* and introducing Catron's *Klein* opinion to the Court itself rather than to the Court's clerk and the *Reports* editor. *See* KEITH E. WHITTINGTON, REPUGNANT LAW: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 96 (2019) ("In lieu of a formal opinion [in *Nelson*], the Court ordered that an 'opinion delivered by Judge Catron in his judicial district' (while he was riding circuit) be published in *U.S. Reports* as 'being of general interest.'" (quoting 42 U.S. 277)).

219. Based on this reading of the historical record, one should conclude that Charles Warren incorrectly describes Judge Monroe's stance on the constitutionality of the 1841 Act's voluntary relief provisions. After discussing Judge Wells's *Klein* decision holding those provisions to be unconstitutional and dismissing hundreds of voluntary Act cases pending before him, Warren

Nelson, which the Supreme Court dismissed on February 7, 1843,[220] was the first and only case relating to the 1841 Act that the Court considered before Congress repealed the Act the following month on March 3, 1843.[221] If one were to adopt a narrow view of antebellum bankruptcy law's development, with the Act's effective and repeal dates as bookends, then the ineluctable conclusion would be that the question on voluntary bankruptcy's constitutionality had not been judicially settled. The available evidence indicates that, by the repeal date, one Justice had definitively declared voluntary bankruptcy to be constitutional in his circuit-court capacity (i.e., Circuit Justice Baldwin in *Irwine*), and another Justice had either sincerely voted in favor of constitutionality or strategically voted against constitutionality in his circuit-court capacity (i.e., Circuit Justice Catron in *Nelson*).[222] But as argued above, the 1841 Act had a life that extended far beyond its repeal date.[223] A starkly different picture emerges once we consider postrepeal decisions by the Justices in their individual and collective capacities—specifically, by Circuit Justices Catron, John McKinley, and Roger Taney in 1843 and by the Supreme Court in 1844, 1845, 1848, 1854 and 1856.

b. Postrepeal Direct Rulings by the Circuit Justices

First, consider the postrepeal decisions by the Circuit Justices that directly ruled on the constitutionality of the 1841 Act's voluntary relief provisions. Having experienced defeat with his certificate-of-division strategy in *Nelson* to prompt the Supreme Court to rule on voluntary bankruptcy's constitutionality, Justice Catron turned his attention back to the pending appeal in *Klein* in relatively short order,

proceeds to describe the procedural posture that culminated in *Nelson* making its way to the Supreme Court as follows: "Shortly after this, a like view of the Act was held by United States District Judge in Kentucky, who adjourned a case into the Circuit Court, where the Judges being opposed in opinion, certified the question of the validity of the Act to the Supreme Court." WARREN, *supra* note 15, at 86. Warren thus claims that Judge Monroe, like Judge Wells, considered voluntary bankruptcy to be unconstitutional and implies that Judge Monroe voted against the Act's constitutionality when sitting on the *Nelson* circuit court. Warren, however, provides no support for these propositions other than citing to the Supreme Court's *Nelson* opinion. *See id.* at 86 & 178 n.49. As detailed above, evidence contemporaneous with the *Nelson* circuit court's certificate of division indicates that Judge Monroe considered the Act's voluntary provisions to be constitutional. *See supra* notes 196–201 and accompanying text. Moreover, as also noted above, the certificate of division did not specify how Judge Monroe and Circuit Justice Catron voted. *See supra* note 192 and accompanying text. Accordingly, scholars should not accept Warren's propositions on this front without evidence that would contradict the account presented in this Article.

220. *See supra* note 175.

221. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

222. *See supra* notes 187–190, 217–219 and accompanying text.

223. *See supra* Section I.B.

just a couple of months after the Court's dismissal of *Nelson*. According to *Niles' National Register*, Circuit Justice Catron reversed Judge Wells's *Klein* decision on April 24, 1843.[224] In holding the 1841 Act's voluntary relief provisions to be constitutional,[225] Circuit Justice Catron emphasized the broad power enjoyed by Congress when enacting legislation pursuant to the Bankruptcy Clause:

> In considering the question before me, I have not pretended to give a definition, but purposely avoided any attempt to define the mere word "bankruptcy." It is employed in the constitution in the plural and as part of an expression,—'the subject of bankruptcies.' The ideas attached to the word in this connection are numerous and complicated. They form a subject of extensive and complicated legislation. Of this subject congress has general jurisdiction; and the true inquiry is, to what limits is that jurisdiction restricted? I hold it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of congress. *With the policy of a law, letting in all classes, others as well as traders, and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law makers.*[226]

Notably, in writing that "the courts have no concern,"[227] Circuit Justice Catron described a judiciary that approved of the Act's system for voluntary relief. Of course, we ought not to take his descriptive claim at face value. Instead, that claim should be corroborated with evidence indicating that judges, through their words and conduct, likewise subscribed to the view that voluntary bankruptcy was constitutional. Nonetheless, one should also consider the possibility that Circuit Justice Catron had his finger on the judicial branch's pulse, which placed him in a position to make an accurate claim. In other words, the statement that "the courts have no concern" should not be dismissed out of hand as mere puffery. But before turning to additional evidence

224. *U.S. Bankrupt Law Constitutional in Missouri*, 14 NILES' NAT'L REGISTER 163, 163 (1843) ("We learn from the St. Louis papers that judge Catron is now holding the circuit court for Missouri, and that on the 24th ult. he gave his decision on the appeal from the opinion of judge Wells, reversing said opinion, and deciding that the bankrupt law is constitutional.").

225. *See In re* Klein, 14 F. Cas. 716, 719 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865).

226. *Id.* at 718 (emphasis added).

227. *Id.*

corroborating Circuit Justice Catron's claim, it is worth considering the effect that his *Klein* ruling had on the 1841 Act's operation in Missouri.

In reversing Judge Wells's decree dismissing Klein's bankruptcy case, Circuit Justice Catron ordered that Wells reinstate the cases of and grant discharges to Klein and Christopher Rhodes, another voluntary bankrupt whose case had likewise been dismissed by Wells on constitutional grounds.[228] One scholar has claimed that, because the circuit court's reversal in *Klein* occurred after the Act's repeal, Missourians missed out on the opportunity to obtain voluntary relief under the Act.[229] I previously questioned this claim given the repeal legislation's savings clause, yet also suggested that the absence in the archives of 1841 Act case files from the District of Missouri made it difficult to draw a firm conclusion about the Act's postrepeal life in the district.[230] Since then, however, through subsequent archival research, I uncovered a bound manuscript volume in which the U.S. District Court for the District of Missouri kept a record of proceedings held in the district's 1841 Act cases (the "District of Missouri Record Book").[231] This source sets forth evidence unmistakably indicating that Circuit Justice Catron's *Klein* ruling enabled Missourians to obtain voluntary relief under the Act far into the Act's postrepeal period. For example, on September 2, 1845, the federal district court granted thirty discharges in voluntary cases.[232] And looking even further ahead, the district court reinstated James Teas's case on March 1, 1847, and granted him (as well as three other voluntary bankrupts) a discharge approximately six months later on September 6, 1847.[233]

Two examples of contemporary reporting on the *Klein* saga contextualize the reversal of fortune for voluntary bankrupts in Missouri. Shortly after the circuit court's ruling, one newspaper observed that "it [wa]s said [Judge Wells] w[ould] conform his action in all other cases before him to the opinion of Judge Catron."[234] By virtue of being bound by the ruling above, Judge Wells would have to clean up

228. *See id.* at 719.

229. *See* BALLEISEN, *supra* note 52, at 259 n.18 ("By the time circuit court judge Catron overruled Wells on appeal in April 1843, Congress had repealed the 1841 act. Thus Wells's action essentially prevented residents of Missouri from obtaining bankruptcy relief.").

230. *See* Pardo, *supra* note 55, at 85–86 n.84.

231. *See supra* note 88.

232. *See* WDMO Record Book, *supra* note 88, at 382, 387–88 [handwritten].

233. *See* Case Minutes, *In re* Teas, No. 1,087 (D. Mo. Mar. 1, 1847) (located in WDMO Record Book, *supra* note 88, at 417 [handwritten]); Case Minutes, *In re* Brewer, No. 580; *In re* Josaling, No. 1038; *In re* Wilson, No. 1086; *In re* Teas, No. 1,087 (D. Mo. Sept. 6, 1847) (located in WDMO Record Book, *supra* note 88, at 421–22 [handwritten]).

234. *The Decision of Judge Catron of the U.S. Circuit Court, on the Constitutionality of the Recently Repealed Bankrupt Law*, RADICAL (Bowling Green, Mo.), May 6, 1843, at 2.

the colossal mess he made by declaring the 1841 Act unconstitutional, which another newspaper described as follows: "Much time and money would have been saved to an unfortunate class of citizens in this State, if Judge Wells had delivered an honest opinion in the outset, and not been afflicted with the idea of a seat in the Senate of the United States."[235] Just like Klein's and Rhodes's cases, Wells ultimately reinstated a multitude of 1841 Act cases that he dismissed as unconstitutional and then proceeded to administer them according to the terms of the 1841 Act. Thus, the only federal judge currently known to have ruled against the constitutionality of the 1841 Act's voluntary relief provisions subsequently engaged in a repeated course of judicial conduct validating those very provisions long after Congress had repealed the Act.

Returning to the postrepeal decisions by the Circuit Justices, on April 24, 1843, the same day that Circuit Justice Catron issued his *Klein* decision, Circuit Justice McKinley, sitting on the U.S. Circuit Court for the Eastern District of Louisiana, considered and ruled on the constitutionality of the 1841 Act's voluntary relief provisions in a pair of 1841 Act cases in which the same creditor opposed each debtor's petition to be declared a bankrupt under the Act.[236] William Whiting and Elihu Woodruff, both from New Orleans, filed their bankruptcy petitions in the U.S. District Court for the Eastern District of Louisiana on, respectively, January 16 and 31, 1843.[237] David Akin, a creditor of both Whiting and Woodruff, filed individual objections to each of their petitions on the ground that the Act's voluntary relief provisions were unconstitutional.[238] Akin's objection in *In re Woodruff* argued:

> 1st That the said Woodruff is not a bankrupt having committed no act of bankruptcy according to the meaning of the constitution of the

235. *The Bankrupt Law*, BOON'S LICK TIMES (Fayette, Mo.), Apr. 29, 1843, at 2.

236. *See* Order of Court, Aiken v. Woodruff, No. 1108 (McKinley, Circuit Justice, C.C.E.D. La. Apr. 24, 1843) (located in U.S. Cir. Court for the E. Dist. of La., *Case Files, April 1, 1837–December 31, 1911*, Records of the District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas [hereinafter CCEDLA Case Files]) [hereinafter *Woodruff* Court Order]; Order of Court, Aiken v. Whiting, No. 1109 (McKinley, Circuit Justice, C.C.E.D. La. Apr. 24, 1843) (located in CCEDLA Case Files, *supra*) [hereinafter *Whiting* Court Order].

237. *See* 2 U.S. Dist. Court for the E. Dist. of La., *Bankruptcy Act of 1841 Dockets, 1842–1843*, at 259, 318 [handwritten] (located in Records of District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas) [hereinafter EDLA Dockets] (setting forth docket reports for *In re Whiting*, No. 621, and *In re Woodruff*, No. 680).

238. *See* Opposition of David Akin, *In re* Whiting, No. 621 (E.D. La. Feb. 17, 1843) (located in EDLA Case files, *supra* note 88) [hereinafter Akin *Whiting* Opposition]; Opposition of David Akin, *In re* Woodruff, No. 680 (E.D. La. Mar. 10, 1843) (located in EDLA Case files, *supra* note 88) [hereinafter Akin *Woodruff* Opposition].

> United States of America, and that even if he have committed such act he cannot be declared a bankrupt on his own petition:
>
> 2d That so much of the act of the congress of the United States of August, 1841, entitled an act "to establish a uniform system of bankruptcy throughout the United States" as applies to the case of said Woodruff and for the benefit of which he has petitioned, is unauthorized by the constitution of the United States of America, is contrary to the intent and meaning of said constitution and is null void and of no effect.[239]

Rather than ruling on Akin's objections, U.S. District Court Judge Theodore McCaleb adjourned the question on the constitutionality of the 1841 Act's voluntary provisions into the district's federal circuit court with respect to both cases.[240] The circuit court filed the record transcripts from the district court and docketed both cases on April 11, 1843.[241] Less than two weeks later, Justice McKinley issued one-page orders in both cases, unaccompanied by any opinion or explanation, each holding "that the Act of Congress to Establish a Uniform system of Bankruptcy throughout the United States, approved the 19th August 1841, is a valid and binding Law, according to the constitution of the United States of America."[242]

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239. Akin *Woodruff* Opposition, *supra* note 238. Akin's objection in *Whiting* was substantively the same as his objection in *Woodruff*, though more concise. *See* Akin *Whiting* Opposition, *supra* note 238

240. *See Woodruff* Court Order, *supra* note 236; *Whiting* Court Order 236.

241. *See* 2 U.S. Cir. Court for the E. Dist. of La., *Dockets, 1837–1911*, at 154–55 [handwritten] (located in Records of the District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas) (setting forth docket reports for *Aiken v. Woodruff*, No. 1108, and *Aiken v. Whiting*, No. 1109).

242. *Woodruff* Court Order, *supra* note 236. *Accord Whiting* Court Order, *supra* note 236. Carl Swisher has noted that Justice McKinley's "Circuit Court opinions were not published, and few if any of them were regarded as of such general interest as to justify printing, even in newspapers." SWISHER, *supra* note 124, at 67. Swisher has further opined that McKinley "made no significant contribution to legal thinking in any form" and that "[h]e was probably the least outstanding of the members of the Taney Court." *Id.* Relatedly, in hypothesizing why some Justices "published few or none of their Circuit Court opinions," Swisher states that "[i]n some instances refraining from writing opinions may have been a convenient means of avoiding display of sheer lack of ability—with Justice McKinley as an example." *Id.* at 262.

