

BANKRUPTCY AND THE ENTREPRENEURIAL ETHOS IN ANTEBELLUM AMERICAN LAW

EDWARD J BALLEISEN*

Historians of the nineteenth-century United States have long pondered the relationship between the country's legal institutions and the development of its capitalist economy. For at least a century, but especially in the last fifty years, scholars have investigated both the influence of perceived economic imperatives on American law and the impact of legal outcomes on America's business institutions and economic culture. Most of this historiography highlights one of three purported tendencies within the legal system.

In the first half of the twentieth century, scholars tended to emphasize the protection of longstanding property rights as a defining impulse of nineteenth-century American law. Focusing on constitutional disputes, these early historical interpretations gave particular prominence to instances in which judges struck down state laws because they violated the rights of property owners. For a political scientist such as Edwin Corwin, the vital function of the post-revolutionary legal structure was to uphold the settled expectations to enjoy particular uses of property, which nineteenth-century Americans often referred to as 'vested rights'. More recently, this view has attracted adherents within the 'law and economics' movement.¹

Beginning in the 1950s, a second group of American legal historians offered a very different portrayal of nineteenth-century American law, concentrating instead on the government's role in 'releasing economic energies'. First explored systematically by James Willard Hurst, this theme has received extended treatment in the work of numerous other scholars, including several who studied or taught with Hurst at the University of Wisconsin. According to Hurstians, or the 'Wisconsin School' as they are sometimes called, antebellum governments at every

* Hunt Family Assistant Professor of History, Duke University, Durham, North Carolina, USA.
¹ Edwin Corwin, 'The Basic Doctrine of American Constitutional Law' (1914) 24 *University of Michigan Law Review* 247; Robert McCloskey (ed), *Essays in Constitutional Law* (1957); Harry Schieber, 'Vested Rights' in Leonard Levy and Kenneth Kart (eds), *Encyclopedia of the American Constitution* (1986) vol 4, 1962; Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); James W Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1992) 63-71.

level generally proved receptive to lobbyists and claimants who plausibly connected their causes to improved economic productivity and general economic growth; and this inclination held even in many instances when the proponents of growth and economic progress attacked assertions of 'vested' property rights. Especially in transportation and banking policy, and in land and resource law, the Hurstians documented instances in which legislators, administrative officers, and judges took actions that favored the interests of proprietors who sought broad-based access to commercial opportunities or who wished to foster new channels of economic activity.²

Within this historiographic framework, there has been a significant split in the characterization of the political and social context in which the government's encouragement of economic aspirations took place. To Hurst and many of his disciples, 'the release of energy' reflected a political consensus within the white male electorate, as most voters harbored ambitions of personal advancement through the capitalist marketplace. To other scholars who shared much of the Hurstian worldview, such as Morton Horwitz and Charles Sellers, the emphasis on reshaping law to facilitate economic growth was rather the product of social and political conflict, in which the legal profession allied with the interests of emerging business sectors to skew political and legal outcomes, often at the expense of workers and non-commercially oriented agrarian proprietors.³ Both groups of historians, however, agreed that nineteenth-century American law responded rapidly to the imperatives of a dynamic capitalist class.

The 'commonwealth tradition' within American legal history offers yet another way of understanding the nineteenth-century American legal system's relationship to business culture. Initially prompted by a search for historical precedents for the New Deal's wide-ranging regulatory mechanisms, this school emerged in the 1940s with studies by Oscar and Mary Handlin and Louis Hartz, and has received a recent restatement and elaboration in the work of William Novak. Like the Hurstians, scholars of the commonwealth tradition primarily examine the lawmaking activities of states and municipalities, and for much the same reason – in a world in which the federal government employed few individuals outside post offices and customs houses, local and state officials had a much greater impact on the day to day lives of most Americans. But they, and especially Novak, part company with the Wisconsin School in their depiction of the law's primary economic purposes and consequences. For Novak, the key feature of antebellum legal culture was its wide-ranging imposition of legal constraints on social behavior, including commercial transactions and other uses of property, in light of a perceived 'common good'. He

² James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956); Hurst, *Law and Social Process in United States History* (1960). For an overarching narrative of nineteenth-century legal history that incorporates a Hurstian framework and draws heavily on the substantial scholarship shaped by his work, see Lawrence Friedman, *A History of American Law* (2nd ed, 1985).

³ Morton Horwitz, *The Transformation of American Law, 1780-1860* (1977); Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (1991).

finds support for this contention in a host of legal contexts, from fire regulations and the supervision of public markets to public health ordinances and ‘morals’ legislation. The Hurstian view, he argues, inflates the influence of business interests, while insufficiently appreciating both the legal system’s autonomy and the deep commitment of lawyers and judges to common-law conceptions of the public interest, which often checked entrepreneurial ambitions.⁴

In a probing review of Novak’s scholarship, Harry Schieber has persuasively cautioned against attempts to discern the ‘dominant’ thrust in the antebellum legal system’s handling of economic matters. America law before the Civil War, he observes, was at different times and in different contexts powerfully shaped by all three impulses – the protection of established property rights, the facilitation of new commercial ambitions, and the regulation of property and business in the name of the commonweal. The best tack for American legal historians, Schieber suggests, is to explore how and why political and legal actors chose among these various approaches when faced with particular business-related controversies.⁵

Antebellum federal bankruptcy law, and especially the adoption, operation, and repeal of the 1841 *Bankruptcy Act*, offers fertile ground for engaging in this kind of analysis. Few legal reforms impinged more directly on economic life – bankruptcy legislation redefined the debtor-creditor relations at the heart of the commercial economy, while adjusting the stance of the America’s national government toward economic risk and the social worth of entrepreneurial ventures. In addition, bankruptcy policy reflected the opinions and actions of every level within the federal government, as well as the nation’s legal fraternity. As a creature of statute, bankruptcy law depended on congressional initiative. But the actual workings of the federal bankruptcy system were crucially shaped by the strategies of lawyers representing the nation’s bankrupts and their creditors, including those officers of the executive branch who went to court on behalf of America’s most powerful creditor – the United States government. The federal judiciary played an even more important role in the development of bankruptcy law, as its members had the task of interpreting, implementing, and applying the 1841 Bankruptcy statute. Thus bankruptcy law furnishes a context in which to compare the inclinations and priorities of a wide range of public actors, as well as the ability of private litigants to modify the direction of legal change. Finally, the court records created by that

⁴ Oscar and Mary Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (1947); Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (1948); William Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (1996). For discussion of other works in this tradition, see Harry Schieber, ‘Government and the Economy: Studies of the “Commonwealth” Policy in Nineteenth-Century America’ (1972) 3 *Journal of Interdisciplinary History* 135. Novak seeks to distinguish himself from other practitioners of the commonwealth school by arguing that these scholars generally took a Hurstian perspective on governmental policy, primarily focusing on contexts in which officials sought to encourage economic growth. Novak, *People’s Welfare* 284.

⁵ Harry Schieber, ‘Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America’ (1997) 107 *Yale Law Journal* 823.

piece of legislation create an evidentiary basis for considering the long-term ramifications of bankruptcy policy for individual bankrupts, and by implication, for the development of American capitalism.

