GAMBLING AND BANKRUPTCY IN NINETEENTH CENTURY AMERICA

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TABLE OF CONTENTS

I. INTRODUCTION

Article I, section 8, clause 4 of the U.S. Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[1] Exercising this power, Congress enacted

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[1] U.S. CONST. art. I, § 8, cl. 4. The word "bankruptcy" likely is the product of

> a mixing of the ancient Latin words *bancus* (bench or table) and *ruptus* (broken). When a banker, who originally conducted his public marketplace transactions on a bench, was unable to continue lending and meet obligations, his bench was broken in a symbolic show of failure and inability to negotiate. As a result of the frequency of this practice in Medieval Italy, the current term bankrupt is commonly believed to spring specifically from the translation of *banco rotto*, Italian for broken bank. Others speculate that the word's origin actually stems from the French expression *banque route*, [meaning] table trace. This phrase relates to the metaphorical practice of only a sign left at the site of a banker's

three early, but short-lived, bankruptcy statutes (in 1800, 1841, and 1867) before finally passing the Bankruptcy Act of 1898, also known as the "Nelson Act."[2] Forty years later, the Nelson Act was supplanted by the Bankruptcy Revision of 1938, also known as the "Chandler Act."[3] After another forty years, both Acts were replaced by the Bankruptcy Reform Act of 1978 ("BRA").[4]

Although a fair amount has been written about the treatment of gambling debts under modern U.S. bankruptcy law,[5] very little has been

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> table[,] once there and now gone. This practice involved those who fled quickly, escaping with money that had been entrusted to them.

A Brief History of Bankruptcy, BANKRUPTCYDATA, *at* https://www.bankruptcydata.com/a-history-of-bankruptcy (last visited Feb. 22, 2023).

[2] *See* Pub L. No. 55-541, 30 Stat. 544 (July 1, 1898) (repealed 1978). The Nelson Act is named for U.S. Senator Knute Nelson (R-MN). For a biography of Nelson (1843-1923), see MILLARD L. GIESKE & STEVEN J. KEILLOR, NORWEGIAN YANKEE: KNUTE NELSON AND THE FAILURE OF AMERICAN POLITICS, 1860-1923 (1995).

[3] *See* Pub. L. No. 75-696, 52 Stat. 840 (June 22, 1938) (repealed 1978). The Chandler Act is named for U.S. Representative Walter Chandler (D-TN). For a biography of Chandler, see *Chandler, Walter (Clift), 1887-1967*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *at* https://bioguide.congress.gov/search/bio/C000296 (last visited Feb. 22, 2023).

[4] *See* Pub. L. No. 95-598, 92 Stat. 2549 (Nov. 6, 1978). The BRA has been amended frequently, with the most significant changes taking place in 1984, 1986, 1994, and 2005. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L. No. 98-353, 98 Stat. 333 (July 10, 1984); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (Apr. 20, 2005). More minor changes occurred in 2006 and 2010. *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, § 5(a)(1), 120 Stat. 2695 (Dec. 12, 2006); Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3557 (Dec. 22, 2010).

On August 23, 2019, President Donald J. Trump signed into law four separate BRA amendments: 1) Family Farmer Relief Act of 2019, Pub. L. No. 116-51, 133 Stat. 1075; 3) Honoring American Veterans in Extreme Need ("HAVEN") Act of 2019, Pub. L. No. 116-52, 133 Stat. 1076; 3) National Guard and Reservists Debt Relief Extension Act of 2019, Pub. L. No. 116-53, 133 Stat. 1078; and 4) Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079.

Lastly, in 2020 and 2021, the BRA was amended to exclude from the definition of "currently monthly income" federal emergency COVID payments. *See* Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, div. A, title I, § 1113(b)(2)(A)(i), (B), 134 Stat. 311 (Mar. 27, 2020), *as amended by* COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5, 135 Stat. 249 (Mar. 27, 2021).

For a further account of the development of U.S. bankruptcy law, see, *e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2004); PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900 (1974); Charles Warren, BANKRUPTCY IN UNITED STATES HISTORY (1935); F. Regis Noel, A HISTORY OF THE BANKRUPTCY LAW (1919).

[5] *See*, *e.g.*, LAWRENCE H. SUMMERS, A STUDY OF THE INTERACTION OF GAMBLING AND BANKRUPTCY (1999); John Duns, *Other People's Money: Gambling and Bankruptcy*, 31 MELBOURNE U. L. REV. 87 (2007); Richard I. Aaron, *Collection of Gambling Debts and the Bankruptcy Reform Act of 2005*, 9 GAMING L. REV. 299 (2005); John Norwood, *The Judicial Treatment of Gambling Related Transactions in Current Bankruptcy Proceedings*, 106 COM. L.J. 25 (2001); Derek A. Wu, *Dischargeability of Credit Card Debt Incurred for Gambling*, 4 GAMING L. REV. 13 (2000); Nancy H.

written about them under the country's first three bankruptcy statutes.[6] Accordingly, this article seeks to fill the gap.[7]

Kratzke & Thomas O. Depperschmidt, *Credit Card Advances: The Impact on Gambling Bankruptcies*, 2 GAMING L. REV. 257 (1998); Spencer H. Newman, Comment, *Unreasonably Risky: Why A Negligence Standard Should Replace the Bankruptcy Code's Fraudulent Intent Analysis for Gambling Debts*, 8 UNLV GAMING L.J. 197 (2018); J. Chadwick Mask, Comment, *Gambling Debts: Should Policy Considerations Affect Their Treatment Under the Bankruptcy Code*[*?*], 67 MISS. L.J. 323 (1997); J. David Krekeler, *Gambling and Bankruptcy: Safe Bet or Fool's Wager*, U.S. BANKRUPTCY COURT—EASTERN DISTRICT OF WISCONSIN, Oct. 6, 2015, *at* https://www.wieb.uscourts.gov/sites/default/files/chambers/svk/LouJones/10-06-2015-Outline-Krekeler.pdf. *See also* Thomas B. Swanton & Sally M. Gainsbury, *Gambling-Related Consumer Credit Use and Debt Problems: A Brief Review*, 31 CURRENT OP. BEHAV. SCIS. 21 (2020).

For a discussion of the related subject of casino bankruptcies, see, e.g., Sean McGuinness & Adam M. Langley, *Corporate Reorganizations, Bankruptcy, and Restructuring*, *in* THE LAW OF REGULATED GAMBLING: A PRACTICAL GUIDE FOR BUSINESS LAWYERS 99-110 (Keith C. Miller ed., 2020); Robert W. Stocker II & Peter J. Kulick, *Gambling with Bankruptcy: Navigating a Casino Through Chapter 11 Bankruptcy Proceedings*, 57 DRAKE L. REV. 361 (2009); Gregg W. Zive, *The House Doesn't Always Win*, 8 GAMING L. REV. 278 (2004); John M. Czarnetzky, *When the Dealer Goes Bust: Issues in Casino Bankruptcies*, 18 MISS. C. L. REV. 459 (1998).

[6] The one exception is David S. Kennedy & James E. Bailey, III, *Gambling and the Bankruptcy Discharge: An Historical Exegesis and Case Survey*, 11 BANKR. DEV. J. 49 (1995). While these commentators do a very good job of describing the first three statutes, they ignore the case law generated by them (despite the title of their article). *See infra* Parts VI and VII of the present article for a detailed discussion of these decisions.

[7] In this article, I am using the words "gaming," "gambling," and "wagering" to refer to those activities that now commonly are understood as constituting betting (*e.g.*, playing dice or cards for money). In the 19th century, however, these words included speculating in commodity futures and trading stocks on margin. *See* I. Nelson Rose, *How Securities Trading Became Legally Not Gambling*, 15 GAMING L. REV. 249 (2011) (explaining that the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a)(3), finally made it clear that investment contracts are not gambling). As such, I have omitted from Parts VI and VII of this article cases like Miller v. Tarbox, 43 N.W. 840 (Minn. 1889), in which the court, in relieving a grain trader of his financial obligations, held that Minnesota law did not penalize debtors for losing their assets through "gambling": It stands admitted by the testimony of the insolvent witness that he continued to invest the daily cash receipts of his business in options long after he realized himself to be an insolvent, and that he lost, at least, $1,000 in this way… . And the appellants claim, upon this admission, and their contention [is] that option dealing is gambling, pure and simple, that the insolvent should be held, as a matter of law, to have fraudulently disposed of his property with the intent mentioned in the statute. Conceding, for the purposes of this discussion, that dealing in options is gambling in its most vicious and unadulterated form, we quite agree with the court below … that it appeared from the testimony that this conduct of the insolvent was not induced by any intent or attempt to defraud his creditors, but, on the contrary, with an illusory hope that he might be successful, thereby improving his financial condition and standing… .Our statute does not prohibit, in terms, (as did the United States bankruptcy act of 1867,) the discharge of an insolvent, if it appear[s] that he has lost any part of his property in gaming subsequent to the passage of the law.

Id. at 840. For other cases of this sort, see, e.g., *In re* Hunt, 26 F. 739 (D.N.J. 1886) (stocks); Clarke v. Foss, 5 F. Cas. 955 (W.D. Wis. 1878) (No. 2,852) (grain); *In*

II. BANKRUPTCY LAW IN THE UNITED STATES PRIOR TO 1800

At the time of the American Revolution, bankruptcy proceedings in the colonies were governed by the 1732 Statute of George II.[8] As this law applied only to "traders" and authorized only involuntary bankruptcies,[9]

> *re* Green, 10 F. Cas. 1084 (W.D. Wis. 1877) (No. 5,751) (wheat); *Ex parte* Young, 30 F. Cas. 828 (N.D. Ill. 1874) (No. 18,145) (grain); *In re* Chandler, 5 F. Cas. 443 (N.D. Ill. 1874) (No. 2,590) (grain); Wheeless & Pratt v. Fisk, 28 La. Ann. 731, 1876 WL 8982 (1876) (gold). *See also In re* Beatty, 3 F. Cas. 8 (S.D.N.Y. 1869) (No. 1,196), a case involving ships. In describing the facts in *Beatty*, the court wrote: I[t] would seem, on general principles, to be hardly credible, that a swindle of the character of that perpetrated by [Thomas H.] Armstrong, so transparent in some of its features, could have been carried on through a period of several months, without being detected by persons of ordinary intelligence. But his [uncle] relationship to the bankrupts, and their terms of intimacy with him, and the fact that they must have thought, if they believed what Armstrong told them, (and everything shows that they did,) that they were making, and not losing, money all the time, account, in a great measure, for what would otherwise seem incredible. It is, indeed, hard to believe that they could have supposed that they had $640,000 worth of ships, with which they were playing as with dice, while, at the same time, they gave no attention to the condition or whereabouts of any of the ships. But this is, perhaps, explainable on the ground, that the ships were, all through, to them a mere matter of purchase and sale, and not at all a matter of employment in traffic. None of them were understood to be held over a few days. Instead of being ships, they might as well have been fancy stocks, or merchandise of any kind. The whole thing, even as the bankrupts viewed it, was a mere gambling transaction, outside of their legitimate business [as tea merchants], which they left to be managed by Armstrong.

