Petition - On the Bill to Repeal the Bankrupt
Law - 1842

SPEECH

MR. BERRIEN, OF GEORGIA,

ON THE

BILL TO REPEAL

THE BANKRUPT LAW.

DELIVERED

IN THE SENATE OF THE UNITED STATES,

JANUARY 26, 1842.

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SPEECH.

Mr. PRESIDENT: The relation in which I stand to the Senate, makes it my duty to state the grounds on which the law which it is now proposed to repeal, was adopted at the late session of Congress. Superadded to this is the consideration, that multiplied appeals, from various parts of the Union, have been made to me, to vindicate, as far as any effort of mine can accomplish it, the great and varied interests, which that beneficent law was intended and calculated to protect—appeals resulting rather from the confidence of those who have made them, in the strength and sincerity of the opinions which I have long entertained, and often expressed on this subject, than from any ability which I can bring to the task.

There is another motive sir, which yet more imperiously urges me to trespass at this moment upon the attention of the Senate. A majority of the Legislature of Georgia, has formed and expressed opinions, in relation to the bankrupt law, adverse to those which I entertain. The resolutions expressing these opinions have been communicated to me, and have received, as from me they were entitled to receive, the most deliberate and respectful consideration. But my convictions are unchanged. I am still thoroughly convinced that the enactment of the law, which it is now proposed to repeal, was a duty enjoined by the Constitution, demanded by the best interests of all classes of the community, and specially commending itself to all the charities of our nature, as a measure of tardy justice, too long withheld from a numerous and suffering portion of our fellow-citizens. I regret, very sincerely, that an opposite opinion is entertained by the local representatives of Georgia. The subject is indeed beyond the sphere of those duties which the Constitution of the State has assigned to them, and is expressly and exclusively entrusted by our federal compact, to the Congress of the United States; nevertheless, this is an opinion entertained and expressed by a portion of my immediate constituents, who apart from their own personal claims, have a commanding title to my respect, honored as they are by the confidence of the people of Georgia. It is due therefore to them, to myself, and to the occasion, to state the reasons which constrain me to differ from them.

Allow me, sir, to make a single preliminary remark. The enemies of our free institutions, may rejoice and be glad in the spectacle which is exhibited here to-day. They may rejoice in this manifestation of the instability of our counsels, and be glad in anticipation of the consequences, which will too surely follow in its train. A few short months have passed away, since this Congress composed almost entirely of the same individuals who are now assembled here, deliberately adopted a great measure of national policy, demanded by the interests of all classes of the community, and signally characterized by an expansive but discriminating benevolence. It was urgently called for by innumerable petitions, presented to each house of Congress. Since that time, such change as public opinion has undergone, has been favorable to the act. Among the people those who were its opponents have become its advocates; and these,

longer confined to the commercial community, are found in all the various classes of our citizens. Under such circumstances, at a moment of great and general suffering, when universal depression and want of confidence pervade the community, we are called upon publicly to repudiate our own counsels, to acknowledge our ignorance of what it was which the Constitution and the public interest demanded at our hands, and to forfeit, by stultifying ourselves, all claim to public confidence.

To such a course of legislation, Mr. President, I cannot submit, except under the pressure of an irresistible necessity; and, to show that no such necessity exists, I will examine, as briefly as I may, and yet with as much amplitude as may be necessary to the correct apprehension of them, the objections which have been urged against this law. These objections, as they have been stated at different times, are—

1. That the law is imperfect, and requires amendment; impracticable, and cannot be carried into operation.
2. That it is unconstitutional.
3. That it is immoral, and corrupting in its tendency.
4. That it is inexpedient, not demanded by the necessities of the country, to which State legislation (it is said) is entirely adequate.
5. That it will encourage a spirit of wild speculation.
6. That it will increase the embarrassments of the country, by forcing on the market, one hundred millions of property.
7. That it is perpetual.

These objections it is my purpose to examine separately, and in the order in which they are stated.

First objection. Sir, the merit of drawing the bill, which became a law at the last session, is not claimed by the Judiciary Committee. The responsibility of having adopted it, is cheerfully assumed. The subject of bankruptcy, had been considered in the Senate at two preceding sessions; and from various plans which were suggested, this bill, in the form in which it was passed at that session, was ultimately adopted. It was presented in that precise form, as one in which it was least likely to encounter objection—not as perfectly faultless, for it was not believed that any merely speculative legislation could produce such a result, but as one which was capable of being carried into beneficial operation, and upon which might be engrafted those improvements which experience would suggest. In my judgment, Mr. President, there are mistaken views on this subject entertained by the friends, as well as by the opponents, of the bankrupt law. The latter have, for the most part, indulged in general and indiscriminate denunciation. When they have been pleased to specify their objections, they have met with a ready answer, but its friends have in general contented themselves with replying that these objections might be removed by a supplemental bill, and therefore furnished no ground for the *repeal* of the present law; thus impliedly, and sometimes expressly, admitting the alleged defects of that law. Now sir, speaking for myself, I am not disposed to make this admission. The law commends itself to my judgment, by the simplicity of its machinery, by the absence of that complicated agency, to the blunders and delays arising from which, the *repeal of the act of 1800* was mainly to be ascribed. It defines the *principles on which it is* to operate, designates a single and competent *judicial officer to apply* them, arms him with power to prescribe suitable *rules, regulations,* and forms of proceeding, and then leaves it to experience

to suggest the improvements which it may require legislative interposition to accomplish. The evidence of the practicability of the law, in its present form, is to be found in the promptitude and facility, with which the judicial officers entrusted with its execution, have prepared to carry it into effect.

But, sir, the amendments which are proposed apply not to the *form*, but to the principles and *substance* of the law—are totally adverse to the views of its friends, and are intended to defeat, and will defeat it, if they are adopted. They propose—

1. To limit its operation to *traders*.

2. To make it merely *compulsory* on the debtor, and to deprive him of any option to originate proceedings under it.

3. To prevent its application to *existing contracts*.

4. To make the *assent of the creditors* necessary to the *allowance of the certificate*, and the *appointment of the assignees*.

5. To include *banking corporations* in its provisions.

The friends of the law will at once perceive that a bankrupt act, containing these provisions, would find few advocates in this chamber. I will, however, examine them.

The three first of these proposed amendments properly belong to that portion of the argument, in which the constitutional question will be discussed. On the two last, I will submit a brief remark here.

As to the *assent of creditors* in the *allowance of the certificate*.

It is difficult to divest ourselves of our earlier impressions on any subject. Those in relation to bankruptcy, we have borrowed for the most part, from the English system. There, bankruptcy was originally dealt with as a *crime*, and the failing debtor was treated as a *criminal*, who having expiated his *offence* by a compliance with all the requisitions of the law, might receive his certificate as a *boon* granted by his creditors. A better view of this subject, has been subsequently taken in England, and, certainly bankruptcy is not at this day, so considered in the United States. Here, the exercise of the authority conferred by the constitutional grant, to establish laws on the subject of bankruptcy, is an exercise of the *protective power of the Government*. Its right so to interpose, will be more particularly considered hereafter. Assuming in this part of the argument the position, that the allowance of the certificate results from that interposition, and is not a boon conferred by the creditor, there is an obvious propriety in providing that the question of its allowance, shall be decided by the impartial judgment of the judicial officer of the Government, rather than to permit it to be dependent on the caprice of the creditor. The very same power, differing only in degree, would be exercised by a provision, that a certificate of discharge might be granted with the assent of any portion of the creditors, *less than the whole*; and this, it is admitted, might be done.

Thus the Government, assuming under its constitutional grant of power the right to grant the certificate, prescribes the general terms of its allowance, and fitly confides the application of them to its own judicial officer.

The same observation is applicable to *the appointment of assignees*. In lieu of the remedy allowed to each individual creditor, against the property of the debtor, or so much of it as will satisfy his claims, the Government assumes upon itself the task of making a ratable distribution *of all his property, among all his creditors*. It is fit, that it should so

its own agents in performing this office. The wishes of the creditors, will however doubtlessly be consulted in their selection.