The operation and legacy of the 1841 *Bankruptcy Act* underscore the value of Scheiber's plea for nineteenth-century American legal history. One cannot fully grasp the legislation's history without taking account of the nineteenth-century legal traditions of protecting vested rights, releasing economic energies (whether for the many or the few), and regulating property rights in an ostensibly broader public interest. All three of these traditions influenced members of Congress when they crafted the law, and then when they repealed it a year and a half later; all three similarly played roles in the thinking of the nation's judges as they interpreted the legislation and applied it to the bankrupts and creditors who appeared before them in court.

On the whole, the impulse to nurture entrepreneurial ambitions shaped antebellum America's experiment with bankruptcy more powerfully than the other two tendencies in the law; and the later careers of bankrupts who received discharges under the 1841 Act suggest that this exercise of the federal bankruptcy power helped to consolidate a business environment predicated on risk-taking and the search for profitable innovation. But the first of these two outcomes resulted from a series of legal conflicts that require historical explanation; and the second was tempered by a set of market adjustments and personal career choices by former bankrupts that did not always accord with the expectations of lawmakers and judges. Equally important, the history of antebellum bankruptcy law suggests that legal historians would do well to expand their analytical tool kits when considering the evolution of nineteenth-century American capitalism, borrowing from the approaches that increasingly influence historical explorations of 'law and society' outside the domain of the marketplace.⁶

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One might plausibly portray the 1841 *Bankruptcy Act* as both a powerful example of national politicians' commitment to unleashing entrepreneurial energies and a straightforward rejection of vested rights – certainly this approach has largely characterized historical examinations of the statute.⁷ Passed by a Whig Congress seeking to make partisan advantage out of the financial panics of 1837 and 1839, which the Whigs attributed to Democratic mismanagement of economic policy, the

⁶ This article draws on research for Edward Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (2001), but considers that evidence in a different analytical framework. My goal here is to consider the implications of my findings for the wider historiography of antebellum American law, and particularly for depictions of the relationship between law and American business in that era.

⁷ For leading accounts of the 1841 Act, see Charles Warren, *Bankruptcy in United States History* (1935); David Beesley, 'The Politics of Bankruptcy in the United States, 1837-1845' (PhD thesis, University of Utah, 1968); Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (1974).

1841 Act represented a stark departure from bankruptcy law in England. Across the Atlantic, bankruptcy proceedings could only reach merchants and traders, and creditors retained a substantial degree of control over legal process. Only creditors could open bankruptcy dockets and no bankrupt could receive a discharge without the acquiescence of a super-majority of creditors in number and amount.⁸ Under the Whig Bankruptcy Law, by contrast, all American citizens had access to the bankruptcy courts and they could file voluntary petitions for bankruptcy relief, while their creditors lacked a collective veto power over the granting of discharges.⁹

Supporters of the 1841 *Bankruptcy Act* were well aware of its comparative generosity to debtors, lauding it as a mechanism to return tens of thousands of heavily indebted businessmen to the nation's marts of trade. For nearly every organization or group of individuals who lobbied Congress to enact a bankruptcy law, for nearly every advocate of such legislation in the nation's newspapers and periodicals, and for nearly every member of Congress who backed the 1841 Act, the statute's chief purpose was to resuscitate business careers that had been derailed by insolvency. Without a federal bankruptcy process, bankruptcy reformers insisted, thousands of enterprising Americans who had failed in the aftermath of financial panic would remain hobbled by their old debts. Since creditors stood ready to pounce on any newly acquired assets, bankrupts had no way to pursue new business ventures unless they did so under someone else's name, or unless the federal government handed them new leases on commercial life, courtesy of bankruptcy certificates.

In making these arguments, bankruptcy reformers used language suffused with the premises emphasized by James Willard Hurst and the Wisconsin School. The problem created by widespread business failures, one New Jersey Senator argued in 1840, was that 'the best energies of the country have been paralyzed; and the brightest visions of gain have disappeared'. An anonymous writer of a pamphlet calling for adoption of voluntary bankruptcy that same year agreed, portraying the nation's insolvent proprietors as 'smitten with a paralysis'. So too did the nation's leading mercantile periodical, *Hunt's Merchants' Magazine*, which in 1841 implored Congress not to put 'a freeman's energies in fetters'. Bankruptcy law, its supporters repeatedly insisted, would give bankrupts 'a FUTURE'. By absolving bankrupts for their old debts, such legislation would, in the words of an Indiana Senator:

elevate them from the character of bondmen to that of free and independent citizens; ... restore them to society; ... call into activity and usefulness all the energies of their character; ... strike off the fetters and set the bondmen free.¹⁰

⁸ On English bankruptcy law during the nineteenth century, see: V Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-Up in Nineteenth-Century England* (1995).

⁹ *An Act to Establish a Uniform System of Bankruptcy throughout the United States*, Act of 19 Aug 1841, Ch 8, 5 Stat 440.

¹⁰ Speech of Senator Wall, 12 May 1840, *Appendix to the Congressional Globe*, 26th Cong 1st Sess, 463; *The Expediency of A Uniform Bankrupt Law* (1840) 11; J Vann Cott, 'A General

From February 1842, when the Bankruptcy Law went into operation, through March 1843, when Congress repealed it, close to 40,000 insolvent Americans obtained such commercial emancipations. Thousands more used the threat of bankruptcy filings to negotiate compromises with their creditors. At least some of these bankrupts viewed themselves as having experienced a form of economic liberation. After receiving a bankruptcy certificate in the spring of 1843, for example, one upstate New York distiller proclaimed to a correspondent that he was 'as free as air' and as 'triumphant as a Phoenix bird'.¹¹

In order to bring about this kind of commercial resurrection, of course, Congress had to curtail the longstanding rights of those individuals and entities that held debts against insolvent Americans. To unsecured creditors, the 1841 Bankruptcy Law proclaimed the authority of the federal government to extinguish the legal force of their claims, so long as bankrupts relinquished all of their unencumbered assets beyond minimal exemptions. The legislation did furnish a mechanism for creditors to share in the proceeds brought in by court-supervised liquidations of bankrupts' property. But since the assets that the vast majority of applicants surrendered to the nation's bankruptcy courts were worth only a small fraction of what they owed, most unsecured creditors received only a pittance or nothing at all.¹²

Clearly, key elements of the 1841 Act closely fit the Wisconsin School's model of nineteenth-century law. Yet to focus only on the statute's comparatively easy route to bankruptcy discharges and its curtailment of creditors' common law actions is to miss other dimensions of the legislation that point to enduring concern for vested rights and a far-reaching impulse to regulate commercial relationships through the auspices of the federal courts. Despite the 1841 statute's abrogation of creditors' claims, concern for vested rights still shaped the legislation in a fundamental way. Its drafters took care to exempt secured creditors from the operation of the statute, so long as they made no effort to collect on their debts through the bankruptcy process. (Any secured creditors who proved their debts in bankruptcy court had a legal obligation to surrender any collateral for liquidation and *pro rata* distribution to all creditors.) Thus mortgagors of bankrupts maintained full rights to foreclosure,

Bankrupt Law' (1841) 4 *Hunt's Merchants' Magazine* 34-35; Speech of Senator Smith, 15 May 1840, *Appendix to the Congressional Globe*, 26th Cong, 1st Sess, 840.