Id. at 9 (paragraphing inserted for improved readability). The opinion in *Beatty* was authored by District Judge Samuel M. Blatchford. As will be seen, Judge Blatchford—who was elevated to the Second Circuit in 1878 and to the U.S. Supreme Court in 1882—also decided several of the cases discussed in Part VI of this article. *See infra* notes 68, 76-83, and 87-88 and accompanying text. In the first three editions of his long-running treatise on bankruptcy (1st ed. 1868, 11th ed. 1898), Baltimore attorney Orlando F. Bump included Judge Blatchford's bankruptcy rules as an appendix and noted in the book's preface:

> Judge Blatchford's Rules have been inserted because they are models in themselves, and show the views of one of the ablest expounders of the [Bankruptcy] Act. It is believed, moreover, that, in the main, they are like the rules adopted by other Judges, and hence fairly exhibit the general practice.

ORLANDO F. BUMP, PRACTICE IN BANKRUPTCY: THE BANKRUPT LAW OF THE UNITED STATES 8 (1st ed. 1868). For a biography of Blatchford (1820-93), see *Samuel M. Blatchford*, PRABOOK, *at* https://prabook.com/web/samuel.blatchford/1717853 (last visited Feb. 22, 2023).

[8] *See* An Act to Prevent the Committing of Frauds by Bankrupts, 5 Geo. 2, ch. 30 (1732).

[9] Limiting bankruptcies to traders and giving only creditors the right to initiate proceedings had been features of English law since 1542. *See* An Act Against Such Persons as Do Make Bankrupts, 34 & 35 Hen. 8, ch. 4 (1542-43). This statute notably labeled bankrupts "offenders," thereby equating them to criminals (meaning that creditors, *not* debtors, were the ones in need of protection). For the development of English bankruptcy law, whose roots lie in the Statute of Merchants ("Statuta de Mercatoribus"), 13 Edw. 1 (1285), *see, e.g.*, Emily Kadens, *The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law*, 59 DUKE L.J. 1229 (2010); Ian P.H. Duffy, *English Bankrupts, 1571-1861*, 24 AM. J. LEGAL HIST. 283 (1980); Louis E. Levinthal, *The Early History of English Bankruptcy*,

many colonies had their own debtor-creditor laws.[10] While some of these laws addressed "bankruptcy,"[11] most focused on "insolvency."[12]

The Articles of Confederation (1781-89) made no mention of bankruptcy,[13] thereby leaving the subject to the states.[14] The widespread abuse of state laws—through the practice of state legislators granting "private relief" bills to politically-connected debtors—led to the inclusion of the Bankruptcy Clause in the U.S. Constitution,[15] although its addition appears to have been something of an afterthought.[16] In *The Federalist Papers*, James Madison devoted just one sentence to the Bankruptcy Clause:

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67 U. PA. L. REV. 1 (1919). *See also* ALEXANDER WAKELAM, CREDIT AND DEBT IN EIGHTEENTH-CENTURY ENGLAND: AN ECONOMIC HISTORY OF DEBTORS' PRISONS (2020); V. MARKAM LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH CENTURY ENGLAND (1995).

[10] For a look at these laws, see COLEMAN, *supra* note 4, at 6-15.

[11] In 1721, for example, South Carolina enacted a bankruptcy law discharging debtors who owed more than £2 so long as their annual income was less than £5. *Id.* at 181. In 1756, Rhode Island passed a similar law. *See id.* at 92. Two pounds in 1721 is the equivalent today of £329.10, or $419.20, while £5 in 1721 is the equivalent today of £822.70, or $1,048. *See Purchasing Power of British Pounds from 1270 to Present*, MEASURING WORTH, *at* https://www.measuringworth.com/calculators/ppoweruk/ (last visited Feb. 22, 2023) [hereinafter *Purchasing Power*] (converting historical pounds to contemporary pounds); *Convert Pounds to Dollars, GBP to USD Foreign Exchange*, FOREIGN EXCHANGE, *at* https://www.foreignexchange.org.uk/fx-rates/conversion/1/GBP/USD (last visited Feb. 22, 2023) [hereinafter *Convert Pounds*] (converting contemporary pounds to contemporary dollars).

[12] Historically, bankruptcy laws discharged a debtor's financial obligations while insolvency laws freed debtors from prison but did not extinguish their debts. *See* John Honsberger, *The Nature of Bankruptcy and Insolvency in a Constitutional Perspective*, 10 OSGOODE HALL L.J. 199, 199-200 (1972).

[13] The drafting of the Articles of Confederation is examined at length in MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781 (1940, eighth printing, 1976). As Jensen explains, the three most pressing issues were felt to be "representation, the basis of taxation, and the control of the West. Over the most vital problem of all—the distribution of power between the states on the one hand and Congress on the other, the problem of 'sovereignty'—there was only a short discussion[.]" *Id.* at 139. *See also* COLEMAN, *supra* note 4, at 17 ("Although some members of the commercial community wanted a uniform bankruptcy law, it could not be obtained under the Articles of Confederation. Passage would have required the unanimous consent of the states. That was an impossibility on so controversial a question.").

[14] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 6, 12-13 (1995).

[15] In a further effort to clamp down on private relief bills, the Founders prohibited states from passing "Law[s] impairing the Obligation of Contracts." *See* U.S. CONST. art. I, § 10, cl. 1 (Contract Clause). As has been explained elsewhere, "Courts have generally interpreted [the Bankruptcy and Contract] clauses … as [giving] wide latitude to the federal government to alter the obligations of debt contracts while restricting state governments." Bradley Hansen, *Bankruptcy Law in the United States*, EH.NET ENCYCLOPEDIA (Robert Whaples ed.), Aug. 14, 2001, *at* https://eh.net/encyclopedia/bankruptcy-law-in-the-united-states/. *See also infra* note 20.

[16] *See* Jonathon C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 625 (2008) ("Little is known about [the Bankruptcy Clause's] legislative history. It was apparently added late in the proceedings of the Constitutional Convention, 'after very

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question.[17]

Professor Jonathan C. Lipson (Temple University) has suggested that the Bankruptcy Clause was inserted merely as a warning to states to avoid being too liberal in their treatment of either creditors or debtors:

> Giving Congress the power to sweep aside state bankruptcy (and perhaps insolvency) laws was not the same thing as requiring Congress to use that power. Thus, absent federal bankruptcy legislation, the states could, and did continue to, enact bankruptcy and insolvency laws… . If the Framers believed this would happen in the absence of federal bankruptcy law, perhaps the purpose of the Bankruptcy Clause was to act as a threat to those states that might wish to give extraordinary relief to debtors (or creditors). Perhaps this was an attempt to preempt a state law race to the bottom. A state can never be extreme in protecting debtors or creditors, the Clause might really be saying, for if it is, Congress always has the power to preempt the rogue state by imposing a uniform law.[18]

Regardless of whether Lipson is correct, one thing is clear: during the first 11 years of the Republic, bankruptcy remained entirely a state subject,[19] even though states could not give debtors complete relief because of the Constitution's Contract Clause.[20]

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little debate.' Charles Pinckney of South Carolina was said to be its drafter. Only Connecticut voted against it.") (footnotes omitted). For a further discussion, see, e.g., Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319 (2013); Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215 (1957).

[17] THE FEDERALIST No. 42, at 308 (James Madison) (Benjamin Fletcher Wright ed., 1961). Madison's cursory comment later led Justice Joseph Story to exclaim: "The brevity … with which this subject [bankruptcy] is treated by the Federalist, is quite remarkable." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1100, at 4 (1833).

[18] Lipson, *supra* note 16, at 631 (footnote omitted).

[19] *See* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 169-82 (2009).

[20] *See supra* note 15. Three days before the Constitutional Convention adjourned, a proposal was made to similarly restrict Congress. This change would have left the Bankruptcy Clause in tatters:

> [O]n September 14, 1787, … a motion by Nathaniel Gorham [of Massachusetts sought] to place upon Congress the same prohibition as to impairing the obligation of contracts as had been laid upon the States. Had this motion been adopted, no bankruptcy law could have discharged prior debts.

III. THE FIRST FEDERAL BANKRUPTCY ACT (1800)

The Panic of 1797[21] finally caused Congress to pass the country's first federal bankruptcy law in 1800.[22] As has been explained elsewhere, previous efforts had stalled due to Southern opposition:

> There had been earlier calls for a federal bankruptcy law, but in the throes of the Panic of 1797, advocates renewed their pleas with a much greater sense of urgency. Since the inclusion of the Bankruptcy Clause in the United States Constitution in 1789, members of Congress had drafted bankruptcy bills every year, only to ignore them or let them die in committees. As the new American economy fluctuated, however, Congressional reluctance to pass a bankruptcy law left the question foremost in the minds of many Americans—particularly as the economy contracted and the number of business and individual failures increased. It had become increasingly clear that chancery courts and state insolvency laws were inadequate to deal with interstate commerce, and, in fact, only three states allowed for the forgiveness of debts in bankruptcy—Rhode Island, Maryland, and Connecticut. Pennsylvania allowed

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WARREN, *supra* note 4, at 5-6. For a further discussion, see *infra* note 52.

[21] The Panic of 1797 was precipitated by the Bank of England's decision to suspend specie payments (*i.e.*, its policy of redeeming paper money for gold or silver coins). This action—taken to prevent a run on the bank by nervous account holders—upended the North Atlantic credit market and led to rapid deflation in the United States. *See* Nicholas A. Curott & Tyler A. Watts, *A Monetary Explanation for the Recession of 1797*, 44 E. ECON. J. 381 (2018). *See also* Richard S. Chew, *Certain Victims of an International Contagion: The Panic of 1797 and the Hard Times of the Late 1790s in Baltimore*, 25 J. EARLY REPUBLIC 565 (2005).

[22] *See* Bankruptcy Act of 1800 ("An Act to Establish an [sic] Uniform System of Bankruptcy Throughout the United States"), ch. 19, 2 Stat. 19 (Apr. 4, 1800) [hereinafter 1800 Bankruptcy Act]. The law took effect on Monday, June 2, 1800. *See supra* § 1. During its existence, the law was amended twice. *See* Act of Feb. 13, 1801 ("An Act to Provide for the More Convenient Organization of the Courts of the United States"), ch. 4, 2 Stat. 92, § 12 (granting circuit judges the same bankruptcy powers as district judges); Act of Apr. 29, 1802 ("An Act to Amend the Judicial System of the United States"), ch. 31, 2 Stat. 164, §§ 11 (continuing existing bankruptcy cases) and 14 (transferring the power to appoint bankruptcy commissioners from district judges to the president).