It is next said, that this law ought to be so amended as to include *banking corporations*. Sir, this presents to our consideration, a subject of commanding interest—one, which when it becomes necessary to decide it, it will be our duty carefully to examine in all its various aspects. It involves the great question of our constitutional power over the currency and the extent of that power, and is to be considered with a view to the multiplied interests, which will be affected by its exercise. I have an opinion on this subject, which has been formed with some deliberation, and which, ere long, it will probably become my duty to express. But I am not willing to connect that question, with the subject of a general bankrupt law; especially, I am unwilling to abrogate an existing law, for the purpose of that connexion. I waive therefore, *ex industria*, the expression, at this moment, of any opinion on the question of the power of Congress, to subject the corporations created by the States, to the action of a bankrupt law. Looking to the difficulties which will attend its exercise, I think it better to take the opinion of the National Legislature on that subject by a separate bill. Independently of the question of mere power, there are many who believe that the present condition of the country presents an insuperable objection to such a measure. For my own part, I incline to think that public opinion is gradually becoming more favorable to the assertion of the power, but I believe it would be impracticable at this moment, to pass a general bankrupt law, which included banking corporations. I put myself however now upon the ground, that there is no necessary connexion between the two subjects—the one relating chiefly to the great public question of the regulation of the currency, the other to that of the private relations of individual debtors; the one looking to the future and uncertain action of Congress, while the other has already received its deliberate sanction.

In fine sir, on this branch of the subject, I maintain that this law is practicable, and capable of being carried into beneficial operation, as gentlemen will discover, if they will leave it undisturbed for a few days. Nay, it is already in operation, without the aid of legal process, or the assistance of judicial officers. It has anticipated the period of its legal inception. The very fact of its existence on the statute book, even though its legal operation is postponed, has already produced many compromises, beneficial to both debtor, and creditor. Yes sir, it *is* practicable, and it is *therefore* objectionable to gentlemen on the other side of the chamber. It is obnoxious, not merely *per se*, in and by itself, but also *per nos*, in and through us—not merely as a *bankrupt law*, but also as a *Whig measure;* as a measure of the *extra session;* as *one* of a *system of measures, all of which must be repealed*, or even *two vetoes* of a *Whig* President will have lost their charm.

Second objection. I will next examine the question of the constitutional power of Congress, to pass this law. The objections to it are various. I will meet them all in the assertion of the following propositions:

That Congress has power to pass a bankrupt law, not *limited to traders*, but *extending to all classes of the community*.

Not merely *compulsory on the debtor*, for the *benefit of the creditor alone*, and to be *put in operation solely at his option*, but also for the *benefit of the debtor*, and to be called into *activity by his separate will*.

A law which shall discharge the *person* of the debtor, and his *future acquisitions*, as well from *contracts made before*, as from those *made after the law*.

Which shall empower a competent *judicial tribunal*, to grant the *certificate of discharge*, *with* or *without* the *consent* of *all*, or of *any of his creditors*.

In short, that the *whole subject* of the relations between a *debtor in failing circumstances*, and *his creditors*, is by the Constitution, confided to Congress, with a *single limitation*.

Mr. President, the general power of Congress to pass a bankrupt law is not questioned. It is written in broad letters on the face of the Constitution. But it is contended that bankruptcy is a *technical* term, derived from the English law, having a fixed interpretation in that system of jurisprudence, which must be conformed to here. The fact, and the consequence are both denied. The objection is, that bankruptcy, as contradistinguished from insolvency, is limited to traders, is compulsory on the debtor, applied solely at the option of the creditor, and discharges the contract; while insolvency, extending to all classes of the community, can only be put in operation by the debtor, and is limited to his discharge from imprisonment. Sir, no such distinction exists. Bankruptcy was borrowed from the civil law, which did not recognise it. The commission of the Prætor extended to lunatics and profligates, as well as to debtors, and was granted at the instance of relations, as well as creditors. In England, the first law in relation to bankruptcy, formed part of their criminal code, dealt with it as a crime, and was directed against the Lombards. The statute (34 *Henry* VIII) against persons "*who do make bankrupt*," was applicable to *all persons and classes*. This is expressly acknowledged by English writers on the law of bankruptcy. That statute does not specify the *persons* or *classes* who shall be liable to its operation, but *enumerates the acts*, the commission of which, would render *any person*, of *any class*, amenable to the law. The *statute* of *Elizabeth*, was confined to persons *engaged in merchandize*; but before the adoption of our Constitution, the provisions of that act had been extended, by judicial interpretation, to *all* persons, of *whatever* class, *buying* and *selling for profit*. So the English bankrupt law was *not* confined to *professional traders*; and it is equally certain that a man might be declared *insolvent* at the *instance of his creditors*, as any man may convince himself, by reading the statute (32 *George* II) commonly called the *Lords' Act*, 3 Story's Comm. Const. 10, in nota. Neither part of the proposition which is asserted, is therefore true in point of fact. But if it were so, would the conclusion follow? The proposition is, that the ample power given to Congress, to establish laws *on the subject of bankruptcy*, is *confined to the establishment of such laws, as were in existence in England, at the date of the grant*. Can any thing be more preposterous? By such a regulation, our ancestors would have denied to us the right, to avail ourselves of the progress of legal science. Whatever errors existed in the English system, would have been fastened upon us, and would have been irrevocable, but by an amendment of the Constitution. This particular branch of legal science, has advanced in England, and elsewhere, since the date of that instrument. In Great Britain, a commission combining distinguished intelligence, with persevering industry, after years of laborious research, has detected and exposed the errors of the bankrupt system, as it

had existed there for centuries. She has corrected the errors of her own system. Are we constitutionally bound to adhere to them? Sir, I protest against this slavish subjection to the by-gone errors of any nation. It could never have been designed by the framers of our Constitution. We do wrong to the memory of our patriot sires, who broke the chains of our colonial vassalage in vain, if we are to rivet them anew, and by our own act.

But there is an obvious, palpable fallacy in the proposition. It confounds *principal* and *incident*—the *details* which belong to the *exercise of the power*, with the *grant of the power itself*. The power granted is to *establish laws on the subject of bankruptcy, to regulate the relations between a failing debtor, and his creditors*, subject to a single limitation, that of *uniformity*. This is the *principal* power, and it is irrevocable, unchangeable. As the Constitution left it, so it must remain while that Constitution exists; all else is *incident*, *detail*, not *specifically prescribed* by the Constitution, but *necessarily confided to the discretion of Congress*, because time and circumstances, not to be foreseen and provided for in a fundamental law, would require their modification. In passing a bankrupt law, Congress has to determine—

1. What *classes of persons* shall be included in the act.
2. What *acts* of such persons shall constitute *bankruptcy*.
3. What shall be the *rule of distribution* of the bankrupt's *effects*.
4. What shall be the *effect of the certificate*.
5. What shall be the *mode of proceeding*, to ascertain the act of bankruptcy, enforce the distribution, and obtain the certificate.

These are *details*. The *power* to *regulate them*, is necessarily incidental to the *principal* power, which is the power to *establish laws of bankruptcy*. Are we bound to follow the English law in *all these particulars*? If not in *all*, in *which*? Are we obliged to incorporate the *penalties* of the statute of Elizabeth, in an American bankrupt law?

The argument for which I am contending, is strengthened by *the words of the grant*. These are peculiar—"to establish laws on the subject of bankruptcy, which shall be uniform throughout the United States." Was ever charter more ample? The *whole* "*subject*" *of bankruptcy*, is committed to the discretion of Congress, with a *single limitation*. The laws which are established must be *uniform*. Where is the power to take from the constitutional grant, by adding to the constitutional limitation? *Expressio unius, est exclusio alterius*. If the framers of the Constitution, had intended to impose any other limitation, they would have expressed it. By expressing this *alone*, they have *excluded every other*. The Constitution gives to Congress the power to *establish laws on the subject of bankruptcy*. The inquiry forces itself upon us—*what laws*? Those of England, of France, of the other States of the continent—or *laws devised by an American Congress*?

Mr. President, the reasons assigned for the limitation of the English statutes of bankruptcy to *traders*, grew out of their own peculiar condition, and are wholly inapplicable here. The diversity of occupation, which separates that people into classes, is fixed and permanent. The *lines of* division are distinctly marked, and their boundaries are seldom passed. *It is not so with us*. The same individual here, is often engaged *in quick succession, in* various pursuits. The mechanic who has capital *of his own, or can* command credit for the purchase of unwrought mate-

rials, labors until he has acquired a stock of manufactured articles, and then turns trader to dispose of them, adding to his own, some things of a different kind, to give variety to his stock, and to facilitate the disposal of it. The same operation in effect, with some modification in the form, is performed by all classes of our citizens. To a certain extent, we are all traders. The spirit of enterprise which belongs to a young and flourishing community (for such *has* been our condition) is not confined to traders by profession.