¹¹ The number of bankrupts who received discharges may have been even higher, since the available statistics exclude a number of federal district courts that did not comply with congressional requests for tallies of bankruptcy applications and discharges. *Letter from the Secretary of State ... Relative to the Application and Discharge of Persons under the Bankrupt Law*, House Doc No 223, 29th Cong, 1st Sess (1846); *Letter from the Secretary of State Transmitting Statements Showing Proceedings under the Bankrupt Act*, House Doc No 99, 29th Cong, 2nd Sess (1847). On private settlements prompted by the adoption of the 1841 Act, see *Morning Courier and New York Enquirer* (New York) 4 Feb 1842; 'Veto', *Journal of Commerce* (New York), 23 Jan 1843. Charlemagne Tower to Eddy Tower, 14 June 1843, Charlemagne Tower Papers, Columbia University Rare Book and Manuscript Library, New York City.

¹² *An Act to Establish a Uniform System of Bankruptcy*, above n 9, Stat 443-5; *Letter from the Secretary of State ... Relative to the Application*, above n 11; *Letter from the Secretary of State Transmitting Statements*, above n 11.

holders of collateral against bankrupt debtors retained the right to sell that property, and creditors who had obtained judgment liens against bankrupt debtors in state courts could collect through court-ordered levies on attached property.¹³

If respect for vested rights shaped the contours of federal bankruptcy policy, so too did the inclination to use law as a technique of regulation, and even more substantially. In part, the federal bankruptcy system enacted in 1841 reflected the longstanding efforts of a group of reformers worried about standards of commercial behavior in the rapidly changing, boom and bust economy of antebellum America. This collection of northeastern businessmen, lawyers, clergymen, and social commentators, whom I have called ‘commercial moralists,’ included Arthur and Lewis Tappan, the New York City silk merchants who bankrolled so many evangelical reform movements, the Massachusetts Whig and perennial Presidential hopeful Daniel Webster, Supreme Court Justice Joseph Story, the influential Protestant minister Henry Ward Beecher, and T S Arthur, the prolific fiction and advice writer best known for his screeds against alcohol.

Drawing on a Anglo-American discourse of mercantile ethics that stretched back to early eighteenth-century England and Daniel Defoe, antebellum commercial moralists readily accepted the proposition that bankruptcy law should furnish honest debtors with a means to get free of their creditors, and that bankrupts should have the ability to initiate proceedings themselves. But the most vociferous American advocates of bankruptcy legislation also worried about failing debtors who secretly transferred their property to friends and relatives, or who favored some creditors, usually relatives or close business associates, over others, either paying the former directly before suspending their businesses or facilitating their efforts to collect through the courts. Preferential payments by failing creditors were endemic in the early nineteenth-century United States, sustained by the broadly held understanding that confidential creditors – those personal relations who supplied start-up capital, or who furnished endorsements and accommodation loans to buttress a proprietor’s worsening credit – merited special treatment in the event of insolvency. A number of American bankruptcy reformers additionally fretted about excessive flows of credit in the country’s marketplaces, which fueled speculation and a business cycle that lurched from bountiful prosperity to deflationary financial crashes.

To tackle these problems, commercial moralists sought to reconfigure American approaches to insolvency. Throughout the antebellum decades, the moralists used their pens, pulpits, and printing presses to mold informal codes of commercial conduct, encouraging failing debtors to treat their creditors honestly and equally, and pleading with creditors voluntarily to release upright bankrupts from their obligations. These reformers further supported the enactment of a comprehensive federal bankruptcy system, which would encompass involuntary as well as voluntary bankruptcy, thereby providing creditors with the means to discipline

¹³ *An Act to Establish a Uniform System of Bankruptcy*, above n 9, Stat 442-3.

wayward debtors through the federal courts. In doing so, commercial moralists made clear that they wished to use federal bankruptcy law to trim common law property rights of debtors, and especially their rights to pay creditors in the order that debtors chose, or to execute assignments for the benefit of creditors that specified preferential payments to particular creditors.¹⁴

In several respects the 1841 Bankruptcy Act incorporated these priorities. Much to the consternation of some legislators, who preferred a temporary, purely voluntary bankruptcy system designed primarily to give relief to the victims of the financial panics of the late 1830s, the American Congress opted for a more comprehensive approach. At the insistence of several urban boards of trade, as well as Whigs who represented northeastern cities, the 1841 Bankruptcy Act empowered creditors to institute involuntary proceedings against merchants, brokers, or bankers who secreted assets, fraudulently conveyed property, or made preferential payments in contemplation of bankruptcy. For the commercial moralists and their political allies, this legislation promised to create a permanent mechanism for policing commercial behavior and upholding the requirements of mercantile rectitude.¹⁵

In the eyes of some supporters of the 1841 Act, even the provisions for discharging debtors from their obligations had regulatory dimensions. When creditors placed too much confidence in their ability to collect debts through the courts, these bankruptcy reformers argued, creditors far too readily extended loans or sold on credit. A proper bankruptcy code would shift the psychology of mercantile transactions. The inexperienced or speculatively inclined would find it more difficult to attract capital, as would the financially troubled, who would no longer be able to attract accommodation loans and endorsements on the understanding that in the event of outright failure, 'confidential' creditors would receive priority payment ahead of any other claimants. By curbing flows of credit, a permanent bankruptcy law would check speculation, smooth out business fluctuations, and impart a more measured tone to the American economy.¹⁶

Thus when federal judges began to hear bankruptcy cases in 1842, they confronted a piece of legislation that promised both to release economic energies and to

¹⁴ On the antebellum 'culture of preference,' and on commercial moralism and its links to antebellum bankruptcy reform, see Balleisen, above n 6, 69-72, 90-94, 103-104, 130-31.

¹⁵ 'Memorial of the New York Board of Trade' 13 June 1840, Sen Doc 557, 26th Cong, 1st Sess; 'Memorial of the New Orleans Chamber of Commerce, 6 Jan 1841, Sen Doc 42, 26th Cong, 2nd Sess; 'Memorial of a Number of Citizens of New York, Praying the Incorporation of Certain Provisions in Any Bankrupt Law' 14 Jan 1841, Sen Doc 74, 26th Cong, 2nd Sess. Although mercantile interests succeeded in keeping involuntary bankruptcy as part of the federal bankruptcy system, they were not able to secure adoption of two other desired provisions in the 1841 Act – creditors' control over the appointment of assignees, and the requirement that a majority of creditors assent to discharges.