Many historians believe that Congress acted to help Robert Morris, Jr. (1734-1806). *See*, *e.g.*, THOMAS L. PURVIS, A DICTIONARY OF AMERICAN HISTORY 29 (1995). Once the richest man in America, Morris, a signer of the Declaration of Independence and a former U.S. senator, had lost everything in the Panic of 1797. As a result, in 1798 he was placed in Philadelphia's Prune Street debtors' prison, where he remained until 1801. Utilizing the 1800 bankruptcy law, Morris was released after his creditors agreed to his discharge. At the time, Morris's debts totaled $2,948,711.11, or $49,589,235.67 in 2022 money. *See* S. Morgan Friedman, *The Inflation Calculator*, *at* https://westegg.com/inflation/ (last visited Feb. 22, 2023) (converting historical dollars to contemporary dollars). For a further discussion of Morris's bankruptcy, see CHARLES RAPPLEYE, ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION 507-15 (2010).

> its insolvency law to lapse in 1798 with the expectation that Congress would pass a federal law.
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> The debate over a federal bankruptcy law, though, was highly contentious and would become "one of the great legislative battlegrounds of the nineteenth century." The debate itself was centered on an ideological divide between the Federalists and the Republicans. Federalists believed that commerce was essential to the future of the country and that a bankruptcy law was necessary "both to protect non-fraudulent debtors and creditors and to encourage the speculative extension of credit that fueled commercial growth." Republicans, on the other hand, believed that the future of the economy was agrarian. It was Thomas Jefferson who asked, "Is commerce so much the basis of the existence of the U.S. as to call for a bankrupt law? On the contrary, are we not almost entirely agricultural?" Republicans were reluctant to enact a federal bankruptcy law because they viewed it as a Federalist power grab, fearing such a law would put farms and homes in the South at risk from attachment by greedy, overzealous creditors from the North.[23]

The 1800 bankruptcy law (like England's 1732 bankruptcy law) applied only to traders[24] and authorized only involuntary bankruptcies.[25] It also was agreed that the law would sunset after five years.[26]

The law provided for bankruptcy proceedings to be superintended by the district courts, with the day-to-day work handled by "commissioners" with input from one or more "assignees."[27] Even with the creation of the

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[23] Thomas M. LeCarner, *Of Dollars and Sense: Economies of Forgiveness in Antebellum American Law, Literature, and Culture* 46-47 (footnotes omitted) (unpublished Ph.D. dissertation, University of Colorado, 2014), *available at* https://scholar.colorado.edu/concern/graduate_thesis_or_dissertations/t435gd03t.

[24] *See* 1800 Bankruptcy Act, *supra* note 22, § 1 (defining traders as "any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying and selling in gross, or by retail, or dealing in exchange, or [acting] as a banker, broker, factor, underwriter, or marine insurer[.]").

[25] *Id.* § 2 (authorizing a debtor to be forced into bankruptcy by one creditor owed $1,000; two creditors jointly owed $1,500; or three or more creditors jointly owed $2,000). These amounts respectively are the equivalent today of $16,480.91; $24,721.37; and $32,961.83. *See* Friedman, *supra* note 22.

[26] *See* 1800 Bankruptcy Act, *supra* note 22, § 64.

[27] *Id.* §§ 2-8. *See also* Tabb, *supra* note 14 at 14. As explained *supra* note 22, at first commissioners were appointed by the district courts but later this power was transferred to the president. Assignees (who had to be creditors of the bankrupt) were chosen either by the commissioner or by a vote of the

federal bankruptcy courts in 1978, this basic structure has continued to the present day (although the nomenclature has changed over time).[28]

By the time of the 1800 Bankruptcy Act, many Americans had turned against gambling.[29] Partially as a result, profligate bettors were treated harshly by the 1800 bankruptcy law.[30] Section 37 denied bankruptcy relief to any debtor who "has lost, at any one time fifty dollars, or in the whole three hundred dollars, … within twelve months before he became a bankrupt, by any manner of gaming or wagering whatever."[31] These amounts, in present day dollars, respectively equal $824.05 and $4,944.27.[32]

From the beginning, the 1800 bankruptcy law drew complaints from creditors, who found it "expensive to administer," objected to having to

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other creditors. While commissioners made recommendations to the district courts, assignees (on behalf of all the creditors) made recommendations to the commissioners.

[28] *See generally* 1 COLLIER ON BANKRUPTCY ch. 2 ("Bankruptcy Courts") (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2022); 1 WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE ch. 1 ("History of Bankruptcy Laws") (3d ed. 2022).

[29] Gambling had been quite popular in both colonial times and the early days of the Republic. *See, e.g.,* Beverly A. Randles, *The Persistence of Gambling in Early American History*, 1 GAMING L. REV. 531 (1997). The change in the public's attitude can be traced to the "moral societies" that grew out of the country's Second Great Awakening (1790-1840). As has been noted elsewhere, "the aim of [the moral societies was] to educate public opinion toward requiring a more strict decorum[,] enforcing the laws for sabbath observance[,] and suppressing profanity, gambling, and drinking." Richard D. Birdsall, *The Second Great Awakening and the New England Social Order*, 39 CHURCH HIST. 345, 360 (1970). *See also* Neil Meyer, *Falling for the Lord: Shame, Revivalism, and the Origins of the Second Great Awakening*, 9 EARLY AM. STUD. 142 (2011).

[30] A second contributing factor, of course, was England's longstanding practice of denying relief to gamblers. Its 1732 bankruptcy statute, discussed *supra* note 8 and accompanying text, which served as the basis for the 1800 Bankruptcy Act, provided:

> [N]othing in this act shall be construed to extend, or give or grant any privilege, benefit or advantage, to any bankrupt … who hath or shall have lost in any one day the sum or value of five pounds, or in the whole the sum or value of one hundred pounds within the space of twelve months next preceding his, her or their becoming bankrupt, in playing at or with cards, dice, tables, tennis, bowls, billiards, shovelboard, or in or by cock-fighting, horse-races, dog matches or foot-races, or other pastimes, game or games whatsoever, or in or by bearing a share of part in the stakes, wagers or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run aforesaid[.]

5 Geo. 2, ch. 30, § 12. Five pounds in 1732 is the equivalent today of £913, or $1,163, while £100 pounds in 1732 is the equivalent today of £18,260, or $23,260.50. *See Purchasing Power*, *supra* note 11, and *Convert Pounds*, *supra* note 11.

[31] 1800 Bankruptcy Act, *supra* note 22, § 37. The second prong of Section 37 was used by Congress when, exercising its home rule power, it promulgated an insolvency law for the District of Columbia. *See* Act of Mar. 3, 1803 ("An Act for the Relief of Insolvent Debtors within the District of Columbia"), ch. 31, 2 Stat. 237, § 7 (denying discharge to any debtor who "had at any one time within twelve months next preceding said application, lost by gaming more than three hundred dollars"). For a further look at this statute, see *In re* Connelly's Case, 6 F. Cas. 304 (C.C.D.C. 1823) (No. 3,111).

[32] *See* Friedman, *supra* note 22. When compared to the amounts specified in England's 1732 bankruptcy statute ($1,163 and $23,260.50), see *supra* note 30, it is obvious that Congress was much less forgiving than Parliament when it came to gamblers seeking bankruptcy relief.

"travel to [distant] federal courts," and insisted "that the law provided opportunities for fraud."[33] Debtors also complained,[34] in large part because the law required two-thirds of their creditors to agree to any discharge of their debts.[35] As a result, the law was repealed in 1803, nearly 18 months before its expiration date.[36]

IV. THE SECOND FEDERAL BANKRUPTCY ACT (1841)

Following the repeal of the 1800 Bankruptcy Act, creditors and debtors once again were relegated to state law. In 1819, the U.S. Supreme Court decided that due to the lack of federal legislation, states were free to enact their own bankruptcy laws (subject, of course, to the limitations imposed by the Constitution's Contract Clause).[37] In 1827, however, the Court held that such laws could not bind out-of-state creditors.[38]

The Panic of 1837[39] led to the adoption of the country's second federal bankruptcy law in 1841.[40] Unlike its predecessor, the 1841 law did not limit its provisions to traders;[41] permitted voluntary bankruptcies;[42] and reduced

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[33] Hansen, *supra* note 15.

[34] *See* WARREN, *supra* note 4, at 19-20.

[35] *See* 1800 Bankruptcy Act, *supra* note 22, § 36 ("[N]o person becoming a bankrupt according to the intent and provisions of this act, shall be entitled to a certificate of discharge … unless two thirds, in number and in value, of the creditors of the bankrupt, who shall be creditors for not less than fifty dollars respectively, and who shall have duly proved their debts … shall sign such certificate to the judge, and testify their consent to the allowance of a certificate of discharge, in pursuance of this act[.]").

[36] *See* Act of Dec. 19, 1803 ("An Act to Repeal an Act entitled 'An Act to Establish an [sic] Uniform System of Bankruptcy Throughout the United States'"), ch. 6, 2 Stat. 248. The act did not apply to any bankruptcy proceeding begun before its passage. *Id.* ("[E]very such commission may and shall be proceeded on and fully executed as though this act had not passed.").

[37] *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 196-97 (1819) ("[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.").

[38] *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 238 (1827) ("[A] State cannot … by general law … regulate the manner in which *all* debtors may be discharged from subsisting contracts; in other words, they cannot pass general bankrupt laws[.]") (emphasis added).

[39] Once again, a tightening of credit by the Bank of England, coupled with a collapsing land bubble, led to what has been termed America's first "Great Depression." *See* ALASDAIR ROBERTS, AMERICA'S FIRST GREAT DEPRESSION: ECONOMIC CRISIS AND POLITICAL DISORDER AFTER THE PANIC OF 1837 (2013).

[40] *See* Bankruptcy Act of 1841 ("An Act to Establish a Uniform System of Bankruptcy Throughout the United States"), ch. 9, 5 Stat. 440 (Aug. 19, 1841) [hereinafter 1841 Bankruptcy Act]. The law became effective on Tuesday, February 1, 1842. *See id.* § 17.

[41] *See id.* § 1 ("*All* persons whatsoever, residing in any State, District or Territory of the United States, owing debts … who shall, by petition, setting forth to the best of his knowledge and belief, a list of his or their creditors [may] apply to the proper court … for the benefit of this act[.]") (emphasis added).

[42] *Id.* Involuntary bankruptcies, however, remained available only in cases involving traders. *See id.* ("[A]ll persons, being merchants, or using the trade of merchandise, all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount of not less than

the percentage of creditors needed for a discharge from two-thirds to one half.[43] And with the Second Great Awakening having ended,[44] the 1841 law made no distinction between gamblers and other debtors.[45] As a result of these relaxed restrictions, thousands of individuals petitioned to have their debts discharged.[46]

Despite its success, the 1841 law was repealed in 1843, just 13 months after its effective date.[47] As has been explained elsewhere, its demise was caused by a shift in the national mood:

> The Whigs [had] made bankruptcy legislation a central issue in the 1840 presidential campaign, which put the Whig candidate William Henry Harrison in the White

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two thousand dollars, shall be liable to become bankrupts within the true intent and meaning of this act, and may, upon the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than five hundred dollars, to the appropriate court, be so declared accordingly[.]").

