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Response

Justice Story, Bankruptcy Injunctions, and the Anti-Injunction Act of 1793

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In their provocative article, *The Anti-Injunction Act and the Problem of Federal–State Jurisdictional Overlap*,¹ James Pfander and Nassim Nazemi offer a radical reinterpretation of the federal Anti-Injunction Act of 1793, at least as measured by the conventional wisdom that the statute enacted a “sweeping prohibition” providing in “manifest . . . terms” that “proceedings in the state courts should be free from interference by federal injunction”—period.² Federal bankruptcy proceedings provide a natural testing ground for the validity of these competing interpretations. If the 1793 Act had been an absolute bar to federal courts enjoining state court proceedings, it would have presented a formidable obstacle to efficacious administration of federal bankruptcy laws, which lean very heavily upon federal courts’ injunctive powers. Perhaps not surprisingly, therefore, the federal courts’ administration of nineteenth-century bankruptcy legislation aroused federalism tensions similar to those that had produced the 1793 Act, including a very confrontational exchange between New Hampshire Supreme Court Justice Joel Parker and U.S. Supreme Court Justice Joseph Story. The manner in which the courts navigated and ultimately resolved those conflicts, though,

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1. James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal–State Jurisdictional Overlap*, 92 TEXAS L. REV. 1 (2013).

2. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132 (1941) (Frankfurter, J.). The other serious challenge to the dominant interpretation of the 1793 Act (as proffered by Justice Frankfurter in *Toucey*) is the single-justice theory of Professor William Mayton. See William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 334–38 (1978).

provides indirect support for the Pfander–Nazemi interpretation of the 1793 Act.

I. Federal Injunctions and the Nature of Bankruptcy Relief

The intrinsic necessity for federal courts sitting in bankruptcy to enjoin state court proceedings flows directly from the most fundamental features of any “uniform [federal] Law[] on the subject of Bankruptcies.”³

First, and foremost, the basic nature of bankruptcy is that of a collective, comprehensive, and *compulsory* process, binding upon all creditors. Professor Radin nicely captured the compulsory essence of bankruptcy as follows:

If we follow the course of bankruptcy from the earliest statute—that of Henry VIII in 1542 . . . we shall find that whatever else was present or absent, there was always some method by which *all* the creditors were compelled to accept some arrangement or some disposition of their claims against the bankrupt’s property, whether they all agreed to it or not.

Everything else is clearly incidental. . . .

. . . Whoever initiates the process and however it is done, the important thing is that the bankruptcy court . . . rounds up the creditors and compels them to adjust or discharge their claims in a particular way.

. . . .

. . . Whatever purposes bankruptcy attempts to carry out, it does by working on the creditors primarily, by compelling them to reorganize their relations to the debtor or to each other in regard to the debtor’s property. No extension of the bankruptcy power has in fact attempted anything else, whatever the words used may have been.⁴

Second, the constitutional provision for federal bankruptcy laws was premised upon the assumption that “[e]very bankrupt or insolvent system in the world[] must partake of the character of a judicial investigation.”⁵ Congress’s Bankruptcy Power, therefore, provided authorization for a *federal judicial process* that would *bind all of a debtor’s creditors* to a comprehensive

3. U.S. CONST. art. I, § 8, cl. 4.

4. Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 3–4, 9 (1940).

5. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 366 (1827). “Thus, it is perfectly logical to conclude that congressional power to enact uniform national bankruptcy ‘laws’ necessarily, and even primarily, envisions the power to place adjudication of all disputes incident to administering bankruptcy estates in federal court.” Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 808 (2000).

debt-restructuring scheme.⁶ And in a federalist system in which creditors' rights against their debtor (in the absence of bankruptcy proceedings) are enforced principally through the state courts, provision for the *federal courts* sitting in bankruptcy to *enjoin creditors' state court proceedings* would seem to be an indispensable aspect of any federal bankruptcy law, by its very nature.⁷