¹⁶ Joseph Hopkinson, 'Lecture on Commercial Integrity' (1839) 1 *Hunt's Merchants' Magazine* 378; *Expediency of a Bankrupt Law*, above n 10, 15-17; 'The Morals of Trade: Number 5' (1842) 6 *Hunt's Merchants' Magazine* 453; J N Bellow, 'The Late Bankrupt Law of the United States' (1844) 3 *Pennsylvania Law Journal* 13.

constrain them, and that still maintained a healthy respect for vested rights. These various commitments inevitably presented debtors and creditors with areas of legal ambiguity, which they and their lawyers each construed in ways that would further their respective interests. Attorneys who represented creditors, for example, consistently argued that the statute's concerns about fraudulent debtors required judges to interpret statutory ambiguities so as to complicate legal paths to bankruptcy discharges. Applicants who presented incomplete debt schedules should not have the chance to revise them, but should rather have their petitions dismissed by the courts; creditors should be able to interpose objections to a bankrupt's petition even if their lawyers missed a court deadline, and should have the leeway to depose debtors about their financial affairs, even in the absence of specific allegations of wrongdoing; the courts should give broad meaning to the law's prohibition of 'concealed property', 'fraudulent conveyances' and 'preferences' given 'in contemplation of bankruptcy'. Unsurprisingly, lawyers who appeared on behalf of debtors tended to respond that such arguments flew in the face of the statute's overriding goal of releasing unfortunate debtors from the bondage of irretrievable indebtedness. Some destitute bankrupts further argued that this central legislative aim required the courts to allow them to gain bankruptcy discharges without paying court costs.

As they confronted these clashing visions of the Whig bankruptcy experiment, the federal judiciary had ample grounds for strictly construing the 1841 Act's procedural requirements and granting broader scope to its prohibitions on fraudulent conveyances and preferential payments. Judges might have read the 1841 Act against the earlier Bankruptcy Law of 1800, which was more friendly to creditor interests; or they might have interpreted the legislation's ambiguities in light of common law protections for creditors, narrowing the law's impact on long settled rights; or they might have emphasized the regulatory intentions of those legislators aligned with commercial moralism. For the most part, though, federal judges eschewed these interpretive possibilities. Throughout the country, the federal courts gave debtors the benefit of the doubt if their petitions 'inadvertently' omitted debts or assets; the judiciary typically required that creditors put forward specific allegations of wrongdoing before allowing their lawyers to interview debtors under oath, and limited those depositions to such allegations; and judges usually confined the definition of fraudulent conveyances and illegal preferences, requiring that both had to occur after the 1841 Act came into effect, and as a result of a clear-cut expectation of insolvency.¹⁷

There were limits to the propensity of federal judges to adopt the interpretations of the Bankruptcy Law put forward by bankrupts and their attorneys. The most important restriction concerned the position of individuals who had petitioned for bankruptcy, but who averred that they could not afford the fees charged by court clerks and bankruptcy assignees. In these cases, the federal judiciary drew a class

¹⁷ For detailed discussions of the legal strategies adopted by creditors and debtors and the outcome of leading bankruptcy cases, see Balleisen, above n 6, 109-13.

line among financially distressed Americans. Those bankrupts who had not squirreled away the \$15-\$50 dollars needed to pay filing fees, or who could not borrow to do so, were not eligible for discharges. As Samuel Rossiter Betts, District Judge for the Southern Federal District of New York explained, the 1841 Act had no provision for 'mendicants applying in bankruptcy', but presupposed that petitioners would come from the property-owning classes who had assets to surrender. Since court costs in many federal districts equaled one to two months wages for a skilled artisan, this rule set up a substantial barrier for heavily indebted poor Americans.¹⁸

The historical challenge posed by this pattern of bankruptcy decisions is to account for their general tilt toward debtors, as well as the exception to this pattern in the case of applicants who pleaded destitution. One crucial nudge in the direction of interpretive generosity to bankrupts came from judicial perceptions about the chief purposes of the 1841 Bankruptcy law. Congress's overriding goal, Judge Betts ruled in a pivotal early bankruptcy case, was to 'apply relief to that oppressive condition of indebtedness then weighing on the community'.¹⁹ But there were other contributors as well. Respect for vested rights made judges nervous about trenching too substantially on the ability of business owners to pay creditors in the order and manner that they deemed fit; the Tyler Administration, not wishing to antagonize a large and vocal constituency of bankrupts, ordered United States Attorneys not to contest bankruptcy petitions, lessening the force of objections from other creditors; and the crush of bankruptcy cases that afflicted most federal courts predisposed judges to look skeptically at requests from creditors that seemed to be geared toward dragging out proceedings, such as seeking open-ended depositions.²⁰ Together, these considerations encouraged legal decision-making with an emphasis on releasing debtors from their obligations; but they did not all reflect Hurstian intentions.

The unwillingness of the judiciary to waive fees for applicants alleging poverty similarly had more than one source. It is certainly possible that a class perspective led federal judges like Samuel Betts to view requests for fee waivers with a jaundiced eye. Betts almost certainly had more sympathy for the members of the New York City elite who had suffered crippling financial reverses after the Panic of 1837 than he did for impoverished Hudson River Valley farmers and New York City artisans. Whether or not class position shaped the viewpoints of federal judges, institutional imperatives militated against allowing bankruptcy petitions *in forma pauperis*. Bankruptcy officials' livelihood depended on fees paid by bankrupts and their creditors, which would be threatened by exceptions for petitioners who

¹⁸ *In Re Alexander Greaves*, 1 *New York Legal Observer* 213 (1842); *In Re David Barnett*, *New York Herald*, 12 June 1842. On court costs set by the various federal district courts, see: *Fees in United States Circuit and District Courts in Admiralty and Bankruptcy Cases*, House Doc No 172, 27th Cong, 3d sess (1843); on antebellum wage rates for skilled artisans, see Stuart Blumin, *The Emergence of the Middle Class: Social Experience in the American City, 1760-1900* (1989) 109-10.

¹⁹ *In Re Creditors of Hull and Smith*, 1 *New York Legal Observer* 1 (1842).

²⁰ Balleisen, above n 6, 113-15.

claimed not to be able to pay required fees. Such exceptions also endangered the regulatory purposes of the Bankruptcy Law. As Betts explained in rejecting appeals for a fee waiver, allowing applicants to gain bankruptcy certificates without paying for the work of bankruptcy officials would create a dangerous temptation to fraud – bankrupts would have a powerful incentive to conceal assets and then allege utter poverty, thereby obviating the need for bankruptcy assignees to inquire into the nature and extent of their property. In this regard, the concerns animating commercial moralism placed a constraint on the bankruptcy system's work of releasing debtors from their obligations.²¹

Nor was this the only significant trace that commercial moralism left on the actual workings of the 1841 *Bankruptcy Act*. Even with the generally debtor-friendly decisions from the federal bench, the bankruptcy system still had a considerable regulatory impact. Hundreds of failed debtors in 1842 or early 1843 found their applications for bankruptcy certificates blocked because their creditors were able to furnish compelling evidence of fraudulent actions on the eve of failure; hundreds more found themselves hauled into bankruptcy court by involuntary bankruptcy petitions. Failing proprietors by no means had a free pass through or complete control over the bankruptcy process.²²

These outcomes had significant repercussions for the nation's business culture. Where failing debtors had previously often taken great pains to repay their close business associates and family members, generally at the expense of their other creditors, now they took care to avoid the appearance of singling out particular creditors for special treatment. Assignments for the benefit of creditors, for example, increasingly specified that all claimants would share proportionately in the proceeds of the trust, since preferential assignments unambiguously opened up debtors to involuntary bankruptcy petitions. In New England, if we can believe the report of Supreme Court Justice Joseph Story, financially troubled businessmen found it much more difficult to attract accommodation loans that might keep their ventures afloat for a time, since the grantors of such loans could no longer count on preferential treatment in the event of outright bankruptcy. And according to some Congressmen, the creation of the federal bankruptcy system contributed to a general tightening of credit. Just as the commercial moralists had predicted, lenders seem

²¹ *In Re Alexander Greaves*, above n 18; *In Re David Barnett*, above n 18. In the latter case, Judge Betts did make clear that he would entertain motions that court officials were asking for unreasonably high fees in particular instances.