[43] *See id.* § 4 ("[E]very bankrupt, who shall bona fide surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may from time to time be passed by the proper court, and shall otherwise conform to all the other requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts, shall file their written dissent thereto) be entitled to a full discharge from all his debts[.]").

[44] *See supra* note 29. *See also* ROBERT WILLIAM FOGEL, THE FOURTH GREAT AWAKENING AND THE FUTURE OF EGALITARIANISM 21 (2000) (explaining that the Second Great Awakening "lasted until 1840").

[45] *See supra* note 41. The end of the Second Great Awakening led to renewed enthusiasm for gambling throughout the country. In New York City, for example, 6,000 gambling parlors—one for every 85 residents—operated day and night; on the Mississippi River, 1,500 professional card players were creating the metaphor of the riverboat gambler; and out west, "gambling hells" worked to separate miners from their hard-earned profits. *See* Fact Research, Inc., *Gambling in Perspective: A Review of the Written History of Gambling and an Assessment of its Effect on Modern American Society*, *in* U.S. COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING 1, 22-27 (App. 1—"Gambling in America") (Oct. 1976), *available at* https://www.ojp.gov/pdffiles1/Digitization/44064NCJRS.pdf. *See also* DAVID G. SCHWARTZ, ROLL THE BONES: THE HISTORY OF GAMBLING 259 (2006) ("While every major American city from the 1840s on had a thriving gambling underworld, in the West gambling went on [in] full view of the public much of the time."); HENRY CHAFETZ, PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1955, at 181 (1960) ("In the '40s and the faction-ridden '50s gambling houses were the only places where abolitionists and secessionists were seen together. [Such establishments] provided, in the no-man's-land neutrality of the gaming tables, the most elegant spot for people of different political views to meet.").

[46] *See* Hansen, *supra* note 15 ("[O]ver 41,000 petitions for bankruptcy, most of them voluntary, were filed under the 1841 law."). As has been explained elsewhere, one of the little-noticed consequences of these petitions is that they made the federal government "the owner and seller of hundreds, if not thousands, of slaves belonging to financially distressed slaveowners who sought forgiveness of debt through the federal bankruptcy process." Rafael L. Pardo, *Bankrupted Slaves*, 71 VANDERBILT L. REV. 1071, 1072 (2018).

[47] *See* Act of Mar. 3, 1843 ("An Act to Repeal the Bankrupt Act"), ch. 82, 5 Stat. 614. As before, bankruptcy proceedings commenced before the statute's repeal date were permitted to continue. *See id.* ("[T]his act shall not affect any case or proceeding in bankruptcy commenced before the passage of this act, or any pains, penalties, or forfeitures, incurred under the said act; but every such proceeding may be continued to its final consummation in like manner as if this act had not been passed.").

> House and gave the Whigs control of Congress. But this alone was not enough to ensure passage of the act. Almost every Democrat opposed the proposed legislation, as did a small but potentially decisive group of Whigs. The Whig leadership finally secured passage of the act by agreeing to support a land distribution bill in return for votes for the 1841 act. Almost as soon as it came together, the coalition that voted for the 1841 act started to unravel. When a small group of Southern and Midwestern Whigs defected, the 1841 Bankruptcy Act was doomed. John Tyler, who became president [in April 1841] when Harrison died shortly after his inauguration, was much less enthusiastic about the legislation than his predecessor. Popular opinion had turned against the law, and Tyler signed the repeal legislation in 1843.[48]

In addition to its loss of political and public support, the 1841 Bankruptcy Act perished for a third reason:

> The law was declared unconstitutional by multiple district courts, all on the grounds that a true bankruptcy law allowed only "a proceeding by creditors against debtors, who are traders." One such decision [*In re Klein*, 14 F. Cas. 719 (D. Mo. 1843) (No. 7,866)] was reversed on appeal by Justice Catron riding circuit, [see *In re Klein*, 14 F. Cas. 716 (C.C.D. Mo. 1843) (No. 7,865)], but the constitutionality of the Act was never considered by the Supreme Court. Indeed, the Supreme Court held, over Justice Catron's dissent, that it had no jurisdiction to consider an appeal raising the question. [*See Nelson v. Carland*, 42 U.S. 265 (1843).]
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> Senator Thomas Hart Benton, who introduced the repeal in the Senate, accused the Act of being "unconstitutional at six different points." He laid the most stress on the "attempt to confound insolvency and bankruptcy, and to make Congress supreme over both," which he framed as "the most daring attack on the Constitution, on the State laws, on the rights of property, and on public morals, which the history of Europe or

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[48] David A. Skeel, Jr., *Bankruptcy Act of 1841*, ENCYCLOPEDIA.COM, *at* https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/bankruptcy-act-1841 (last visited Feb. 22, 2023).

> America exhibited." He compared the 1841 Act to the Alien and Sedition Acts and called for "the people to rise against it"—for judges to declare it unconstitutional, for state courts to ignore the bankruptcy courts' certificates of discharge, and for both to resign rather than obey Supreme Court dictates to the contrary. While Senator Benton's nullification argument was extreme, he was far from the only congressman to think the 1841 Act unconstitutional and vote as he did on that basis.[49]

V. THE THIRD FEDERAL BANKRUPTCY ACT (1867)

In 1855, the Indiana Supreme Court could not resist the opportunity to take a swipe at both the 1800 Bankruptcy Act and the 1841 Bankruptcy Act: "It is easy to imagine that the legislature may pass a very odious enactment. Our statute books abound with them. Such were both the bankrupt laws passed by congress."[50] Nevertheless, in 1867 Congress decided to try again and passed the country's third federal bankruptcy law.[51] This time, the impetus was the dire economic straits the country found itself in following the Civil War:

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[49] Joseph E. Simmons, Note, *Reconstructing the Bankruptcy Power: An Originalist Approach*, 131 YALE L.J. 306, 335-36 (2021) (footnotes omitted).

[50] Beebe v. State, 6 Ind. 501, 527, 1855 WL 3616 (1855). It was during this period that George H. Boker (1823-90) published *Francesca da Rimini* (1853), his famous play that has been called the "best American romantic tragedy written before the twentieth century." Myron Matlaw, *Preface to Francesca da Rimini*, *in* NINETEENTH CENTURY AMERICAN PLAYS: SEVEN PLAYS INCLUDING THE BLACK CROOK 97, 97 (Myron Matlaw ed., 1967). In it, Francesca (the doomed heroine) compares herself to a bankrupt gambler:

> The first character who undergoes a significant change in terms of awareness of the mendacity and fraud which pervades … society is Francesca…. After she herself is committed to feigning a wifely affection for Lanciotto [who, for political reasons, she has agreed to marry even though she is in love with his brother Paolo], … she speaks as follows:
>
> Thus I begin the practice of deceit,
> Taught by deceivers at a fearful cost.
> The bankrupt gambler has become the cheat,
> And lives by arts that erewhile ruined me.
> Where it will end, Heaven knows; but I—
> I have betrayed the noblest heart of all.

Paul D. Voelker, *George Henry Boker's Francesca da Rimini: An Interpretation and Evaluation*, 24 EDUCATIONAL THEATRE J. 383, 389 (1972).

[51] *See* Bankruptcy Act of 1867 ("An Act to Establish a Uniform System of Bankruptcy Throughout the United States"), ch. 176, 14 Stat. 517 (Mar. 2, 1867) [hereinafter 1867 Bankruptcy Act]. The law became effective on Saturday, June 1, 1867. *See id.* § 50.

> After repeal of the Bankruptcy Act of 1841, the subject of bankruptcy again disappeared from congressional consideration until the Panic of 1857, when appeals for a bankruptcy law resurfaced. The financial distress caused to Northern merchants by the Civil War further fueled demands for bankruptcy legislation. Though demands for a bankruptcy law persisted throughout the War, considerable opposition also existed to passing a law before the War was over. In the first Congress after the end of the War, the Bankruptcy Act of 1867 was enacted.[52]

Although intended to help Northern merchants, the 1867 Bankruptcy Act found its greatest use in the South. In 1868 (the law's first full year), 29,539 bankruptcy petitions were filed.[53] The bulk came from former slaveowners.[54]

The 1867 Bankruptcy Act contained several noteworthy provisions: 1) only debtors who had at least $300 in debts could seek protection;[55] 2)

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[52] Hansen, *supra* note 15. In the South, article I, § 8, clause 4 of the Permanent Constitution of the Confederate States of America ("CSA") (adopted Mar. 11, 1861; effective Feb. 22, 1862) had authorized the CSA's Congress to "establish … uniform laws on the subject of bankruptcies, throughout the Confederate States; but no law of Congress shall discharge any debt contracted before the passage of the same." *See* DEPARTMENT OF JUSTICE, THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 11, 14 (James M. Mathews ed., 1864), *available at* https://docsouth.unc.edu/imls/19conf/19conf.html. As has been explained elsewhere, "[The proviso tacked on to the end of the CSA's Bankruptcy Clause] was the meaning which Democratic statesmen for seventy years tried to have read into the Bankruptcy Clause of the Federal Constitution." WARREN, *supra* note 4, at 6. Because of the press of other business, the CSA Congress never passed implementing legislation.

[53] Hansen, *supra* note 15.

[54] For a further discussion, see ELIZABETH LEE THOMPSON, THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR (2004) [hereinafter SOUTHERN DEBTORS]. As Thompson points out, although White Southerners despised both Congress and the federal courts, they wholeheartedly embraced the 1867 Bankruptcy Act:

> Historians who have studied lower federal court operations in the South during Reconstruction have portrayed southerners' intense opposition to the handling of civil rights and other Reconstruction measures by federal tribunals…. This opposition reached its zenith in the late 1860s and early 1870s when federal courts most aggressively applied Radical Reconstruction legislation. But during these years—in particular the late 1860s—southerners (primarily white, propertied males) flocked to the federal courts to employ the Bankruptcy Act.

Id. at 15 (footnote omitted). The irony, which was lost on no one, see *id.* at 18, was heightened by the CSA's stringent treatment of debtors. *See supra* note 52.