Modern law fully reflects that supposition that injunctive relief is an indispensable component of bankruptcy relief. The principal means by which federal bankruptcy law ensures that its debt restructuring is both comprehensive and compulsory is via a pair of statutory injunctions that restrain, *inter alia*, creditors' state court actions—the automatic stay⁸ and the discharge injunction⁹—and federal bankruptcy courts are also expressly granted equitable injunctive powers via a bankruptcy version of the All Writs Act.¹⁰ Moreover, each of these statutorily authorized bankruptcy injunctions is expressly excepted from the modern codification of the Anti-Injunction Act (AIA) as “an injunction to stay proceedings in a State court . . . expressly authorized by Act of Congress.”¹¹

Indeed, express provision for bankruptcy injunctions prompted the first amendment of the original 1793 AIA, revised in 1874 to except from its prohibition “cases where such injunction [granted to stay proceedings in any court of a State] may be authorized by any law relating to proceedings in bankruptcy.”¹² That specific 1874 bankruptcy exception to the AIA “was

6. See Ralph Brubaker, *Explaining Katz's New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 126–29 (2007).

7. Cf. Ralph Brubaker, *From Fictionalism to Functionalism in State Sovereign Immunity: The Bankruptcy Discharge as Statutory Ex Parte Young Relief After Hood*, 13 AM. BANKR. INST. L. REV. 59, 126 (2005) (“The manner in which bankruptcy has *always* implemented its mandatory, collective debt-restructuring process, binding on *all* creditors, is through a series of prospective declaratory and injunctive decrees.”).

8. 11 U.S.C. § 362(a) (2012).

9. *Id.* § 524(a).

10. See *id.* § 105(a). The legislative history makes clear that “Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651.” H.R. REP. NO. 95-595, at 316 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6273; see also Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 1035–42.

11. 28 U.S.C. § 2283 (2006). The legislative history for the bankruptcy version of the All Writs Act expressly notes that it is “an authorization, as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court.” H.R. REP. NO. 95-595, at 317, *reprinted in* 1978 U.S.C.C.A.N. at 6274.

12. Act of June 20, 1874, tit. 13, ch. 12, § 720, 18 Stat. 136 (1875). When the AIA was amended after the *Toucey* decision, the specific bankruptcy exception was removed and replaced by the general exception for any injunction expressly authorized by another federal statute. See 28 U.S.C. § 2283 (historical and revision notes).

inserted in the Act of 1793 by the Revisers” compiling the 1874 comprehensive codification of the Revised Statutes of the United States in order to acknowledge the federal injunctive powers expressly authorized by the Bankruptcy Act of 1867.¹³

II. Federal Injunctions Under Nineteenth Century Bankruptcy Law

Under the short-lived bankruptcy act that preceded the 1867 Bankruptcy Act—the Bankruptcy Act of 1841, which was repealed in 1843¹⁴—decades before codification of the specific bankruptcy exception to the AIA, the extent to which the bankruptcy laws actually authorized such a stay of state court proceedings was a matter of prominent dispute. Moreover, the meaning and effect of the 1793 AIA itself figured prominently (even when implicitly so) in that dispute. That dispute, therefore, provides an illuminating context against which to test the Pfander–Nazemi thesis regarding the meaning of the 1793 statute. Significantly, the manner in which that dispute was argued, particularly as between Justices Story and Baldwin, is fully consistent with the Pfander–Nazemi interpretation of the 1793 Act—i.e., that its prohibition against “writs of injunction” to stay state court proceedings (sought via an original bill through a suit in equity) did *not* prohibit ancillary relief in the nature of an injunction (sought via motion or petition) granted in an equitable proceeding principally seeking relief other than or independent of such an injunction, but for which an injunctive decree (*not* via a “writ of injunction”) might nonetheless be necessary or appropriate.