²² In the thirty-three federal districts that sent in bankruptcy statistics to the federal government, nearly a thousand applicants were refused discharges by bankruptcy courts. *Letter from the Secretary of State ... Relative to the Application*, above n 11; *Letter from the Secretary of State Transmitting Statements*, above n 11. Nationwide statistics for involuntary petitions are not available, but in the southern district of New York, they comprised 84 of 2563 bankrupts, or 3.3%. See *Alphabetical List of Applicants for the Benefit of the Bankrupt Act (Passed 19 August 1841) within the Southern District of New York, Carefully Compiled from the Petitions on File in the United States District Clerk's Office* (1843).

to have become more discriminating in the face of all the bankruptcy filings going on around them.²³

One must be careful, though, not to overstate the bankruptcy system's reconfiguration of deeply felt beliefs about economic justice, even if that system created new risks that debtors and creditors ignored at their peril. In spite of the 1841 Act's fundamental premise that all creditors receive equal treatment in case of insolvency, creditors continued to seek out preferential payments after the legislation's passage, many failing debtors continued to give them, and both groups found ways to use provisions of the bankruptcy law to further these ends. The chief tactic that creditors employed was to file an involuntary petition against a financially troubled debtor, or to file objections to a voluntary petition, and then offer to withdraw either the involuntary petition or the objections to the voluntary application upon receipt of a preferential payment. For their part, many bankrupts worked out that after receiving bankruptcy certificates, there was nothing to stop them from selectively paying creditors to whom they felt especially keen obligations. The *Bankruptcy Act* by no means uprooted the culture of preference that predominated in the antebellum United States, both in rural communities and in the close-knit business networks of the nation's mercantile centers.²⁴

So the dual purposes of the 1841 Act remained quite evident in its implementation by the federal judiciary, even though the goal of releasing failed proprietors from their obligations often took precedence when it came into conflict with that of enforcing the precepts of commercial moralism, and even though some debtors and creditors found ways to frustrate those precepts. As the bankruptcy system matured, there was reason to expect that the regulatory side of the 1841 Act would take on a more prominent role. By early 1843, most of the individuals who had failed amidst the pressure of financial panic had already filed voluntary bankruptcy applications or arranged private compositions with their creditors. With the retrospective operation of the statute ebbing, the provisions for involuntary bankruptcy were likely to become more significant within the workings of the bankruptcy system.²⁵ Congress, however, decisively blocked such a development in March 1843, when it voted overwhelmingly to repeal the 1841 *Bankruptcy Act*, shutting off the federal courts to failed businessmen and their creditors alike. The death of the bankruptcy law, like its birth, resulted from a variety of causes and political agendas, suggesting the diversity of concerns that animated the development of nineteenth-century law.

²³ Balleisen, above n 6, 130-32.

²⁴ Ibid 115-19, 124-30. Numerous scholars have noted that in rural exchange culture, obligations to 'insiders' had a much higher priority than those to 'outsiders'; but as antebellum bankruptcy records make clear, these same considerations often shaped commercial relations with the business circles of the nation's largest cities. On the commercial ethics and legal sensibilities of rural proprietors, see, eg.: Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1780-1860* (1990); Tony Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America* (1994).

²⁵ For contemporaneous expectations along these lines, see the speeches by Senator Buchanan and Berrien, 27 Dec 1842, 24 Feb 1843, *Congressional Globe*, 27th Cong, 3rd Sess, 84, 341.

In part, repeal stemmed from political maneuvering and shifts in partisan power during 1841 and 1842. Bankruptcy legislation had barely passed in August 1841, initially failing to obtain a majority in the House. The bill eventually eked out a one vote majority after determined logrolling within the Whig caucus. A series of complicated legislative deals ensured the passage of the party's overall program, which in addition to bankruptcy reform embraced a land distribution bill, a higher protective tariff, and recharter of a national bank. When President Tyler unexpectedly vetoed the bank bill in September 1841, though, the Whigs lost effective control of Congress, as one faction broke with the Administration and another remained loyal, hoping to retain influence over patronage appointments. Democrats quickly sought to exploit the resulting division within their opposition by rolling back Whig measures that had become law, including the 1841 *Bankruptcy Act*.²⁶

Ideological considerations amplified the drive to remove that of that piece of legislation from the federal statute book. To most Jacksonians, the concept of voluntary bankruptcy struck at the moral obligation to pay debts, while the commercial moralists' blueprint for a permanent bankruptcy system signified dangerous expansion of federal power, unjustified grants of power to northeastern economic elites, and wasteful creation of a bloated corps of placemen. Democratic editors and politicians savaged voluntary bankruptcy proceedings, and especially those that operated retrospectively, as unconstitutional assaults on the vested rights of creditors to any property that their insolvent debtors might obtain. Democrats further saw no need for a national judicial police to restrain individual merchants and manufacturers, any more than they desired a national bank to oversee the country's flows of credit and currency. Instead, they preferred to leave debtor-creditor relations to the supervision of state law and to the give and take of private negotiations, which generally tolerated preferences to local debtors over distant ones, and confidential creditors over those creditors whom they had no personal links. Democratic critics of the 1841 Act particularly excoriated the legislation's administrative framework, arguing that the assets of bankrupts were going into the pockets of bankruptcy clerks and assignees rather than to creditors. Senator Thomas Hart Benton of Missouri spearheaded these bitter attacks, maintaining that 'a bankrupt's estate in the hands of assignees, is a lump of butter in a dog's mouth'.²⁷

Deep-seated antagonism to voluntary bankruptcy petitions and federal commercial regulation, though, was not universal within the Democratic Party, and even if it had been, the Democrats lacked the votes in the 27th Congress to kill the bankruptcy system on their own. For some advocates of repeal, including a substantial number of Whigs and a handful of Democrats, the overriding problem with the bankruptcy system lay with its repercussions for the nation's supply of

²⁶ For an especially astute analysis of these dynamics, see the speech of Representative Barnard, 20 Dec 1842, *Congressional Globe*, 27th Cong, 3rd Sess, 65-66.

