



**WashU**

# **Federalizing Slavery Through the Bankruptcy Power**

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Frank W. Koger Bankruptcy Symposium

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# Roadmap

1. book project
2. federalizing bankruptcy
3. bankruptcy system design and administration
4. slavery's federalization through bankruptcy

***Reinventing American  
Bankruptcy: Financial  
Failure and Freedom in  
the Slaveholding Republic***

(under contract with Columbia University Press)



# The Reinvention of Federal Bankruptcy Law

## Bankruptcy Act of 1800 (the 1800 Act)

“The bankrupt act of the *United States*, of *April*, 1800, was a consolidation of the previous provisions in the *English* statutes of bankruptcy; and the *English* decisions on their statutes prior to that date, properly apply as rules of construction to this act of congress.”

Roosevelt v. Mark, 6 Johns. Ch. 266, 285 (N.Y. Ch. 1822).

## Bankruptcy Act of 1841 (the 1841 Act)

“That the act of 1841 is anomalous in its provisions, unlike any other known in any legislation here or elsewhere, cannot be doubted. In the great outlines as well as in the details of the system, we feel the exercise of an express plenary power, competent to act at its own unlimited discretion, (so that the action be uniform,) either by adopting or modifying some old system on the subject of bankruptcy or prescribing a new one; the latter mode has seemed the better in the eye of the legislature, and the duty of the judicial department is to consider its intentions and to carry it into effect.”

*In re Kerlin* (C.C.E.D. Pa. Oct. 26, 1843) (Baldwin, Circuit J.), quoted in *Ex parte Christy*, 44 U.S. (3 How.) 292, 327 (1844) (Catron, J., concurring in part and dissenting in part).

# Core Historical Question

Why and how did federal bankruptcy law change under the systems established by the 1800 and 1841 Acts?

# Why: Changing Attitudes Toward Capitalism and Financial Failure

“Bankruptcy proved so divisive because it was perceived by Americans as emblematic of a fundamental issue of economic identity: the expansion and consolidation of the capitalist presence in American life.”

Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 291 (1994) (footnotes omitted).

# Why: Changing Attitudes Toward Capitalism and Financial Failure

“[T]he early American republic of debtors constituted an enduring tension between relentless capitalistic market behavior and interpersonal moral obligation.”

Tony A. Freyer, *Debt Failure and the Development of American Capitalism: Bruce Mann's Pro-Debtor Republic*, 30 L. & SOC. INQUIRY 739, 755 (2005) (reviewing BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2002)).

# Why: Changing Attitudes Toward Capitalism and Financial Failure

“In the 1841 Act, . . . moral failure had been transformed into market failure, not just for merchants and traders but for all citizens. The moral hazard narratives . . . had given way to market hazard narratives that burst out of the merchant-class boundaries suggested by Blackstone and set by the 1800 American act and its English predecessors. Middle-class failures in fields as diverse as agriculture, trades, and skilled artisanry had come to be seen either as structural products of recessions outside the control of the proprietor, or as the worthwhile byproducts of entrepreneurial risk taking. Either way, bankruptcy legislation would provide the debtor with an orderly means to a fresh start, free from the burden of prior debts.”

John Fabian Witt, *Narrating Bankruptcy/Narrating Risk*, 98 NW. U. L. REV. 303, 322 (2003) (reviewing MANN, *REPUBLIC OF DEBTORS*; EDWARD J. BALLEISEN, *NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA* (2001); and DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001)).

# How: Slavery and Legal Innovation

- Until recently, extant scholarship on *how* federal bankruptcy law changed from the start of government under the U.S. Constitution to the start of the Civil War did not account for the role of slavery.
- *Reinventing American Bankruptcy* provides that account by showing how application of the 1841 Act to the institution of slavery generated legal innovation and, in the process, contributed to slavery's federalization.

# Federalizing Bankruptcy



# On Federalization

“The growth of federal law at the expense of the states may be referred to as the ‘**federalization**’ of our legal system. This term is actually a bit awkward, since it sounds a good deal like ‘**federalism**,’ which is largely an opposing tendency. But the most convenient alternative, ‘**nationalization**,’ is generally reserved for governmental ownership of previously private property. Nationalization can be a rather powerful device for asserting central government control, but it is not the same thing as federalization, and it has not been a major component of that process in our country. Instead, the federal government has expanded its legal authority largely by initiating regulatory programs.”

Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251, 1251 (1989) (emphasis added) (footnote omitted).

# The Federal Bankruptcy Power (1789)

“The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States[.]”

U.S. CONST. art. I, § 8, cl. 4.

# The *Concurrent* Federal Bankruptcy Power

“Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it.

Is the power to establish uniform laws on the subject of bankruptcies, throughout the United States, of this description?

....

. . . If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that State legislation on the subject must cease. . . .

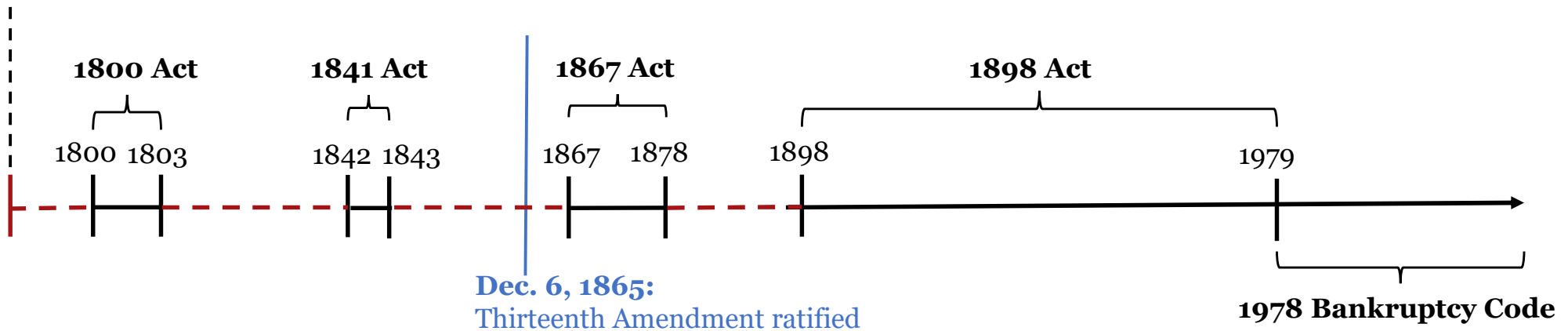
. . . [U]ntil the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the constitution of the United States.”