That distinction born of equity practice—between an original bill praying for a “writ of injunction” and an ancillary motion or petition seeking relief in the nature of an injunction—was ultimately lost in the merger of law and equity, which itself had begun in earnest by the middle of the nineteenth

13. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132 (1941) (Frankfurter, J.). The Bankruptcy Act of 1867 remained in effect until its repeal in 1878. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878). Section 21 of the 1867 Act provided that “no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor’s discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge.” *Id.* § 21, 14 Stat. 517, 526–27. Upon grant of the bankruptcy discharge, it was then incumbent upon the discharged bankrupt to present the certificate of discharge in any state court actions (pending or thereafter commenced) as an affirmative defense against suits on discharged debts. Federal injunctions restraining state court suits on discharged debts could not issue until authorized by the Supreme Court’s decision in *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), the common law precursor to the now-codified statutory discharge injunction. See Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex parte Young Relief*, 76 AM. BANKR. L.J. 461, 511–19, 524–28 (2002).

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

century.¹⁵ As Pfander and Nazemi skillfully demonstrate, though, when the AIA was enacted in 1793, that distinction would have been apparent to practicing lawyers, as revealed by prominent equity-practice treatises of the day.

Pfander and Nazemi acknowledge that they can point to “no contemporaneous statements that describe the Act in precisely the[] terms” posited by their original–ancillary interpretation.¹⁶ If the Pfander–Nazemi interpretation of the 1793 Act is correct, though, one might expect to find it reflected (if only implicitly) in the Story–Baldwin dispute regarding the scope of federal bankruptcy courts’ injunctive powers under the 1841 Bankruptcy Act. Justice Story was clearly familiar with the original–ancillary distinction, which he discussed in his equity treatise.¹⁷ Moreover, Justice Story was particularly expert in bankruptcy law and is widely reputed to have been the principal draftsman of the federal Bankruptcy Act of 1841.¹⁸

Like Pfander and Nazemi, I have been unable to find in the early bankruptcy cases any direct statements describing the scope of the 1793 AIA in terms of the original–ancillary distinction. Nonetheless, various aspects of those cases are consistent with and explained well by the Pfander–Nazemi original–ancillary account, which I find entirely plausible and highly persuasive.

A. *Exclusive Federal In Rem Jurisdiction = Automatic Stay of State Court Proceedings*

The principles of exclusive in rem jurisdiction that Pfander and Nazemi discuss as illustrative of ancillary relief in the nature of an injunction (and, thus, *not* barred by the 1793 AIA according to their account) have obvious and natural application to bankruptcy proceedings. Indeed, even before the 1874

15. New York abolished its Court of Chancery in 1846, and the consequent Field Code’s uniform practice rules were promulgated in 1848. See LARRY L. TEPLY AND RALPH U. WHITTEN, CIVIL PROCEDURE 37–39 (3d ed. 2004).

16. James E. Pfander & Nassim Nazemi, *Morris v. Allen and the Lost History of the Anti-Injunction Act of 1793*, 108 NW. U. L. REV. 187, 234 (2014). The same appears to be true of Professor Mayton’s single-justice interpretation. See generally Mayton, *supra* note 2.

17. See 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 861, at 154 n.1 & § 890, at 175–76 (2d ed. 1839).

18. See, e.g., PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 23 (Beard Books 1999) (1974); GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 385 (1970); JAMES McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 258 (1971); R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 329 (1985); 2 LIFE AND LETTERS OF JOSEPH STORY 407 (William W. Story ed., 1851); Morris Weisman, *Story and Webster—And the Bankruptcy Act of 1841*, 46 COM. L.J. 4, 4 (1941).

bankruptcy exception to the AIA, it was widely recognized that vesting of the bankrupt's property in the bankruptcy trustee (formerly denominated the assignee) as the court-appointed representative of the bankrupt's "estate," had the effect of *automatically enjoining* any state court interference with that property.