²⁷ Speech of Senator Benton, 27 Dec 1841, *Appendix to the Congressional Globe*, 27th Cong, 2nd Sess, 30; Balleisen, above n 6, 119-24.

credit. Several of these members of Congress had voted for the 1841 Act, in many cases because they gave credence to the strong popular support for federal debt relief created by economic depression, and because they agreed that the nation would benefit by removing the 'manacles' of debt from so many enterprising bankrupts. But by late 1842, these legislators expressed great concern that the availability of bankruptcy discharges had convinced those with capital dramatically to cut back on their extension of credit. A permanent federal bankruptcy system, they insisted, meant that entrepreneurs without substantial resources of their own would struggle to find the capital required to finance their ventures. It would, just as the commercial moralists predicted, crimp and restrain the economy, but excessively so. To one New York Democrat in the House, the bankruptcy law had only brought about a want of commercial confidence and 'hidden and hoarded capital'. Its repeal would accordingly encourage lenders to lend, merchants to trade, and businessmen to finance new ventures of all kinds. In other words, for a crucial component of the coalition that voted for repeal, to kill the 1841 Act was to facilitate the release of economic energies throughout the United States.²⁸

If assessments of how to boost economic activity gave crucial momentum to the movement to abolish the bankruptcy system, concern for vested rights almost caused that initiative to founder. Despite the growing majorities in both houses of Congress that wished to close the federal courts to new bankruptcy petitions, supporters of repeal differed on one key issue. Most Democrats supported a 'summary execution' of the bankruptcy system that would bar both future bankruptcy petitions and the completion of bankruptcy cases already on federal court dockets, but not yet disposed of by the courts. Even Whigs who supported repeal balked at this second provision, which they viewed as an illegitimate assault on the settled expectations of failed businessmen. As a North Carolina Whig explained, the debtors who had already initiated bankruptcy proceedings 'had done so on the faith of the Government, and so had a sort of vested right in [them]'.²⁹ Only by conceding this point as the 27th Congress came to a close were Democrats able to gain passage for repeal.

Although the repeal of the 1841 *Bankruptcy Act* put an end to its regulatory dimensions, the bankruptcy certificates that federal judges distributed under that law continued in force, ostensibly offering those who had received them the chance to renew their entrepreneurial ambitions. In the later careers of former bankrupts lies a means of testing the assumption, made so repeatedly by advocates of a federal bankruptcy system, that bankruptcy discharges would inject dynamism into the American economy, enabling failed business-owners to attempt new entrepreneurial ventures.

²⁸ Speech of Representative Gordon, 20 Dec 1842, *Congressional Globe*, 27th Cong, 3rd Sess, 68. See also speeches of Representatives Everett, Wise, Ferris, Pickens, and Rayner, 20 Dec 20, 21 Dec 1842, 3 Jan, 4 Jan, 12 Jan, 1843, *Congressional Globe*, 27th Cong, 3rd Sess, 65, 72, 110, 116, 156.

²⁹ Speech of Representative Rayner, 12 Jan 1843, *Appendix to the Congressional Globe*, 27th Cong, 3rd Sess, 188.

There is certainly good reason to be skeptical of this assumption, especially as a universal description of the responses of bankrupts to receiving a discharge. By themselves, legal releases from past debts did not ensure the opportunity to pursue entrepreneurial risk-taking, or even the chance to regain the status of proprietorship. To petition for bankruptcy, or for insolvency relief under state laws untouched by the repeal of the 1841 *Bankruptcy Act*, was to place one's name on the lists of bankrupts that circulated as early forms of credit reporting, and that served as public warnings to prospective business partners, suppliers, and lenders. America's first credit reporting agencies, which offered periodic, qualitative evaluations of business-owners throughout the country, also took great care to point out that a given subject had experienced bankruptcy, noting past failure years after the fact, and invariably linking such an event to cautions about creditworthiness. Alongside tarnished reputations, discharged bankrupts had to cope with a lack of start-up capital, unless they had successfully hidden away sufficient assets to finance new undertakings. An antebellum Georgia newspaper commented on this basic consequence of business failure by posing the following conundrum for its readers in 1842. 'Why is a bankrupt's property like a riddle that no one can solve?' The answer was, 'because it is given up'.³⁰

In order to test the ability of former bankrupts to overcome these obstacles, I located R G Dun & Co. credit reports on over 130 individuals who appeared on the bankruptcy dockets in the federal district for Southern New York as a result of the operation of the 1841 Act, supplementing this inquiry with research into city directories, local histories, and census returns. And in order to check the representativeness of bankrupts' later endeavors in southern New York, I also tracked the post-failure careers of dozens of additional individuals who filed under the 1841 Bankruptcy Act in three Georgia cities and one Illinois town, as well as a cluster of Massachusetts businessmen who filed for state insolvency relief in the late 1840s, and a group of San Francisco businessmen who did the same in 1855.³¹ This research indicates that economic experience in the aftermath of failure frequently accorded with the premises of bankruptcy reform and the dynamics depicted in Hurstian legal history.

Despite the handicaps associated with prior bankruptcy, recipients of discharges under the 1841 Act regularly found ways to try their luck once again as business-owners. For many failed businessmen, economic assistance from relatives or friends overcame the problems of finding access to capital and credit. Others restarted businesses in sectors of the nineteenth-century American economy with low barriers to entry, or readily received credit because they possessed mechanical skills that were in short supply, or sold themselves so expertly that they found financial

³⁰ Balleisen, above n 6, 168-70, 173.

³¹ States could set up insolvency proceedings that discharged applicants from the legal force of their obligations, so long as those proceedings did not touch debts created before the adoption of a particular insolvency statute, and so long as they did not affect the claims of out-of-state creditors.

backers who overlooked their pasts.³² Furthermore, a substantial group – roughly one-fourth of those bankrupts in the sample whom I could identify as reestablishing independent business careers – continued to assume considerable risk in their business strategies. The collective activities of these latter bankrupts, which ranged from wholesale trade to stock and commodity speculation to manufacturing and real estate development, provide intriguing evidence of a link between bankruptcy law and the growth of an entrepreneurial ethos in nineteenth-century America.

Consider the post-failure business careers of bankrupts such as George North, Lewis Feuchtwanger, and Elisha Bloomer. In the early 1840s, North failed as a storekeeper in Kingston, a Hudson River market town roughly one hundred miles upstream from New York City. Once possessed of his bankruptcy discharge, he plunged into local real estate development for the following two decades, playing a pivotal role in the growth of commercial districts in Kingston and a neighboring village. After the Civil War, North moved to Virginia, where he bought a ravaged southern plantation and converted it into a hotel, hoping to build up a tourist trade. An inveterate inventor and promoter, Feuchtwanger toiled as a chemist and drug merchant in New York City, where expensive marketing campaigns landed him in financial difficulties during the late 1830s. After receiving a bankruptcy certificate in late 1842, he spent the next thirty years plowing whatever capital he could attract into further experimentation with medicinal compounds and aggressive efforts to market his various concoctions throughout the United States. Bloomer, a large-scale New York City hat manufacturer whose business crashed in 1836, before the following year's financial panic, found not only a legal release from the bankruptcy system, but also his future life's work. An early vulture capitalist, Bloomer spent his days between 1842 and 1845 attending bankruptcy auctions in southern New York, quietly accumulating a large financial portfolio from the remaining assets of his fellow bankrupts. Over the next several decades, he turned his attention to New York City sheriff's sales, continuing to look for investment opportunities created by economic misfortune.³³

The significance of bankruptcy law for these entrepreneurially inclined former bankrupts, and the many others like them, was not that it cleared a route to later financial success. Elisha Bloomer ended his life an extremely wealthy man, but George North careened twice more into insolvency, while Lewis Feuchtwanger continually struggled to meet his obligations, despite his eventual receipt of a large inheritance. Instead, these commercial biographies, along with many similar ones, suggest that bankruptcy discharges helped to consolidate a business culture predicated on what Joseph Schumpeter has described as 'creative destruction' – the

³² Balleisen, above n 6, 173-81.