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193, 196–97 (1819) (Marshall, C.J.).

# Availability of Federal Bankruptcy Relief

**Mar. 4, 1789:**

government under the U.S. Constitution begins



--- interregna between federal bankruptcy case-filing periods (93.5 cumulative years)

<b>1800 Act Case-Filing Period:</b>	June 1, 1800 – December 19, 1803 (3.6 years)	} (16 cumulative years)
<b>1841 Act Case-Filing Period:</b>	February 1, 1842 – March 3, 1843 (1.1 years)	
<b>1867 Act Case-Filing Period:</b>	June 1, 1867 – September 1, 1878 (11.3 years)	

# Availability of Debt Discharge Under State Law on the Eve of the 1800 and 1841 Acts' Effective Dates

Northern States		
State	June 1, 1800	Feb. 1, 1842
1. <i>Pennsylvania</i>	no	no
2. <i>New Jersey</i>	no	no
3. <i>Connecticut</i>	yes	no
4. <i>Massachusetts</i>	no	yes
5. <i>New Hampshire</i>	no	no
6. <i>New York</i>	yes	yes
7. <i>Rhode Island</i>	yes	no
8. Vermont	yes	no
9. Ohio	--	no
10. Indiana	--	no
11. Illinois	--	no
12. Maine	--	no
13. Michigan	--	yes
<b>No discharge</b>	<b>4 of 8</b>	<b>10 of 13</b>

Southern States		
State	June 1, 1800	Feb. 1, 1842
1. <i>Delaware</i>	no	no
2. <i>Georgia</i>	no	no
3. <i>Maryland</i>	yes	yes
4. <i>South Carolina</i>	yes	yes
5. <i>Virginia</i>	no	no
6. <i>North Carolina</i>	no	no
7. Kentucky	no	no
8. Tennessee	no	no
9. Louisiana	--	yes
10. Mississippi	--	no
11. Alabama	--	no
12. Missouri	--	no
13. Arkansas	--	yes
<b>No discharge</b>	<b>6 of 8</b>	<b>9 of 13</b>

Note: states listed by order of ratification of the U.S. Constitution or admission to the Union; original states italicized.

Key: -- denotes not yet admitted to the Union.



# Bankruptcy System Design and Administration



# Some Fundamental Choices

1. initiation of relief
2. debtor eligibility
3. price of relief
4. scope of relief
5. creditor consent to relief
6. claim allowance
7. rights of secured creditors

# Scope of the Federal Bankruptcy Power (1819)

“This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion, that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law. . . .

. . . .

The insertion of . . . section [61 of the 1800 Bankruptcy Act] indicates an opinion in Congress, that insolvent laws might be considered as a branch of the bankrupt system, to be repealed or annulled by an act for establishing that system, although not within its purview.”

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 195, 201 (1819) (Marshall, C.J.).

# Scope of the Federal Bankruptcy Power (1833)

“And a law on the subject of bankruptcies, in the sense of the constitution, is a law making provisions for cases of persons failing to pay their debts.”

<sup>3</sup> Joseph Story, Commentaries on the Constitution of the United States § 1108, at 14 n.3 (Boston, Hilliard, Gray & Co.; Cambridge, Brown, Shattuck & Co. 1833).

# Scope of the Federal Bankruptcy Power (1843)

“I hold [the Bankruptcy Clause] 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.”

*In re Klein*, 14 F. Cas. 716, 718 (C.C.D. Mo. 1843) (No. 7,865) (Catron, Circuit J.).

# The Normative Dimension of Bankruptcy System Design and Administration

“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.”

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

# Entangling Slavery with Federal Bankruptcy Law

The potential for entanglement depended on the interaction of statutory design and judicial administration choices, including:

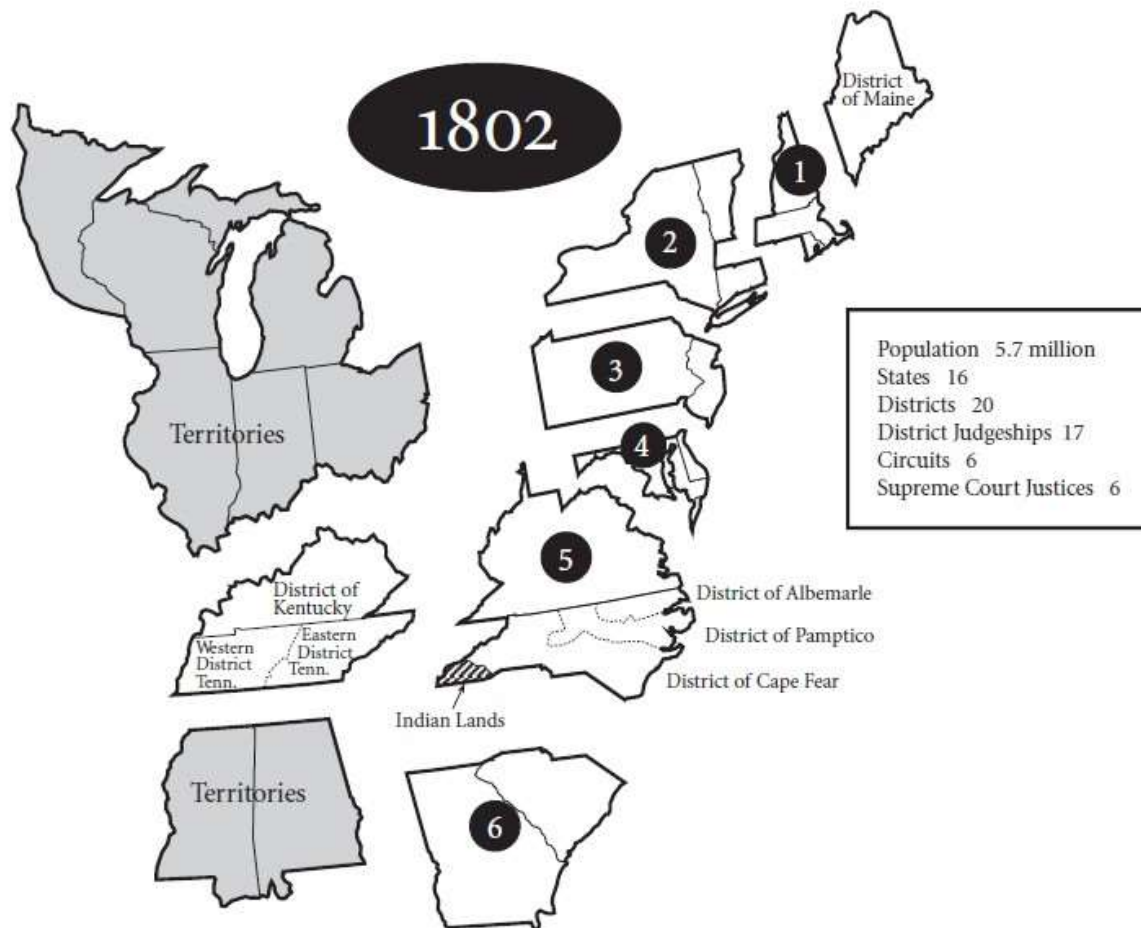
Design/Administration Choice	Yes	No
* 1. debtor-initiated relief permitted	greater potential	lesser potential
2. eligible debtors include persons connected to slavery	greater potential	lesser potential
3. bankruptcy estate includes enslaved persons and slavery-related assets	greater potential	lesser potential
4. scope of discharge includes slavery-related debts	greater potential	lesser potential
5. creditor consent required for discharge	lesser potential	greater potential
6. slavery-related creditor claims allowed	greater potential	lesser potential
7. secured-creditor consent required for sale of encumbered property	lesser potential	greater potential