Swisher's sweeping claims about Justice McKinley seem a bit harsh when considering his rulings in *Aiken v. Whiting* and *Aiken v. Woodruff*. The day after Circuit Justice McKinley issued the circuit court's orders in the cases, the *Daily Picayune* reproduced the order language in its entirety and declared that, as a result of the Supreme Court's ruling in *Nelson v. Carland*, the circuit court's "decision is *of the more importance*, inasmuch as it is final." *Constitutionality of the Bankrupt Law*, DAILY PICAYUNE (New Orleans, La.), Apr. 25, 1843, at 2 (emphasis added). Moreover, Swisher was just plain wrong in writing that "the Circuit Court opinion of Justice Catron in the *Klein* case . . . seems to have provided the only official treatment of [the 1841 Act's] constitutionality by any of the Justices." SWISHER, *supra* note 124, at 141. Swisher was clearly

To be sure, Circuit Justice McKinley's rulings were significant because of their declaration that the 1841 Act's voluntary relief provisions were constitutional. On a practical level, the rulings mattered a great deal to the debtors who had faced a constitutional objection to their requests for relief: Not only did the circuit court's twin decisions open the door for Whiting and Woodruff to be declared bankrupts under the Act, it also paved the way for the federal district court to ultimately grant them discharges.[243] In this regard, a closer look at Woodruff's bankruptcy case reveals an added layer of complexity that should make us think about the circuit court's *Woodruff* ruling in a very different light.

Various filings in Woodruff's bankruptcy case identified him as a member of the firm of "Turner & Woodruff of New Orleans," including the schedule of debts that he filed with his bankruptcy petition.[244] That firm quite likely was a commission-merchant firm,[245] thus placing it squarely in the business of slavery.[246] Woodruff also seems to have been

unaware of McKinley's *Whiting* and *Woodruff* rulings—or, for that matter, Circuit Justice Baldwin's *Irwine* ruling. *See supra* note 188 and accompanying text. To my knowledge, Edward Balleisen is the only scholar who has previously identified McKinley's ruling on the 1841 Act's constitutionality, albeit based on a newspaper article that did not report the names of the circuit court cases. *See* BALLEISEN, *supra* note 52, at 259–60 n.18.

243. *See* EDLA Dockets, *supra* note 237, at 259 [handwritten] (setting forth docket report for *In re Whiting* and indicating that the court declared Whiting a bankrupt on April 28, 1843, and granted him a discharge on August 4, 1843); *id.* at 318 [handwritten] (setting forth docket report for *In re Woodruff* and indicating that the court declared Woodruff a bankrupt on May 11, 1843, and granted him a discharge on February 24, 1844).

244. List of Debts of Elihu Woodruff and of Turner & Woodruff of New Orleans, *In re* Woodruff, No. 680 (E.D. La. Jan. 31, 1843) (located in EDLA Case files, *supra* note 88) [hereinafter *Woodruff* Debt Schedule].

245. Two contemporary New Orleans directories had a listing for an E. Woodruff, a commission merchant whose business was located a 2 New Levee. *See* NEW-ORLEANS DIRECTORY, FOR 1841, at 288 (New Orleans, Michel & Co. 1840) [hereinafter 1841 NEW-ORLEANS DIRECTORY]; NEW ORLEANS DIRECTORY FOR 1842, at 427 (New Orleans, Pitts & Clarke 1842) [hereinafter 1842 NEW ORLEANS DIRECTORY]. The only other listing in both directories for a Woodruff whose first or middle name began with an "E" was for a J.E. Woodruff, a commission merchant whose business was located on Camp Street. *See* 1841 NEW-ORLEANS DIRECTORY, *supra*, at VII; 1842 NEW ORLEANS DIRECTORY, *supra*, at 427. The J.E. Woodruff was James E. Woodruff. *See, e.g.*, *Removal*, DAILY PICAYUNE (New Orleans, La.), Nov. 5, 1841, at 3 ("James E. Woodruff has removed to No. 70, Camp street."). One can reasonably conclude that the E. Woodruff in both directories was Elihu Woodruff given that some of the filings in his bankruptcy case referred to him as "E. Woodruff." *E.g.*, Petion of E. Woodruff Bankrupt, for a Discharge, *In re* Woodruff, No. 680 (E.D. La. May 11, 1843) ("Respectfully represent[s] E Woodruff Individually and as a member of the firm of Turner & Woodruff of New Orleans . . . that on the 11th day of May . . . he was duly declared Bankrupt . . . .").

246. *Cf. Regular Coast Packet*, DAILY PICAYUNE (New Orleans, La.), July 17, 1841, at 3 ("The well known A 1 steamboat PIONEER, of New Orleans, . . . will run as a regular freight boat from New Orleans up and down the coast as far as Baton Rouge and Fort Jackson. The Pioneer has two large barges of 250 tons each, and will at the shortest possible notice deliver sugar, molasses, &c. in the city . . . . All orders left with . . . E. WOODRUFF, New Levee, . . . will receive prompt

a prominent member of the New Orleans business community, serving as a director of the New Orleans Canal & Banking Company,[247] one of the state's systemically important financial institutions.[248] Finally, Woodruff and his business partner, Turner, were enslavers, as evidenced by the schedule of assets that Woodruff filed in his case, indicating that the firm owned "A Negro Boy named 'Joe,' a runaway reported to be at Chicago Illinois," and listing his value as $1,000.[249] On March 20, 1844, the federal marshal for the Eastern District of Louisiana sold Joe (who was thirty years old) in absentia at Banks Arcade, one of the main commercial exchanges in New Orleans for auctioning enslaved Black Americans,[250] to a purchaser, whose last name was Doll, for the price of $1.50.[251] These details demonstrate that one of the key cases of voluntary bankruptcy relief's composite constitutional settlement intersected with slavery, a point to which we will return upon completing the account and analysis of the settlement issue.[252]

c. Postrepeal Indirect Rulings by the Circuit Justices

None of the remaining postrepeal decisions by the Justices in their individual and collective capacities involved a direct ruling on the constitutional question. Instead, each one involved, in some form or another, rulings on statutory-interpretation questions regarding voluntary relief under the Act. Though the constitutionality of such

attention."). *See generally* KILBOURNE, *supra* note 298, at 108–20 (discussing role of commission-merchant firms in antebellum New Orleans and the legal environment in which they operated); FREDERIC BANCROFT, SLAVE TRADING IN THE OLD SOUTH 319 (Univ. of S.C. Press 1996) (1931) (describing the business model of New Orleanian commission merchants).

247. *See* 1841 NEW-ORLEANS DIRECTORY, *supra* note 245, at 347. Woodruff's debt schedule filed in his 1841 Act case listed various debts owed by Turner & Woodruff to the bank, including on a $4,200 note that was to become due the month following his bankruptcy filing. *See Woodruff* Debt Schedule, *supra* note 244.

248. *See generally* HOWARD BODENHORN, STATE BANKING IN EARLY AMERICA: A NEW ECONOMIC HISTORY 231–32 (2003) ("Like other states, Louisiana turned to its banks, chartering several that assisted, organized, and supervised the construction of one infrastructure project or another. The first one was the New Orleans Canal and Banking Company (1831). With a $4 million aggregate capital, the bank invested $1 million in the construction of a canal linking the Mississippi River in central New Orleans with Lake Ponchartrain [*sic*]. Another $1.3 million of its capital was divided among four rural branches, with at least two-thirds of that amount used for mortgage lending. The Canal Bank, as it was popularly called, was to be all things to all borrowers: general contractor, mortgage lender, commercial lender, and canal financier. It was a lot to ask of one bank, no matter how large." (endnote omitted)).

249. Assets of E Woodruff and of Turner & Woodruff New Orleans, *In re* Woodruff, No. 680 (E.D. La. Jan. 31, 1843) (located in EDLA Case files, *supra* note 88).

250. *See* Pardo, *supra* note 22, at 857–74 (discussing Banks Arcade).

251. *See* Account Sales, *In re* Woodruff, No. 680 (E.D. La. Mar. 20, 1844) (located in EDLA Case files, *supra* note 88).

252. *See infra* notes 286–292 and accompanying text.

relief was not raised in any of these decisions, that issue obviously lurked in the background. Whether Congress had authorized the relief requested under the Act was, of course, a separate question from whether the Constitution authorized such relief. If any of the Justices had deemed the relief in question to exceed the scope of the bankruptcy power, one would have expected them to have raised the constitutional objection *sua sponte*. In fact, this approach had already been modeled in a highly visible way when Judge Wells from the District of Missouri considered the bankrupt's discharge petition in *Klein*, a case that certainly was on the Justices' radar given that Justice Catron had, in his *Nelson* dissenting opinion, extensively quoted Judge Wells's *Klein* ruling.[253]

Minutes from the hearing in which Judge Wells considered Klein's unopposed request for a discharge clearly indicate that Klein was statutorily eligible for such relief:

> And now again at this day came the said Edward Klein by . . . his solicitor and made proof that notice of his said application & notice to his creditors had been given according to the rules and practice of this court. And the said Edward Klein having produced to the court a certificate in writing from the assignee in Bankruptcy of the surrender of all the property & rights of property of said Edward Klein to the said assignee for the benefit of the creditors of said Edward Klein. *And the said Edward Klein having fully complied with & obeyed all the orders of this court & all the requisitions of the Act of Congress entitled An Act to establish a uniform System of Bankruptcy throughout the United States approved Aug 19. 1841* And no cause being now shewn to the court why the prayer of the said petitioner should not be granted & no written dissent to the granting of the prayer of said petitioner having been filed by a majority in number & value of his creditors. The said Edward Klein by his solicitor aforesaid moves the court that he the said Edward Klein by virtue of the act aforesaid be decreed & fully discharge of an from all his debts owing by him . . . .[254]

Nonetheless, Judge Wells deemed it his duty to raise the constitutional question on his own initiative and to ignore the Act's directive to grant Klein a discharge if doing so would be unconstitutional.[255] As already discussed, Judge Wells ruled that the Act's voluntary relief provisions ran afoul of the Constitution,[256] which ultimately led him to dismiss

253. *See supra* note 203 and accompanying text.

254. *Klein* Case Minutes, *supra* note 204 (emphasis added).

255. *See In re* Klein, 14 F. Cas. 719, 719 (D. Mo. 1842) (No. 7,866), *rev'd*, 14 F. Cas. 716 (Catron, Circuit Justice, C.C.D. Mo. 1843) (No. 7,865).

256. *See supra* note 205 and accompanying text.

Klein's discharge petition.[257] That the Justices never pulled a move like Judge Wells in any of the remaining decisions discussed below strongly counsels in construing them as indirect rulings upholding the constitutionality of voluntary bankruptcy relief under the 1841 Act.

The first of these indirect rulings was by Circuit Justice Taney. On May 22, 1843, Judge Willard Hall of the U.S. District Court for the District of Delaware adjourned two questions arising in the voluntary bankruptcy case of Jacob K. Higgins into the U.S. Circuit Court for the District of Delaware.[258] At the initial hearing before the district court on March 21, 1843, to consider Higgins's discharge petition, Higgins was not able to prove that the *Delaware State Journal* had published the notices required under the Act relating to his discharge petition.[259] Moreover, the assignee in the case had not yet filed his report indicating that Higgins had surrendered all his property and rights in property to him, which was a necessary condition for Higgins to be deemed eligible for a discharge.[260] Accordingly, the district court adjourned the matter.[261] Thereafter, Higgins passed away, proof of publication of the requisite notices was established, and the assignee filed his report indicating that Higgins had complied with his surrender obligation.[262]

When the time came for the district court to rule on the deceased bankrupt's discharge petition, Judge Hall teed up the questions adjourned into the circuit court as follows:

> It thus appears that on the 21st March aforesaid, the requisite notice had been published in the designated Newspaper, and the requisite surrender of property and rights of property had been made by the bankrupt to the assignee; but that decree could not be made, because the publication could not be proved, and the assignee had not made requisite report. There is no objection, nor dissent.
>
> These questions now arise in this case; As the said petitioner was dead before said proof [of notice] was taken and said [assignee's] report made, whether a full discharge from all his debts according to the form

257. *See Klein* Case Minutes, *supra* note 204 ("Whereupon the Court refused to grant such motion because he considers the act of Congress under which the said Edward Klein asks to be discharged from all his debts as being against the Constitution of the United States and therefore that he has no power to grant such discharge. Wherefore and for the reasons aforesaid It is ordered that the petition of the said Edward Klein be dismissed.").

258. Questions Adjourned into the Circuit Court, *In re* Higgins (D. Del. May 23, 1843) (located in U.S. Dist. Court for the Dist. of Del., *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 Delaware Case Files]).

259. *See id.*

260. *See id.*

261. *See id.*

262. *See id.*

> of the Act of Congress in this behalf, can be decreed and allowed by this court, and a certificate thereof granted to him accordingly upon said petition for such purpose? Whether upon the aforesaid petition for full discharge and certificate a decree of such discharge and certificate can be passed by the court nunc pro tunc, to have effect from the 21st day of March aforesaid?"[263]

Before answering the adjourned questions, Circuit Justice Taney found that, at the initial hearing on the discharge petition, Higgins "had done everything required of him by law to entitle him to a discharge; . . . the delay d[id] not appear to have been occasioned by any culpable negligence on his part; and . . . no creditor appeared to contest his right to his discharge and certificate."[264] On this basis, Circuit Justice Taney, sitting alone on the circuit court, "determined . . . that a full discharge of the said Jacob K. Higgins the bankrupt from all his debts according to the form of the Act of Congress in this behalf can be decreed and allowed by the District Court aforesaid and a certificate thereof granted upon his said petition for such purpose."[265] It is hard to imagine Circuit Justice Taney issuing this ruling if he had not deemed the 1841 Act's voluntary relief provisions to be constitutional.[266]

d. Postrepeal Indirect Rulings by the Supreme Court

One can say the same about the Supreme Court Justices acting in their collective capacity when deciding cases that required interpretation of the 1841 Act's voluntary relief provisions. In 1844, in *Chapman v. Forsyth*,[267] the Court examined the interplay of the Act's eligibility and discharge provisions. The issue before the court was whether an individual, who had incurred debts arising before the 1841 Act's enactment and resulting from defalcation while acting as a public officer or in a fiduciary capacity, was eligible to be declared a bankrupt and receive a discharge.[268] The Court held that such an individual could

263. *Id.*

264. Answers to Questions Adjourned into the Circuit Court, *In re* Higgins (D. Del. Oct. 11, 1843) (located in Delaware Case Files, *supra* note 258).

265. *Id.*

266. *Cf.* Whittington, *supra* note 218, at 96 ("But in the cases most likely to involve partisan divisions, the Taney Court upheld federal power as it had been exercised by the Whig Congress.").