The movie *Lady for a Night* (Republic Pictures, 1942), set sometime during Reconstruction (the precise year is not specified), involves a Southern plantation owner named Alan Alderson (played by Ray Middleton) who runs up a $5,000 gambling tab at the *Memphis Belle*, a floating casino co-owned by Jenny Blake (Joan Blondell) and Jackson Morgan (John Wayne). (Depending on the year, $5,000 during Reconstruction would be the equivalent today of $100,000-$150,000. *See* Friedman, *supra* note 22.) Seeing a way to finally become part of high society (her goal since childhood), Blake demands that Alderson settle his account. When he admits he is broke (a fact Blake already knows), she offers him a

petitioners had to swear allegiance to the United States;[56] 3) district judges were to be aided by "registers," who had to be lawyers and had to be nominated by the Chief Justice of the U.S. Supreme Court;[57] 4) anyone (not just traders) could be made the subject of an involuntary bankruptcy;[58] and 5) for the first time, corporations and partnerships were authorized to file for bankruptcy.[59]

For present purposes, however, the law's most important provisions were contained in sections 29 and 44. The former stated: "No discharge shall be granted, or, if granted be valid, if the bankrupt has … [10] lost any part [of his property] in gaming[.]"[60] The latter stated:

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deal: she will tear up his markers *and* pay off his plantation's back taxes if he marries her ("I have what you need—money—and you have what I want—background, position, and a name everyone respects."). After considering his options (including suicide, which Blake breezily points out will not erase his debts), Alderson takes the deal. For a further look at the movie, see, e.g., Harold V. Cohen, *"Lady for a Night" Comes to the Fulton with "Cadet Girl,"* PITT. POST-GAZ., Feb. 12, 1942, at 23 (reporting that the picture cost $750,000 to make, an unprecedented sum for the normally parsimonious Republic Pictures).

[55] *See* Bankruptcy Act of 1867, *supra* note 51, § 11. This amount is the current day equivalent of $6,017.69. *See* Friedman, *supra* note 22.

[56] *See* Bankruptcy Act of 1867, *supra* note 51, § 11. This requirement was designed to deny bankruptcy protection to unrepentant Southerners. *See* SOUTHERN DEBTORS, *supra* note 54, at 21 (explaining that while Northern hardliners wanted to deny relief to all Southerners who had supported the CSA, "[i]n the end, sentiments in favor of partisan and sectional neutrality and economic stability trumped, at least on paper. Congress required those filing for bankruptcy to swear their present—not their past—loyalty to the United States.").

[57] *See* Bankruptcy Act of 1867, *supra* note 51, § 3.

[58] *Id.* § 39.

[59] *Id.* §§ 36-37. Despite this change, I have found no case under the 1867 statute in which a gambling business sought bankruptcy protection.

[60] See Bankruptcy Act of 1867, *supra* note 51, § 29. In addition to gambling, § 29 included 18 other grounds on which a debtor could be denied a discharge. *See In re* Cretiew, 6 F. Cas. 810, 811-12 (N.D.N.Y. 1871) (No. 3,390) (listing all 19 grounds, with gaming losses being tenth). *See also In re* Jones, 13 F. Cas. 932, 933 (D. Mass. 1875) (No. 7,446) ("[T]he fraudulent payment, conveyance, or loss by gaming … include[s] all such payments, conveyances, and losses as have diminished the assets, which otherwise would have come to the assignee."); *In re* Rogers, 20 F. Cas. 1104, 1104 (D. Mass. 1870) (No. 12,001) ("Every kind of fraud is carefully prohibited [by § 29], but not extravagance or waste, except gaming."); *In re* Locke, 15 F. Cas. 734, 735 (D. Mass. 1868) (No. 8,439) ("[S]ection twenty-nine … sternly prohibits both fraud and negligence. Not keeping proper books of account, wasting money by gaming, not keeping the estate for the assignee after the petition has been filed, and many other acts of omission and commission are grounds for withholding the certificate, though several of them are not acts of bankruptcy.").

In *In re* Hussman, 12 F. Cas. 1073 (D. Ky. 1869) (No. 6,951), the court described § 29 as a punitive measure:

> The twenty-ninth section, among other things, provides that 'no discharge shall be granted if … (the bankrupt) … has lost any part [of his property] in gaming.… The withholding of a discharge from a bankrupt is in its nature a penalty for … improper conduct[.]

Id. at 1073. One year later, however, in *In re* Goodfellow, 10 F. Cas. 594 (D. Mass. 1870) (No. 5,536), the court disagreed with *Hussman's* characterization:

> [I]f any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, … spends [sic] any part [of his property] in gaming … he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.[61]

Writing in 1867, just after the law was passed, the notorious former British barrister Edwin John James[62] took section 29 to task for its harshness and lack of precision:

> This provision has probably been adopted from the earlier English Bankrupt Laws, by which the certificate of the bankrupt, which was analogous to the order of Discharge, was rendered invalid if the bankrupt at any time before his bankruptcy had lost the sum of ten pounds sterling by gaming or wager. In practice it operated very harshly; in many instances a bankrupt had given up the whole of his property to his creditors, and had acted honestly in every respect, when some person came forward and impeached his certificate upon the ground that he had lost a wager or bet to the amount which the statutes prohibited. There is no such provision in the recent English

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> The act requires an equal distribution of the estate, and if this fails through the act of the debtor, as, for instance, if he have lost a part of it in gaming, the discharge is not granted. It is not a punishment; it is not retroactive. It is simply a condition precedent.

Id. at 596.

[61] Bankruptcy Act of 1867, *supra* note 51, § 44.

[62] James (1812-82) was disbarred by the Inner Temple (one of London's four Inns of Court) in 1861 after his heavy debts (£100,000, the equivalent today of $12.3 million—see *Purchasing Power*, *supra* note 11, and *Convert Pounds*, *supra* note 11) caused him to commit various unethical acts (including agreeing to go easy on an adverse witness in exchange for a £1,250 loan). *See* GERARD NOEL, A PORTRAIT OF THE INNER TEMPLE 125 (2002). *See also Memoranda*, 1 Best & S. 640 (1861).

Following his disbarment (the first time a Queen's Counsel had suffered such a fate), James moved to America and became a member of the New York bar. Although an effort was made to disbar him when the facts surrounding his British disbarment became widely known, the New York Supreme Court deadlocked 2-2. As a result, James was allowed to keep his license. *See The Case of Edwin James—The Court Divided in Opinion—The Matter Finally Disposed of*, N.Y. TIMES, June 9, 1862, at 2. (This source reprints the otherwise unreported opinions issued by Presiding Justice Ingraham (joined by Justice Clerke) (favoring continuation of the case to permit more evidence to be gathered) and Justice Leonard (concurred in by Justice Barnard) (favoring immediate dismissal based on James's denials)). In 1873, James moved back to England, where he worked as a paralegal but eventually ended up a charity case. *See* G.C. Boase, *James, Edwin John*, *in* 29 DICTIONARY OF NATIONAL BIOGRAPHY 206-07 (Sidney Lee ed., 1892).

> act consolidating the law of bankruptcy, nor was there any such in the United States Bankrupt Act of 1841.
>
> The word gaming has a large signification: it includes wagers, bets, or stakes made to depend upon any chance, casualty, or unknown or contingent event whatever, and is strictly prohibited by the statutes of the various States.
>
> Gaming, therefore, is not confined to playing at a common gambling-house, but includes betting and wagering… .
>
> The provision itself is somewhat loosely drawn. Is the loss of any part of the bankrupt's *property* to mean the same thing as the loss of *money*? Upon reference to the various statutes in each State prohibiting gaming and wagering, and enacting penalties, it will be found that they almost invariably specify the word *money* as well as *property*… .[63]

Finding no prior cases in which a debtor had been punished for gambling after filing for bankruptcy, James cited section 44 but did not discuss it.[64]

More than a century later, a different pair of commentators found James's criticisms of section 29 to be well taken:

> Unlike its predecessors, the language of section 29 of the 1867 Act did not list specific acts or dollar amounts, but its import remained clear—gambling could preclude the granting of a bankruptcy discharge. Indeed, this subtle semantic sidetrack may have cast the net of denial even further than the prior provisions. Without placing specific dollar limitations on the statutory grounds for denial of a discharge, presumably even a de minimis loss to the estate through gambling could justify the denial of the discharge. Theoretically, [under] the statute's broad terminology, "gaming," could have encompassed a broader scope of acts than those enumerated in the statutes of England. The 39th Congress not only chose to deny the benefit of the bankruptcy discharge to certain bankrupts who gambled

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[63] EDWIN JOHN JAMES, THE BANKRUPT LAW OF THE UNITED STATES, 1867, WITH NOTES, AND A COLLECTION OF AMERICAN AND ENGLISH DECISIONS UPON THE PRINCIPLES AND PRACTICE OF THE LAW OF BANKRUPTCY, ADAPTED TO THE USE OF THE LAWYER AND MERCHANT 130 (1867) (italics in original).

[64] *See id.* at 288-89.

> but also included criminal penalties for the diminution of the estate through post-commencement gaming activity.[65]

In 1874, the statute was substantially overhauled,[66] with the key change being the addition of a "composition" provision.[67] "Under the composition provision a debtor could offer a plan to distribute his assets among his creditors to settle the case."[68] At the same time, all the provisions were

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[65] Kennedy & Bailey, *supra* note 6, at 54-55.

[66] *See* Act of June 22, 1874 ("An Act to Amend and Supplement an Act Entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States'"), ch. 390, 18 Stat. 178 [hereinafter 1874 Bankruptcy Act Amendments]. By this time, six minor amendments already had been made to the statute. *See* Act of July 27, 1868 ("An Act in Amendment of an Act Entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States'"), ch. 258, 15 Stat. 227; Act of June 30, 1870 ("An Act to Amend an Act Entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States'"), ch. 177, 16 Stat. 173; Act of July 14, 1870 ("An Act in Amendment of the Act Entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States'"), ch. 262, 16 Stat. 276; Act of June 8, 1872 ("An Act to Amend an Act Entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States'"), ch. 339, 17 Stat. 334; Act of Feb. 13, 1873 ("An Act to Amend an Act Entitled 'An Act to Establish a Uniform System of Bankruptcy Throughout the United States'"), ch. 135, 17 Stat. 436; Act of Mar. 3, 1873 ("An Act to Declare the True Intent and Meaning of the Act Approved June Eight, Eighteen Hundred and Seventy-Two, Amendatory of the General Bankrupt Law"), ch. 235, 17 Stat. 577.

[67] *See* 1874 Bankruptcy Act Amendments, *supra* note 66, § 17.

[68] Hansen, *supra* note 15.

> In 1877, John F. Chamberlain—who in 1869 had opened a large gambling house in Long Branch, New Jersey (instantly transforming the town into an elite resort) and in 1870 had helped establish Monmouth Park (one of the country's premier racetracks)—filed for bankruptcy. His proposed composition, which sought to pay off his debts for a penny on the dollar, resulted in an important (but unreported) decision by Judge Blatchford: An interesting question of law has just been settled by Judge Blatchford in the United States district court. A short time ago John F. Chamberlain, the well known sporting man, filed a voluntary petition asking to be adjudged a bankrupt. On the same date he filed another petition proposing a composition on the basis of one percent, to which 60 out of 87 of his creditors agreed. Among his creditors was the state of New York, represented by the attorney-general, to the amount of $10,000 in bonds, which had been declared forfeited. The attorney-general put in the claim of the state to be paid in full before any of the general creditors, and before any composition had been made… .Judge Blatchford has decided that the bonds having been given under the criminal law of the state of New York, the state is a creditor; that the state might make whatever disposition it pleased of the money; that the state could examine the bankrupt in composition proceedings and witnesses to ascertain if any assets were hidden. The state was entitled to payment first and could apply to put Chamberlain in bankruptcy—any debt due to a state in which an insolvent part resides must be considered a preferred debt and paid before any other general creditors come in in bankruptcy proceedings.