\* **focus of this presentation**

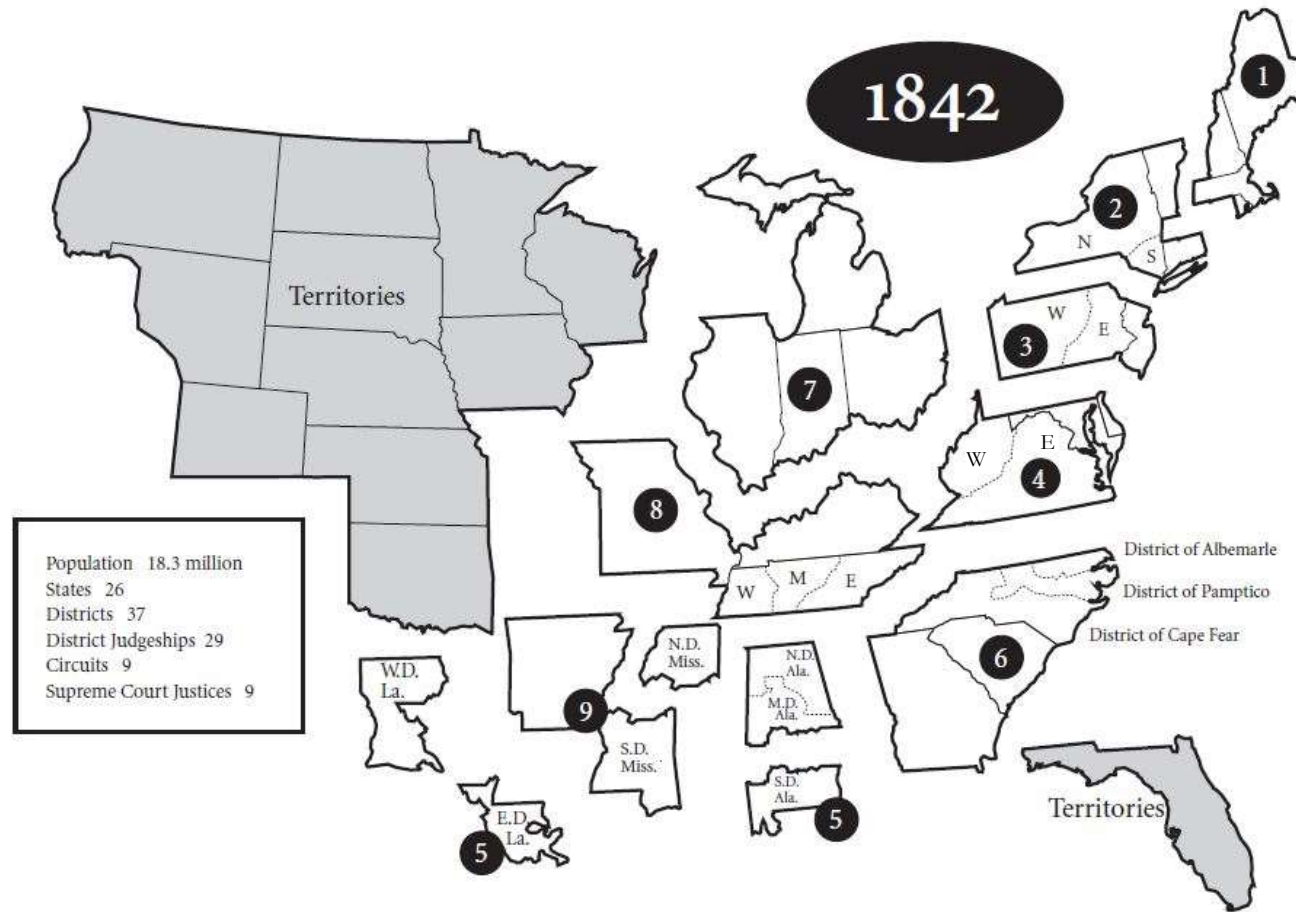
# Federal Bankruptcy in the Expanding Slaveholding Republic

1. expansion of federal judicial administration
2. growth of the enslaved population
3. greater use of the federal bankruptcy system