One nineteenth-century bankruptcy judge¹⁹ nicely summarized this injunctive feature of exclusive in rem jurisdiction as follows:

The estate surrendered is placed in the custody of the [federal] court so sitting in bankruptcy, and the officer (assignee or trustee) appointed to manage it, is accountable to the court appointing him, and that court alone. No state court has jurisdiction in, or can withdraw the property surrendered, or determine in any degree the manner of its disposition. . . . The filing of a petition in bankruptcy at once brings the property of the insolvent into the bankruptcy court, and places it in its custody and under its protection as fully as if actually brought into the visible presence of the court. Being in the custody of the court, no other court can, without the permission of the court in bankruptcy, interfere with it, and so to interfere is a contempt of the bankrupt court.²⁰

Those general principles of exclusive in rem jurisdiction (automatically giving rise to relief in the nature of an injunction), however, could have no application to a bankrupt's property already in the possession of a state court upon the commencement of the bankruptcy proceedings. The question that arose under the 1841 bankruptcy statute, therefore, was the extent to which a federal bankruptcy court could, nonetheless, affirmatively enjoin such a state court proceeding.

19. Whose actual title was bankruptcy "register"—a non-Article III judicial officer authorized by the Bankruptcy Act of 1867. See Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 BANKR. L. LETTER, Aug. 2011, at 1, 6, 15 n.39.

20. *In re Brinkman*, 4 F. Cas. 145, 147–48 (S.D.N.Y.) (No. 1884) (opinion of bankruptcy register) (citations omitted), *overruled on other grounds by* 4 F. Cas. 144 (S.D.N.Y. 1872) (No. 1883). As the Supreme Court subsequently put it, "the filing of the [bankruptcy] petition is a *caveat* to all the world, and in effect an attachment and injunction" pursuant to which "title to the bankrupt's property became vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court." *Mueller v. Nugent*, 184 U.S. 1, 14 (1902) (internal citation omitted); see also *Bank v. Sherman*, 101 U.S. 403, 406 (1879) ("The filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction."); *Ex parte Foster*, 9 F. Cas. 508, 513 (C.C.D. Mass. 1842) (No. 4960) (Story, J.) (citing English authorities for the proposition that "a commission and decree, declaring a man to be a bankrupt, has been emphatically said to be a statute execution for all the creditors").

B. Property in the Possession of a State Court: Herein of the Attachment Controversy

With respect to property already in the possession of a state court upon commencement of the debtor's bankruptcy proceedings, the context that produced the sharpest controversy involved state prejudgment attachment procedures (as distinguished from postjudgment levy of execution), by which creditors could, upon commencement of suit on a debt, reach (by writ of attachment) identified property of their debtor that the sheriff would attach (by seizing possession) and hold pending and to secure payment of any judgment the creditor might ultimately procure in the suit. English bankruptcy statutes,²¹ the prior Bankruptcy Act of 1800,²² and the subsequent Bankruptcy Act of 1867²³ expressly dissolved such prejudgment attachments in pending suits, but the 1841 Bankruptcy Act contained no such provision.

Attachment creditors, therefore, contended that they had a secured priority payment right in attached assets that was expressly preserved by the lien-saving provision of the 1841 Bankruptcy Act,²⁴ and thus, their suits could proceed to judgment notwithstanding their debtor's bankruptcy filing, in order to fix their priority in the attached assets (by postjudgment levy of execution on the attached assets).

21. See THOMAS COOPER, *THE BANKRUPT LAW OF AMERICA, COMPARED WITH THE BANKRUPT LAW OF ENGLAND 185–86* (1801); *Downer v. Brackett*, 7 F. Cas. 1001, 1003–04 (D. Vt. 1842) (No. 4043).

22. Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). Section 31 of the 1800 Act provided that “in the distribution of the bankrupt’s effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor . . . having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt, . . . shall not be relieved upon any such . . . attachment, for more than a rateable part of his debt, with the other creditors of the bankrupt.” *Id.* § 31, 2 Stat. at 30; see also *Harrison v. Sterry*, 9 U.S. (5 Cranch) 289, 301 (1809) (Marshall, C.J.) (holding that “[b]y the bankrupt law of the United States,” attaching creditors’ “priority, as to the funds of the bankrupt, is lost” such that “[t]hey can only claim a dividend with other creditors”).

23. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878). Section 14 of the 1867 Act provided that the title to “all the estate, real and personal, of the bankrupt . . . shall vest in [the] assignee, although the same is then attached on mesne process as the property of the debtor,” which “shall dissolve any such attachment made within four months next preceding the commencement of [bankruptcy] proceedings.” *Id.* § 14, 14 Stat. at 522.

24. See Act of Aug. 19, 1841, ch. 9, § 2, 5 Stat. 440, 442 (repealed 1843). Section 63 of the 1800 Bankruptcy Act contained a similar lien-saving provision. 2 Stat. at 36. Given the express provision in § 31 of the 1800 Act, though, denying any priority to attachment creditors, “their lien [was] removed by the bankruptcy.” *Harrison*, 9 U.S. (5 Cranch) at 301.

C. *Justice Story and Ex parte Foster*

Justice Story, however, was of the firm opinion that the 1841 Bankruptcy Act (like prior English statutes and the 1800 Bankruptcy Act) also denied attachment creditors in pending suits any priority in attached assets, and he so held in his capacity as a Circuit Justice in the case of *Ex parte Foster*.²⁵ Perhaps the omission of any express statutory provision negating prejudgment attachments was simply a drafting oversight that Justice Story sought to correct by judicial construction; perhaps not. But Justice Story interpreted the statute essentially as if it *did* contain such a provision, through a rather involved (and somewhat convoluted) reasoning process.

First, Story concluded that a prejudgment attachment on mesne process did not create a “lien” in favor of the attachment creditor within the meaning of the Bankruptcy Act’s lien-saving provision.²⁶ For Story, then, attachment creditors had no legitimate secured priority payment right in attached assets, which should (according to Story) be available for pro-rata distribution amongst the debtor’s general unsecured creditors (which included attachment creditors). Story also concluded (purportedly in the alternative) that the federal district courts, sitting in bankruptcy, should enjoin attachment creditors in pending suits from prosecuting their suits to judgment and execution.²⁷ That latter conclusion, however, was obviously shaped by Story’s view that an attachment creditor had to be considered an *unsecured* rather than a secured creditor and, thus, in the absence of an injunction, “the attaching creditor, by a race of diligence, [would] be allowed to obtain . . . a preference [over other unsecured creditors] in violation of the whole policy of the bankrupt act, which is an equal distribution of the assets among all the [unsecured] creditors.”²⁸

That latter conclusion (that attachment creditors’ pending suits should be enjoined) was also shaped, though, by Story’s view regarding the equity jurisdiction of the federal district courts sitting as courts of bankruptcy. This *was* a matter entirely independent and distinct from the attachment controversy itself, but the attachment controversy forced an articulation of the scope of (and limits on) federal bankruptcy courts’ equity powers. And, of course, it is this aspect of the attachment controversy that implicated the 1793 AIA.

25. 9 F. Cas. 508, 519 (C.C.D. Mass. 1842) (No. 4960).

26. *Id.* at 516–17.

27. *Id.* at 519.

28. *Id.* at 517.

III. The Scope of Federal Bankruptcy Jurisdiction

Along the judicial federalism dimension of the full subject-matter scope of federal bankruptcy jurisdiction, Justice Story's interpretation of the outermost bounds of the 1841 grant of bankruptcy jurisdiction to the federal district courts departed significantly from the more limited meaning and scope of "bankruptcy proceedings" in England.²⁹ His general view, though, ultimately prevailed and has endured as the intellectual foundation for determining the scope of federal bankruptcy jurisdiction.³⁰

A. *Equity Jurisdiction*

District courts' bankruptcy jurisdiction under the 1841 Bankruptcy Act also went beyond Congress's other jurisdictional grants to the district courts, particularly as to the equity jurisdiction of the district courts. "Independent of the Bankrupt Act of 1841, . . . the District Courts of the United States possess[ed] no equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority" ³¹ Under the 1841 bankruptcy statute, though, the district courts' equity jurisdiction was every bit as broad as that of the federal circuit courts—federal trial courts at that time, with both law and equity jurisdiction.³² Indeed, the 1841 Act expressly provided that "the [district] courts shall have full authority and jurisdiction to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent the circuit courts may now do in any suit pending therein in equity."³³