The Bankrupt Law—A Rare Legal Question Decided by Judge Blatchford—The State and Its Insolvent Debtors, BUFFALO COURIER, May 21, 1877, at 3. For a further look at Chamberlain (1837-96), see JOHN MORRIS [pseud. of John O'Connor], WANDERINGS OF A VAGABOND: AN AUTOBIOGRAPHY 197-207 (1873); *John Chamberlain's Ways*, N.Y. SUN, Aug. 25, 1896, at 7 (explaining that by his death, Chamberlain had managed to reinvent himself and was one of the country's best-known restauranteurs).

readopted as part of the first edition of the *Revised Statutes of the United States*.[69]

In 1876, two more amendments were passed. Both were minor. The first[70] required any bankruptcy case pending in a territorial supreme court to be transferred to the district court of the district in which "the bankrupt or bankrupts, or some one of them, resided at the time of the filing of the petition in bankruptcy[.]"[71] The second slightly tweaked the rules governing discharges.[72]

In 1878, after just 11 years, the 1867 Bankruptcy Act suffered the same fate as its predecessors.[73] In a virtual replay of 1803, the statute was repealed at the request of both creditors and debtors:

> As with the prior federal bankruptcy acts, criticisms levied by creditors included small dividends, high fees and expenses, and lengthy delays. Northern creditors who had hoped to use the bankruptcy law to facilitate collection from southern debtors were disappointed. Indeed, most of the pressure for repeal came from creditors.
>
> Nor did debtors do very well under the 1867 law. Due to the inclusion of numerous grounds for denying discharge, only about one-third of the debtors received a discharge. Procedurally, the discharge was obtained after application by the debtor, upon notice to creditors and a court hearing.

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[69] *See* 61 Rev. Stat. §§ 4972-5132 (1874). In 1878, a second edition of the *Revised Statutes* was released, but the bankruptcy law's section numbers remained the same. For a further discussion, see Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, IN CUSTODIA LEGIS, July 2, 2015, *at* https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ (explaining that while the first edition was adopted by Congress as "legal evidence of the laws and treaties therein contained," the second edition was "not enacted into law by Congress, and [therefore] constituted only prima facie evidence of the law.").

[70] *See* Act of Apr. 14, 1876 ("An Act Concerning Cases in Bankruptcy Commenced in the Supreme Courts of the Several Territories Prior to the Twenty-Second Day of June, Eighteen Hundred and Seventy-Four, and Now Undetermined Therein"), ch. 62, 19 Stat. 33.

[71] *Id.* § 2. At the time of this amendment, there were nine organized territories (dates in parentheses indicate when they achieved statehood): Arizona (1912); Colorado (Aug. 1, 1876); Dakota (1889, as North Dakota and South Dakota); Idaho (1890); Montana (1889); New Mexico (1912); Utah (1896); Washington (1889); and Wyoming (1890). *See* JANE KAMENSKY ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 455 (11th ed. 2019). The country also included the Department of Alaska (1959) and the unorganized Indian Territory (1907, as Oklahoma). *Id.*

[72] *See* Act of July 26, 1876 ("An Act to Amend the Act Entitled 'An Act to Amend and Supplement an Act Entitled an Act to Establish a Uniform System of Bankruptcy Throughout the United States'"), ch. 234, 19 Stat. 102.

[73] *See* Act of June 7, 1878 ("An Act to Repeal the Bankrupt Law"), ch. 160, 20 Stat. 99. Once again, bankruptcy proceedings commenced before the statute's repeal date were permitted to continue. *See id.* ("[This] repeal shall in no manner invalidate or affect any case in bankruptcy instituted and pending in any court prior to the day [Sunday, September 1, 1878] when this act shall take effect[.]").

> The discharge still had to be raised as an affirmative defense to subsequent collection efforts.[74]

VI. FEDERAL CASE LAW

Neither the 1800 Bankruptcy Act nor the 1841 Bankruptcy Act generated any reported decisions involving gambling debts.[75] In contrast, the 1867 Bankruptcy Act produced several such decisions.

In *In re Patterson*,[76] for example, a New York City stockbroker named Charles G. Patterson[77] lost $35,000—the equivalent today of $641,640.58[78]—in September 1866 while playing faro[79] at gambling houses

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[74] Tabb, *supra* note 14, at 19-20.

[75] Oblique references to the 1841 statute, however, can be found in two cases:

(a) The second headnote in *Ex parte* Robertson, 20 F. Cas. 938 (C.C.S.D.N.Y. 1842) (No. 11,921), states: "Property, the right or interest in which has passed out of the petitioner prior to petitioning, whether by negligence, extravagance, gaming, donation, or fraud, need not be set forth [by the bankrupt] in the schedule [listing his or her assets]." *Id.* at 938. In the actual opinion, however, the court omits the word gaming: "This then cannot include property which might have continued [to be] his, but has passed out of him so as no longer to be reclaimable by him, whether it is lost by negligence, by extravagance, by donation, or by fraud." *Id.* at 939.

(b) In Ivey v. Nicks, 14 Ala. 564, 1848 WL 584 (1848), Philips (the court does not provide any first names) issued a note for $150 to Ivey. Ivey lost the note while gambling with Conner and an unidentified third person. Conner later transferred the note to Nicks, who then sued Ivey. By this time, Ivey had been declared a bankrupt and had had his debts discharged. *Held*, Nicks, although a bona fide holder in due course, could not recover on the note because it had been used for illegal wagering. As such, the court did not reach Ivey's alternate argument that the note was uncollectible due to his bankruptcy: "Waiving the consideration of the effect of defendant's discharge in bankruptcy upon the liability sought to be enforced against him…." *Id.* at 567.

[76] 18 F. Cas. 1319 (S.D.N.Y. 1867) (No. 10,816), *later proceedings at* 18 F. Cas. 1322 (S.D.N.Y. 1867) (No. 10,820).

[77] This Charles G. Patterson (1835-1912) should not be confused with the Charles G. Patterson (1834-1910) who graduated from Columbia University's law school (Class of 1865) and became a respected New York City corporate lawyer. *Compare* [*Obituary of*] *Charles G. Patterson*, EVENING STAR (Washington, DC), Apr. 30, 1912, at 7, *with* [*Obituary of*] *C. Godfrey Patterson*, N.Y. DAILY TRIB., Jan. 6, 1910, at 7.

[78] *See* Friedman, *supra* note 22.

[79] In the 19th century, faro (a card game invented in France in the 17th century) was the most popular gambling game in the United States. *See* 1 WILLIAM N. THOMPSON, THE INTERNATIONAL ENCYCLOPEDIA OF GAMBLING 250-51 (2d ed. 2010); John R. Sanders, *Favorite Gambling Game of the Frontier*, 9 WILD W. MAG. 62 (Oct. 1996), *available at* https://www.historynet.com/faro-favorite-gambling-game-of-the-frontier/?f. As these sources explain: (a) the game's name was a corruption of the word "pharaoh," so-called because the winning card (known as the "king" card) often bore the face of an Egyptian pharaoh; and (b) early table layouts usually displayed a Bengal tiger, which gave faro its nickname ("bucking the tiger") and led to the practice of faro house proprietors hanging a tiger portrait outside their establishments. By 1925, faro had all but disappeared in the United States. Its demise has been attributed to two factors: "The opportunity for dealer cheating at faro was greater than with any other card game, and, for people who ran the casinos, faro had a low house edge." Joe Zentner, *Faro—Card Game of the Southwest*, DESERTUSA, *at* https://www.desertusa.com/desert-activity/faro-card-game.html (last visited Feb. 22, 2023). For a further discussion, see, e.g., ALFRED TRUMBLE, FARO EXPOSED: OR THE GAMBLER AND HIS PREY (1882).

owned by Ferdinand A. Abell and Albert M. Stokes. When Patterson sued Abell and Stokes, claiming they had cheated him, they counter-sued for libel.[80] In June 1867, as the case dragged on, Patterson was forced to file for bankruptcy.[81]

In October 1867, Robert D. Benedict, the lawyer for Tupper & Beattie, a freight forwarding company that was one of Patterson's creditors, asked Patterson whether he had lost any money gambling *since* his petition. On the advice of his lawyer (James M. Smith, Jr.), Patterson refused to answer. The register (James F. Dwight) ruled that Benedict's question was proper, but the district court (Judge Blatchford) held that forcing Patterson to answer would violate his Fifth Amendment rights:

> The question, so far as it called on the bankrupt to answer as to whether he had, since the commencement of the proceedings in bankruptcy, lost in gaming any portion of his estate, was objectionable, as calling on him for an answer which might subject him to punishment for a criminal offence, under section 44 of the bankruptcy act. The question was broad enough to cover the time subsequent to the commencement of the proceedings in bankruptcy, and was, therefore, improper.[82]

Following Judge Blatchford's ruling, Benedict resumed his examination and asked Patterson if he had lost any money gambling *prior* to his petition. Once again, Patterson, on Smith's advice, refused to answer; Dwight ruled the question was proper; and Judge Blatchford disagreed: "It is impossible for the court to decide as to the question raised, for the reason that the certificate does not show what interrogatories preceded the one which the witness refused to answer."[83]

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[80] *See An Emeute Among the Gamblers*, N.Y. TIMES, Dec. 25, 1866, at 2.

[81] *See Patterson*, 18 F. Cas. at 1319.

[82] *Id.* at 1320.

[83] *Patterson*, 18 F. Cas. at 1323. When, however, in a different case the question was properly posed, Judge Blatchford had no trouble upholding Dwight. *See In re* Richards, 20 F. Cas. 691, 691 (S.D.N.Y. 1870) (No. 11,769) ("I concur with the register in the view that the questions must be answered by the bankrupt.").

In 1872, William M. Graham lost $30,000 at a New York City gambling house run by Samuel E. Briggs and Charles N. Moody. (In 1872, $30,000 was the equivalent today of $702,617.87. *See* Friedman, *supra* note .) When Graham subsequently declared bankruptcy, the register (John W. Little) ordered Briggs and Moody to state whether (and when) they had run a gambling house at the address (16 West 24th Street) listed in Graham's petition. Citing the Fifth Amendment, Briggs and Moody refused to answer. In a one-sentence opinion, Judge Blatchford agreed with them: "I think that the witnesses were privileged from answering the questions." *In re* Graham, 10 F. Cas. 913, 914 (S.D.N.Y. 1876) (No. 5,659). *See also Gamblers Protected by Law*, N.Y. TIMES, May 16, 1876, at 2.