# Federal Judicial Administration (1802)



# Federal Judicial Administration (1842)



# Enslaved Population (1800 and 1840)

Northern States		
State	1800	1840
1. <i>Pennsylvania</i>	1,706	64
2. <i>New Jersey</i>	12,422	674
3. <i>Connecticut</i>	951	17
4. <i>Massachusetts</i>	0	0
5. <i>New Hampshire</i>	8	1
6. <i>New York</i>	20,903	4
7. <i>Rhode Island</i>	380	5
8. <i>Vermont</i>	0	0
9. <i>Ohio</i>	--	3
10. <i>Indiana</i>	--	3
11. <i>Illinois</i>	--	331
12. <i>Maine</i>	--	0
13. <i>Michigan</i>	--	0
<b>Total</b>	<b>36,370</b>	<b>1,102</b>

Southern States		
State	1800	1840
1. <i>Delaware</i>	6,153	2,605
2. <i>Georgia</i>	59,406	280,944
3. <i>Maryland</i>	107,707	93,057
4. <i>South Carolina</i>	146,151	327,038
5. <i>Virginia</i>	346,968	450,361
6. <i>North Carolina</i>	133,296	245,817
7. <i>Kentucky</i>	40,343	182,258
8. <i>Tennessee</i>	13,584	183,059
9. <i>Louisiana</i>	--	168,452
10. <i>Mississippi</i>	--	195,211
11. <i>Alabama</i>	--	253,532
12. <i>Missouri</i>	--	58,240
13. <i>Arkansas</i>	--	19,935
<b>Total</b>	<b>853,608</b>	<b>2,460,509</b>

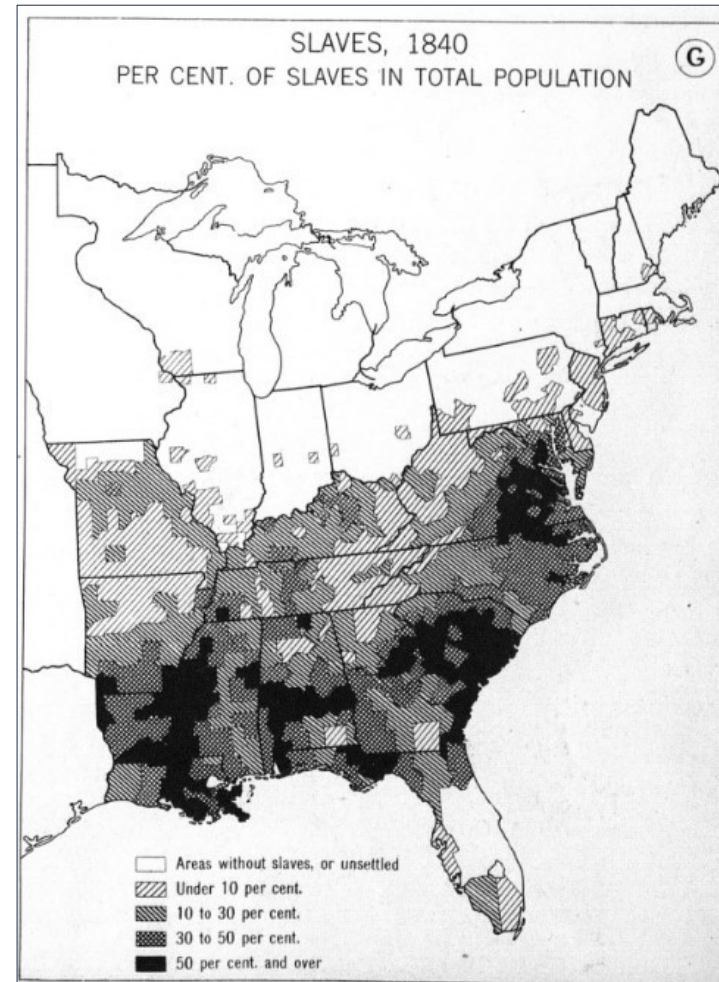
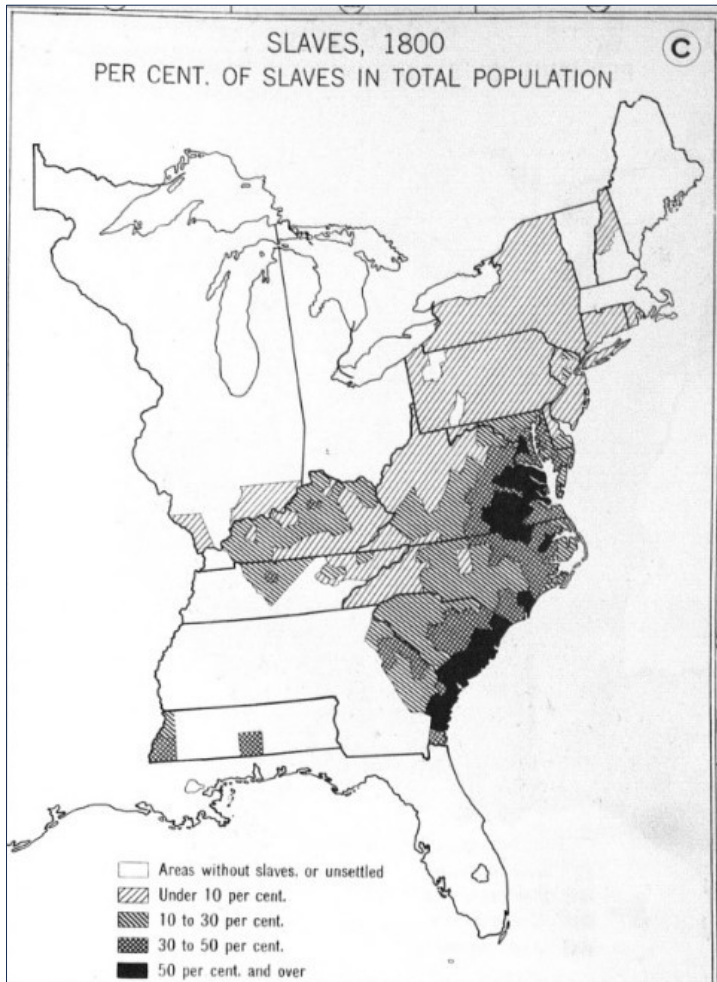
Note: states listed by order of ratification of the U.S. Constitution or admission to the Union; original states italicized.

Key: -- denotes not yet admitted to the Union. Source: U.S. Decennial Census.