267. Chapman v. Forsyth, 43 U.S. (2 How.) 202 (1844).

268. The 1841 Act provided that "[a]ll persons whatsoever, . . . owing debts, which shall not have been created in consequence of a defalcation as a public officer; or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, . . . shall be deemed bankrupts within the purview of this act." Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 441 (repealed 1843). A contemporary bankruptcy treatise on the Act identified the following scenarios as ones involving defalcation: "all public officers . . . who have misapplied the moneys entrusted to them, all

obtain relief under the Act, but that the debts arising from defalcation would be excepted from the bankrupt's discharge.[269]

In 1848, in *Mace v. Wells*, the Court reversed a decision by Vermont's highest court, which had affirmed a trial judgment in favor of a creditor who sought to recover a debt from a debtor who argued that it had been discharged in his 1841 Act case.[270] The Court did not mince any words when applying the Act's discharge provision to the facts presented: "And the fourth section declares, that from all such demands the bankrupt shall be discharged. This is the whole case. It seems to be clear of doubt."[271]

In 1854, in *Clark v. Clark*, which required the Court to apply the Act's provision establishing a limitations period for suits brought by and against the assignee, the Court observed that, under the Act, "[t]he bankrupt is personally discharged from his debts, and so are his future acquisitions; but, the property and rights of property which vested in the assignee are subject to the creditors of the bankrupt."[272] In 1856, in *Bush v. Person*,[273] the Court returned to this principle distinguishing between the personal liability of the bankrupt and the *in rem* liability of the bankrupt's property for the bankrupt's prebankruptcy debts. In determining "what effect the discharge of a bankrupt [under the Act] ha[d] upon estoppels, arising by law from covenants of warranty contained in his deeds of conveyance of land," the Court stated that it

executors who have applied to their own use their testator's assets, all administrators who have applied to their own use the moneys collected by them due to the estate of their intestate, and all trustees or guardians who have applied to their own use the funds of their *cestui que trust*." SAMUEL OWEN, A TREATISE ON THE LAW AND PRACTICE OF BANKRUPTCY 13–14 (New York, John S. Voorhies 1842). *See generally* Bullock v. BankChampaign, N.A., 569 U.S. 267, 271–73 (2013) (surveying the history of disagreement among legal authorities on the meaning of defalcation for purposes of federal bankruptcy law).

269. *See* 43 U.S. (2 How.) at 207–08. Henry Forsyth, the voluntary bankrupt who argued that the debt sought to be recovered from him had been discharged in his 1841 Act case, likely incurred the debt through his involvement in the business of slavery. *See id.* at 206 ("This was an action of assumpsit for the proceeds of 150 bales of cotton, shipped to and sold by defendants as the property of the plaintiff the defendants being factors. The defendant, Forsyth, pleaded that he had been duly discharged as a bankrupt, on his own voluntary petition."); *cf.* SCOTT P. MARLER, THE MERCHANTS' CAPITAL: NEW ORLEANS AND THE POLITICAL ECONOMY OF THE NINETEENTH-CENTURY SOUTH 87 (2013) ("It is important to keep in mind the dual role that most Crescent City factors played for their clients: they not only marketed incoming staple cromps from rural districts, but they also directed an outward flow of commodities back to those same districts by supplying goods to planters on credit."). *See generally Factor*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing various definitions for "factor," including "[a]n agent who is employed to sell property for the principal and who possesses or controls the property").

270. *See* Mace v. Wells, 48 U.S. (7 How.) 272, 274, 276 (1848).

271. *Id.*

272. Clark v. Clark, 58 U.S. (17 How.) 315, 321 (1854).

273. Bush v. Person, 59 U.S. (18 How.) 82 (1856).

was "obvious, that though the bankrupt, personally, was released by the act, the debt due from the land continued undischarged."[274]

Importantly, these four decisions by the Court spanning twelve years were all unanimous opinions. None of them offered even a hint of a suggestion that the Justices, in their collective capacity, considered the 1841 Act's voluntary relief provisions to be unconstitutional. And as we shall now see, this was the Illinois Supreme Court's perception when it considered the constitutional question in *Lalor*.

2. Application of the *Lalor* Framework

When the *Lalor* court decided the constitutionality of voluntary bankruptcy under the Act, which it described as "truly a grave and momentous question,"[275] it first lamented that "it [wa]s matter of deep regret that the question ha[d] not been presented to [U.S. Supreme Court], whose determination c[ould] alone put an end to all controversy on the subject."[276] But the court then proceeded to suggest the analytical framework of composite constitutional settlement, pursuant to which its holding would be issued, based on its prediction in light of existing rulings by the Circuit Justices in their individual capacities that the Supreme Court, if given the opportunity, would hold voluntary bankruptcy to be constitutional:

> Fortunately, however, this court is not without strong indications of what will be the decision of [the U.S. Supreme Court], whenever the question shall be brought before it. The bankrupt act has been before most of the judges of the supreme court on their respective circuits, and questions either directly or indirectly made as to its constitutionality, and we believe that a decided majority of the judges have pronounced the law to be constitutional. . . . And when it can be clearly ascertained, from the individual action of the judges, what will be their decision when the question shall be presented to them in their collective capacity, it seems to be reasonable that we should follow in the path thus indicated. We do not, therefore, deem it our duty to enter into any argument on the subject. . . . We, therefore, consider it incumbent on this court to decide that the voluntary branch of the bankrupt act is constitutional and valid.[277]

At the time that the *Lalor* court held that the Act's system for voluntary relief was constitutional, Justices Baldwin, Catron, and

274. *Id.* at 84.
275. Lalor v. Wattles, 8 Ill. (3 Gil.) 225, 226 (1846).
276. *Id.*
277. *Id.* at 226–27.

McKinley had directly ruled the same way when sitting as Circuit Justices;[278] Justice Taney had indirectly signaled that voluntary relief under the Act was constitutional;[279] and the Supreme Court had indirectly signaled the same in its unanimous *Chapman* opinion.[280] Subsequent to the *Lalor* court's ruling, the Supreme Court indirectly signaled on three additional occasions—in 1848, 1854, and 1856—that it continued to view voluntary relief under the Act to be constitutional.[281] Accordingly, when one expands the *Lalor* framework to include decisions by the Justices in their collective capacity on the Court, both before and after *Lalor*, a strong story emerges regarding voluntary bankruptcy's constitutional settlement by the late 1850s.[282] That story becomes even stronger when one considers that (1) no other federal district court judge is known to have held the Act's voluntary relief provisions were unconstitutional, like Judge Wells in *Klein*;[283] and (2) the high courts of at least eight states upheld the constitutionality of voluntary bankruptcy under the Act.[284] By taking account of the

278. *See supra* notes 185–188, 224–226, 236–242 and accompanying text.

279. *See supra* notes 258–266 and accompanying text.

280. *See supra* notes 267–269 and accompanying text; *see also* Rowan v. Holcomb, 16 Ohio 463, 464 (1847) (citing *Chapman* in support of the proposition that the Supreme Court had settled the constitutionality of the 1841 Act's voluntary relief provisions). Justices Baldwin, Catron, Daniel, McKinley, McLean, Story, and Wayne were present on February 19, 1844, when *Chapman v. Forsyth* "was submitted to the court on the record and printed arguments." Case Minutes, Chapman v. Forsyth, No. 125 (U.S. Feb. 19, 1844) (located in U.S. S. Ct., *Engrossed Minutes, February 1790–June 7, 1954*, Vol. K, Jan. 8, 1838–Jan. 24, 1848, at 4,834–35 [handwritten], Records of the Supreme Court of the United States, Record Group 267, National Archives at Washington, D.C.), https://catalog.archives.gov/id/178833990 [https://perma.cc/ESY8-TZAT]. Whether Chief Justice Taney joined the Court's opinion is thus unclear. *See generally* SWISHER, *supra* note 124, at 277 ("[S]oon after the beginning of the [1844] term Chief Justice Taney fell ill and was absent the remainder of the term. Justice Story . . . presided in the absence of the Chief Justice . . . .").

281. *See supra* notes 271–274 and accompanying text.

282. The fact that some members of Congress voted to repeal the 1841 Act on the basis that they considered it to be unconstitutional has been offered to support the argument that voluntary bankruptcy's constitutional settlement did not occur during the antebellum era. *See* Simmons, *supra* note 232, at 335–36. Given that the repeal legislation contained a savings clause, it seems reasonable to conclude that a majority of Congress considered the Act to be constitutional. If the majority had thought otherwise, why would it have permitted an unconstitutional system to continue operating? After all, there was a history of English bankruptcy repeal legislation without savings clauses that demonstrated indifference to the reliance interest of bankrupts who had not received discharges when the repeal occurred. *See* Pac. Mail S.S. Co. v. Joliffe, 69 U.S. 450, 464–65 (1864).

283. *See* State Bank v. Wilborn & Phillips, 6 Ark. 35, 36 (1845); BALLEISEN, *supra* note 52, at 109.

284. *See* Kunzler v. Kohaus, 5 Hill 317, 319–26 (N.Y. 1843); *State Bank*, 6 Ark. at 36–37; Loud v. Pierce, 25 Me. 233, 238–39 (1845); Lalor v. Wattles, 8 Ill. (3 Gil.) 225, 227 (1846); Thompson v. Alger, 53 Mass. 428, 442 (1847); *Rowan*, 16 Ohio at 464; Hastings v. Fowler, 2 Ind. 216, 216 (1850); Reed v. Vaughan, 15 Mo. 137, 143 (1851); *cf.* Ikelheimer v. Chapman's Adm'rs, 32 Ala. 676, 701 (1858) ("Suppose congress should enact a bankrupt law, and, as they have heretofore done, engraft

longer period of time during which the Act continued to operate, we witness constitutional innovation in antebellum bankruptcy law.[285]

III. BANKRUPT PLANTATIONS

The 1841 Act's innovation of voluntary bankruptcy relief, coupled with a broad definition of the class of individual eligible for such relief,[286] can be viewed as a key moment in the evolving meaning of "failure in the land of the free," which entailed "the redefinition of insolvency from moral failure to economic risk [and] applied principally to debtors who were themselves entrepreneurs in the changing economy."[287] That legislation signified "the bankruptcy ideal of conferring absolution on insolvent debtors and sending them back into the world to make a fresh start in the quest for economic independence—a quest that has been a driving theme in American history."[288] When the Act came under constitutional attack, federal and state judiciaries upheld the validity of the innovation.[289] Recall that one such case involved an enslaver, Elihu Woodruff.[290] Circuit Justice McKinley's decision in that case, which declared voluntary bankruptcy to be constitutional,[291] was significant on two fronts. First, and perhaps most obvious, his ruling in *Aiken v. Woodruff* helped shore up the foundation of the 1841 Act system. Second, and perhaps less obvious (though not less important), the *Woodruff* decision symbolized tacit approval that financially distressed debtors involved in the business of slavery were just as worthy of benefitting from the Act as other types of debtors.[292] Enabling enslavers to avail themselves of the system would have profound effects on the development of federal bankruptcy law.

A federal district court's decree declaring a debtor to be a bankrupt under the 1841 Act created an estate consisting of the

upon it provisions or details unknown to the English system when our constitution was adopted. Would such provisions or details be unconstitutional? Certainly not. It was a bankrupt law, as a measure of relief to insolvent traders, which the framers of the constitution had in view, and not the details of the English bankrupt law.").

285. *But see* Simmons, *supra* note 232, at 336 ("In sum, the view that the 1841 Act represented a phase shift in the constitutional law of bankruptcy is untenable.").

286. *See supra* notes 114–119 and accompanying text.

287. Bruce H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1, 3 (2003).

288. *Id.* at 7.

289. *See supra* Section II.C.1.

290. *See supra* notes 244–246, 249 and accompanying text. The possibility also exists that the voluntary bankrupt in another such case, Henry Forsyth, had incurred some of his debts through his involvement in the business of slavery. *See supra* note 269.

291. *See supra* note 242 and accompanying text.

292. *Cf.* Mann, *supra* note 287, at 1 ("Whether a society forgives its debtors and how it bestows or withholds forgiveness are more than matters of economic or legal consequence. They go to the heart of what a society values.").

bankrupt's prebankruptcy, nonexempt property.[293] As I have previously argued, the estate became the property of a bankruptcy trust, which constituted a federal instrumentality.[294] On this view, Congress's system for resolving financial distress under the Act entailed nationalization of a bankrupt's assets.[295] Some cases under the Act involved bankrupt plantation owners, which gave federal court officials the opportunity to profit from the business of slavery while actively managing and winding down those enterprises, sometimes over a period of years beyond the Act's repeal date. Through its analysis of the manuscript court records pertaining to one such case, *In re Maurin*,[296] this Part spotlights the institutional capacity of federal courts to regulate antebellum slavery through the bankruptcy power.

A. Judicial Sale of the Perot Plantation to A. Maurin & Co.

By the end of the 1830s, New Orleanian Antoine Maurin, one of the Louisiana State Bank's directors,[297] found himself in dire financial straits, grappling with the economic dislocation caused by the Panic of 1837 like much of the U.S. business community.[298] His eponymous commission-merchant firm, A. Maurin & Co., which was located just a couple of blocks from the Mississippi River at 64 Old Levee Street in the French Quarter,[299] announced its dissolution in a *New-Orleans Bee* notice dated May 1, 1839.[300] The firm's six partners had mutually

293. *See* Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 442–43 (repealed 1843); Pardo, *supra* note 22, at 814–19.

294. *See* Pardo, *supra* note 22, at 811–56.

295. *See id.* at 855–56.

296. *See* 2 EDLA Dockets, *supra* note 237, at 75–77 (setting forth docket report for *In re Maurin*, No. 437, which was commenced in the Eastern District of Louisiana on October 27, 1842).

297. *See* GIBSON'S GUIDE AND DIRECTORY OF THE STATE OF LOUISIANA, AND THE CITIES OF NEW ORLEANS & LAFAYETTE 341–42 (New Orleans, John Gibson 1838).

298. *See generally* RICHARD HOLCOMBE KILBOURNE, JR., LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD 157–65 (1980) (discussing the 1837 financial crises in New Orleans, New York, and London); JESSICA M. LEPLER, THE MANY PANICS OF 1837: PEOPLE, POLITICS, AND THE CREATION OF A TRANSATLANTIC FINANCIAL CRISIS (2013) (same).