³³ For the bankruptcy records of these three individuals, see Case-Files 1649, 749, 203, Entry 117, Bankruptcy Records, Act of 1841, United States District Court for the Southern Federal District of New York, National Archives and Record Administration, Northeast Region, New York City (hereafter 'Case-Files'); for credit reports describing their later careers, see R G Dun & Co Collection, Nineteenth-Century Credit Ledgers, New York vols 604:155, 224:58, 368:449, Baker Library, Harvard Business School, Boston, Mass. On North, see also Nathaniel B Sylvester, *History of Ulster County, New York* (1880) 281-8.

ceaseless chase after new markets, new technologies and production techniques, new goods and services, and new commercial practices and investment techniques. A substantial proportion of nineteenth-century American capitalists were determined, as one contemporaneous observer put it, 'to break the bondage of antiquated habit, and inaugurate a revolution in trade'.³⁴ Such determination, of course, generally required businesses to bear appreciable risk, and often resulted in account books filled with unpayable debts. In most antebellum industrial and commercial sectors, failure rates most likely ranged between 33% and 50%, and those rates were probably higher still for entrepreneurs who attempted to remold business practices or carve out entirely new market niches.³⁵ The ability of unsuccessful entrepreneurs to get clear of their financial obligations – the leading goal of the 1841 *Bankruptcy Act* even after one takes its regulatory purposes into account – swelled the ranks of American business owners who exhibited this dynamic, destabilizing approach to the marketplace.

Bankruptcy certificates, though, by no means led ineluctably to such grandiose economic ambitions. Indeed, failure at least as often prompted a searching reconsideration of the most effective means to achieve and sustain economic independence within a rapidly changing capitalist world. To many former antebellum bankrupts, insolvency served as a kind of mercantile school. The process of failing conveyed a compelling curriculum about the dangers of undercapitalization and speculation, the pressures faced by proprietors in especially competitive commercial sectors, and the vulnerabilities of credit-based businesses to financial panics and unanticipated credit squeezes. Impressed by the financial hazards that had derailed their prior ventures, some failed business-owners maintained a determination to regain the status associated with independent proprietorship, but reoriented their business strategies so as to reduce their exposure to economic fluctuations.

One common tactic, especially among retailers and wholesalers, was to restrict reliance on credit. The post-failure career of Frederic Conant, a New York City wholesale clothing merchant, nicely illustrates this tendency. Conant's failure in 1842 had resulted primarily from his willingness to extend generous credit terms to his customers, mostly storekeepers in New York State and the Old Northwest. When the sharp economic downturn of the early 1840s left those storekeepers sorely tested to make good on their obligations to Conant, he found himself unable to pay his own debts to suppliers. After returning to the clothing business in the 1840s, drawing on capital provided by a new partner's father, Conant maintained an exceedingly conservative business philosophy. The firm generally paid for goods with cash or on short credits, limited its overall obligations to twice the value of its

³⁴ Joseph Schumpeter (repr ed), *Capitalism, Socialism, and Democracy* (1986) 81-6; W Frothingham, 'Stewart, and the Dry Goods Trade of New York' (1862) 2 *Continental Monthly*: 529.

³⁵ Several scholars have ascertained business failure rates for particular nineteenth-century communities, relying on R G Dun credit reports. For a discussion of these works and the limitations of the Dun credit reports, see Balleisen, above n 6, 3, 234.

capital, and sold goods for cash wherever possible. These practices earned the concern strong evaluations from credit reporters, which approvingly observed that it did 'a sm[all] bus[iness] & this is what makes them so secure'.³⁶

Another standard strategy by risk-averse bankrupts was to carve out a market niche within the commercial services sector that essentially bypassed the credit system. After failing in 1834 as a Norwich, Connecticut, merchant, and then again in 1840 as a tallow chandler in Buffalo, Joseph Lester adopted this approach. Along with several partners, including another previously insolvent merchant, Lester developed a business that inspected and stored pot and pearl ash for New York City dealers in these commodities. This enterprise avoided substantial overhead costs and demanded cash payments from its customers, thus freeing it from the vulnerabilities that beset firms that were heavily dependent on credit transactions.³⁷ The business maneuvers of former insolvents like Frederic Conant and Joseph Lester constrained potential returns by refusing the larger volumes that come with more extensive use of credit, but they simultaneously curtailed the likelihood of renewed financial problems.

Still other former bankrupts rejected independent proprietorship altogether, turning instead to commercial agency or to salaried positions. Finding this kind of employment was a necessity for scores of antebellum bankrupts in the immediate aftermath of failure, when they had yet to receive court-ordered discharges or to negotiate private releases from their creditors. But substantial numbers of failed proprietors continued to labor in such posts long after their former creditors had lost the power to attack their property through the courts. Serving as a freight agent for a steamboat company or the clerk of an urban wholesaler relieved onetime bankrupts of ultimate financial responsibility for the enterprise in which they worked. So long as the family of a factory's salesman or a merchant's bookkeeper held their personal consumption in line with their income, they did not have to worry about the possibility of financial failure. At the same time, that family could frequently count on sufficient income to maintain a respectable middle-class lifestyle.³⁸

The movement of former bankrupts into the salaried middle-class was not exactly what the advocates of a federal bankruptcy process had in mind when they pressed Congress to enact the 1841 Act. For the failed business-owners who made that transition, federal bankruptcy law released them from the chains of debt, but not from the condition of working for someone else. Receipt of a bankruptcy certificate did not ineluctably lead nineteenth-century Americans into renewed entrepreneurial activity.

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³⁶ Case-File 502, above n 33; R G Dun & Co Nineteenth-Century Credit Ledgers, above n 33, New York vols 365:111, 369:561.

³⁷ Case-File 1354, above n 33; R G Dun & Co Nineteenth-Century Credit Ledgers, above n 33, New York vol 368:430.

³⁸ Balleisen, above n 6, 203-19.

Conflict, persistence, and irony – these are all key historical realities that emerge from antebellum America’s short-lived experiment with a federal bankruptcy system, and that command the attention of scholars who study the relationship between nineteenth-century law and the development of American capitalism. Originating and expiring amidst substantial political controversy, the 1841 *Bankruptcy Act* incorporated not a single, unitary purpose, but rather a set of clashing visions for American economic development. At one level the bankruptcy law represented the coordinated demands of thousands of politically active businessmen who had discovered the financial dangers lurking within the linkages of America’s ‘credit system’, and who insisted that Congress exercise its constitutional authority to relieve the crushing burdens created by their misfortunes. Those demands meshed well with the widespread predisposition in the nineteenth-century United States to encourage widely dispersed commercial ventures.