An English writer on the law of bankruptcy, for the purpose of justifying the limitation to traders, reasons substantially thus: If one who is not engaged in trade, purchases property, having present means of payment, and does not pay for it, he has no claim to relief. If he buys without having those means, he commits a fraud, and is still less entitled to it. The exclusion of farmers, is attributed to a different cause. The title to the landed property in England, is for the most part, in the nobility, to enable them to preserve the rank, which is assigned to them, as a distinct order in the State. But the real agriculturists are the tenants of these noble Lords, and to subject them to the statutes of bankruptcy, which require a ratable distribution of a debtor's effects, would be to take from the landlord his priority of lien for his rent. On which of these reasons, can we justify the limitation of the bankrupt law, exclusively to traders, in this country?

But sir, there is a striking fact, to show that this limitation was not believed to exist at the time of the adoption of the Constitution. The State of New York, in ratifying that instrument, expressly instructed her Senators, and Representatives, to propose as an amendment to this particular grant of power to Congress, its *limitation to traders;* and that amendment was not adopted. The fact will appear in the supplement to the Journal of the Convention, page 436.

'Mr. President, this proposal and its rejection prove two things:

1. The proposal to *limit the grant*, proves the *cotemporary interpretation of its extent*, and that it was considered applicable to *all classes of the community*.

2. The rejection of that proposal by a body of men, many of whom had been engaged in forming the Constitution, proves that *at the time of its ratification*, it was not deemed proper *to limit it to traders.*

But why sir, should the convention have looked exclusively to the English rule of bankruptcy, or have resorted alone to her statutes, for the interpretation of the term? Her common and statute law are justly entitled to a respect, of which no American lawyer can, if he would, divest himself. But why should our fathers have gone abroad, to search for the meaning of the term? It was well understood, and in familiar use here, before the Constitution was formed. Our own colonial and State legislation was all before them. Insolvent laws, co-extensive with the English bankrupt laws, had been passed here. They looked to the past, as well as the future, and made no distinction, such as is now contended for, between bankruptcy, and insolvency. 3 Story's Com. Const., 10–11.

Let me ask the attention of the Senate, to the opinion of the Supreme Court of the United States, on these questions. In *Sturges vs. Crowninshield*, Chief Justice Marshall, not uttering mere obiter dicta, but pronouncing the opinion of that high tribunal, on certain questions certified

from the Circuit Court of New York, thus annihilates the alleged distinction between bankruptcy, and insolvency.

"It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws. But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel much hesitation in saying that this was an insolvent, and not a bankrupt act; and therefore unconstitutional. Another distinction has been stated, and has been uniformly observed: insolvent laws operate at the instance of an imprisoned debtor; bankrupt laws at the instance of a creditor. But should an act of Congress, authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity."

He repels as distinctly, the suggestion that a bankrupt law must be *limited to traders.* In the same case, he observes: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this discription. It is like every other part of the subject, one on which Congress may exercise an extensive discretion."

And Mr. Justice Story, whose name and whose reputation are familiar to every American lawyer, and who is equally esteemed among foreign jurists, in his Commentaries on the Constitution, has given his high sanction to the doctrines for which I am contending. Speaking of the alleged distinctions between bankruptcy and insolvency, to which I have referred, he says: "In England, it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense, bankrupts or insolvents." He adds: "It is not true, and never was true, as a distinction in colonial legislation." And with reference to the limitation of bankrupt laws to traders, he says: "This is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws, to prevent their being applied to any other class of unfortunate and meritorious debtors"—3 Story's Comm. Const., 13. Looking to the very question which we are considering—the extent of the constitutional grant to Congress in relation to bankruptcy—he says: "Perhaps as satisfactory a description of a bankrupt law as can be framed, is, that it is a law for the benefit and relief of creditors, and their debtors, in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provisions for cases of persons failing to pay their debts." 3 Story's Comm. Const. 13, in nota. Thus it will be seen, that this distinguished jurist affirms the proposition, which in an earlier stage of this argument, I ventured to present to the Senate—that the power of Congress, extends to the whole subject of the relations between a debtor in failing circumstances, and his creditors.

But, Mr. President, I am met by the suggestion of the Senator from South Carolina, (Mr. CALHOUN,) that the decisions of the Supreme Court are not obligatory upon him; that the arguments which they urge have been answered and refuted by those in whom he has more confidence.

Sir, it often happens that in the discussion of a subject, some incidental question arises, greatly transcending in importance the principal subject itself. We have a striking illustration of this here. The inquiry which *is now thus incidentally* presented to us is, what is the legitimate influ-

ence of judicial decisions, in relation to questions of constitutional law, on the subsequent legislative consideration of the same question, which has been judicially decided? This is an inquiry vastly exceeding in importance, the question of the repeal of the bankrupt law. The stability of our constitutional law, depends on its correct decision. I trust sir, the Senate will not consider that time as mispent, which is employed in the effort to place it on the basis of truth and reason.

Plausibly stated, the proposition for which the Senator from South Carolina contends is this: That, as a Senator of the United States, called to exercise his legislative functions, the question whether a proposed law is conformable to, or conflicts with the Constitution, is one which must be decided by him according to his own understanding of that instrument, and cannot be controlled by the judgment of any other person. Such a proposition results in this—That the *interpretation of the Constitution*, by its *own appointed arbiter*, is not obligatory upon any man, who is called in the discharge of his official duty, to obey the requirements of that instrument; but that he is at liberty to follow out implicitly the dictates of his own understanding, uncontrolled by such interpretation.

Mr. President, I protest against this proposition, as the assertion of a political heresy of the most alarming character. The Constitution of the United States, vests judicial power in certain designated tribunals, and declares that such power shall extend to all cases in law and equity, arising under that Constitution, the laws of the United States, and treaties made under their authority. To the judicial power, therefore belongs, by the express provision of the Constitution itself, in all cases properly brought before it, the right to interpret that instrument, to decide what it permits, and what it forbids—in fine, *to determine what it is*. Each judicial decision, so made under the authority of the Constitution, becomes incorporated in, and is part and parcel of, the instrument itself, enlarging, restraining, or modifying the original text, according to the legal import and effect of such decision. He who disregards it, whether he be legislator or executive officer, disregards the Constitution itself, of which it is part, and confessedly of higher authority than the original text; since, in all cases of supposed conflict, every where but in the halls of legislation, it definitively interprets, and controls if need be, the literal import of that text. The legislator who disregards it may do so with impunity, because his motives to action are in the recesses of his bosom, or if avowed, are beyond human control; but the act is nevertheless recorded in *foro conscientiæ*, as a violation of the Constitution.

Advancing years sir, may render me sensitive on this subject. I *am* sensible of their influence; but I am still more sensible of the influence of considerations connected with the relative position in this confederacy, of my immediate constituents—of the deep and abiding interest which they have in preserving in its full and whole extent, in all its original authority, and vigor, and efficiency, the constitutional power of the judicial department. I look with wonder upon any man, claiming to be an advocate of the rights of the States, who would seek to impair it. Why sir, it is upon the very principle for which I am contending, that our State laws receive the interpretations which those who framed them designed they should have, and that the intention of our State Legislatures is carried out, when these laws are brought into controversy, in the federal judicial tribunals. The decisions of State judges, are considered in those

tribunals, as part and parcel of the laws, which they are called to interpret—the principle which I maintain, being equally applicable to acts of ordinary legislation, and to the fundamental law. When a question arises there, on the construction of a State law, the judges of those tribunals, do not undertake to interpret it according to their own understanding. The immediate enquiry is, what construction has been given to this law, by the State judiciary; and that construction is the rule of interpretation in the federal tribunal.