299. *See* GIBSON'S GUIDE, *supra* note 297, at 142. Old Levee Street (presently Decatur Street) began at its intersection with Canal Street. *See Norman's Plan of New Orleans & Environs, 1845*, LIBR. CONGRESS, https://www.loc.gov/resource/g4014n.ct000243 [https://perma.cc/P3XU-3C59]. The latter constituted the demarcating line between the American Sector (presently the Central Business District) and the French Quarter. *See* Samuel Wilson, Jr., *Early History of Faubourg St. Mary*, *in* 2 NEW ORLEANS ARCHITECTURE: THE AMERICAN SECTOR (FAUBOURG ST. MARY) 3, 11 (Mary Louise Christovich et al. eds., 2d prtg. 1978).

300. *See Dissolution of Partnership*, NEW-ORLEANS BEE, May 2, 1839, at 2. *See generally* LA. CIV. CODE art. 2847 (1825) ("A partnership ends: . . . 5. By the will of all the parties, legally expressed . . . .") (current version at LA. CIV. CODE ANN. art. 2826 (2023)), *reprinted in* WHEELOCK S. UPTON & NEEDLER R. JENNINGS, CIVIL CODE OF THE STATE OF LOUISIANA 436 (New Orleans, E. Johns & Co. 1838).

consented to call it quits, with the burden of liquidating the partnership falling solely on Maurin's shoulders.[301] Given that in the antebellum marketplace "almost all business owners found themselves entangled in complex webs of credit, at once debtors to suppliers and creditors to customers,"[302] A. Maurin & Co.'s demise may have been partially attributable to the cascading effects of financial contagion.[303]

The firm's business included provisioning upriver plantations and selling their products.[304] One of the firm's customers, Remy Perot, clearly faced a liquidity crunch by the late 1830s. From 1835 through 1838, he had incurred a massive amount of secured debt. On August 29, 1835, he borrowed $10,000 from the City Bank of New Orleans.[305] In exchange, he promised to repay the loan in five annual $2,000 installments at eight-percent interest.[306] Additionally, he secured the debt by granting the bank a mortgage on (1) his ten-and-a-half-acre Natchitoches Parish plantation located near the town of Campti and surrounded by the Red River;[307] and (2) the sixteen Black Americans who at that time were enslaved on the plantation,[308] a group consisting

301. *See Dissolution of Partnership*, *supra* note 300; *see also* State v. Judge of Par. Ct., 15 La. 531, 535 (1840) (stating that petition by creditors of A. Maurin & Co. to the Parish Court of New Orleans described Maurin "as the liquidating member of said firm").

302. BALLEISEN, *supra* note 52, at 2.

303. *See id.* at 32 ("Economic hardships anywhere along the chain of credit could quickly migrate up and down the chain."); SCOTT A. SANDAGE, BORN LOSERS: A HISTORY OF FAILURE IN AMERICA 30 (paperback ed. 2006) ("Independence in commercial society risked perilous interdependence. In the panic, it seemed as if everybody owed everybody and nobody could pay anybody.").

304. *See, e.g.*, *Steamboat Arrivals*, NEW-ORLEANS PRICE-CURRENT, & COMMERCIAL INTELLIGENCER, June 2, 1838, at 3 (indicating that the Steamboat Teche arrived in New Orleans on May 25, 1838, with 12 bales of cotton for A. Maurin & Co.).

305. Certified True Copy of Notarized Act of Mortgage Between the City Bank of New Orleans and Remy Perot (Aug. 29, 1835), *In re* Maurin, No. 437 (E.D. La. June 5, 1843) (located in EDLA Case Files, *supra* note 88) [hereinafter Perot Mortgage Act].

306. *See id.*

307. *See id.* The plantation consisted of "five arpents in front on the left bank of the Red River, and seven and one half arpents in front on the right bank of the said River," and was "bounded above by land of Nöel Coindet, a free man of color, and below by land of Charles Simon, also a free man of color." *Id.* One arpent equals approximately 0.845 acres.

308. The Louisiana Civil Code at that time defined enslaved persons as immoveables (i.e., real property). *See* LA. CIV. CODE art. 461 (1825) ("Slaves, though moveables by their nature, are considered as immoveables, by the operation of law.") (invalidated by U.S. CONST. amend. XIII, § 1), *reprinted in* UPTON & JENNINGS, supra note 300, at 68; *see also id.* art. 453 (defining immoveables) (amended 1870 and repealed 1978). The Civil Code provided that immovables, including enslaved persons, could be mortgaged. *See id.* art. 3248 (invalidated in part by U.S. CONST. amend. XIII, § 1) (current version at LA. CIV. CODE ANN. art. 3286 (2023)), *reprinted in* UPTON & JENNINGS, supra note 300, at 494. *See generally* Pardo, *supra* note 32, at 1305–09 (discussing the law of mortgages in antebellum Louisiana).

of five men and eleven women whose ages ranged from eleven to twenty-nine years old.[309]

Nearly two and a half years later, Perot's marriage to Marie Juliet Lambre gave rise to a statutory mortgage on Perot's property in Lambre's favor to secure restitution of her $1,000 dowry and the $10,000 gift that Perot promised her on condition that "there should be no children born of the said marriage."[310] Five months later, in order to secure the $4,000 debt that they owed to the Exchange and Banking Company of New Orleans, the spouses mortgaged additional land belonging to them near the town of Campti, and also four enslaved Black Americans whom they had already mortgaged to the City Bank.[311] And two weeks after that transaction, Frederick Williams, an attorney and notary public, passed an act of mortgage in Natchitoches on August 15, 1838, to secure the $31,105 debt that Perot and Lambre owed to A. Maurin & Co.[312]

Considering just these transactions, Perot incurred secured debts totaling $56,105 over the three-year period dating back to when he received his loan from the City Bank.[313] Given the American

309. *See* Perot Mortgage Act, *supra* note 305. The mortgage agreement did not specify the national origin of these individuals, *see id.*, even though the Civil Code required that, when enslaved persons were subject to such an agreement, "as nearly as may be, their age and nation, must be mentioned in the act of mortgage," LA. CIV. CODE art. 3274 (invalidated by U.S. CONST. amend. XIII, § 1), *reprinted in* UPTON & JENNINGS, supra note 300, at 497. This omission suggests that Perot had very little knowledge about the personal history of the individuals whom he enslaved.

310. *See* Certificate of Mortgage on the Remy Perot Tract & Slaves (Jan. 24, 1843), *In re* Maurin, No. 437 (E.D. La. Mar. 9, 1844) (located in EDLA Case Files, *supra* note 88) [hereinafter Perot Mortgage Certificate]; *see also* LA. CIV. CODE art. 3287 (providing that "[t]he wife has a legal mortgage on the property of her husband" to secure, among other things, "the restitution of her dowry," as well as "the restitution or reinvestment of dotal property, which came to her after the marriage . . . by donation.") (amended 1870 and repealed 1978), *reprinted in* UPTON & JENNINGS, supra note 300, at 499; *id.* art. 3254 ("Legal mortgage is that which is created by operation of law.") (current version at LA. CIV. CODE ANN. art. 3299, 3301), *reprinted in* UPTON & JENNINGS, supra note 300, at 495.

311. *See* Perot Mortgage Certificate, *supra* note 310. The Exchange and Banking Company, one of several banks that Louisiana chartered in the 1830s to manage infrastructure projects and that would ultimately fail in the 1840s, built the St. Charles Hotel in New Orleans at a cost of $616,775, thereafter operating it. *See* BODENHORN, *supra* note 248, at 231–32. That building played a prominent role in the city's slave trade. *See* BANCROFT, supra note 246, at 325; *Architectural Inventory*, *in* 2 NEW ORLEANS ARCHITECTURE, *supra* note 299, at 93, 200; Maurie D. McInnis, *Mapping the Slave Trade in Richmond and New Orleans*, BUILDINGS & LANDSCAPES, Fall 2013, at 102, 113.

312. *See* Perot Mortgage Certificate, *supra* note 310; Copy of Sherriff's Act of Sale, A. Maurin & Co. v. R. Perot & His Wife, Sheriff to A. Maurin & P.A. Hebrard (Nov. 11, 1840), *In re* Maurin, No. 437 (E.D. La. Mar. 30, 1846) (located in EDLA Case Files, *supra* note 88) [hereinafter Sheriff's Act of Sale].

313. To put this sum in perspective, consider that the original St. Charles Theatre in New Orleans, which was built in 1835 and at the time was the fourth-largest theater in the world, had a construction cost of $250,000. *See* Pardo, *supra* note 26, at 794–95.

economy's continuing expansion and the climbing prices of land, enslaved Black Americans, and cotton,[314] Perot likely viewed his financial horizon to be filled with unbounded potential when he went on his borrowing binge. But the Panic of 1837 would tear that optimism asunder,[315] painfully revealing how "universal dependence on credit . . . made [antebellum] Americans more susceptible to the shifting current of the overall economy or the misfortunes of the firms with whom they transacted business, and thus more likely to undergo financial shipwreck."[316]

By the time A. Maurin & Co. obtained a mortgage in 1838 from Perot and Lambre, the $31,105 debt owed to the firm had apparently accumulated over the years on an unsecured basis as a result of Perot buying provisions through the firm on open credit to supply his plantation operations. The firm's apprehension about its financial exposure during a time of great economic upheaval would have created an incentive to seek security from Perot and Lambre in the form of a mortgage on his property. The spouses, in turn, may have had an incentive to provide that security to stave off any collection efforts by A. Maurin & Co. The legal wrangling that ensued between the parties suggests as much.

A. Maurin & Co.'s measures to collect the spouse's debt need to be considered in light of changes to the partnership's legal status that arose after the partnership had obtained the mortgage on the Perot plantation. As the firm's sole liquidating partner tasked with winding down its financial affairs,[317] Maurin sought to accomplish the task pursuant to Louisiana's debt-forgiveness law.[318] That judicial process, known as a "cession of property"[319] was defined as "the relinquishment that a debtor makes of all his property to his creditors, when he finds himself unable to pay his debts."[320] The cession would discharge all of the debtor's scheduled debts if a majority of creditors, in both the number and value of claims held against the debtor, consented.[321] The

314. *See, e.g.*, BALLEISEN, *supra* note 52, at 251; STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE 56–59 (2005); KILBOURNE, *supra* note 298, at 157–58, 162.

315. *See* RICHARD HOLCOMBE KILBOURNE, JR., DEBT, INVESTMENT, SLAVES: CREDIT RELATIONS IN EAST FELICIANA PARISH, LOUISIANA, 1825–1885, at 64 (1995); KILBOURNE, *supra* note 298, at 157.

316. BALLEISEN, *supra* note 52, at 32.

317. *See supra* note 301 and accompanying text.

318. *See* Sheriff's Act of Sale, *supra* note 312 (referring to Maurin and Hebrard as "syndics of the firm of A. Maurin & Co. of the same city").

319. LA. CIV. CODE book III, tit. IV, ch. 5, sec. I, § 5 (1825) (amended 1870 and repealed 1978), *reprinted in* UPTON & JENNINGS, supra note 300, at 338–40.

320. *Id.* art. 2166, *reprinted in* UPTON & JENNINGS, supra note 300, at 338.

321. *See id.* art. 2173, *reprinted in* UPTON & JENNINGS, supra note 300, at 339.

syndic in charge of the cession, who was appointed at a meeting of the debtor's creditors, would sell the surrendered property at public auction for the creditors' benefit.[322] A. Maurin & Co.'s cession involved cosyndics: Maurin and Pierre Adolphe Hebrard,[323] a businessman who was not one of the firm's partners.[324] It is in this representative capacity that Maurin ended up litigating against Perot and Lambre.

The August 1838 mortgage transaction between A. Maurin & Co. and Perot and Lambre earned the couple a mere nine months of breathing room. The following year, cosyndics Maurin and Hebrard availed themselves of the firm's mortgage-creditor rights, which were triggered upon the couple's payment default, obtaining a judgment issued on May 3, 1839, by the Sixth Judicial District Court for the Parish of Natchitoches against Perot and Lambre in the amount of $6,705, with interest accruing at the annual rate of ten percent.[325] It took quite a while before John A. DeRussy, the Natchitoches Parish sheriff, eventually seized and sold the couple's property to satisfy that judgment, possibly because of ongoing negotiations between the parties to work out the details for the property's disposition.[326] Perot and

322. *See id.* art. 2171, 2180, *reprinted in* UPTON & JENNINGS, supra note 300, at 339–40. For a description of the cession procedure, including the syndic's appointment, see *Tyler v. Their Creditors*, 9 Rob. 372, 375 (La. 1844).

323. *See* Sheriff's Act of Sale, *supra* note 312 (referring to Maurin and Hebrard as "syndics of the firm of A. Maurin & Co. of the same city"). In 1844, the Louisiana Supreme Court confirmed that a member of a partnership could initiate a cession of property on behalf of the partnership. *See Tyler*, 9 Rob. at 376–77.

324. *See Dissolution of Partnership*, *supra* notes 300 (listing A. Maurin & Co.'s partners as A. Maurin, L. Jeannet, A. Texier Dupaty, Paul Lacroix, Chas. Rouvin, and G. Montigut). An 1838 New Orleans directory listed Hebrard as being a partner at that time of Gillet & Co., a dry goods store. *See* GIBSON'S GUIDE, *supra* note 297, at 85, 97.

325. *See* Sheriff's Act of Sale, *supra* note 312; *see also* LA. CIV. CODE art. 3361 ("When the things mortgaged are in the debtor's possession, the creditor may, in case of failure of payment, proceed against him in the usual manner, by citing him to obtain judgment against him, if the original title does not amount to confession of judgment, and causing afterwards the thing mortgaged to be seized and sold . . . .") (amended 1870 and repealed 1992), *reprinted in* UPTON & JENNINGS, supra note 300, at 510. The district court also awarded the firm ten dollars and fifty cents as "Costs of Protest." Sheriff's Act of Sale, *supra* note 312. These costs presumably related to Perot's and Lambre's failure to pay a promissory note (or notes) made by them in the firm's favor. *See generally* LA. CIV. CODE art. 1905 ("The debtor may be put in default . . . [b]y the act of the party, when at or after the time stipulated for the performance, he demands that it shall be carried into effect, which demand may be made . . . by a protest made by a notary public . . . .") (current version at LA. CIV. CODE ANN. art. 1991, 2015 (2023)), *reprinted in* UPTON & JENNINGS, supra note 300, at 293; *Notice of Protest*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A statement, given usu. by a notary public to a drawer or indorser of a negotiable instrument, that the instrument was neither paid not accepted; information provided to the drawer or indorser that protest was made for nonacceptance or nonpayment of a note or bill.").