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# Enslaved Share of Total Population (1800 and 1840)



C. OSCAR PAULLIN, ATLAS OF THE HISTORICAL GEOGRAPHY OF THE UNITED STATES (1932).

# Case Filings Under the 1800 and 1841 Acts

Northern States		
State	1800 Act Cases	1841 Act Cases
1. <i>Pennsylvania</i>	208	3,767
2. <i>New Jersey</i>	?	810
3. <i>Connecticut</i>	74	1,536
4. <i>Massachusetts</i>	281	3,257
5. <i>New Hampshire</i>	?	1,792
6. <i>New York</i>	166	8,148
7. <i>Rhode Island</i>	35	342
8. <i>Vermont</i>	24	1,687
9. <i>Ohio</i>	?	2,057
10. <i>Indiana</i>	--	1,221
11. <i>Illinois</i>	--	1,592
12. <i>Maine</i>	--	3,478
13. <i>Michigan</i>	--	671
<b>Total</b>	<b>≥ 788</b>	<b>30,358</b>

Southern States		
State	1800 Act Cases	1841 Act Cases
1. <i>Delaware</i>	?	91
2. <i>Georgia</i>	≥ 4	305
3. <i>Maryland</i>	58	490
4. <i>South Carolina</i>	?	277
5. <i>Virginia</i>	≥ 45	2,755
6. <i>North Carolina</i>	≥ 5	≥ 886
7. <i>Kentucky</i>	?	2,372
8. <i>Tennessee</i>	?	≥ 2,501
9. <i>Louisiana</i>	--	877
10. <i>Mississippi</i>	--	≥ 1,617
11. <i>Alabama</i>	--	2,182
12. <i>Missouri</i>	--	≥ 1,231
13. <i>Arkansas</i>	--	178
<b>Total</b>	<b>≥ 112</b>	<b>≥ 15,762</b>

Note: states listed by order of ratification of the U.S. Constitution or admission to the Union; original states italicized.

Key: ≥ denotes minimum documented filings; ? denotes unknown; -- denotes not yet admitted to the Union.



# 1841 Act Filing Rates

- **northern states:** 75 cases for every 10,000 free adults
- **southern states:**  $\geq 91$  cases for every 10,000 free adults

# Statutory Design Choice: Initiation of Relief



# 1800 Act: Restricted Initiation of Relief

- formally, only creditor-initiated cases by one of three categories of petitioning creditors: (1) one creditor owed at least \$1,000; (2) two creditors owed at least \$1,500; or (3) three or more creditors owed at least \$2,000

Act of Apr. 4, 1800, ch. 19, § 2, 2 Stat. 19, 22 (repealed 1803).

- substantively, indications of cooperative and collusive filings

*See, e.g.*, 31 Annals of Cong. 997–98 (1818) (statement of Rep. Joseph Hopkinson); MANN, REPUBLIC OF DEBTORS, at 229–30.

# ***Sturges*: Initiation of Relief as a Statutory Design Choice**

“Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. *But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a Court would scarcely be warranted in saying, that the law was unconstitutional, and the commission a nullity.*”

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 194 (1819) (Marshall, C.J.) (emphasis added).

# 1841 Act: Expanded Initiation of Relief

- **debtor-initiated cases:** by petition of the debtor
- **creditor-initiated cases:** by petition of one or more creditors owed at least \$500

Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 440–42 (repealed 1843).

# Statutory Design Choice: Debtor Eligibility



# 1800 Act: Narrow Debtor Eligibility

- merchants, traders, bankers, brokers, factors, underwriters, and marine insurers who:
  1. were U.S. residents,
  2. owed at least \$1,000, and
  3. committed one of several enumerated acts (e.g., departing one's state of residence) with an intent to delay or defraud their creditors

Act of Apr. 4, 1800, ch. 19, § 1–2, 2 Stat. 19, 19–22 (repealed 1803).

# 1800 Act: Narrow Debtor Eligibility

“The first national bankruptcy act in 1800 applied only to commercial debtors whose success had allowed them to amass debts that were far beyond the means of less prosperous debtors. *The act was, in effect, a national statement of the ‘principle’ that release from debts was a boon reserved for capitalist entrepreneurs, while simpler debtors should, by implication, remember the sanctity of their obligations.*”

Bruce H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1, 6 (2003) (emphasis added) (footnote omitted).

# ***Sturges: Debtor Eligibility as a Statutory Design Choice***

“The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say, who must be excluded from, or may be included within, this description. *It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion.*”

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 195 (1819) (Marshall, C.J.)  
(emphasis added).

# 1841 Act: Broad Debtor Eligibility

- **voluntary debtors:** all U.S. residents “unable to meet their debts and engagements”
- **involuntary debtors:** merchants, traders, retailers, bankers, brokers, factors, underwriters, and marine insurers who (1) were U.S. residents (2) owed at least \$2,000 and (3) committed one of several enumerated acts (e.g., departing one’s state of residence) with an intent to delay or defraud their creditors

Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 440–42 (repealed 1843).

# 1841 Act: Bankrupt Planters

**UNITED STATES OF AMERICA.**  
**IN BANKRUPTCY.**

Petition by Debtor for benefit of the Act of Congress.

To the Honorable the Judge of the United States District Court, for the Eastern District of Louisiana:

Respectfully represents *John Simeon Armant*

in the Parish of *St James* and State of Louisiana, that he is owing debts in his private right and capacity -

to sundry creditors, a list of whose names and places of residence, and the amount due to each, according to the best of his knowledge and belief, is contained in the schedule hereto annexed, marked A., and that the annexed schedule marked B. contains an accurate inventory of his property, rights and credits, of every name, kind and description, and of the location and situation of each and every parcel and the roof; that he is unable to meet his debts and engagements, and he prays that he may be declared bankrupt under the Act of Congress, entitled an Act to establish a uniform system of Bankruptcy throughout the United States, and prays that after the said Act had, he may be declared by a decree of the Court to be a Bankrupt under the purview of the said act, and upon his compliance with all the requisitions of the said Act, and all the orders and directions of the Court in the premises, that he may be decreed to have a certificate of discharge from all his debts provable under the said Act, and otherwise entitled to all the benefits thereof.