Mr. President, a beautiful illustration of the habitual deference, paid by the highest judicial tribunal of the Union, to the authority of the State judiciary, as the constitutional interpreters of the legislation of the States, was afforded by the late distinguished, and venerable, and lamented Chief Justice of the United States. It occurred, sir, while I had the honor to be the counsel of the Government. Sitting in the Circuit Court of Virginia, at Richmond, he had pronounced a decision on a particular statute of that State. An appeal was taken by the attorney of the United States for the district, and it became my official duty to contend before the Supreme Court, that this distinguished jurist had erred in the construction of a statute of his own State. I felt all the embarrassment of my situation, but was happily relieved from it. In the interval between the trial in Richmond, and the hearing of the cause in the Supreme Court, the Court of Appeals of Virginia had given a decision on this statute, which was adverse to that of the Chief Justice. My duty to the Government, was performed by bringing that case to his notice. He was the first to pronounce for the reversal of his own decision. Well sir, this distinguished jurist might have opposed his individual opinion, to that of the Court of Appeals of Virginia. He might have claimed the right to determine the construction of the statute which was in controversy, *according to his own understanding* of it. And when a question of the construction of the Constitution, arises in this chamber, or is presented to an executive officer, of whatever rank, notwithstanding that construction has been settled by the arbiter, which the Constitution itself has appointed—regardless of this constitutional arbitrament, *I* may say, the Senator from South Carolina may say, that executive officer may say, we *will* exercise the right of deciding that question, according to our own understanding of it. But when we so say sir, we speak not in the language, or in the spirit of the Constitution, but in the spirit (and why should we not adopt the language?) of the Roman Emperor—*sic volo, sic jubeo, stet pro ratione, voluntas.*

Mr. President, the recent decision of the Supreme Court, in the case of *Groves and Slaughter*, or rather the opinions expressed by some of the judges in that case, will illustrate the position for which I am contending, that a decision of that Court, on a question of constitutional law, becomes itself part of the Constitution. The question whether the power of Congress "to regulate commerce among the several States," authorized the inhibition of the slave trade between those States, was discussed at large in that case, and with great ability. Its determination was not necessary to the decision of the case, and it was therefore not decided. Some of the judges however expressed their opinions upon it. I suppose, for the *purpose of the illustration* which I am desirous of making, and to show (*independently of the just* construction of their own local statutes) the *importance to Southern* interests of the principle for which I am con-

tending, that it had formed part of the issue, and had been decided according to the intimations given from the bench; that the Supreme Court had decided, that the power of Congress "to regulate commerce among the several States," did not authorize that body, to prohibit the traffic in slaves between those States. Then sir, my proposition is, that such decision would have become part of the Constitution, of equal force with its original provisions; that no judge, no legislator, no executive officer, would have been at liberty to disregard it; that thereafter, the text of the Constitution, would have read thus—Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," *but this power shall not extend to authorize the prohibition by Congress, of the traffic in slaves, between the said States.* And what Southern man, with all the force of his intellect, and with all the fervor of his patriotism, would not have asserted the binding authority, at all times, and on all persons, of this judicial supplement to the original text of the Constitution? I trust, then, sir, that the law which we are considering, will not be deprived of the support and confirmation, which it is entitled to receive from the judicial decisions, which I have adduced to sustain it.

[Mr. BERRIEN here gave way to a motion to proceed to the consideration of executive business.]

WEDNESDAY, JANUARY 26, 1842.

Mr. BERRIEN resumed. He said: It is with sincere and unfeigned regret, Mr. President, that I make this additional trespass on the time of the Senate. No petty ambition, no mere love of display, even on this great theatre, elevated as it confessedly is, could tempt me to it. In the position in which I stand, if it were consistent with the duty which I owe to myself, and to a portion of my own immediate constituents, to the creditor, as well as the debtor interests, which will be affected by the operation of this law, and to the interest, as well as the duty of the Government, I would not detain the Senate, by the utterance of an additional word upon the subject. But it is not so, sir. An imperative sense of duty compels me to proceed; and, to the best of my ability, that duty shall be faithfully fulfilled.

Sir, when the Senate passed from the consideration of this subject yesterday, I had discussed the question of the constitutional authority of Congress to pass a bankrupt law, not limited to traders merely, but extending to all classes of the community, and had endeavored to place the assertion of that power, under the protection of the Constitution, of cotemporaneous interpretation, of judicial decision, and of the concurring opinions of enlightened jurists, who had commented upon that instrument. I attempted also to vindicate the rightful authority of judicial decisions, in the last resort, as the final arbitrament which the Constitution itself had provided.

I am now to discuss the constitutional question in another aspect. It is objected that the bankrupt law is unconstitutional, because it is *rĕtroactive*, because it extends to, and discharges contracts which have been entered into before, as well as those which may be entered into after, the *act begins to operate*. It is competent, say the objectors, to pass a bankrupt law, which will release the future acquisitions of the debtor, fr

contracts entered into *after* the passage of the act, but not from *pre-existing* contracts. Why not, sir? I repeat the inquiry, why not? Does the Constitution forbid it? Is it forbidden by any principle of good faith, or of the inviolability of contracts? Do not the interests, as well as the duty of the Government require it?

Is it forbidden by the Constitution? Far from it. The power is asserted in that instrument, both affirmatively and negatively—*affirmatively*, by the *express* grant of the power to Congress, to *establish laws on the subject of bankruptcy*, which, in every commercial nation of the world, have been held to cover the whole ground of the relations between a debtor in failing circumstances, and his creditors, and to extend to the discharge of the future acquisitions of the debtor, from liability to his contracts, totally regardless of the time at which they were entered into. Such is the nature and effect of those laws, according to the understanding of all civilized nations. If then, it were admitted, that a bankrupt law, operating *retroactively*, would *impair the obligation of contracts*, the answer is, that, *to this extent*, and *for this purpose*, Congress has *power under the Constitution*, by *express grant*, to pass laws *impairing the obligation of contracts*. Thus the power is given expressly, *affirmatively*.

But it is also given *negatively*, and with equal clearness. The obligation of contracts, their sacredness and inviolability, engaged the attention of the framers of the Constitution, when they expressly declared that no *State* shall pass "any law impairing the obligation of contracts." The States had surrendered to the Federal Government, the power to enact bankrupt laws, on high considerations of expediency and necessity. For all other purposes, contracts ought to be held inviolate, and *hence the inhibition upon the States*, to pass any law, which would impair their obligation; but this power had been vested in the Federal Government, and that consideration forbade that Congress should be included in the prohibition. They were not included; and thus, by a *negation*, as strongly as by the *express grant* of the authority, to establish laws on the subject of bankruptcy, is this power of Congress, asserted in the Constitution.

Is its exercise forbidden by any principle of good faith? And what is that principle, and how is it violated by this law? There is a sacredness in contracts, entered into *bona fide*, both in the eye of the law, and of sound morality. The maxim *fides servanda est*, is of undisputed authority, and ought to be universally observed. I shall never be found among the advocates for its violation. But sir, *is* it violated, and *how*, by the provisions of the law under consideration? A contract is an agreement to do, or not to do, a particular thing. Let us distinguish between the *obligation of a contract*, and the *remedy for its enforcement*; and admitting *argumenti gratia*, the inviolability of the former, let us consider whether, even independently of the constitutional grant, the latter is not habitually subjected, in the exercise of ordinary legislation, to be regulated as considerations of expediency may dictate. The creditor enters into a contract, as a remedy for the enforcement of which, if its terms be not complied with, you give him an action at law. For the purpose of the argument, I will suppose that this right of action is, under the law existing at the date of the contract, unlimited as to time. Before the creditor *finds it necessary to resort* to his remedy, the Legislature deem it expedi*ent to prescribe a period within* which this remedy must be used, and *after which, it shall no longer* be available to him. What is this but to

say, that the remedy of the creditor for the enforcement of his contract, which, at the time of entering into it, was unlimited, shall at the expiration of a certain time, which the Legislature in its wisdom prescribes, cease to exist? This power is constantly exercised in the enactment of statutes of limitation, not indeed, under the precise circumstances, and to the extent here stated, because such statutes were generally speaking, already in existence, at the date of the contracts on which they are made to operate; but the whole power which is contended for, is exerted in the modification of them. Who doubts the right of the Legislature to modify a statute of limitations, by provisions which will apply to, and control all suits brought after its enactment, even although these be founded on contracts, which were entered into before such modification? Here then, in the exercise of ordinary legislation, is an interposition by the Government, an interference with, and *withdrawal* of the remedy of the creditor, for the *enforcement* of his *pre-existing* contract.

But sir, let us accompany the creditor, in the enforcement of his remedy, one step further. He prosecutes his claim to judgment, which, *ipso facto*, by the laws of some of the States, gives him a lien on all the property of his debtor. Is the law which regulates the continuing efficacy and universality of this lien, irrevocable, incapable of modification, except prospectively? May not the Legislature prescribe a time, after which all judgments not enforced, shall cease to be obligatory as judgments, or restrain the universality of their lien, by withdrawing from it certain specified property of debtors?