Graham (1819-86) had fed his gambling habit by stealing money from the Wallkill National Bank (of which he was the president). Found guilty of embezzlement and fraud by a Brooklyn federal jury in 1874,

In *In re Puffer*,[84] an unidentified creditor argued that a debtor named "Puffer" was ineligible for bankruptcy protection because he "had wilfully sworn false in his affidavit annexed to the petition and schedules[,] he was not insolvent, [he] had given preference to certain creditors, and [he] had lost part of his property in gaming."[85] In a short opinion, the district court held that the creditor's challenge was premature:

> The objections filed by the creditor are objections to the bankrupt's discharge, and it appears from the register's statement that the proper adjudication of bankruptcy was made; that the creditor proved his debt, and that an assignee was appointed. The register has no authority to decide questions arising upon objections properly urged against the bankrupt's discharge, and such questions are to be determined by the district judge, after the bankrupt has applied for his discharge under section twenty-nine of the bankrupt act [14 Stat. 531].
>
> Even if these objections were sufficient in form and substance they would not stay the proceedings before the register, and, though they are, in part, at least, clearly insufficient in form and certainty, it is not necessary now to decide how far they are insufficient, as the question is not properly before me. The register will proceed, notwithstanding these objections. If the creditor desires an examination of the bankrupt with a view to using such examination on opposing his discharge, or for any other purpose, he can proceed under district court rule twenty-six, which does not require the same particularity and

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he was sentenced to 10 years at hard labor but in 1877 was pardoned by President Rutherford B. Hayes. Graham spent his remaining years working as a hospital orderly. *See A Checkered Career Ended*, N.Y. TIMES, Nov. 15, 1886, at 1.

As *Graham*, *Patterson*, and *Richards* make clear, getting information about a bankrupt's affairs was a regular challenge for both judges and registers. In *In re* Salkey, 21 F. Cas. 235 (N.D. Ill. 1875) (No. 12,253), a non-gambling case involving two recalcitrant merchants, the court found it necessary to remind the petitioners that

> [t]he duty of the bankrupt is to honestly account for his assets according to facts. He may have lost his property by unfortunate speculations, or gambling even, so that it is beyond his reach or that of his assignees, and a true statement of the facts would be an accounting for it. That is a showing what has become of it, within the intention of the law, but until some explanation is made, the court must hold the bankrupt answerable.

Id. at 238.

[84] 20 F. Cas. 31 (N.D.N.Y. 1868) (No. 11,459).

[85] *Id.* at 31. The court does not give Puffer's first name.

> certainty of statement which is required when the discharge is opposed.[86]

In *In re Son*,[87] an unidentified creditor objected, on multiple grounds including loss of property by gambling, to the discharge of a bankrupt named Nathan A. Son. In dismissing the creditor's objections, the district court (again Judge Blatchford) wrote:

> Nothing could well be more general than these allegations. They are merely the language of section 29 of the act. They are all of them so vague that it is impossible for the court or the bankrupt to ascertain from them what specific acts or omission are relied on as grounds for withholding a discharge. The case stands as if there were no opposition to the discharge and no specifications filed, and, it appearing that the bankrupt has in all things conformed to his duty under the act, a discharge is granted to him.[88]

In *In re Wilkinson*,[89] a bankrupt named Joseph L. Wilkinson applied for a discharge. Although none of Wilkinson's creditors objected, "The court, upon inspecting the record of the bankrupt's examination by the assignee, discovered that since the passage of the act the bankrupt had lost a large sum of money at gambling. [As a result, the] discharge was refused, the court holding that it was its duty to examine the record before granting a discharge[.]"[90]

In *In re Marshall*,[91] a debtor named "Marshall"[92] was denied a discharge because of his gambling losses. When he pointed out that he was a professional gambler, and therefore everything he lost he had acquired through gambling, the court held that it could not consider this fact due to the wording of section 29:

> The objection to the bankrupt's discharge is that he lost a part of his property in gaming. The evidence tends to show that he was interested in a gambling house in Boston, and that he did lose money at that house and in some others like it. The preponderance of evidence supports the allegation of losses sustained in that way. On the other

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[86] *Id.* (paragraphing inserted for improved readability).

[87] 22 F. Cas. 794 (S.D.N.Y. 1868) (No. 13,174).

[88] *Id.* at 795.

[89] 29 F. Cas. 1253 (E.D. Mo. 1869) (No. 17,667).

[90] *Id.* at 1253. The court provides no further information about Wilkinson's gambling. No further details about Wilkinson's case have been discovered.

[91] 16 F. Cas. 827 (D. Mass. 1870) (No. 9,123).

[92] The court does not give Marshall's first name.

hand, the evidence for the defence tends to show that the bankrupt had lost all his property some years ago, so that whatever he may from time to time have made or lost, he is no worse off now than if he had never lost at all. From this the argument is deduced that he never had any property to which creditors had a right to trust, and cannot justly be said to have lost any property in gaming. It is said that, if the law should be rigidly applied in such a case, the creditors would receive an undue advantage, because they could always prevent the discharge of a person to whom they had given credit with a full knowledge of the character of the business, and an understanding of its hazardous nature.

So far as this argument applies to gambling debts the bankrupt would have the remedy in his own hands, because the debts, if objected to, could not be proved against his estate; as it regards other debts, much of its force would depend on the circumstances under which each particular debt was contracted. A creditor may know that his debtor has property without knowing how he acquired it, or he may lend him money or sell him goods for some legitimate purpose without reference to his occupation. And such are some, at least, of the debts in this case.

I cannot limit the general language of the statute, though its effect may be, and I think is, to consider property acquired in gaming to be assets, which, if the bankrupt spend in gaming, he loses his discharge. It is impossible to look into the mode in which such property as the statute speaks of has been acquired. If property once in the possession of the bankrupt is spent in gaming, which, if not so spent, would be assets in bankruptcy, the case is made out.

It is too late after it is spent to say that it was unlawfully acquired, or acquired in any particular way, or that creditors are no worse off on the whole. The case does not by any means show that whatever the defendant won was lost immediately, but rather that he had considerable sums at times, which he afterwards lost. I cannot distinguish such losses from those which any other debtor might sustain in a similar way.

The statute is clear and explicit, and cannot be construed away in favor of one whose profession is gambling, though

> its operation may be somewhat severe in such a case. Neither the knowledge of his creditors of his course of business, nor any intent on his or their part, is material. The fact only can be inquired into. Nor does the law in the matter of discharge invest the court with discretion, as it does so largely in England. It is a mere question of legal right. Discharge refused.[93]

In *In re Signer*,[94] the court was forced to grapple with the temporal aspects of section 29:

> The discharge of the bankrupt is resisted in this case upon the ground, among others, that he had lost part of his property in gaming, contrary to subdivision 5, Sec. 5110. The question has been certified to the court whether any evidence should be admitted in support of the specification of the loss of money by gaming prior to the time when the objecting creditor's debt arose, as shown by the proof of debt, which was in 1878. The evidence cannot be restricted to the period since the objecting creditor's debt accrued; it must, at least, extend to the whole period covered by any debts from which the bankrupt is sought to be discharged. The clause of the statute which makes the loss of any part of the bankrupt's property by gaming a bar, is not limited as to time; nor is it qualified by the preceding language of the section, requiring an intent to defraud creditors… .
>
> It is not necessary to determine the whole question at this time. The evidence as to when the bankrupt lost any of his property by gaming, must, however, be admitted as far back as the origin of any of the debts of the bankrupt; and also to such anterior period, since the passage of the act, in which it may affirmatively appear, or be reasonably supposed, that the assets of the bankrupt which ought to and would have come into the assignee's hands were depleted through such losses.[95]

Lastly, in *In re Stewart*,[96] the court, in denying the debtor's request for a discharge, made it clear that its hands were tied:

> The sole allegation in the specifications filed against the discharge of the bankrupt is that he lost some part of his

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[93] *Id.* at 827-28 (paragraphing inserted for improved readability).

[94] 20 F. 236 (S.D.N.Y. 1884). The court does not give Signer's first name.

[95] *Id.* at 236-37.

[96] 21 F. 398 (D.N.J. 1884). The court does not give Stewart's first name.

property in gaming. This is one of the grounds set forth in section 5110 of the Revised Statutes, which, when it is proved, compels the court to refuse the discharge. It is founded on the idea that the order of discharge is not a matter of right, but of favor; that the law may prescribe the terms on which the debtor may be released from the payment of his debts; and that every person who subjects his property to the hazard of loss at the gaming table, and loses what in fact belongs to his creditors, is not within the class entitled to the benefit of the act. Such a provision occurred in all the earlier English bankruptcy laws, but has not been included in the later acts consolidating the law of bankruptcy; nor is it found in the United States bankrupt act of 1841.

What is gaming? And has the allegation been proved in the present case? The word has a wide signification. It includes wagers, bets, or stakes depending upon chance. Webster says it is the use of cards, dice, billiards, or other instruments according to certain rules, with a view to win money at various places, but especially at the village of Washington, New Jersey, the residence of the bankrupt. The proofs are clear as to the fact of the gambling, but not very definite as to the losses which the bankrupt sustained. These were so small that the counsel for the bankrupt, on the argument, suggested that the court ought to apply the maxim '*de minimis non curat lex*,' and dismiss the case. But I am not clear that I ought to do this.

No such question could arise under the provisions of the English bankruptcy act, as they always specified the amount that must be lost to authorize the court to withhold the certificate. But our act is different. The discharge must be refused, or, if granted, must be invalidated on proof that any part of his property has been lost in gaming.

The counsel for the bankrupt also urged that if the bankrupt did not appear to be a loser on summing up the aggregate result of his losses and gains, he did not come within the act. The law does not charge the court with the duty of going into any such calculations. It is not to add up in one column the losses and in another the winnings, and then hold that the law has been violated or not, according to the amounts of the respective columns. Such an attempt was made in [the English case of] *Ex parte Newman*, 2 Glyn

> & J. 329, but was not sustained by Vice-Chancellor LEACH.
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> In that case the bankrupt applied for the certificate of discharge, and the application was opposed on the ground that he had on a certain day before the bankruptcy lost £40 by a wager at a main of cocks. The statute of 6 Geo. IV. *c.* 16, § 130, enacted 'that no bankrupt shall be entitled to his certificate, etc., and that any such certificate, if obtained, shall be void, if such bankrupt shall have lost by any sort of gaming or wagering in one day twenty pounds,' etc. The bankrupt admitted the loss charged, but offered to prove that on the same day he won £45 on another wager on the same cocks, and that he was winner in the sum of £5. The vice-chancellor held that it was not a question of loss or gain, and that the bankrupt had lost by gambling within the meaning of the act. He would not allow any offset of the losses by the winnings, and refused the certificate.
>
> As the proofs here show losses, I must hold that the case comes within the law, and must refuse the discharge.[97]

VII. STATE CASE LAW

From the ratification of the U.S. Constitution in 1789 to the passage of the Nelson Act in 1898 —a period spanning 109 years— federal bankruptcy legislation existed for just 16 years. During the other 93 years, creditors and debtors had to look to the haphazard, and often conflicting, patchwork of state laws.[98] Surprisingly, however, only a handful of state law cases have been located involving gambling debts.