*John Simeon Armant*  
 atty

Schedule marked 'B' referred to in the Petition, and containing an accurate Inventory of all the property, effects, Rights & Credits of every kind, belonging to me, with their description

1. One sugar Plantation in the Parish of St James, measuring 8 arpents front, more or less, by 80 arpents deep - exclusive of seven hundred & odd acres bought of the United States & now making part of said Plantation - on which Plantation there are a house, negro cabins, sugar house, Stables &c. - Together with about sixty negroes, the names & ages being mentioned in the act of mortgage passed before Th. Seghers not. pub. in favor of the Citizens Bank of La to secure 780 shares of the stock of said Institution. On said Plantation there are horses, cattle & all the necessary implements & utensils for cultivating the said lands at.....
- N.B. On the Plantation there are several heads of cattle which belong to M<sup>rs</sup> Armant as part of her personal effects
- 2 15 or 20 hogs of sugar & about 7000 lbs of molasses
- 3 Furniture in the house on the Plantation & Carriage
- 4

Bankruptcy Petition and Schedule B, *In re Armant*, No. 688 (E.D. La. Feb. 2, 1843).

# 1841 Act: Bankrupts in the Business of Slavery

1840

**VALUABLE GANG OF YOUNG NEGROES**

**By JOS. A. BEARD.**

Will be sold at Auction,  
**ON WEDNESDAY, 25<sup>TH</sup> INST.**  
 At 12 o'clock, at Banks' Arcade,  
**17 Valuable Young Negroes,**  
**Men and Women, Field Hands.**  
**Sold for no fault; with the best**  
**city guarantees.**

**Sale Positive**  
**and without reserve!**  
**TERMS CASH.**

**New Orleans, March 24, 1840.**

after Lexington and Buckeye.

BY JOSEPH J. BEARD  
*Valuable Negroes at Auction.*

Will be sold at auction on Wednesday the 25th. at 12 o'clock, at Banks' Arcade, the following valuable negroes sold for no fault, without reserve -

The negro man JOHN, aged 29 years, likely field hand.  
 do do JACK, do 19 do do do.  
 Boy do GREEN, do 14 do very likely.  
 Negress GRACE, do 23 do field hand.  
 Also her children, MARTHA aged 7 years, and ANDREW 3 years.  
 JULIA, aged 19 years, field hand.  
 SARAH, do 23 do and boy child, field hand.  
 NED, do 27 do field hand and wagon maker  
 ELIZA, his wife 23 years and boy GEORGE, 4 years.  
 Malatto boy CHARLES, 17 years, field hand.  
 Negro do JIM, 19 do do.  
 Negress FANNY, 27 do do.  
 Negro ANDERSON, 13 do do.

Act of sale before J B Marks, Esq, Not. Pub, at the expense of the purchaser.  
 Terms—Cash. m24

BY VINCENT VIGNIE & DE FERIET

NEW-ORLEANS COMMERCIAL BULLETIN, Mar. 24, 1840, at 2.

“Emergence of Advertising in America: 1850–1920,” John W. Hartman Center for Sales, Advertising & Marketing History, Rubenstein Rare Book & Manuscript Library, Duke University

# 1841 Act: Bankrupts in the Business of Slavery

To the Honorable Theodore W. McCall Judge  
of the District Court of the United States in & for  
the Eastern District of Louisiana.

The Petition of Joseph Anthony Beard  
and of Charles Burgin Bioren residents of New  
Orleans State of Louisiana

Respectfully sheweth

That these Petitioners have become  
unable to meet their individual debts and  
engagements and those of the late Commercial  
firm which traded in the said City of New  
Orleans under the name & style of Beard &  
Bioren

These Petitioners further state that  
they are indebted to the Persons & in the sums  
mentioned & set forth in the Schedules of  
their individual Debts & of the debts of the  
said late commercial firm of  
which Schedules contain a list  
of these Petitioners creditors their residence  
& the amount due to each and a correct  
inventory of these Petitioners property rights  
& credits of every name kind & description  
to the best of these Petitioners Knowledge &  
belief & these Petitioners annex the said  
Schedules to this Petition as a part thereof.

These Petitioners further state that

**IN BANKRUPTCY**—United States District Court, Eastern District of Louisiana.—**JOSEPH A. BEARD & C. B. BIORN vs. their creditors and the creditors of BEARD & BIORN**—Notice is hereby given that J A Beard & C B Bioren of New Orleans, have filed in this Court a petition to be declared bankrupt and an order has been duly entered appointing the 15th day of April, at 10 o'clock A M for the hearing of said petition. All persons may then appear before this Court and show cause why the prayer of said petition should not be granted.

By order of the Court,  
**ED LAUVE**, Deputy Clerk of the  
United States District Court

m9 3t

NEW-ORLEANS COMMERCIAL BULLETIN, Mar. 18, 1842, at 2.

Bankruptcy Petition, *In re Beard & Bioren*, No. 96 (E.D. La. Mar. 8, 1842).

## 1841 Act: Bankrupts in the Business of Slavery

“About eight years after [seeking relief under the 1841 Act], Beard reported the highest gross amount of auction sales among New Orleans auctioneers during the second quarter of 1850, more than \$397,000 in total sales . . . , which was nearly twice as much as the next-highest reported amount. His commission on such sales would have ranged from \$3970 to \$9925 . . . , depending on the type of property sold.”

Rafael I. Pardo, *Federally Funded Slaving*, 93 TUL. L. REV. 787, 801–02 (2019)  
(footnotes omitted).

# **Judicial Administration Choice: Price of Relief**



# The Federal Bankruptcy Estate

## 1800 Act

“[I]t shall be the duty of the commissioners . . . after they have declared such person a bankrupt, and they shall have power to take into their possession, *all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity*, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value, . . . and also to take into their possession, and secure, all deeds and books of account, papers and writings belonging to such bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed . . . .”

Act of Apr. 4, 1800, ch. 19, § 54, 2 Stat. 19, 23 (emphasis added) (repealed 1803).

## 1841 Act

“*All the property, and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt . . . who shall . . . by a decree . . . be declared a bankrupt . . . shall, by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as . . . shall be appointed . . . .*”

Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 442–43 (emphasis added) (repealed 1843).