Again, existing laws, laws existing at the date of the contract, have given to the creditor, a right to enforce his judgment, by the same process of execution, against the lands and tenements of the debtor. Is the right of the Legislature to modify this remedial process, limited to suits founded on contracts, entered into after the date of the amending act? May they not subject to the operation of the ordinary process of *fieri facias*, property which it could not formerly reach, without giving just cause of complaint to the debtor, and in like manner withdraw from its operation, certain species of property, which anterior laws had rendered liable to it, without violating the rights of the creditor?

And what is it which the bankrupt law proposes in relation to the property of the debtor? As the law now stands, each creditor may enforce his claim by judgment and execution, against so much of the debtor's property, as will be sufficient to satisfy it. The right to do this, does not arise from the contract, but from the law. It does not result from the obligation of that contract, but from the exercise of the legislative power, in providing the remedy for its enforcement. The remedy is given by the Government. May it not be modified by the same authority? The bankrupt law contemplates nothing more—exercises no greater power. It does not touch the obligation of the contract. It does not withdraw the property of the debtor, from its liability to the claims of his creditors. It simply modifies the process, by which that liability is to be enforced. Instead of leaving the property of a debtor, who is in failing circumstances, to be sacrificed in detail, by the separate action of individual creditors, or appropriated in gross, by assignment to a favored portion of those creditors, it interposes the constitutional authority of the Government, by the decree of its judicial officer, places the whole property in custodia *legis, and then*, acting upon the principle that equality is equity, provid

for the ratable distribution of it, among *all* the creditors. This is a bankrupt law, the *monstrum horrendum*, which affrights the imagination of gentlemen—and this, the head and front of its offending. I mistake, sir; it does more. When all the property of the debtor, is thus exhausted, it declares that the remedy of the creditor is exhausted also. *All* the property of the debtor must be surrendered; all must be applied in satisfaction of the claims of his creditors; the pound, the whole pound of flesh, for this is in the bond, but not one drop of blood. His hopes, his expectations, his unfettered energies, the buoyancy of an elastic spirit, the intellectual power which guides, and the unchained hand which executes its purposes—these are all his own. They are the gifts of a bountiful Creator, and may not be subjected to the grasping avarice of man. The creditor has the fruits of his process, against the goods and chattels, lands and tenements, of his debtor, by having them *all summarily subjected to his claim*. When this is done, no principle of equity, no rule of good faith, no duty of the Government, requires that it should *extend the remedy*, which *it alone provides*. Having stripped the unfortunate debtor of all, having turned him penniless upon the world, it is not bound to award a *prospective fieri facias*, to authorize a *levy* and *sale* of his *hopes* and *expectations*, or to render against a living man, to whom nothing but life is left, judgment payable out of assets *quando acciderint*.

But whence sir, this sacredness which is ascribed to contracts, solely with reference to the *time at which they were entered into*? The propriety of a bankrupt law, operating *prospectively*, is admitted, or if not admitted, is denied with diminished zeal. Whence this distinction? Why is the contract of yesterday, more meritorious, more sacred, than that of to-day, or to-morrow? Gentlemen tell us that a bankrupt law, operating prospectively, gives notice to those who enter into contracts, *after* its date. This is to apply to the ample and unfettered legislation of Congress, founded as it is on an expresss constitutional grant, the principle, which by a peculiar concurrence of circumstances in the Supreme Court, has been brought to uphold the restricted legislative power of the States, over this subject. But let it be considered.

A bankrupt law operating prospectively, it is said, would give notice to creditors; they would contract with a view to it, and would therefore be rightfully bound by it. Be it so. Sir, I give to gentlemen the full benefit of the objection, and claim that of the concession which accompanies it. That concession is this: laws existing at the time of entering into a contract, give notice to the parties, form a part of their contract, and may rightfully control it. And now sir, I say to Senators, *the Constitution of the United States is a law, it is the supreme law, of which all are bound to take notice.* It contains on its face, an express grant of power to establish laws on the whole subject of bankruptcy. Of this, each creditor who will be subjected to the operation of this act, had notice when he entered into his contract. He knew that Congress had ample authority to enact, and might at any moment enact, just such a law, as that under consideration. Then *ex concessis* of gentlemen, his contract was made with a view to this supreme law. It entered into, and formed part of it.

Did he speculate upon the failure of Congress, to exercise *this power? Well sir, his speculation has* been realized; for a series of years, he has

been enjoying the fruits of it. Congress had for a long time, been heedless of the requirements of the Constitution in this regard. It has, at length obeyed them. Of its constitutional power to pass this law, he had full knowledge when he entered into his contract. *He had no right to doubt the disposition of Congress to fulfil its constitutional duty.* At any rate, such doubt cannot impart inviolability to his contract, or absolve us from the obligation to perform our whole duty. Yes sir, I say emphatically, our whole duty. This is not a mere question between *debtor, and creditor.* It is one of higher, far higher, and loftier import. It is a question between the Government, and its citizens; one which involves both its rights and its duties—its right to the benefit of the productive energies of its citizens—its reciprocal duty to protect them, in the legitimate exercise of the faculties which God has given them. For what other conceivable purpose was Government instituted? Its protective power is this day invoked, in the name and for the benefit of half a million of American freemen. Its duty to them demands, its own interest requires, its exercise. This duty is rendered more imperative by the conceded fact, that many of these unfortunates have been reduced to poverty and wretchedness, by the misgovernment of those who had the power to relieve, but who had hitherto refused to relieve them.

I dismiss this branch of the subject, in the conviction that no constitutional objection exists to the *retroactive* character of the bankrupt law.

On the objection which is urged to the law, on the ground of its want of *uniformity*, a word only is necessary. This want of uniformity, is alledged to consist in its failure to include *banking corporations.* The question of the propriety of doing this, has been heretofore adverted to. Now, the omission is said to render the law unconstitutional. Sir, the objection exhibits, in striking relief, the inconsistency of those who urge it. The law is said to want uniformity, and therefore to be unconstitutional, because it does *not apply* to *all classes*, not excepting even this class of *merely artificial persons;* and these same objectors allege that it violates the Constitution, because it is *extended to more than a single class*, namely, *traders.* But the answer to the objection is a plain one, and may be concisely stated. The Constitution provides that the bankrupt law shall be *uniform* in its operation *throughout the United States*, that is, in the ceveral States; but nowhere requires that it shall be *extended to all classes* of citizens in those States. It is sufficient, that its operation is not diverse, in different States; that its provisions are alike, in each State.

Third objection. Mr. President, I am now to consider an objection of a graver character. This law is said to be *immoral, and corrupting in its tendency.* Sir, if this be so, it ought to be repealed; but my reflections have led me to an opposite conclusion. Such a law cannot, I think, be corrupting to creditors, while charity is among the virtues; nor to debtors, if the prayer that we may not be led into temptation, is (and who doubts that it is?) of divine original. But let us look at the question for a moment. In assuming this as the rule of our decision, we take upon ourselves the responsible office of Censors of the public morals. It is fit that we should do so; but it becomes us to qualify ourselves for the exercise of the high functions which appertain to it, to rise above the atmosphere of party, and studiously to exclude every feeling, which may divert us from *an honest inquiry* after truth. The objects of the bankrupt law are—

To check the career of the fraudulent debtor.

To afford relief to the honest, but unfortunate one.

To provide, in each case, for an equal distribution of all his property, among all his creditors, who chose to avail themselves of it.

Mr. President, these are honest purposes. If the law be honestly carried into effect, they will be fulfilled. It is said, that this will not be so, that frauds will be committed under this law, and that many fraudulent debtors will secure its benefits. Sir, if we were legislating for angels, we might expect a different result. If we were omniscient, and could guard against every wicked device of man, this would afford a just ground, not for the *repeal*, but for the *amendment* of the law. But we are men, legislating for men, and we all partake of the imperfections of our common nature. If the fact that frauds will be committed under a law, be a sufficient ground for its repeal, we must strike out the whole code of our statute law. Our revenue laws, land laws, pension acts—under each of these, innumerable frauds are committed. And even that emblem of purity, the Independent Treasury Act itself, cold and heartless as it was, and withdrawn by its own intrinsic selfishness, from the sphere of all other human passions, and human affections, and exempt therefore from all temptation, except the *auri sacra fames*, which would have inspired its votaries and chosen ministers, even that has been well expunged from the statute book.