At another level, however, bankruptcy law reflected the aspirations of a considerably smaller but still influential group – the commercial moralists and their political allies who viewed the culture of preference as an illegitimate form of privilege and who dreamed of taming the credit system by giving creditors access to the regulatory power of the federal courts. The tension between these two visions injected a degree of contingency into the bankruptcy process, which debtors, creditors, and especially the nation’s legal fraternity recognized and sought to exploit. Debtors and creditors’ responses to the 1841 Act also reflected a conflict between two legal cultures – one that emanated from the personal networks which powerfully animated local economic exchange in both hinterland and metropolis, and that placed especially high value on the obligations that ‘insiders’ owed to one another; and another that was emerging out of the forces of national economic integration, that emphasized the value of orderly economic growth, and that sought to erase the distinction between economic insiders and outsiders.³⁹

The theme of conflicting legal cultures has increasingly preoccupied American legal history, and much to the field’s benefit. For the most part, however, the scholars embracing this approach have steered clear of contending legal cultures within the world of the marketplace. Instead they have tackled the collision of legal systems and mentalités in colonial America, or the divergent ways that elites and the working classes conceptualized and sought to use legal institutions, especially with regard to criminal law, or the clash between the legal presumptions of non-commercially oriented farmers and those of entrepreneurs who were thoroughly integrated into systems of market exchange and long-distance trade.⁴⁰ The legal

³⁹ By ‘legal culture’, I mean a shared set of expectations that discrete groups of individuals held about: (a) the sources, nature, and limits of legal rights and obligations; (b) the appropriate functions and processes of legal institutions; and (c) the range of acceptable contexts for seeking out legal solutions to individual controversies. For a useful introduction to the various ways that historians and legal scholars have defined ‘legal culture’, see: David Nelken (ed), *Comparing Legal Cultures* (1997).

⁴⁰ For illustrations of this approach, see: William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (1983) 54-81; Christopher Tomlins and Bruce Mann (eds), *The Many Legalities of Early America* (2001); Robert Steinberg, *The*

tensions exposed by antebellum business failure suggest the value of extending this perspective to analysis of law's place within the centers of capitalist development. As historians attempt to identify the key structural functions and economic ramifications of nineteenth-century American law, they need to remain attuned not only to the various traditions evident in legislative action and legal decision-making, and not only to the adversarial processes in which individuals and groups strove to appropriate those traditions for their own ends, but also to the different legal cultures that often informed individual legal strategies.⁴¹

One potential advantage of considering the role of plural legal cultures in nineteenth-century commercial contexts is that historians of the nineteenth-century United States would gain a better read on the persistence that legal ideals and values frequently demonstrated amid economic flux and efforts at legal reform. Fidelity to vested property rights cast a continuing shadow over nineteenth-century American law, even as other goals increasingly shaped public policy and judicial action. The depth of the attachment to such rights, largely a product of 'localist' legal culture, at once limited the impact of bankruptcy law on secured creditors, fueled the Democratic drive to repeal the law, and constrained the ability of Democrats to cut off pending bankruptcy cases. In the antebellum United States, it turned out, bankrupts had vested rights that the government was bound to respect. Commitment to the 'culture of preference,' even in the face of a bankruptcy reform designed to root it out, represents a similar example of long-held expectations and values resisting the premises of fundamental legal change.

Finally, the long-term consequences of the 1841 *Bankruptcy Act* for the bankrupts who benefitted from its provisions underscores the central importance of reconstructing the social and economic repercussions of far-reaching legal shifts. Only by following the lives of American bankrupts after they emerged from federal courthouses with bankruptcy certificates in their coat pockets does one learn that the freedom from past debts did not necessarily translate into the freedom to pursue new entrepreneurial pursuits. Rather than unflinchingly seeking out commercial ventures, discharged bankrupts sometimes sought out security rather than economic risk, which they located in salaried employment and agency. In some cases, the

Transformation of Criminal Justice: Philadelphia, 1800-1880 (1989); Richard J Ross, 'The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History' (1993) 3rd Series, 50 *William and Mary Quarterly* 28; Hendrik Hartog, 'Pigs and Positivism' (1985) *Wisconsin Law Review* 899-935; and Harry L Watson, "'The Common Rights of Mankind?': Subsistence, Shad, and Commerce in the Early Republican South' (1996) 83 *Journal of American History* 13.

⁴¹ Historians of the British legal system have been more willing to pursue this line of analysis, especially in their consideration of commercial dispute mechanisms outside the formal legal system. See in particular H W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (1985). Two works that suggest the possibility of analogous approaches in nineteenth-century America are Charles McCurdy, 'American Law and the Marketing Strategies of the Large Corporation, 1875-1890' (1978) 38 *Journal of Economic History* 631; and Freyer, above n 24.

impact of bankruptcy proceedings was essentially the opposite of what bankruptcy reformers anticipated.

This result, largely unanticipated by contemporaries, was closely connected to the law's capacity for creating enduring social identities – in this case, through designation of the legal category, 'bankrupt'. The federal courts publicly tagged this label on insolvent debtors through newspaper notices, and such identifications lived on not only in the memories of former creditors and business associates, but also in the published lists of bankrupts and the handwritten assessments of credit reporters. In legal terms, the application of such terminology to an individual generally signaled freedom from past debts. But in social and economic terms, the category 'bankrupt' often carried very different connotations, often confining access to credit and business opportunities.

As with the study of conflicting legal cultures, explorations of law's role in structuring pivotal social categories has increasingly characterized innovative historical work on the nineteenth-century American legal system. Once again, much of this scholarship addresses social relations that did not grow directly out of the business environment, such as the construction of the family, or gender roles, or racial hierarchies; and to the extent that this scholarship has examined commercial contexts, it has primarily investigated social relations between managers and workers, whether free or slave. The case of antebellum bankruptcy policy indicates that historians of law and economy might profitably pay closer attention to the constitutive elements of nineteenth-century law, considering the legal construction of such crucial capitalist categories as 'creditor' and 'debtor', 'partner' and 'corporation', and 'principal' and 'agent'.⁴²

None of these observations obviate the conclusion that the 1841 *Bankruptcy Act*, on balance, underscores the dominance of entrepreneurial values in the making of nineteenth-century American commercial law, and the tendency of that era's legal system to reinforce those values. For all the regulatory dimensions of that piece of legislation, it owed its passage primarily to the intense lobbying of tens of thousands of failed businessmen who desired freedom from their debts. More than any other consideration, judicial application of the bankruptcy law was guided by the imperative of meeting this demand for legal absolution. And in spite of all the long-term constraints created by personal legacies of business failure, the widespread granting of bankruptcy certificates did strengthen an entrepreneurial ethos in the nineteenth-century American marketplace. To ignore these facts would be to distort grossly the history of bankruptcy law in the antebellum United States.

⁴² Influential works of legal history in this vein include Robert W Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57; Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985); Richard Wightman Fox, 'Intimacy on Trial: Cultural Meanings of the Beecher-Tilton Affair' in Richard Wightman Fox and T Jackson Lears (eds), *The Power of Culture: Critical Essays in American History* (1993) 103; Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (1993); and Ariela Gross, *Double Character: Slavery in the Antebellum Southern Courtroom* (2000).

But to observe them and them alone would bring distortions as well, exaggerating the level of consensus within nineteenth-century law, ignoring the extent to which legal outcomes diverged from initial political and legal intentions, and overlooking the legal system's role in shaping prevailing assumptions about the norms of behavior in the marketplace.