326. *Cf.* LA. CODE PRAC. art. 648 (1825) ("[W]hen the creditor who prosecutes the execution of the judgment has a . . . mortgage on part of [the debtor's] property, . . . the creditor shall have a right to direct the seizure of such property as is mortgaged to him, if he prefers it[.]") (amended

Lambre would have had an especially strong interest in the matter, not only because of their loss of assets, but also because the property to be liquidated included the plantation on which they resided.

Before the parties reached an agreement, Maurin had to contend with his own crisis. On May 30, 1840, he was imprisoned pursuant to a court order issued in response to a joint petition by the Citizens' Bank of Louisiana and other creditors alleging that A. Maurin & Co. owed them $88,165 and that Maurin had committed fraud by attempting to place the firm's assets beyond their reach.[327] While the court order conditioned Maurin's release from prison on his posting a $90,000 bond, Maurin was able to obtain his release a couple of days after his arrest pursuant to the writ of habeas corpus.[328] Litigation over the legality of his imprisonment eventually made its way before the Louisiana Supreme Court.[329]

In due course, Maurin avoided imprisonment and resumed his duties as cosyndic of A. Maurin & Co. He and Perot reached an agreement in the town of Campti on October 30, 1840, pursuant to which all of the property securing A. Maurin & Co.'s mortgage would be seized, advertised, and sold at public auction for cash.[330] The Sixth Judicial District Court based its order of seizure and sale on the parties' postjudgment agreement, and Sheriff DeRussy conducted the auction on November 4, 1840.[331] The sheriff's act of sale memorializing the event reveals details about the confluence of financial pressures that precipitated the unraveling of the credit chain involving Perot, Lambre, the City Bank, the Exchange and Banking Company, and A. Maurin & Co.[332]

1870 and repealed 1960), *reprinted in* WHEELOCK S. UPTON, CODE OF PRACTICE IN CIVIL CASES, FOR THE STATE OF LOUISIANA 110–11 (New Orleans, E. Johns & Co. 1839).

327. *See* State v. Judge of Par. Ct., 15 La. 531, 531 (1840); Transcript of Record at 614 [stamped], State v. Judge of Par. Ct., 15 La. 531 (1840) (No. 4,152). The Citizens' Bank 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. *See* BODENHORN, *supra* note 248, at 254.

328. *See State*, 15 La. at 531.

329. *See id.*; *see also* Martin v. Chrystal, 4 La. Ann. 344, 345–46 (La. 1849) (describing *State v. Judge of the Parish Court* as a case "that attracted great attention at the time").

330. *See* Sheriff's Act of Sale, *supra* note 312.

331. *See id.*

332. After adjudicating a winning bidder at an execution sale, the parish sheriff who conducted it had to comply with certain legal formalities regarding passage of an act of sale. *See* LA. CODE PRAC. art. 691–694, 696–697, 699 (amended 1870 and repealed 1960), *reprinted in* UPTON, supra note 326, at 117–18. Sheriff DeRussy did not comply with some of these formalities. First, the law required the sheriff to pass the act of sale within three days after adjudicating the winning bidder. *Id.* art. 691, *reprinted in* UPTON, supra note 326, at 117. DeRussy, however, did not do so until a week after the sale. *See* Sheriff's Act of Sale, *supra* note 312 (stating that the execution sale took

First, the act of sale identified Maurin and Hebrard as "syndics of the firm of A. Maurin & Co." and as the purchasers of the Perot plantation for the sum of $28,500.[333] Given that the firm's property included its rights against Perot and Lambre and the property that they had mortgaged in the firm's favor, Maurin and Hebrard sought to appropriate the value of those rights for the benefit of the firm's creditors. To be sure, the firm may have sought to do the same even in the absence of its cession of property. But once that process was initiated, the dynamic changed to one in which the syndics had no choice but to liquidate the firm's surrendered property and property rights. In other words, the financial pressure on A. Maurin & Co. and the ensuing legal process to address it had financial and legal repercussions for Perot and Lambre.

The spouses' default on their debt to the firm indicated that they too faced financial difficulty. Their struggles to meet their obligations extended not only to A. Maurin & Co., but also to the City Bank. Recall that Perot had agreed on August 29, 1835, to repay his $10,000 loan from the bank in five annual equal installments with interest.[334] By the time Sheriff DeRussy passed his act of sale in favor of Maurin and Hebrard on November 11, 1840,[335] the City Bank loan should have been completely repaid in the absence of financial difficulty for Perot or a modification of the parties' agreement. After all, the plantation owner had agreed to pay each installment "without days of grace or any delay whatever."[336] But as of August 15, 1838, almost three years into the

place on November 4, 1840, and indicating that the act of sale was passed on November 11, 1840). Second, the law required that the act of sale contain several key pieces of information, including "the amount of the privileges or mortgages with which the property adjudicated is encumbered, and which were made known at the time of the adjudication." LA. CODE PRAC. art. 693, *reprinted in* UPTON, supra note 326, at 117; *see also id.* art. 679 ("When there exists a mortgage or privilege on the property put up for sale, the sheriff shall give notice, before he commences the crying, that the property is sold subject to all privilege and hypothecations of whatsoever kind they may be, with which the same is burthened . . . ."), *reprinted in* UPTON, supra note 326, at 115. Other than a brief reference to A. Maurin & Co.'s mortgage on Perot's and Lambre's property, DeRussy's act of sale made no mention of the City Bank's, Lambre's, and the Exchange and Banking Company's mortgages on the property. *See* Sheriff's Act of Sale, *supra* note 312 (referring to August 15, 1838 as "the day on which the property hereby described was specially mortgaged to said plaintiffs by the said defendants by an act passed before Frederick Williams Esqr Notary Public at the Town of Natchitoches Parish aforesaid"). Importantly for the winning bidder, the sheriff's noncompliance with these legal formalities did not affect the sale's validity. *See* LA. CODE PRAC. art. 695, *reprinted in* UPTON, supra note 326, at 117.

333. Sheriff's Act of Sale, *supra* note 312. The Louisiana Code of Practice gave judgment creditors, like A. Maurin & Co., the right to bid on property seized and sold to satisfy the judgments owed to them. *See* LA. CODE PRAC. art. 686, *reprinted in* UPTON, supra note 326, at 116.

334. *See supra* text accompanying note 306.

335. *See supra* note 332.

336. Perot Mortgage Act, *supra* note 310.

five-year loan term, he had only paid the first installment.[337] Other evidence reveals that this installment remained the only one that had been paid by the time that Maurin and Hebrard emerged as the successful bidders at the public auction of Perot's and Lambre's mortgaged property.[338] As such, a substantial portion of the plantation owner's debt to the City Bank remained outstanding when A. Maurin & Co. became the owner of the property securing that debt.[339] The bank might have had some comfort given the partnership's assumption of the obligation when purchasing the property,[340] and also given that the property remained subject to the bank's mortgage.[341] Maurin's subsequent 1841 Act case, however, would change everything, vividly demonstrating that, "in its most fundamental sense, bankruptcy . . . represents nothing less than a wholesale and compulsory readjustment of contractual obligations and realignment of property interests."[342]

337. *See* Perot Mortgage Certificate, *supra* note 310.

338. *See* Assumed Bond, *In re* Maurin, No. 437 (E.D. La. n.d.) ("Amount due the Office of the City Bank of New Orleans at Natchitoches on the Bond of Remi Perot for $10,000 and Interest @ 8% per annum secured by mortgage on Plantation and Slaves situated in the Parish of Natchitoches assumed by A. Maurin as purchaser of the Property – Bond reduced by Instalment & Interest paid up to 29th August 1843 $ 4,240 Int @ 8% from 29 Aug 1843.") (located in EDLA Case Files, *supra* note 88).

339. Before the execution sale, Perot and Lambre owned the mortgaged property. *See* Perot Mortgage Certificate, *supra* note 310. Sheriff DeRussy's act of sale formally purported to "sell, convey, grant, assign, and confirm unto the said Pierre Adolphe Hebrard and the said Antoine Maurin . . . all the right, title, interest, claim or demand which the said Remy Perot and Julia Lambre his wife had at the time of the seizure & sale of the said above described property." Sheriff's Act of Sale, *supra* note 312; *see also* LA. CODE PRAC. art. 690 ("The adjudication thus made has, of itself alone, the effect of transferring to the purchaser all the rights and claims which the party in whose hands it was seized might have had to the thing adjudged.") (amended 1870 and repealed 1960), *reprinted in* UPTON, supra note 326, at 117. Despite this language, the execution sale substantively transferred ownership of the property to A. Maurin & Co. given that Hebrard and Maurin participated in the sale in a representative capacity as the firm's cosyndics, with the result that the firm would remain the property's owner until the cosyndics, or someone appointed by them, sold it at public auction. *See* LA. CIV. CODE art. 2170, 2175, 2178, 2180 (amended 1870 and repealed 1978), *reprinted in* UPTON & JENNINGS, supra note 300, at 338–40; Rivas v. Hunstock, 2 Rob. 187, 194 (La. 1842).

340. *See* Assumed Bond, *supra* note 338. Had the partnership not assumed the bond, the plantation's sale presumably would have been prohibited. *See* Pardo, *supra* note 32, at 1308.

341. By virtue of having the first recorded mortgage against the Perot plantation, *see* Perot Mortgage Certificate, *supra* note 310, the City Bank held the superior mortgage claim on the property, *see* LA. CIV. CODE art. 3360 (providing "[t]hat the mortgagee has the benefit of being preferred . . . to the other mortgagees who are posterior to him in the date of their mortgage or of its registry") (current version at LA. CIV. CODE ANN. art. 3307 (2023)), *reprinted in* UPTON & JENNINGS, supra note 300, at 510. Accordingly, the judicial sale of the plantation pursuant to A. Maurin & Co.'s subordinate mortgage did not discharge the City Bank's mortgage. *See* Pardo, *supra* note 32, at 1308 & n.42.

342. 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).

B. Federal Ownership and Management of the Perot Plantation

Toward the end of October 1842, facing financial pressure from his separate and partnership debts, Maurin sought relief under the 1841 Act by filing a bankruptcy petition in the U.S. District Court for the Eastern District of Louisiana in New Orleans.[343] On November 22, 1842, Judge Theodore McCaleb declared Maurin, "Individually & as a member of the late Commercial firm of A Maurin & Co," a bankrupt under the Act.[344] This order transferred all of Maurin's property to the *Maurin* bankruptcy trust,[345] which consisted of his separate property and his proportionate share of the partnership's property,[346] which included the Perot plantation.[347] Accordingly, in addition to Maurin's partial ownership interst in the plantation, the *Maurin* bankruptcy trust acquired his individual right as the firm's sole liquidating partner to possess, control, and liquidate the plantation.[348] The latter became the subject of litigation by the assignee at the outset of the case.[349] To fully appreciate the dynamics animating the dispute, however, a brief discussion of the assignee's appointment is warranted.

The 1841 Act gave federal judges great leeway in exercising their assignee-appointment power,[350] which they used to create patronage

343. *See* Petition of Antoine Maurin to Be Declared Bankrupt, *In re* Maurin, No. 437 (E.D. La. Oct. 27, 1842) (located in EDLA Case Files, *supra* note 88) (describing Antoine Maurin as "owing debts in his private right and capacity and as a member of the commercial firm of A. Maurin & Co."). *See generally* LA. CIV. CODE art. 2784 ("A participation in the profits of a partnership carries with it a liability to contribute between the parties to the expenses and losses.") (current version at LA. CIV. CODE ANN. art. 2803–2804, 2808), *reprinted in* UPTON & JENNINGS, supra note 300, at 426.

344. Bankruptcy Decree and Order Appointing Assignee, *In re* Maurin, No. 437 (E.D. La. Nov. 22, 1843) (located in U.S. Dist. Ct. for the E. Dist. of La., *Bankruptcy Act of 1841 Provisional and Discharge Decrees, 1842–1843*, at 80 [handwritten], Records of District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas [hereinafter EDLA Decree Book]).

345. *See supra* notes 293–295 and accompanying text.

346. *Cf.* COMMENTARY ON THE BANKRUPT LAW OF 1841, SHOWING ITS OPERATION AND EFFECT 43 (New York, Henry Anstice 1841) ("Under a bankruptcy of one partner, nothing passes to the assignees but the separate property of the bankrupt, and such part of the joint property as he would have been entitled to."). *See generally* LA. CIV. CODE art. 2772 ("Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill or industry, furnished in determined proportions by the parties.") (current version at LA. CIV. CODE ANN. art. 2801), *reprinted in* UPTON & JENNINGS, supra note 300, at 425; *id.* art. 2779 ("Property, when brought into partnership, or acquired by it, and the profits, when they are kept undivided for the benefit of the partnership, are called the partnership stock.") (amended 1870 and repealed 1980), *reprinted in* UPTON & JENNINGS, supra note 300, at 425.

347. *See supra* note 339 and accompanying text.

348. *See supra* note 301 and accompanying text.

349. *See infra* notes 366–368 and accompanying text.

350. *See generally* Pardo, *supra* note 22, at 819–22 (discussing appointment of 1841 Act assignees).

networks.[351] Judge McCaleb was no different, often recruiting assignees from the elite New Orleans bar.[352] On November 22, 1842, the same date that he declared Maurin a bankrupt under the Act, McCaleb appointed Thomas B. Slidell, whose law office was located in the French Quarter at 11 Exchange Place,[353] just a few blocks from the federal district court,[354] to serve as the *Maurin* trust's assignee.[355] Before the 1841 Act took effect, Slidell had served as the U.S. Attorney for the Eastern District of Louisiana;[356] served as the attorney for the Carrollton Bank, the Merchants' Bank, and the Merchants' Insurance Company;[357] and compiled with Judah P. Benjamin,[358] also one of the Crescent City's most prominent attorneys,[359] a digest of the Louisiana Supreme Court's decisions. Slidell would eventually join that court, serving as its chief justice from 1853 to 1855.[360]

The *Maurin* case was a big deal, and Judge McCaleb conferred the assigneeship bounty on Slidell, but not without requiring him to clear a hurdle that imparted the significance of the bestowed financial benefit.[361] Federal judges had the option to demand a bond from 1841

351. *See* BALLEISEN, *supra* note 52, at 139.