But some fraudulent debtors, it is said, will avail themselves of this act. Yes sir, with all the guards which your skill can devise, that result will follow. Do you desire proof, ample, undoubted proof? Look at the operation of the insolvent laws, and learn how impotent is human skill to anticipate and provide against the subtle contrivances of the fraudulent. Such a result is the ordinary, the inevitable consequence of the infirmity of the legislator, and of the wickedness of the man. What then? *Must relief therefore be withheld* from the *honest*, but *unfortunate debtor?* There is another rule on this subject, which both in its origin, and its principle, has more to commend it to our acceptance. It is better that ninety and nine guilty persons should escape, than that one innocent man should suffer. I don't know whether it has occurred to you sir, but the fact is so, that the only *inexpiable crime*, in the catalogue of offences among us, is *debt*, and *the inability to discharge it.* To the murderer, you are comparatively merciful. You doom him to death, and you execute your sentence. With time to prepare for his entrance into another world, he expiates his offence against society, by leaving this. To the wretched insolvent, the law accords no such boon. You sentence him to a living death. He must drag out the miserable existence to which you have doomed him, or superadd the crime of suicide, to that of debt. Minor offences are punished with imprisonment for a limited period, or with corporal punishment, not extending to loss of life. When the victim has undergone these, his offence against society, is atoned for, and he is restored to the rights and immunities of a free citizen. He only, who is unable to pay his debts, has sinned beyond forgiveness, and the possibility of expiation. To him, there is no *locus penitentiæ*—no *spes recuperandi*—no hope of recovering his lost condition. Upon him, no morning can dawn. He is destined, in the impenetrable gloom of *unbroken night, in sadness and sorrow*, to grope his way to the grave.

Mr. President, the true and practical mode of testing the question of *the tendency of this law to* produce immorality, is to compare the bank-

rupt and insolvent laws, not in the operation of the former, on *the mass of insolvencies*, which our neglect of duty has suffered to accumulate, but to examine each in its *ordinary operation*, as a permanent portion of a system of jurisprudence. Let us do this briefly.

The *bankrupt*, when he is declared to be so, either by his own confession, or the proof adduced by his creditor, is instantly divested of all control over his estate. He has no hope of relief, but from perfect integrity of conduct, and the relief which that promises him, is great and permanent. It is no less than entire emancipation from his thraldom. Thus the law presents every stimulus to honesty, every motive to abstain from fraud. Superadded to this, is the knowledge of the fact, that no time affords him protection. If he has succeeded in concealing his fraud, has obtained his certificate, amassed property, and resumed the station in life from which he had fallen, that certificate may be rendered invalid, his newly acquired property may be subjected to the claims of his creditors, and he himself must be doomed to ignominy, if at any period of his life, however remote, a single act of fraud be established against him. Looking to the ordinary motives of human action, these would seem to be safeguards against dishonesty, which would be sufficient even for the restraint of bad men.

What, now, sir, is the situation of the *insolvent?* His most valuable effects have been assigned to the confidential creditors, who have enabled him to sustain his failing credit, and given him an appearance of substance, by which he has been able to delude the rest of the community. At last, the hour of reckoning comes, but it finds him stripped of the means of satisfying even a small portion of the demands against him. His confidential creditors are safe, and therefore indifferent, and so is he. He has committed no fraud in the eye of the law, in rendering them so. All others are remediless. He is arrested, imprisoned, and, without some gross act of fraud, detected during the process, is discharged. The boon which is awarded to him, is that of dragging out a miserable existence, with the privilege of locomotion indeed; but he is destined for life, to be the slave of his creditors, living, moving, having his being for their benefit. What motive has he for the honest surrender of his property, if he has any left, which is covered from the view of his creditors? Why, all his hopes for the future, depend upon concealment. He is *doomed to a life of deception*. If he is detected, what then? He loses his adventure—it is seized by his creditors; but his discharge is untouched. He may try again. The privilege of dragging his wretched limbs from the market to the strand, is still accorded to him.

Look now at the condition of the *bankrupt* and *insolvent*, when the respective processes against them are closed, and say which is likely to prove the better and more upright citizen. The *bankrupt* has surrendered his all. He is poor, nay destitute, penniless; but *he is free*. Aye, there is the charm. He is really, truly free. It is not merely the poor privilege of locomotion, which is accorded to him. His hands are unshackled. The energies of his mind are unfettered. He is free to exert them for the benefit of those whom nature and affection have endeared to him. His recovered freedom is his *stimulus*. The lesson of experience, which adversity has taught him, is his safeguard. The almost utter impracticability of receiving a second time, the boon which has been once accorded to him, is his *voice of warning*. Thus stimulated, thus guarde

thus warned, he enters upon his new career. If in this world of trial, which we have divested of its original beauty, and loveliness, any man may be delivered from temptation, or enabled to resist it by merely human means, this man is secure. The path of duty, of uprightness, of honesty, which it is the best interest of all to pursue, is that from which, he is without any conceivable motive to wander.

And the *insolvent*, Mr. President—what is his condition? He too, has surrendered his all, at least all which he dare openly claim; and for what? To purchase exemption from imprisonment, or the privilege of departing beyond prison bounds. He breathes the free air of heaven, but not as a free man. He is still the "doomed slave" of his creditor. The fruits of his labor, belong to that creditor, and can only be withheld from him by fraud. The necessities of a helpless family, appeal to him. The eagle eye of his creditor, is upon him. He looks upon that creditor, as his enemy. If he be merciless, he is indeed his enemy—the enemy of those, who are dearer to him than life, whom he is bound to protect, even at the sacrifice of life itself. What then? As an enemy, he fences himself against that creditor. He resorts to fraudulent conveyances, to secret trusts, to a regular system of habitual deception, and his children, into whose young minds, it would have been under more propitious circumstances, his grateful task to have instilled the lessons of virtue, are trained up under the blighting influence of that system of concealment, to which they are indebted for the comforts and conveniencies of life. Such is the actual condition of multitudes, under the operation of State insolvent laws.

Look at the progress of this operation, and judge of its effects on public morals. The discharged insolvent escapes from his cell or his prison bounds, to the wretched hovel, which benevolence may have secured to him, for he has nought which he can claim as his own, and can acquire nothing, which may not be wrested from him, by his creditor. The wants of his family call him to labor, and he does labor. His earliest efforts are rewarded by the pound of beef, and the loaf of bread, with which he appeases their hunger. Even these are filched from his creditor, for the law awards them to him. Your law *did* award them. But there is a public opinion, to the moral force of which, even laws must yield, and the wretched insolvent is secure in the enjoyment of these. By and by, he is enabled to provide some little comforts for his helpless wife and infant children. These must be enjoyed by stealth, or the hand of the creditor, may wrest them from his grasp. In process of time, his labors are rewarded with the means, by which he can do something more than provide for the *present* wants of his family. He considers their dependence upon him, and his liability to be taken from them; and the desire to make some provision for the future, becomes strong, irresistible. He has no right to indulge this desire. His earnings are the property of his creditor. If they are discovered, the law will give them to that creditor. In strict morality, he is bound to yield them. But nature and affection urge their own strong claims, and his wife, whose spirit has been broken by adversity, and his children, who have been reared in penury, are the advocates through whom, these claims are preferred. The appeal may not be resisted. *The morality which* conflicts with it, becomes in his view, cold, *heartless, and unfit to be* regarded. He is a man, with the affections, and *with the imperfections of* our common nature. I speak generally. There

are men who would hold fast to their integrity, under circumstances however trying. But our legislation is, as all legislation must be, based upon the *rule*, not the *exception*. And so speaking, I say such an appeal is irresistible. The insolvent yields to it; he hides his earnings; he cheats his creditors; and then, with a newly awakened spirit, labors to increase his little store. The repetition of the fraud is more easy—habit renders it familiar. It becomes the business of his life. There is an occasional twinge of conscience, but that passes; now and then, a fear of detection, but that is quieted; till at last, all that disturbs him, is the apprehension which seizes him, perhaps on his bed of death, that the depository of his secret earnings, may be as faithless to his *trust*, as he has been to the *legal* claims of his creditors. Such scenes belong to, or rather more frequently occur in, the crowded population of our great cities; more rarely beyond their limits. Speaking generally, the air of the country, is too pure for them. But who doubts their existence—the frequent recurrence of this struggle between the claims of nature and affection, and the sterner demands of legal justice? And shall we sit here "deliberating in cold debates," whether men shall be saved from moral wretchedness like this?