In *Soubie's Executor v. Beale*,[99] for example, Thomas Beale signed over five notes, totaling $8,200, to "Soubie."[100] After Beale died, Soubie's executor filed a collection action against Beale's widow and heirs. The defendants set up two defenses: 1) the notes were void because they were issued to pay money Beale had lost at gambling; and 2) Beale had received "a discharge under the insolvent laws of the state."[101] Agreeing that the

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[97] *Id.* at 398-99 (paragraphing inserted for improved readability; font and italics as in original).

[98] At least some state judges, however, had definite ideas about how bankruptcy and gambling fit together. Writing in 1857, the Tennessee Supreme Court remarked: "Gambling … leads to idleness, dissipation, bankruptcy and wretchedness. Its victims are almost invariably converted into cold, selfish, reckless harpies." Johnson v. State, 36 Tenn. 614, 621-22, 1857 WL 2540 (1857).

[99] 1 Mart. (n.s.) 95, 1823 WL 1354 (La. 1823).

[100] The court does not give Soubie's first name.

[101] *Id.* at 96. The court does not provide any details about Beale's discharge. It is probable, however, that it was obtained under Louisiana's state bankruptcy law. *See* Act of Mar. 25, 1808 ("An Act for the

notes were void, the trial court found for the defendants. On appeal, the Louisiana Supreme Court affirmed:

> In the course of the arguments of counsel before this court, considerable discussion took place on the 2d. plea found in the answer; but, as we are of [the] opinion, that there is not such evident error in the judgment of the court below, rendered on the 1st ground of defence, as to require its reversal, it is not necessary to investigate or decide on that part of the defence which relates to the surrender and discharge of the promisor.[102]

In *Hanks v. Dunlap*,[103] a Camden, South Carolina lawyer named Andrew G. Baskin was retained by a merchant named L.B. Hanks. Baskin obtained two, or possibly more, judgments for Hanks against a man named D.S. Sargent.[104] To satisfy these judgments, two other men—James Dunlap and J.F. Southerland—issued a promissory note for $213.50. The note was payable one year after its making.

Upon receiving the note, Baskin had Hanks endorse it in blank. A few days later, Baskin, pretending to be the note's owner, tried to sell it, first to Southerland and then to Dunlap, for $200. Both declined Baskin's offer due to a lack of funds. In the meantime, Baskin, who had a gambling problem, arranged to borrow $675—or $21,068.75 in current dollars[105]—from a fellow gambler named "Watson." Baskin proceeded to lose this money playing faro.

As partial repayment, Baskin gave Watson the Dunlap-Southerland note. Eventually, the note ended up back in the hands of Dunlap, who purchased it from the Branch Bank. When he learned what had happened, Hanks sued Dunlap.

To avoid paying Hanks, Dunlap claimed that: 1) he was a bona fide holder in due course; and 2) even if he was not, the note was unenforceable because it had been used to facilitate illegal gambling. Agreeing with the first of these contentions, the trial court dismissed Hanks's complaint.[106] In a one

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Relief of Insolvent Debtors in Actual Custody, and for Establishing Prison Bounds for the Public Jail, and for Other Purposes"), *in* 1 A GENERAL DIGEST OF THE ACTS OF THE LEGISLATURE OF LOUISIANA PASSED FROM THE YEAR 1804, TO 1827, INCLUSIVE, AND IN FORCE AT THIS LAST PERIOD 567 (L. Moreau Lislet comp., 1828). *See also* McMillan v. McNeill, 17 U.S. (4 Wheat.) 209 (1819) (finding the statute valid but refusing to give it extraterritorial effect).

[102] *Beale*, 1 Mart. (n.s.) at 96.

[103] 31 S.C. Eq. (10 Rich. Eq.) 139, 1858 WL 3731 (Ct. App. 1858).

[104] There is a typographical error in the case report that makes it impossible to know just how many judgments Baskin obtained: "This note had been accepted by plaintiff in satisfaction of two several [sic] judgments obtained by him through the attorneyship of Baskin against one D. S. Sargent." *Id.* at 139.

[105] *See* Friedman, *supra* note 22.

[106] *See Hanks*, 31 S.C. Eq. at 141.

sentence per curiam opinion, the South Carolina Court of Appeals affirmed.[107]

> In recounting the case's facts, the trial court vividly described Baskin's addiction:
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> In December, 1854, Baskin became utterly insolvent from gambling; and about the end of January, 1855, he and Watson left Camden as bankrupts. Until a time within a few days of his leaving Camden, notwithstanding he was known generally to be a gambler, Baskin was reputed to be efficient and punctual as a collecting attorney and in ordinary matters of business.[108]

In *Meech v. Stoner*,[109] the New York Court of Appeals, in dicta, held that a bankrupt's estate included any right the bankrupt had to sue for the return of money lost at gambling:

> But the statute, it is said, gives the action to "the person," and not to his assigns or representatives. Upon the precise terms of the statute, this is so; yet it is difficult to suggest any reason why the right to be asserted in such an action would not devolve upon the administrator, and thus become a fund for the payment of debts or for distribution amongst the next of kin; or why an assignee in bankruptcy or insolvency would not succeed to the claim and be able to enforce it for the benefit of creditors. The assignability of things in action is now the rule; non-assignability, the exception.[110]

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[107] *Id.* at 142.

[108] *Id.* at 140.

[109] 19 N.Y. 26, 1859 WL 8251 (1859).

[110] *Id.* at 28-29. Judge Comstock (the opinion's author) apparently was unaware that this issue had been settled more than a decade earlier by U.S. Supreme Court Chief Justice Taney while the latter was riding circuit. *See* Thomas v. Watson, 23 F. Cas. 974 (C.C.D. Md. 1846) (No. 13,913). In *Thomas*, a man named J.M. Lloyd lost several thousand dollars (Chief Justice Taney does not give an exact figure) while gambling with Henry H. Watson. Lloyd gave Watson a promissory note but later defaulted and then sought protection under Maryland's insolvency law. As a result, Philip F. Thomas was named Lloyd's trustee. When Watson tried to recover, Thomas argued the note was void because it had been issued to pay off an illegal gambling debt. Chief Justice Taney agreed and held that Thomas was entitled to make the same arguments as Lloyd:

> But we regard it as settled law, that the permanent trustee, appointed upon the release of the insolvent, becomes immediately vested with all the rights, at law or in equity, which the latter then possessed, and may enforce any right, or make any defence, which the insolvent could have maintained or enforced at the time of his insolvency. These rights are transferred to the trustee, and the complainant may now make the same defences, at law or in equity, against these claims and against

Lastly, in *Greenberg v. Hoff*,[111] Meyer Greenberg lent M.J. Hoff money to open a faro house. It was agreed that Greenberg would share in the business's profits. When Hoff failed to pay, Greenberg sued. Hoff argued that the loan was void because its purpose was to facilitate illegal gambling.[112] Hoff also pointed out that he "had been discharged in insolvency."[113] Ignoring these facts, the jury returned a general verdict in Greenberg's favor. Hoff appealed, claiming that the jury should have returned a special verdict in his favor. The California Supreme Court found that it could not consider this argument because Hoff had failed to preserve his objection: "It was the duty of the defendant, if he expected to rely upon the findings, to see that they were in proper form. Not having done so, he has no reason to complain."[114]

VIII. CONCLUSION

As explained at the beginning of this article, in 1898 the United States finally enacted a permanent bankruptcy law.[115] In doing so, Congress rejected the gambler-specific provisions of the 1867 statute and instead planted the seeds for what has become the modern approach, which is to deny a discharge to *any* debtor who either commits fraud[116] or is unable to satisfactorily explain the loss of their assets.[117] This is a much better approach for three reasons: 1) it eliminates the necessity of having to decide what constitutes gambling; 2) it gives gamblers the same opportunity to obtain a "fresh start" as any other debtor; and 3) it avoids adding to the

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> the judgment upon them, which Lloyd could have made if he had never become insolvent.

Id. at 978.

[111] 22 P. 69 (Cal. 1889).

[112] This argument stood on solid ground. Nearly 40 years earlier, the California Supreme Court, in a non-bankruptcy case, had declared faro "an unlawful game." *See* Bryant v. Mead, 1 Cal. 441, 443, 1851 WL 537 (1851) (citing GEORGE HENRY HEWIT OLIPHANT, THE LAW CONCERNING HORSES, RACING, WAGERS AND GAMING 211-12 (1st ed. 1847)).

[113] *Greenberg*, 22 P. at 69. The opinion provides no details regarding when or where Hoff was discharged. Presumably, however, he was discharged under California's 1880 insolvency law. *See* An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors, 1880 Cal. Stats. 82 (Apr. 16, 1880).

[114] *Greenberg*, 22 P. at 69.

[115] *See supra* note 2 and accompanying text.

[116] *See* 11 U.S.C. § 523. *See also In re* Baum, 386 B.R. 649 (Bankr. N.D. Ohio 2008) (debtor who went on a four-month internet gambling spree did not commit fraud because she intended to repay her debts).

[117] *See* 11 U.S.C. § 727. *See also* Matter of Yavarkovsky, 23 B.R. 756 (S.D.N.Y. 1982) (vacating confirmation of debtor's Chapter 13 repayment plan because he could not account for $75,000 he had received just before he took a trip to Las Vegas—the money represented the sale of a block of stock, the debtor's only significant asset).

social ostracization experienced by many gamblers who find themselves down on their luck.[118]

[118] *See*, *e.g.*, Katarzyna Dąbrowska & Łukasz Wieczorek, *Perceived Social Stigmatisation of Gambling Disorders and Coping with Stigma*, 37 NORDIC STUD. ON ALCOHOL & DRUGS 279 (2020); Samuel C. Peter et al., *Public Stigma Across Addictive Behaviors: Casino Gambling, Esports Gambling, and Internet Gaming*, 35 J. GAMBLING STUD. 247 (2019); Nerilee Hing et al., *Unpacking the Public Stigma of Problem Gambling: The Process of Stigma Creation and Predictors of Social Distancing*, 5 J. BEHAVIORAL ADDICTIONS 448 (2016). *See also* Jon E. Grant et al., *Pathologic Gambling and Bankruptcy*, 51 COMP. PSYCHIATRY 115 (2010).

Of course, not everyone agrees with the current approach. *See*, *e.g.*, Newman, *supra* note 5, at 207 ("[I]f the [Bankruptcy] Code truly does exist only for the 'honest but unfortunate debtor,' then why are gambling debts dischargeable?").