352. *See* Pardo, *supra* note 32, at 1330.

353. *See* 1842 NEW ORLEANS DIRECTORY, *supra* note 245, at 375.

354. The federal district court was located in the U.S. Custom House, which occupied the center of a square about the size of two adjacent football fields within the city block formed by Canal, Old Levee, Customhouse, and Front Levee Streets. *See* BENJAMIN MOORE NORMAN, NORMAN'S NEW ORLEANS AND ENVIRONS 89 (Matthew J. Shott ed., La. State Univ. Press 1976) (1845); 1842 NEW ORLEANS DIRECTORY, *supra* note 245, at 403; *Norman's Plan of New Orleans & Environs, 1845*, *supra* note 299 (marking the U.S. Custom House's location with the number "67"). Exchange Place was a small street bounded by Canal and Customhouse Streets and located about a fifth of a mile from the U.S. Custom House. *See id.*

355. *See* Bankruptcy Decree and Order Appointing Assignee, *supra* note 344.

356. 1841 NEW-ORLEANS DIRECTORY, *supra* note 245, at 336.

357. *Id.* at 344–45, 352. The capital of these financial institutions in 1840 was, respectively, $3 million, $1 million, and $1 million. *See id.*

358. *See* ROBERT DOUTHAT MEADE, JUDAH P. BENJAMIN: CONFEDERATE STATESMAN 37 (1943).

359. In the 1850s, Benjamin and his law partners, Edward A. Bradford and William C. Micou, all declined nominations to serve on the U.S. Supreme Court. *See id.* at 84–85.

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

361. The 1841 Act gave federal district courts the authority to establish the fees of court officials who administered the Act, including assignees. *See* Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 446 (repealed 1843). Courts used this authority to promulgate rules structuring assignee compensation based on the funds disbursed by the assignee in a case, with a schedule of compensation calculated as decreasing percentages of increasing amounts of such disbursements—for example, 5% of the first $1,000 disbursed; 2.5% of additional amounts up to $5,000; and 1% of amounts exceeding $5,000. *See, e.g.*, BANKR. D.N.C. R. 46 (1842) (repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 147, at 7; BANKR. S.D.N.Y. R. 59 (1842) (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW-YORK 13 (New York, John S. Voorhies 1842). Some district courts provided more generous compensation. *See, e.g.*,

Act assignees.[362] Judge McCaleb's order appointing Slidell required him to "give security in a bond to the United States . . . in the sum of Fifteen Thousand Dollars, conditioned for the due and faithful discharge of all his duties as such assignee, and his compliance with the orders and directions of the court."[363] This eye-popping amount,[364] set entirely pursuant to Judge McCaleb's discretion, signaled the importance of the *Maurin* bankruptcy trust to the federal government.[365] To put a finer point on it, consider the assignee bond data from the Eastern District of Louisiana, which I have been able to document for approximately 51% (390 of 763) of the 1841 Act cases filed in that district. In that sample, the median and mean amounts of the assignee's bond were, respectively, $50 and approximately $901. Accordingly, Slidell's bond amount in the *Maurin* case was 300 times and approximately 16.6 times greater than, respectively, the sample's median and mean bond amounts.[366] Moreover, only three cases from the sample involved higher

BANKR. D.S.C. R. 59 (providing assignee compensation of 5% of the first $5,000 disbursed and 2.5% of all additional amounts exceeding $5,000); BANKR. E.D. PA. R. 34 (1841) (providing assignee compensation of 5% of the first $2,000 disbursed and 2.5% of all additional amounts exceeding $2,000) (repealed), *reprinted in* RULES AND FORMS IN BANKRUPTCY, IN THE DISTRICT COURT, OF THE EASTERN DISTRICT OF PENNSYLVANIA 27–29 (Philadelphia, J. Young 1841). One court (and perhaps others) did not establish a compensation schedule, instead basing the assignee's compensation on what the court deemed reasonable. *See* BANKR. S.D. MISS. R. 14 (1842) (repealed), *reprinted in Rules, Regulations, and Forms of Proceedings in Bankruptcy, for the District Court*, MISS. FREE TRADER & NATCHEZ WKLY. GAZETTE (Natchez), Feb. 10, 1842 at 3.

A complete set of 1841 Act bankruptcy rules for the Eastern District of Louisiana has yet to be unearthed. *See* Pardo, *supra* note 27, at 1112 n.231. None of the rules for which a record exists addresses the compensation provided to the district's assignees. *See* Transcript of Record at 94, Houston v. City Bank of New Orleans, 47 U.S. (6 How.) 486 (1847) (No. 144) [hereinafter *Houston* Record Transcript]; Transcript of Record at 18–19, Nugent v. Boyd, 44 U.S. (3 How.) 426 (1845) (No. 158). But evidence from the district's case files indicates that assignees routinely received a 5% commission on *all* disbursed amounts. *See*, *e.g.*, A/C Presented by the Assignee, *In re* Homes & Mills, No. 111 (E.D. La. Oct. 6, 1842) (located in EDLA Case Files, *supra* note 88); Assignee's Report of the Sales of the Estate and of the Amount of Assets in Money in His Hands, *In re* Payne, No. 295 (E.D. La. Jan. 24, 1843) (located in EDLA Case Files, *supra* note 88); Report of the Assignee, *In re* Lamothe, No. 385 (E.D. La. March 6, 1843) (located in EDLA Case Files, *supra* note 88); Report of the Assignee, *In re* Armant, No. 704 (E.D. La. May 1, 1844) (located in EDLA Case Files, *supra* note 88). Assigneeships in the Eastern District of Louisiana may thus have been among the most, if not the most, lucrative in the nation.

362. *See* § 9, 5 Stat. at 447.

363. Bankruptcy Decree and Order Appointing Assignee, *supra* note 344.

364. This amount would exceed $556,000 in 2022 dollars according to a conservative estimate of relative value based on the CPI. *See* Williamson, *supra* note 75. At the other end of the spectrum, if estimating relative value based on changes in per capita GDP, this amount would be approximately $12.9 million in 2022 dollars. *See id.*

365. *See* Pardo, *supra* note 22, at 855 n.286 ("That the assignee had to indemnify the United States suggests that the federal government could be harmed if the assignee failed to adhere to the district court's direction and control.").

366. Another way to put the amount of Slidell's assignee bond in perspective is to think about it in relation to Judge McCaleb's annual salary at the time, which was $3,000. *Judicial Salaries:*

bond amounts—specifically, one case involving a $30,000 bond and two cases each involving a $25,000 bond.[367] These data underscore the significance and value of the *Maurin* bankruptcy trust's assets, including its rights in the Perot plantation.

After his appointment, Slidell started to familiarize himself with the *Maurin* bankruptcy trust's affairs in preparation for carrying out one of the primary duties of assignees under the Act: liquidating the trust's assets for the benefit of creditors.[368] After a little more than two weeks in that role, Slidell sought to intervene in a dispute between Hebrard, A. Maurin & Co.'s cosyndic,[369] and Mary F. Conway, Maurin's wife who was "separated in property from her Husband."[370] Hebrard and Conway asserted competing claims to certain assets involved in the *Maurin* case.[371] Hebrard argued that, because those assets belonged to the defunct commission-merchant firm, he had the right to control them in his cosyndic capacity. Conway, on the other hand, argued that the assets had belonged to Maurin as his separate property—not the partnership's—when he was decreed a bankrupt and that Hebrard accordingly had no rightful claim to them.[372]

Despite having incomplete information by virtue of his recent appointment as assignee,[373] Slidell nonetheless agreed with Hebrard's

U.S. District Court Judges by State, 1789–1891, FED. JUD. CTR. https://www.fjc.gov/history/judges/judicial-salaries-u.s.-district-court-judges-state-1789-1891 [https://perma.cc/7ANJ-YYRV]. Accordingly, Slidell's bond amount was equal to five years' worth of the annual salary of the federal judge imposing that requirement.

367. *See* Bankruptcy Decree and Order Appointing Assignee, *In re* Banks, No. 353 (E.D. La. Sept. 5, 1842) ($30,000 bond), *reprinted in Houston* Record Transcript, *supra* note 361, at 38; Bankruptcy Decree and Order Appointing Assignee, *In re* Kohn, Daron & Kohn, No. 199 (E.D. La. June 6, 1842) (located in EDLA Decree Book, *supra* note 344, at 8 [handwritten]) ($25,000 bond); Bankruptcy Decree and Order Appointing Assignee, *In re* Walden, No. 274 (E.D. La. July 18, 1842) (located in EDLA Decree Book, *supra* note 344, at 12 [handwritten]) ($25,000 bond).

368. *See* Act of Aug. 19, 1841, ch. 9, § 10, 5 Stat. 440, 447 (repealed 1843). The 1841 Act only provided for liquidation cases. Federal bankruptcy law did not have an analogue to modern day reorganization cases until an 1874 amendment to the 1867 Act. *See* Cont'l Illinois Nat. Bank & Tr. Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 671 (1935) (noting that, pursuant to 1874 amendment to the 1867 Act, "the debtor for the first time was permitted . . . to propose terms of composition to his creditors to become binding upon their acceptance by a designated majority and confirmation by the judge").

369. *See supra* notes 323–324 and accompanying text.

370. Opposition of Madame Mary F. Conway, Wife of A. Maurin to the Petition of Thomas Slidell, Assignee, for Leave to Sell, *In re* Maurin, No. 437 (E.D. La. Dec. 15, 1842) (located in EDLA Case Files, *supra* note 88) [hereinafter Conway Opposition].

371. *See* Petition of Intervention, *In re* Maurin, No. 437 (E.D. La. Dec. 8, 1842) (located in EDLA Case Files, *supra* note 88) [hereinafter Intervention Petition].

372. *See* Conway Opposition, *supra* note 370; Intervention Petition, *supra* note 371

373. *See* Intervention Petition, *supra* note 371 ("[Y]our Petitioner . . . also reserves the right of exhibiting by more ample details the rights of himself as such Assignee in the premises; the shortness of the time elapsed since the appointment being such that he is not yet fully informed of all the circumstances pertinent to the present litigation.").

assessment that the assets at issue belonged to the partnership when the *Maurin* bankruptcy trust was created.[374] Accordingly, Maurin's residual interest in those assets would be available to satisfy separate claims, like those of Conway, only "after the full and final liquidation of said partnership affairs and the payment of the partnership debts."[375] But Slidell did not agree with Hebrard's assertion that the cosyndic had a "present right of control . . . over the assets of said A. Maurin & Co."[376] Rather, Slidell vigorously argued that the bankruptcy trust had the exclusive right to possess and control the partnership's assets:

> A Maurin at the time of filing his petition to be declared a Bankrupt, was alone by law entitled to administer and liquidate the partnership affairs and assets of the late commercial firm of A Maurin & Co, the several partners of said House with the exception of said A Maurin, having long theretofore ceased to have any lawful possession, administration or liquidating control of or over the assets of the said firm . . . . Now the said Intervener reiterating all the allegations of the said P A Hebrard's petition, except such only as allege any present right of control in the part of said Hebrard over the assets of said A Maurin & Co, which assets your Petitioner alleges he himself is alone entitled to possess and administer, humbly prays leave to intervene herein, that said Madame Maurin and her said husband be cited to answer hereunto, and that after due proceedings it be adjudged that the assets in the original petition described, do appertain and belong to the Bankrupt Estate, whereof your Petitioner is assignee, to be by him under the orders and directions of this Court administered, as soon as the same shall come into his actual possession, for the benefit of the creditors of said A Maurin & Co in preference to all other persons whomsoever and especially in preference to the said Madame Maurin, and that your Petitioner be quieted in his title aforesaid . . . .[377]

Judge McCaleb agreed with Slidell, thereby paving the way for the *Maurin* bankrupt trust to administer those assets, including the Perot plantation and the Black Americans enslaved on it.

374. *See id.*

375. *Id.*

376. *Id.*

377. *Id.* Other 1841 Act cases from the Eastern District of Louisiana involved bankrupts who had been designated as the liquidating partner of the partnership to which they belonged. *See, e.g.*, A. Jonau vs. His Creditors & the Creditors of the Late Two Firms of Jonau Metoyer & Co., In re Jonau, No. 78 (E.D. La. Feb. 24, 1842) (located in EDLA Case Files, *supra* note 88) ("Petitioner shows that he has been trading in the city of New Orleans for a considerable number of years, first under the firm of Jonau Metoyer & Co. comprised of himself and of Auguste Metoyer and Emilian Larrieu, of which firm Petitioner is the liquidating partner . . . .").

Activity in the case shortly after the start of the new year foreshadowed the significant role that the Perot plantation would play in the federal district court's administration of the bankruptcy trust's assets. On January 14, 1843, the trust paid a $112.14 bill for clothing purchased for the Black Americans enslaved on the plantation.[378] Also on that date, Slidell sought the court's approval to sell "[t]he crop of cotton which may be received from the Plantation in the Parish of Natchitoches – terms cash & with liberty to sell through a cotton factor or Broker at private sale in New Orleans – or through the Marshal as the Court may order."[379] Less than a month later, however, Judge McCaleb would appoint a new assignee in the case in response to Slidell "suggesting to the Court that circumstances w[ould] compel him to absent himself from the State in the ensuing summer, & that *the business of said Estate [wa]s of such a nature as to require the constant presence of the assignee*."[380] McCaleb selected Francis B. Conrad, yet

378. Report of the Assᵉᵉ, *In re* Maurin, No. 437 (E.D. La. May 26, 1843) (located in EDLA Case Files, *supra* note 88) [hereinafter First *Maurin* Assignee Report]. The assignee's report identified the payee as "R.C. Armistead." It is possible that the report erroneously indicated Armistead's middle initial and that the payee was actually R.T. Armistead, who was a member of the firm Otto & Armistead, a dry goods store on 22 Chartres Street in New Orleans. *See* 1842 NEW ORLEANS DIRECTORY, *supra* note 245, at 13. The assignee's report further indicated that the *Maurin* bankruptcy trust paid $1.32 on January 23, 1843, for shipping the clothing to the plantation on the Steamboat Rodolph. *See* First *Maurin* Assignee Report, *supra*. Disbursements from a bankruptcy estate required court approval, *see* Act of Aug. 19, 1841, ch. 9, § 9, 5 Stat. 440, 447 (repealed 1843), which often meant there were delays between the trust's receipt of services or goods from third parties and subsequent payment for them. As such, it is quite conceivable that the clothes could have been shipped before the trust's payment for the shipment. On December 27, 1842, the "Steamer Rodolph" departed New Orleans for the city of Natchitoches. *See The Steamer Rodolph, Vandegraft, Master*, DAILY PICAYUNE (New Orleans, La.), Dec. 27, 1842, at 3. Recall that the Perot plantation was located near the town of Campti, *see supra* note 307 and accompanying text, which is approximately eleven miles upriver from the city of Natchitoches. Given that the *Maurin* bankruptcy trust purchased other provisions in New Orleans for the Perot plantation and shipped them by steamboat, *see infra* Table 2, it seems likely that the trust purchased the clothing from Otto & Armistead and shipped it on the Steamboat Rodolph. (Incidentally, that may have been the same steamboat on which Solomon Northup was sent from New Orleans to the Ford Plantation on the Red River in Avoyelles Parish after having been kidnapped and sold into slavery. *See* SOLOMON NORTHUP, TWELVE YEARS A SLAVE 89 (Buffalo, Derby, Orton & Mulligan 1853).)