Fourth objection. Mr. President, the next objection which I am to encounter is, that the bankrupt law is *inexpedient*; that it is not demanded by the necessities of the country; that *State legislation is adequate to every purpose*. Sir, if the view which I have just taken be correct, the highest of all considerations of expediency, the *preservation of the public morals*, demands it. But this has been sufficiently dwelt upon. Let us look at it in a different aspect. My first proposition is, that the *varying legislation of the States* over a subject, the regulations concerning which *ought to be uniform*, renders it *expedient* to retain this law.

The importance of this *uniformity* is clearly inculcated by the Constitution of the United States, since the only limitation which it imposes upon the ample grant of power to Congress, over the whole subject of bankruptcy is, that the laws which they establish, shall be *uniform*. But other considerations as clearly indicate it. Every commercial community has found it necessary to regulate, by special enactments, the relations between creditors, and their debtors, when these last are in failing circumstances. We are a commercial nation, composed of twenty-six confederated sovereignties, and such regulations are indispensable. The necessity exists, not only in relation to our foreign, but also, and principally, in reference to our internal commerce—to that which is carried on between the States. What commerce have we which may compare with this? The *regulation of that commerce, belongs to Congress*. It is fit then, that Congress should regulate, by uniform laws, the important relations which grow out of it. But there is a higher reason: it is that of absolute necessity. Such regulations to be efficient, must be *uniform in the several States*; and this is a result, which Congress alone can produce.

Consider, for a moment, how the legislation of the several States may be varied on this subject:—

In some States, statutes of bankruptcy may be general and unlimited; in others, limited and temporary.

In some, they may merely grant relief from imprisonment; in others, may discharge the contract.

In some, they may grant relief by special legislative acts, applic *to individual cases*; in others, they may decline to interfere at all.

In some, they may give a preference to one class of creditors, in the distribution of the assets, as to specialty and judgment creditors, over creditors by simple contract; in others, the distribution may be equal, and ratable.

In some, creditors within the State may be preferred; in others, resident and non-resident creditors may be placed on the same footing.

Such, and so various may be, and in many of the particulars stated has been, the legislation of the States on this subject. This is upon the supposition that they possessed the whole power over it, instead of that crippled remnant, which has been left them by the decision of the Supreme Court. But the difficulty, amounting almost to impracticability, of obtaining a retrocession of this power to the States, even if it were desirable to do so, serves still more strongly to show how indispensable it is that Congress should exercise it.

Superadded to the expediency of retaining the present bankrupt law, from a consideration of the *varying* legislation of the States, is that which arises from the *inefficiency of that legislation.*

It cannot extend *beyond the limits of the State*, and the *persons subject to its jurisdiction.*

It cannot bind *creditors in other States*, or *affect debts contracted there.*

It cannot *affect the contract*, or the *remedy for its enforcement*, in the *jurisdiction of any other State.*

The Senator from Pennsylvania, (Mr. BUCHANAN) desires that this doctrine may be stated with this modification, that an acceptance of his dividend, under a State insolvent law, by a non-resident creditor, makes the discharge binding on him. Be it so. But in this, the law does not operate *proprio vigore*, but by the *implied assent of that creditor.* He has in effect, by accepting his dividend, become party to a deed of composition, and has by so doing, released his interest. It was at his option, therefore, to subject himself to the law, or to set it at defiance.

Under this State legislation then, the discharged insolvent may be harassed by new suits, as soon as he crosses the boundary line of the State, in which his discharge was obtained. He is *stripped of his property*, by the operation of the bankrupt law of one State, which can *afford him no protection beyond its limits*, and he is *liable to suit in every other State.*

In regard to foreign nations, the legislation of one, or a few States, might be pushed to an extent, which would be retorted by excluding all American creditors, from participating in the distribution of the effects of their foreign debtor, who may become bankrupt. It is expedient therefore, to retain the present law, because of the *inefficiency* of State legislation.

It is expedient also, because of the means which it affords of *preventing the waste of the debtor's property*, when he becomes in failing circumstances, and of *securing the equal distribution of his assets.* A man in failing circumstances, will enter into wild and hazardous speculations, for the purpose of retrieving his affairs. In the vain hope of extricating himself from embarrassment, he engages in adventures, which his calmer judgment would have rejected, and plunges on, until he has involved himself in hopeless insolvency. It is only a bankrupt law, arming the creditor, with the powers which it confers, that can arrest him in this road *to ruin.*

Such a law not only saves the assets of the debtor from waste, but *moreover ensures their equal distribution.* Under the operation of an

insolvent law, he secures his confidential creditors, and is then at liberty to waste in desperate adventures, his remaining means. When he comes to take the benefit of the act, the mass of his creditors are excluded from all participation in the distribution; and among these, are usually found those, who are least able to bear the loss occasioned by his insolvency, while the confidential creditor, whose means are generally ample, appropriates the whole to himself. The bankrupt law prevents this injustice. Its maxim is, that equality is equity. This is the *creditor interest* under this law, and it is felt and understood by those who represent that interest. New York and Massachusetts are, from the course of trade, and the amount of capital which they hold, the great creditor States of this Union; and whatever may be said to the contrary, and however confidently it may be said, their intelligence has enabled them to discover that this act is not merely calculated to benefit the honest debtor, but that it will also eminently promote the interests of the creditor. Hence it is, that in these great creditor States, the majority in favor of retaining the bankrupt law, is so overwhelming. They do not however, advocate it merely for the reasons which I have just stated. They look to the advantage it will afford them, in securing some portion of their existing claims, and of extending their future operations, multiplying their customers, by restoring to a vast number of active, intelligent, and enterprising citizens, who are now in durance, the means of becoming so. But this branch of the subject belongs more appropriately to the Senator from Massachusetts, on the other side of the chamber, who proposes to address the Senate, (Mr. CHOATE,) and to him I leave it.

Fifth objection. It is next said, that this law will *encourage a wild spirit of speculation.* Sir, the precisely opposite result must follow from its continued operation. Senators who urge this objection, at the same time assert that it will *diminish the security* of the creditor. Is it not then most obvious, that it will *increase his caution?* that it will render that creditor more careful *with whom* he deals? *how*, and to *whom* he *gives credit?* He will look to the *present means* of the debtor, will not *speculate* on his *hopes* and *expectations* in the future, and will limit accordingly, the credit which he extends. Such will be its operation on the *creditor.* Why should it tempt the debtor to wild speculation? The benefit which will result to him will be, that he will be stripped of his property, and if his conduct has been honest, that his certificate of discharge, will protect his future acquisitions; but he enters upon his new career, with the unenviable character of a certificated bankrupt, and with the certainty, that however prudent may be his operations, if misfortune should again attend them, the door of relief is forever closed against him, unless his estate will pay seventy-five cents in the dollar. This does not seem to me, to present any very strong temptation to wild speculation. No sir: the natural effect of a bankrupt law is, to *diminish the amount* of dealings on *credit*, while it renders *those dealings more secure.*

Sixth objection. Mr. President, I come now to the consideration of the most extraordinary objection, which has been presented in the various discussions, which have been had on this subject. It is said, that this law will in its immediate operation, embarrass the country, by bringing one *hundred millions of dollars* of bankrupt property on the market. How, *and by what process*, this amount is ascertained, I know not. For the *life of me, sir, I* cannot figure it out. But I do not trouble myself wit

that. The statement, and the argument founded on it, that it would occasion a *sacrifice* of this vast amount of property, by a forced sale of it, received its *coup de grace*, the other day, from the Senator from Kentucky.

I desire to look at it in some of its other aspects. And first sir, what is it which is here asserted? Certainly the most extraordinary proposition which ever emanated from the bewildered imagination of any man. It can have no existence elsewhere. It amounts simply to this: that the *bankrupts* in the United States, hold *an amount of property, which is so large*, that the *solvent* part of the community, *can't conveniently buy it.* This is the proposition which the Senator from South Carolina (Mr CALHOUN) has stated, and on which, he has founded an argument in favor of the repeal of the bankrupt law. I present it to the Senate in its nakedness, in the belief that it requires no other exposure.