# Enslaved Persons as Property for Federal Bankruptcy Purposes

- Neither the 1800 Act nor the 1841 Act expressly stated that enslaved persons would be deemed to be part of a bankrupt's estate.
- Notwithstanding that state law may have deemed bankrupts to have property interests in enslaved persons, that did not automatically mean that enslaved persons would have to be deemed property for purposes of the federal 1800 and 1841 Acts.

*Cf. Almeida v. Certain Slaves*, 1 F. Cas. 538 (D.S.C. 1814) (No. 255) (holding that the term “property” in the federal Prize Act of June 26, 1812, did not encompass enslaved persons).

- Accordingly, an interpretive choice existed under both the 1800 and 1841 Acts.

# 1841 Act: Enslaved Persons as Property

- The 1800 Act gave bankruptcy commissioners, who were appointed by federal district judges, primary authority to administer federal bankruptcy cases. The Act did not confer rulemaking authority on either judges or commissioners to implement the law.
- In contrast, the 1841 Act gave federal district judges primary authority to administer federal bankruptcy cases and rulemaking authority to implement the law.

*See Act of Aug. 19, 1841, ch. 9, § 6, 5 Stat. 440, 445–46 (“[I]t shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy[.]”) (repealed 1843).*

- Federal district judges used their 1841 Act rulemaking authority to classify enslaved persons as property for federal bankruptcy purposes.

# 1841 Act: Bankruptcy Forms Designating Enslaved Persons as Property (District of Kentucky)

**RULES,**  
**REGULATIONS, AND FORMS OF PROCEEDINGS,**  
 IN MATTERS OF  
**BANKRUPTCY,**  
 IN THE  
**DISTRICT COURT OF THE UNITED STATES,**  
 FOR THE  
**KENTUCKY DISTRICT,**  
 DESCRIBED BY THE COURT IN CONFORMITY TO THE ACT OF CONGRESS ESTABLISHING A  
 UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES.  
 FRANKFORT, KY.  
 PRINTED BY WM. M. TODD—BOOKSELLER AND PRINTER.  
 1842.

26      RULES OF PROCEEDINGS IN BANKRUPTCY.  
**INVENTORY.**  
*The Inventory of the property, rights, and credits of \_\_\_\_\_ consti-  
 tuting part of his petition in Bankruptcy, of the present date, to the  
 District Court of the U. States for the Kentucky District.*

Nos.	(Examples of the matters of the Inventory.)	Disputed Property.	Debtor's Property.	Clear Property.
1	One tract of land, undivided moiety of, — acres, in — on —, in co-tenancy with C. T. of —. Title by deed (on Catalogue, No. 8) from J. P. his co-partner, to me, and patent to —, their ancestor—unimproved: Title contested by E. P. elder patentee of a tract of — acres, in possession of improvements <i>with- in his, as alleged, but without our lines:</i> Suit in — court, by him, against C. T. and myself. See brief. Sold under execution from — court, on rep. bond, R. P. against — and myself, (Creditor List, No. 4.) for \$100, less than two-thirds of its value, on — 18—, and so redeemable. My undivided moiety, with good title, worth, I suppose, about —	1000		
2	One house and lot in —, on —: Title by the several deeds of G. L. and G. M. to me, for several parcels of the ground now covered by the house, and constituting an indivisible property (on Catalogue, Nos. 6 & 7.) Estate of reversion after a term of — years, granted by me to —, to be ended — day of — 18—, in possession of —, assignee of the term: Improvements —, worth, I suppose, about \$—: no rent reserved on my lease: use and occupancy now worth about \$—: term of years about \$—: estate in fee about \$—: and my estate in reversion, unincumbered, I suppose, — Incumbered by mortgage for the debts to J. S. P. & Co. (No. 1, 2, 3, on Creditor List.) and sale of the equity of redemption, under execution from — court, on their judgment against myself, on Creditor List, No. 1, on — day of —, for \$100.	2000		
3	Rent charge of \$100 pr. an. payable — forever, reserved on and issuing out of lot of ground in — on —, reserved by R. V. the owner of the ground in his deed of conveyance thereof to A. L. recorded in the office of —: title by the bond of O. G. (Catalogue, No. 9) the owner, by the grant of A. L. registered in the above office: Improvements —, worth about \$—: entire estate in the ground about \$—: use and occupancy about \$—: present value of my estate in fee, in the rent, supposed to be about \$— Suit by U. C. in — court, against myself and O. G. to subject my right to the payment of his judgment, (demand No. 5, on Creditor List.) See Brief.	1000*	800	Qu?
4	—Slave P. about — years old, and W. about — years old: Title by bill of sale from S. D. (on Catalogue, No. 10)			

ment, (demand No. 5, on Creditor List.) See Brief.  
*Movables.*  
 4 —Slave P. about — years old, and W. about — years old:  
 Title by bill of sale from S. D. (on Catalogue, No. 10)

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RULES OF PROCEEDINGS IN BANKRUPTCY.  
*Inventory—Continued.*

in adversary possession of —: suit against him in — court: see brief: but both fugitives in State of —. See letters of —, in packet No. —, on Catalogue—worth each, I suppose, about \$500	1000
--	------

“Slave P. about — years old, and W. about — years old: Title by bill of sale from S. D. (on Catalogue, No. 10) in adversary possession of —: suit against him in — court: see brief: but both fugitives in State of —. See letters of —, in packet No. —, on Catalogue—worth each, I suppose, about \$500[.]”



# 1841 Act: Bankruptcy Forms Designating Enslaved Persons as Property (North Carolina)

RULES AND REGULATIONS

IN

**BANKRUPTCY,**

ADOPTED BY THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE

**DISTRICT OF NORTH CAROLINA,**

FEBRUARY, 1842.

\_\_\_\_\_

FAYETTEVILLE:

PRINTED BY EDWARD J. HALE.

1842.

At a District Court of the United States, for the District of North Carolina, held at Chambers in Fayetteville, on Wednesday the ninth day of February, in the year of our Lord one thousand eight hundred and forty-two:

Present,

The Honorable HENRY POTTER,  
District Judge,

ORDERED, That the following Rules and Regulations be prescribed as rules governing the proceedings in Bankruptcy in the District Court of the United States, for the District of North Carolina, pursuant to the sixth section of the Act entitled "An act to establish a uniform system of bankruptcy throughout the United States," passed August 19, 1841.