379. Petition of Assignee to Sell Estate of Bankrupt, *In re* Maurin, No. 437 (E.D. La. Jan. 14, 1843) (located in EDLA Case Files, *supra* note 88).

380. Reappointment of Assignee by Order, *In re* Maurin, No. 437 (E.D. La. Feb. 11, 1843) (located in EDLA Case Files, *supra* note 88) [hereinafter Assignee Reappointment Order] (emphasis added). While the record is silent on what would prompt Slidell to leave New Orleans that summer, perhaps he was among the elites who routinely departed the city during those months to avoid the mass death caused by yellow-fever epidemics. *See* KATHRYN OLIVARIUS, NECROPOLIS: DISEASE, POWER, AND CAPITALISM IN THE COTTON KINGDOM 15, 162 (2022).

another elite Crescent City lawyer,[381] as Slidell's successor.[382] Conrad would quickly discover that Slidell had not overstated the effort required to administer the estate, which predominantly involved managing a distant plantation in the state's northwest section, far away from New Orleans in the state's southeast corner.[383]

Over the next fourteen months, the *Maurin* bankruptcy trust would incur substantial expenses associated with management of the Perot plantation. Table 2 lists examples of those expenses,[384] including the wages of Luc Poche, the plantation's overseer, for 1842, 1843, and part of 1844, as well as charges paid to A. Rivarde & Co., a New Orleans commission-merchant firm,[385] to sell the plantation's cotton crop. The Table 2 expenses totaled $3,027.09, a figure slightly exceeding Judge McCaleb's $3,000 annual salary at the time.[386]

The *Maurin* bankruptcy trust also generated significant revenue, primarily from the cultivation and sale of the plantation's cotton crop. The examples provided in Table 3 reveal that the estate sold at least 248 bales of cotton.[387] Using the estimate that a bale of

381. By virtue of his role as an assignee in multiple 1841 Act cases, Conrad not only had the opportunity to be involved with the bankruptcy administration of other bankrupt plantations, *see* Pardo, *supra* note 32, at 1313–15, he also litigated a dispute in an 1841 Act case before the U.S. Supreme Court, *see* Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848).

382. *See* Assignee Reappointment Order, *supra* note 379.

383. Natchitoches Parish, where the Perot plantation was located, was in the Western District of Louisiana. *See* Act of Mar. 3, 1823, ch. 44, 3 Stat. 774, 775 (current version at 28 U.S.C. § 98). The 1841 Act provided that, for "every bankrupt," a bankruptcy decree had the effect of transferring "all the [bankrupt's] property, and rights of property, of every name and nature, and whether real, personal, or mixed" into the bankruptcy trust's estate. § 3, 5 Stat. at 442–43. Accordingly, even though Maurin commenced his case in the Eastern District of Louisiana, his bankruptcy decree brought the Perot plantation in the Western District of Louisiana under the control of the Eastern District's federal district court. *Cf.* Barron v. Newberry, 2 F. Cas. 937, 940 (McLean, Circuit Justice, C.C.N.D. Ill. 1857) (No. 1,056) ("By the rendition of the decree, all the property and rights of property of the bankrupt, 'of every name and nature,' pass by operation of law to the assignee, *and this too, in whatever district it may be situated*." (emphasis added)). Because Maurin resided in and had his principal place of business in New Orleans, the Eastern District was the proper venue for Maurin's case. *See* § 7, 5 Stat. at 446.

384. The expenses listed in Table 2 appear in First *Maurin* Assignee Report, *supra* note 378, and 2nd Report of Assignee, *In re* Maurin, No. 437 (D. La. June 10, 1845) (located in EDLA Case Files, *supra* note 88) [hereinafter Second *Maurin* Assignee Report]. Congress consolidated the Eastern and Western Districts of Louisiana into the District of Louisiana in 1845, *see* Act of Feb. 13, 1845, ch. 5, 5 Stat. 722, and subsequently divided the district once again into the Eastern and Western Districts of Louisiana in 1849, *see* Act of Mar. 3, 1849, 9 Stat. 401. Accordingly, some citations in this Article to court filings in 1841 Act cases originally commenced in the Eastern District of Louisiana involve references to the District of Louisiana as the geographical jurisdiction of the federal district court administering the case.

385. *See* 1842 NEW ORLEANS DIRECTORY, *supra* note 245, at 349.

386. *See supra* note 366.

387. The expenses listed in Table 2 appear in the first two reports filed by the assignee in *In re Maurin*. *See* First *Maurin* Assignee Report, *supra* note 378; Second *Maurin* Assignee Report, *supra* note 384.

cotton at the time weighed 400 pounds,[388] the plantation produced 99,200 pounds of cotton, which A. Rivarde & Co. sold for over $7,504.69.

TABLE 2
EXAMPLES OF EXPENSES PAID BY THE *MAURIN* BANKRUPTCY TRUST

Date	**Expense**	**Amount**
01/01/1843	Clothing for the enslaved at the Perot plantation	$112.14
03/07/1843	Provisions for the Perot plantation	$89.80
03/27/1843	Charges for the sale of 75 cotton bales	$162.83
04/08/1843	Overseer's wages for 1842	$600.00
04/20/1843	Medical care for Francois, an enslaved boy	$53.00
12/08/1843	Provisions for and insurance on the Perot plantation	$571.99
12/08/1843	Charges for the sale of 48 cotton bales	$121.67
01/02/1844	Charges for the sale of 40 cotton bales	$113.58
01/05/1844	Overseer's wages for 1843	$576.25
03/11/1844	Charges for the sale of 48 cotton bales	$154.08
04/22/1844	Overseer's wages for 1844	$400.00
04/22/1844	Cotton gin repair	$23.00
	Total:	**$3,027.09**

388. *See Statistics of Iron and Cotton 1830–1860*, 2 Q.J. ECON. 379, 383 (1888); *see also* Schedule B to Bankruptcy Petition, *In re* Brannan, No. 35 (D. Ga. Apr. 14, 1842) (located in U.S. Dist. Court for the Dist. of Ga., *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) (referring to "twenty two bales of Cotton weighing 400 lbs. each").

TABLE 3
EXAMPLES OF PAYMENTS TO THE *MAURIN* BANKRUPTCY TRUST

Date	**Expense**	**Amount**
03/27/1843	Proceeds from the sale of 75 cotton bales	$1,777.70
12/08/1843	Proceeds from the sale of 48 cotton bales	$1,314.93
01/02/1844	Proceeds from the sale of 40 cotton bales	$1,503.34
03/11/1844	Proceeds from the sale of 48 cotton bales	$1,855.18
06/04/1844	Proceeds from the sale of 37 cotton bales	$1,053.54
	Total:	**$7,504.69**

Crucially, all but the first of the expenses listed in Table 2 and all of the payments listed in Table 3 were, respectively, paid and received *after* Congress repealed the 1841 Act.[389] In this respect, the *Maurin* case illustrates how traditional accounts have improperly periodized the Bankruptcy Clause's operation. Conrad ran the Perot plantation, subject to the control and direction of Judge McCaleb of the U.S. District Court for the Eastern District of Louisiana, for more than a year after the Act's repeal. And even after the *Maurin* bankruptcy trust's credit sale of the plantation and the Black Americans enslaved on it on April 15, 1844,[390] which would earn Conrad a five-percent commission

389. *Compare supra* Tables 2 and 3, *with* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614 (repealing 1841 Act).

390. *See* Second *Maurin* Assignee Report, *supra* note 384. Conrad filed a petition on February 16, 1844, requesting to sell some of the *Maurin* bankruptcy trust's assets, including the Perot plantation and the thirty-four Black Americans enslaved on it, a group whose number had significantly increased from the time when Perot had entered into the mortgage agreement with the City Bank. *See* Petition to Sell, *In re* Maurin, No. 437 (E.D. La. Feb. 16, 1844) (located in EDLA Case Files, *supra* note 88); *supra* notes 305–309 and accompanying text. Conrad's petition requested that the mortgages of the City Bank, the Exchange and Banking Company, and Conway on the property "be cancelled & erased for the purpose of transferring unincumbered titles to the purchasers, reserving to said mortgage Creditors respectively, whatever rights they may have on the proceeds, to be settled in said Bankruptcy." Petition to Sell, *supra*. This request comported with one of the Eastern District's bankruptcy rules, which made mortgage cancellation and erasure a standard practice in the district's 1841 Act cases, *see* Pardo, *supra* note 32, at 1322–26, and which constituted a muscular flexing of federal power at the expense of state law," *id.* at 1322. Judge McCaleb issued an order on February 29, 1844, granting Conrad's request to sell the property and another order on March 8, 1844, authorizing Conrad to cancel and erase the mortgages on the property. *See* Docket, *In re* Maurin, No. 437 (E.D. La. commenced Oct. 27, 1842) (located in EDLA Dockets, *supra* note 237).

totaling $946.25,[391] residual matters related to the sale carried on into the start of 1848. Around December 20, 1847, the assignee collected the last amounts due for the purchase price of the plantation.[392] And around March 7, 1848, the estate made its last payment to the plantation's overseer on account of expenses he had incurred on behalf of the bankruptcy assignee.[393] If one expands the field of view to matters unrelated to the Perot plantation, the *Maurin* bankruptcy trust was selling New Orleans properties as late as February 4, 1854.[394]

Throughout this period, federal bankruptcy law was certainly not dormant. To the contrary, the 1841 Act was doing a lot of work. Importantly, evidence of the *Maurin* bankruptcy case is not found in any reported court opinions. It is found in the legal archive's manuscript court records relating to the case. And the *Maurin* case is not a one-off. After the 1841 Act's repeal, there were other bankruptcy cases involving the sale of plantations with Black Americans enslaved on them, not only in the Eastern District of Louisiana,[395] but also in other federal judicial districts throughout the South.[396] For a particularly striking example, consider the 1841 Act case of *In re Ferriday, Ferriday, and Bennett* in the Southern District of Mississippi. On July 30, 1845, F.S. Hunt, the case's assignee, provided notice that he would sell several plantations on August 9, 1845, including (1) a plantation in Washington County with fifty-seven to sixty Black Americans enslaved on it, (2) the Liverpool Plantation in Yazoo County with ninety Black Americans

391. The federal marshal sold the Perot plantation and the thirty-four Black Americans enslaved on it for a total of $18,925. *See* Second *Maurin* Assignee Report, *supra* note 384. Conrad would receive a five-percent commission on the proceeds of that sale as the purchasers made their payments over time. *See, e.g.*, *id.*; 3d Report of Assignee, *In re* Maurin, No. 437 (D. La. June 10, 1845) (located in EDLA Case Files, *supra* note 88).

392. *See* Report No. 4 of Assignee, *In re* Maurin, No. 437 (D. La. Dec. 20, 1847) (located in EDLA Case Files, *supra* note 88).

393. *See* Report No. 5 of Assignee, *In re* Maurin, No. 437 (D. La. Feb. 7, 1849) (located in EDLA Case Files, *supra* note 88).

394. Report of H. Griffon Assignee, *In re* Maurin, No. 437 (E.D. La. June 16, 1854) (located in EDLA Case Files, *supra* note 88).

395. Consider the following examples: Conrad, who also happened to be the assignee in *In re Botts*, arranged for the sale of George Ann Bott's Iberville Parish plantation and the forty enslaved Black Americans on it on November 14, 1843, *see* Account Sales, *In re* Botts, No. 545 (E.D. La. Nov. 14, 1843) (located in 2 U.S. Dist. Ct. for the E. Dist. of La., *Bankruptcy Act of 1841 Sales Record Books, 1842–1853*, at 258 [handwritten], Records of District Courts of the United States, Record Group 21, National Archives at Fort Worth, Texas [hereinafter EDLA Sales Books]); and J.B.C. Armant, the assignee in *In re Armant*, arranged for the sale of John S. Armant's St. James Parish sugar plantation and the fifty-four enslaved Black Americans on it on June 8, 1843, *see* Account Sales, *In re* Armant, No. 688 (E.D. La. June 8, 1843) (located in EDLA Sales Books, *supra*, at 182 [handwritten]).

396. *See, e.g.*, *In re Murphy* Notice, SOUTHERN PATRIOT (Charleston, S.C.), Nov. 11, 1843, at 3 (providing notice of sale by M.H. Pooser, the *Murphy* bankruptcy trust's assignee, of the Edisto Plantation and the nineteen enslaved Black Americans on it).

enslaved on it, and (3) the Medley Plantation in Adams County with sixty-three to sixty-six Black Americans enslaved on it.[397] All of these plantations would be sold three and a half years *after* repeal of the Act.[398] Simply put, the federal government's ownership and management of bankrupt plantations was a feature, not a bug, of an 1841 Act system that endured much longer than scholars have traditionally conceived. This should impact how we think about antebellum bankruptcy innovation.