But there is another aspect, in which this suggestion has offered itself to my mind, and of which I desire to claim the benefit. One would think that Senators who urge it, were indeed yielding to the sympathies, which they acknowledge they feel. Sir, it is the most decided eulogy, which any man has yet ventured to pronounce on that very law, which it is urged as an argument to induce you to repeal. My most sanguine anticipations of the beneficial effects of the bankrupt law, have fallen far short of this. With all my disposition to think well of it, I have not been able to ascribe to it such potency. And yet the Senator from South Carolina, who thus eulogizes this law, denounces it as unconstitutional, corrupt, and fraudulent. Will the Senate consider for a moment, what it is, which is here asserted? The immediate operation of the bankrupt law, will be to throw upon the market, *one hundred millions of dollars'* worth of *bankrupt* property. So says that Senator. The creditors of the numerous bankrupts in the United States, armed with all the authority of the existing laws, with their judgments and executions, exercising to the utmost their own unceasing vigilance, have still suffered one hundred millions of dollars' worth of their debtors' property, to elude their grasp. It does, in fact, exist, (the Senator says it does,) but as to these creditors, it is as though it did not, since they cannot reach it. It exists, and is theirs, but they cannot find it. Well sir, the bankrupt law is put in operation. Instantly, as if by magic, this vast amount of property, is evoked from its hiding places, by the searching, potent influence of that law; and though it will subject the solvent portion of the community, to some inconvenience to buy it, yet nevertheless, it is sold and distributed among the creditors of the bankrupt. This is what the Senator from South Carolina says will occur. Surely then, when he considers how vast a benefit to the creditor interest, will be effected by this law, he himself being the witness of the fact, and the judge of the extent of the benefit, which will accrue, and that immediately by its operation, certainly, sir, he will not refuse to unite with us, in sustaining it. At least, the Senate, and the country will see, why those long-headed and clear-sighted creditors in New York, and Massachusetts, are so urgent to prevent its repeal. Sir, the prize is too tempting not to rouse any man to exertion. Do you wonder that they are startled at the thought of having it wrested from *them? One* hundred millions of dollars are almost within their grasp. *Suffer the law to go into* operation, and they will clutch them. Ought *they not then, to protest* against its repeal? Mr. President, this one hun-

dred million argument is worth just dollar, for dollar, of its whole amount, against the very purpose for which it was produced.

Seventh objection. The remaining objection to this law is, that it is *perpetual.* Sir, with submission, this is a very great mistake. Nothing human is perpetual; especially, nothing which may be subjected to the action of an American Congress. If this bill passes, it may be safely affirmed, that nothing is stable which may be subjected to that action. The bankrupt law is not therefore perpetual. Its *duration is not limited*, and this, while it leaves it liable to repeal, still serves to impart to it a character of stability, which is of the utmost importance. Sir, I do not wish to see a bankrupt law which shall operate merely as a sponge. The framers of the Constitution, looked to it as a permanent part of our jurisprudence. The writers of the Federalist, in an elaborate work, designed to discuss and to vindicate all the questionable parts of the Constitution, seem to have been so confident that the expediency of a bankrupt law, would be universally acknowledged, that they dismiss the whole subject with a single sentence, in which this conviction is expressed. Let me add, sir, that the difficulties which we now experience in settling this question, arise chiefly from the fact, that we have not heretofore had a permanent bankrupt law. If the act of 1800, with such amendments as experience would have suggested, had been permitted to operate to the present time, the beneficial effects of the system, would have been universally acknowledged. It carried on its face, the doubt which was expressed of the propriety of its enactment, by the limitation which was annexed to it, and so was not permitted to run out even the brief career which was allotted to it. I desired to avoid a like result in the law of the last session, and in my judgment, it was happily avoided. This is in my view, sir, one of the excellencies of that law.

But Mr. President, if the considerations which I have urged, be not sufficient to weigh with Senators, whose views have been heretofore unfavorable to this measure, I have yet one last appeal, which I hope may avail with them. We are called to-day sir, to the performance of a duty, which the Constitution has peculiarly and emphatically confided to this body. After years of deliberation in this chamber, the Senate, in obedience to its constitutional duty, adopted at the last session a measure of great public policy, and of large but discriminating benevolence. By the concurrence of the other branch of the National Legislature, and the approval of the President, it became the law of the land. It was heralded throughout the Union, as the messenger of glad tidings, of great joy, to vast multitudes of our fellow-citizens, of all classes and conditions, including age in its decrepitude, and manhood in its vigor, and infancy in its helplessness. The moment when, by its own provisions, its operation is to commence, is drawing near. The calends of February are upon us. No change of public opinion has been manifested to us, unless it be that, which has converted the opponents of the measure, into its advocates, and extended its advocacy from the commercial, to various other classes of the community. The creditor interests, men of large capital, actively and extensively engaged in business, the proprietors of millions, urge it as a measure of great public policy, eminently conducive to the interests of creditors. A countless multitude of unfortunate debtors, stricken, but unless you will it, not yet scathed by adversity, beseech you not to withhold the relief, which this law *has tendered* to them. They implore you to break the chains,

which years of suffering, have only rendered more galling. They ask you to restore them to their wives, to their little ones, to themselves, to the free and unfettered use of those energies, which God has given them. At this moment, an act not introduced in the ordinary manner, nor considered with the ordinary forms of legislation, is sent to us from the other branch of the National Legislature. It calls upon us to repeal this great measure of public policy, and beneficence—to rivet anew the fetters of the unfortunate debtor—and thus to blast, I fear forever, the recently excited hopes of countless multitudes of our fellow-citizens. It calls upon us hastily to undo in January, what we had deliberately done in July. In fine sir, it calls upon us to stultify ourselves, by placing on the journal of our proceedings, our own recorded acknowledgment of our total incapacity to conduct the affairs of this great nation. Sir, I appeal to Senators, can the American people have confidence, that confidence in which, as their representatives, we live and move and have our being—can they, ought they to have confidence in men, whose counsels are thus unstable and vacillating?

Mr. President, the moment has arrived, when the high and peculiar functions of this branch of the legislative department, are called into exercise. We hear much of the checks and balances of this Government, of the security afforded by the veto power, of conservatism in all its various forms. Sir, the *true great conservative principle of this Government, is to be found in this chamber*. The Senate of the United States, was formed and fashioned by the framers of the Constitution, and invested with powers and attributes, and fenced by securities, which were intended to qualify Senators, to illustrate that great principle. You are not limited to mere legislation; a maturer age is necessary to make a man eligible to a seat in this body, and a firmer official tenure belongs to its members. And why is this? Why, but to secure to the public councils, that stability without which, they cannot command the public confidence; to arrest the march of inconsiderate legislation; in times of high public excitement, to give to public opinion, time and space to pause, and calmly to review and consider the reasons and the motives which have influenced it? I invoke Senators to-day, to the exercise of this, their own high, constitutional, and peculiar function, by all those motives which I have endeavored honestly, however feebly, to present to their consideration.

I ask them to bear with a concluding remark. I will not detain them by saying more. With the feelings which press upon me, I could not have said less. I could not have laid my head upon my pillow, with hope of repose, under the conscious neglect of the duty, to which this occasion calls me.

Sir, I have been the early, constant, zealous advocate of this law. All the convictions of my judgment lead me, every feeling of my heart impels me, to sustain it. I have to answer for the political enormity of having acted consistently, uniformly, on this subject, for the last fifteen years, and for the corresponding crime of having expressed to you, in 1842, some of the views, which not having changed them, I entertained in 1827. Mr. President, I plead guilty to this charge. I was the early, have been the uniform, and am the uncompromising advocate of the great interests, which *this law is* designed to protect—of those principles of christian benevolence, *which it is intended* to illustrate. I shall die in this faith, sir. Impelled *by a sense of duty* to the country, armed with constitutional

power, urged, irresistibly urged, by all those considerations which bind man to his fellow man, I cannot yield these convictions, I cannot silence these feelings, I cannot resist the influence of these motives, even although they may conflict with the opinions of individuals in my own State, who are the cherished objects of my regard and confidence; nay, notwithstanding they are in like conflict with views formally expressed and communicated to me by the Legislature of that State, who command all my respect, as the local depository of that people's confidence. In view of all this, I stand here to-day, before God and the country, as an American Senator, to do my duty to the Union, and to the whole Union. And although, in the wide sphere, in which this law will operate, I do not know a single individual who will enjoy its benefits, with whom I have any other relations, than those of that charity, which it is my heart's earnest desire to cherish towards every living man, yet I seize, thankfully, gratefully seize, the occasion, to manifest my willing obedience to that Divine command, which, second though it be, is like unto, and therefore equal in authority with, the first—"thou shalt love thy neighbor, as thyself."