Extract from the Minutes.

H. H. POTTER, Acting Clerk  
in Bankruptcy.

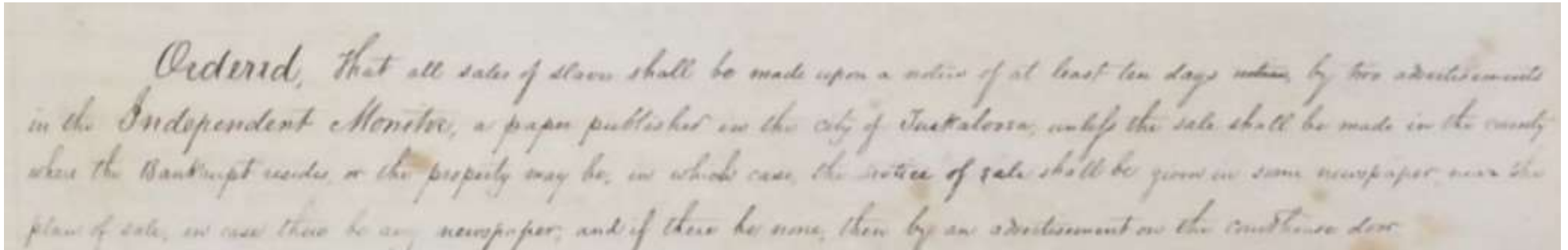
FORM No. 3.—SCHEDULE B. REFERRED TO IN THE FOREGOING PETITION.

The property of the Petitioner consists of the following particulars, viz: Real estate, [describe;] personals, [describe and state all debts, claims, rights, and credits;] the household and kitchen furniture, situated in \_\_\_\_\_, **slaves**, [describe;] provisions and other family stores, consisting of \_\_\_\_\_, [not minutely;] books or library of the Petitioner, viz: [describe in general terms.]

[Petitioner will be careful to discriminate on his inventory the particulars of his property, so that they may be known and taken in possession by the Assignee.]

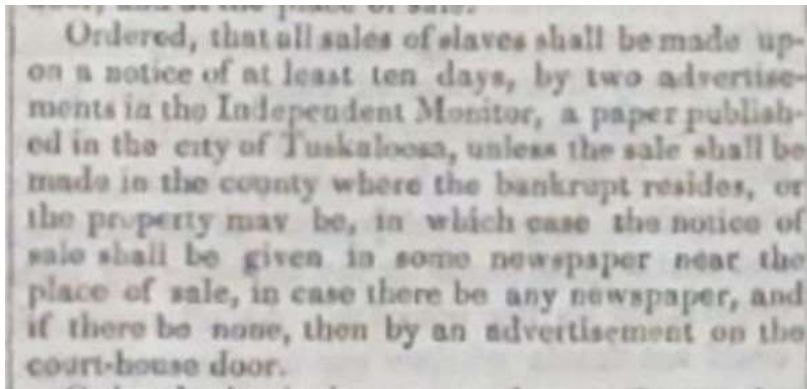
[The Petition must be plainly written, without abbreviation of words, and the name of the Petitioner subscribed thereto in full.]

# 1841 Act: Bankruptcy Rule for the Sale of Enslaved Persons (Middle District of Alabama)



*Ordered, that all sales of slaves shall be made upon a notice of at least ten days notice by two advertisements in the Independent Monitor, a paper published in the city of Tuscaloosa, unless the sale shall be made in the county where the Bankrupt resides, or the property may be, in which case the notice of sale shall be given in some newspaper near the place of sale, in case there be any newspaper, and if there be none, then by an advertisement on the courthouse door.*

1841 Act rule promulgated on May 30, 1842 by Judge William Crawford of the U.S. District Court for the Middle District of Alabama (on file with Nat'l Archives at Kan. City, Records of the District Courts of the United States, Record Group 21, U.S. District Court for the Middle District of Alabama, Bankruptcy Act of 1841 Record Books (1842–1844)).



Ordered, that all sales of slaves shall be made upon a notice of at least ten days, by two advertisements in the Independent Monitor, a paper published in the city of Tuscaloosa, unless the sale shall be made in the county where the bankrupt resides, or the property may be, in which case the notice of sale shall be given in some newspaper near the place of sale, in case there be any newspaper, and if there be none, then by an advertisement on the court-house door.

“Ordered, that all sales of slaves shall be made upon a notice of at least ten days, by two advertisements in the Independent Monitor, a paper published in the city of Tuscaloosa, unless the sale shall be made in the county where the bankrupt resides, or the property may be, in which case the notice of sale shall be given in some newspaper near the place of sale, in case there be any newspaper, and if there be none, then by an advertisement on the courthouse door.”

INDEP. MONITOR (Tuscaloosa, Ala.), June 8, 1842, at 1.

# 1841 Act: Bankruptcy Rules for the Sale of Enslaved Persons (District of Kentucky)

- Judge Thomas Bell Monroe of the District of Kentucky, promulgated a series of 1841 Act rules on December 10, 1842, that regulated the sale of enslaved persons in involuntary cases

*See Bankr. D. Ky. R. CCXXX – CCXXXIV (repealed), reprinted in S. Doc. No. 27-19, at 139–40 (1842).*

- For example: “In cases of involuntary bankruptcy, the assignee shall not sell the immoveable property *nor slaves of the estate*, until he shall have ascertained by the examination of the bankrupt in the mode prescribed . . . that the debts to the estate, and the other moveable property thereof will not be sufficient to pay the just debts against it.”

*Bankr. D. Ky. R. CCXXX (emphasis added) (repealed), reprinted in S. Doc. No. 27-19, at 139.*

# Other Design and Administration Choices

1. scope of discharge: slavery-related debts
2. creditor consent required for discharge
3. claim allowance: slavery-related claims
4. secured-creditor consent required for sale of encumbered property



# Bankruptcy Law's Reinvention

“If we are to properly understand the development of bankruptcy law during the antebellum era, we must recognize . . . how legal innovation and racial subordination have featured prominently in bankruptcy law's reinvention.”

Rafael I. Pardo, *Rethinking Antebellum Bankruptcy*, 95 COLO. L. REV. 995, 1082 (2024).