Through her work analyzing how foreclosure practice became racialized in early America, K-Sue Park has sought to "highlight a generative dynamic between race and economic innovation, which scholars may recognize in other historical episodes."[399] This dynamic quite arguably had a meaningful role in the administration of bankrupt plantations under the 1841 Act. In my research of the 1841 Act's operation in the Eastern District of Louisiana,[400] I have yet to uncover an instance of an assignee managing a nonplantation business in which a bankrupt had been involved prior to seeking relief under the Act. Of course, absence of evidence is not evidence of absence. That said, the Eastern District was home to New Orleans, where "[c]redit-funded entrepreneurial activity . . . yielded frequent and dramatic incidents of financial failure that affected all segments of the business sector."[401] Debtors who conducted business in the Crescent City and sought relief under the Act included commission merchants, steamboat owners, livery stable owners, grocers, booksellers, and the list goes on. The fact that the assignees in 1841 Act cases involving such individuals did not end up conducting the bankrupt's business, in contrast to assignees tasked with winding down bankrupt plantations, suggests that some qualitative difference regarding plantation enterprise invited innovation in bankruptcy administration. And that difference was not that the other businesses were conducted by partnerships while the plantations were not. Recall that the Perot plantation in *In re Maurin* was a partnership asset.[402] Moreover, it was not the only one of its

397. *See Sale in Bankruptcy*, SOUTHRON (Jackson, Miss.), Jul. 30, 1845, at 4.

398. For yet another extreme example from the Southern District of Mississippi, see *Sale in Bankruptcy*, SOUTHRON (Jackson, Miss.), Aug. 12, 1846, at 4 (providing notice of sale by F.S. Hunt, the *Galtney* bankruptcy trust's assignee, of 700 acres of land and the twenty-two enslaved Black Americans on it).

399. K-Sue Park, *Race, Innovation, and Financial Growth*, *in* HISTORIES OF RACIAL CAPITALISM 27, 29 (Destin Jenkins & Justin Leroy eds., 2021).

400. *See supra* notes 29–32 and accompanying text.

401. Pardo, *supra* note 59, at 150; *see also* MARLER, *supra* note 269, at 16.

402. *See supra* note 339.

kind.[403] Accordingly, despite one contemporary treatise—published before the 1841 Act took effect—proclaiming that "the assignees cannot carry on partnership" when one of the partners sought relief under the Act,[404] that is exactly what Conrad did for over a year as he managed the Perot plantation. By permitting administration of bankrupt plantations over extended periods of time, federal district courts laid the groundwork in the crucible of slavery for the making of modern bankruptcy law, pursuant to which the bankruptcy estate's present-day representative may conduct the business of a debtor in a liquidation case for a limited period of time.[405]

403. *See* Petition of R.P. Gaillard Assignee . . . Praying for an Order of Sale, *In re* Bossie, No. 221 (E.D. La. July 9, 1842) (located in EDLA Case Files, *supra* note 88) (describing sugar plantation in St. John the Baptist Parish and the nineteen enslaved Black Americans on it as "[p]roperty belonging to the partnership of W[idow] Benjamin Bossie & Julien Bossie").

404. J.B. STAPLES, THE GENERAL BANKRUPT LAW 35 (New York, John S. Voorhies 1841).

405. Under the 1841 Act, there were only liquidation cases, and none involved artificial entities, like corporations. *See* Pardo, *supra* note 27, at 1083 n.52. Assignees were "vested with all the rights, titles, powers, and authorities to sell, manage, and dispose of the [bankrupt's property] . . . subject to the orders and directions of [the] court." Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 443 (repealed 1843). Although no provision in the Act expressly referred to an assignee's power to conduct a bankrupt's business, one might imagine that federal district court judges, like Judge McCaleb, interpreted the assignee's power to manage the bankrupt's property to broadly include conducting a bankrupt's business. While the Act did not place a temporal limit on the duration of a case, it did establish a two-year benchmark, measured from the date of the bankruptcy decree, as the period within which an entire case should be administered, "if practicable." § 10, 5 Stat. at 447.

With language quite comparable to the 1841 Act, the 1867 Act gave assignees the "right, title, power and authority to sell, manage, [and] dispose of [the bankrupt's property]." Act of Mar. 2, 1867, ch. 176, § 14, 14 Stat. 517, 522 (repealed 1878); *see also* Barron v. Newberry, 2 F. Cas. 937 original reporter's note at 941 (McLean, Circuit Justice, C.C.N.D. Ill. 1857) (No. 1,056) ("By comparing the 14th section of the bankrupt act of 1867 with [the 3rd] section of the act of 1841, it will be seen that the rights, powers, and duties of the assignee are essentially the same under both acts . . . ." (citations omitted)). Initially, no provision in the Act expressly referred to an assignee's power to conduct a bankrupt's business, but that did not prevent some courts from granting such authority to an assignee. *See, e.g.*, Foster v. Ames, 9 F. Cas. 527, 527 (C.C.D. Mass. 1869) (No. 4,965) (Lowell, J.). In 1874, Congress amended the 1867 Act to expressly give the assignee such power, but only when a certain threshold of creditor consent had been met; and even then, the assignee's power would be temporally limited to nine months from the date of the bankruptcy decree. *See* Rev. Stat. § 5062a (1874) (repealed 1878). The amendment's legislative history tellingly reveals that some courts administering the 1867 Act did not construe the assignee's power to manage the bankrupt's property to broadly include conducting a bankrupt's business. *See* 2 CONG. REC. 1142 (1874) (statement of Sen. Edmunds).

Ever since Congress adopted the 1874 amendment, every bankruptcy system has expressly provided that the bankruptcy estate's representative has the power, upon court approval, to conduct a bankrupt's or debtor's business in a liquidation case for a limited period of time. The 1898 Act gave bankruptcy trustees—the modern day analogue of assignees—that power in liquidation cases, *see* Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 545 (repealed 1979); FED. R. BANKR. P. 216 (1973) (repealed), *reprinted in* 12 COLLIER ON BANKRUPTCY ch. 216, at 2-185 (James Wm. Moore & Lawrence P. King eds., 14th ed. 1978), and so too does today's Bankruptcy Code, *see* 11 U.S.C. § 721.

CONCLUSION

If we are to properly understand the development of bankruptcy law during the antebellum era, we must recognize that repeal of the 1841 Act did not terminate its system's operations. To that end, the legal archive must be consulted. Failure to do so will result in lost, forgotten, suppressed, or erased histories. And those histories, as I have sought to demonstrate through this Article and my prior work, are just several of many episodes that reveal how legal innovation and racial subordination have featured prominently in bankruptcy law's reinvention.

APPENDIX

The federal district court judges identified in Table A1 are those who held appointments in their respective districts during the 1841 Act case-filing period. The judges' names, commission dates, and service-termination dates have been obtained from the Federal Judicial Center's *Biographical Directory of Article III Federal Judges, 1789-Present*.[406] Commission dates are provided only for the two instances in which a vacancy arose during the 1841 Act case-filing period (i.e., in the Districts of Indiana and Vermont), thereby resulting in appointment of a successor judge during that period. While a judge could have multiple service termination dates due to reassignment resulting from federal judicial district reorganization, the service-termination date reported is for the last date of federal judicial service.

The filing figures in Table A1 are predominantly based on those that I have previously reported,[407] subject to the following revisions:

- **District of Delaware.** I have confirmed the number of filings by reference to the docket book created by the U.S. District Court for the District of Delaware for purposes of recording the petitions filed and proceedings held in the district's 1841 Act cases.[408]

- **District of Kentucky.** I have confirmed the number of filings by reference to the docket book created by the U.S. District Court for the District of Kentucky for purposes of recording the petitions filed and proceedings held in the district's 1841 Act cases.[409]

- **District of Maine.** The number of filings are derived from a House of Representatives document from 1846

406. *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., https://www.fjc.gov/history/judges [https://perma.cc/3ADL-GFA6].

407. *See* Pardo, *supra* note 55, at 84 tbl.1.

408. U.S. Dist. Court for the Dist. of Del., *Bankruptcy Act of 1841 Docket, 1842–1846* (located in Records of District Courts of the United States, Record Group 21, National Archives at Philadelphia, Pennsylvania). For a description of the contents of this record, see *Bankruptcy Act of 1841 Docket, 1842–1846*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/650756 [https://perma.cc/D2M5-8ARK].

409. U.S. Dist. Court for the Dist. of Ky., *Bankruptcy Act of 1841 Dockets, 1842–1843* (located in Records of District Courts of the United States, Record Group 21, National Archives at Atlanta, Georgia). For a description of the contents of this record, see *Bankruptcy Act of 1841 Dockets, 1842–1843*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/5635890 [https://perma.cc/L5U4-CS5V].

reporting various 1841 Act case statistics by federal judicial district.[410]

- **Northern District of Mississippi.** I have reported the highest case number that I have found in bankruptcy petition notices published in the district's newspapers.[411]

- **District of Missouri.** I have reported the highest case number that I have found assigned to a case appearing in the District of Missouri Record Book.[412]

- **Cape Fear District of North Carolina.** I have reported the total number of 1841 Act cases that I have been able to identify by consulting bankruptcy petition notices in the district's newspapers.[413]

- **Pamptico District of North Carolina.** I have reported the total number of 1841 Act cases that I have been able to identify by consulting bankruptcy petition notices in the district's newspapers.[414]

- **Eastern District of Tennessee.** I have reported the total number of 1841 Act cases that I have been able to identify by consulting bankruptcy petition notices in the district's newspapers.[415]

- **District of Vermont.** The number of filings are derived from a House of Representatives document from 1847 reporting various 1841 Act case statistics by federal judicial district.[416]

410. *See* H.R. DOC. NO. 29-223, at 30 (1846).

411. *See In re Cochran* Bankruptcy Petition Notice, GUARD (Holly Springs, Miss.), Feb. 28, 1843, at 3. *See generally* Act of Aug. 19, 1841, ch. 9, § 7, 5 Stat. 440, 446 (noting that, with regard to "all petitions by any bankrupt for the benefit of this act, . . . notice thereof shall be published in one or more public newspapers printed in such district, to be designated by such court at least twenty days before the hearing thereof") (repealed 1843).

412. *See* WDMO Record Book, *supra* note 88, at 314 [handwritten].

413. *See, e.g.*, Bankruptcy Petition Notices, FAYETTEVILLE WEEKLY OBSERVER (N.C.), August 24, 1842, at 2.

414. *See, e.g.*, Bankruptcy Petition Notices, RALEIGH REGISTER (N.C.), Dec. 30, 1842, at 3.

415. *See, e.g.*, *In re Garrison* Bankruptcy Petition Notice, KNOXVILLE TENN. POST, Feb. 28, 1843, at 3.

416. *See* H.R. DOC. NO. 29-99, at 8 (1847).

Finally, filing figures reported in *italics* are those for which the true number is currently unknown but for which evidence of at least that amount of filings has been documented. In other words, filing figures in *italics* potentially underreport filings in the corresponding district.

TABLE A1: 1841 ACT CASE FILINGS BY NONTERRITORIAL FEDERAL JUDICIAL DISTRICT AND JUDGE

Jurisdiction	**District**	**Judge**	**Filings**
Alabama	M.D. Ala.	William Crawford (service terminated: 02/28/1849)	643
	N.D. Ala.		821
	S.D. Ala.		718
Arkansas	D. Ark.	Benjamin Johnson (service terminated: 10/02/1849)	178
Connecticut	D. Conn.	Andrew Thompson Judson (service terminated: 03/17/1853)	1,536
Delaware	D. Del.	Willard Hall (service terminated: 12/06/1871)	91
District of Columbia	D.D.C.	William Cranch (service terminated: 09/01/1855)	281
Georgia	D. Ga.	John Cochran Nicoll (service terminated: 01/19/1861)	305
Illinois	D. Ill.	Nathaniel Pope (service terminated: 01/23/1850)	1,592
Indiana	D. Ind.	Jesse Lynch Holman (service terminated: 03/14/1842) Elisha Mills Huntington (commission: 05/02/1842) (service terminated: 10/26/1862)	1,221
Kentucky	D. Ky.	Thomas Bell Monroe (service terminated: 09/18/1861)	2,373
Louisiana	E.D. La.	Theodore Howard McCaleb (service terminated: 01/28/1861)	763
	W.D. La.		114

Jurisdiction	**District**	**Judge**	**Filings**
Maine	D. Me.	Ashur Ware (service terminated: 05/31/1866)	3,478
Maryland	D. Md.	Upton Scott Heath (service terminated: 12/21/1852)	490
Massachusetts	D. Mass.	Peleg Sprague (service terminated: 03/13/1865)	3,257
Michigan	D. Mich.	Ross Wilkins (service terminated: 02/18/1870)	671
Mississippi	N.D. Miss.	Samuel Jameson Gholson (service terminated: 01/10/1861)	*745*
	S.D. Miss.		872
Missouri	D. Mo.	Robert William Wells (service terminated: 09/22/1864)	*1,231*
New Hampshire	D.N.H.	Matthew Harvey (service terminated: 04/07/1866)	1,792
New Jersey	D.N.J.	Philemon Dickerson (service terminated: 12/10/1862)	810
New York	N.D.N.Y.	Alfred Conkling (service terminated: 08/25/1852)	5,598
	S.D.N.Y.	Samuel Rossiter Betts (service terminated: 04/30/1867)	2,550
North Carolina	Albemarle D.N.C.	Henry Potter (service terminated: 12/20/1857)	139
	Cape Fear D.N.C.		*338*
	Pamptico D.N.C.		*159*
Ohio	D. Ohio	Humphrey Howe Leavitt (service terminated: 04/01/1871)	2,057
Pennsylvania	E.D. Pa.	Archibald Randall (commission: 03/08/1842) (service terminated: 06/08/1846)	1,799
	W.D. Pa.	Thomas Irwin (service terminated: 01/04/1859)	1,968

Jurisdiction	**District**	**Judge**	**Filings**
Rhode Island	D.R.I.	John Pitman (service terminated: 11/17/1864)	342
South Carolina	D.S.C.	Robert Budd Gilchrist (service terminated: 05/01/1856)	277
Tennessee	E.D. Tenn.	Morgan Welles Brown (service terminated: 03/07/1853)	*691*
	M.D. Tenn.		1,313
	W.D. Tenn.		497
Vermont	D. Vt.	Elijah Paine (service terminated: 04/01/1842) Samuel Prentiss (commission: 04/08/1842) (service terminated: 01/15/1857)	1,687
Virginia	E.D. Va.	John Young Mason (service terminated: 03/23/1844)	1,189
	W.D. Va.	Isaac Samuels Pennybacker (service terminated: 12/06/1845)	1,566
		Total Filings	***46,152***