In *Ex parte Foster*, in the context of the attachment controversy, Story described the district courts' broad equity jurisdiction in bankruptcy as follows:

Before proceeding to consider the questions, which have been argued, I wish to say a few words as to the jurisdiction of the district court in the premises. And here I lay it down as a general principle, that the district court is possessed of the full jurisdiction of a court of equity,

29. And with good reason. See *Minn. Co. v. St. Paul Co.*, 69 U.S. (2 Wall.) 609, 633 (1864) (noting that practice in the English courts is not determinative "in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts").

30. See Brubaker, *supra* note 5, at 755–77, 813–31, 844–52; see generally Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261 (1999) [hereinafter Brubaker, *One Hundred Years*].

31. *Ex parte Christy*, 44 U.S. (3 How.) 292, 311–12 (1845) (Story, J.).

32. See Daniel D. Blinka, "This Germ of Rottedness": *Federal Trials in the New Republic, 1789–1807*, 36 CREIGHTON L. REV. 135, 156–57 (2003).

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

over the whole subject-matters which may arise in bankruptcy, and is authorized by summary proceedings to administer all the relief which a court of equity could administer under the like circumstances, upon a regular bill and regular proceedings, instituted by competent parties. In this respect, the act of congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the courts of the United States than the lord chancellor, sitting in bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in bankruptcy, or sitting in the court of chancery, under his general equity jurisdiction, the courts of the United States are by the act of 1841 competent to do. So that the question resolves itself, so far as the exercise of jurisdiction for relief in this case is concerned, into this, whether it is a fit case for interposition and relief by a court of equity.³⁴

B. Summary Proceedings on Motion and Plenary Suits Against Adverse Claimants

Story made the above-quoted statement against the backdrop of an established jurisdictional and procedural divide, imported from England, separating “summary” bankruptcy proceedings (coming within the Lord Chancellor’s jurisdiction in bankruptcy), from “plenary” suits at law and in equity against “adverse claimants” (conducted in the superior courts).³⁵ The 1841 Bankruptcy Act contained two jurisdictional grants. Section 6 granted the district courts “jurisdiction in all matters and proceedings in bankruptcy,” including “all acts, matters, and things to be done under and in virtue of the bankruptcy,” which jurisdiction was, by its terms, “to be exercised summarily, in the nature of summary proceedings in equity,” initiated by petition or motion.³⁶ Section 8, by contrast, was a grant of jurisdiction to both the district court (in which the debtor’s initial petition for bankruptcy relief was filed) and the circuit court for that district “of all suits at law and in equity . . . by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such [adverse claimant] against such assignee,” requiring an independent plenary suit, commenced by a formal bill or complaint.³⁷

34. *Ex parte Foster*, 9 F. Cas. 508, 512 (C.C.D. Mass. 1842) (No. 4960) (Story, J.).

35. *See generally* Brubaker, *supra* note 5, at 757–65, 769 n.82, 770–71 nn.87–88; Brubaker, *One Hundred Years*, *supra* note 30, at 264–66, 267 n.26; Ralph Brubaker, A “Summary” Statutory and Constitutional Theory of Bankruptcy Judges’ Core Jurisdiction After *Stern v. Marshall*, 86 AM. BANKR. L.J. 121, 122–26 & n.21 (2012) [hereinafter Brubaker, A “Summary” Theory].

36. Ch. 9, § 6, 5 Stat. at 445.

37. *Id.* § 8, 5 Stat. at 446.

C. *Summary Proceedings Against Adverse Claimants*

One might assume, therefore, that the 1841 bankruptcy statute merely replicated the English dividing line between summary bankruptcy proceedings (§ 6) and plenary suits against adverse claimants (§ 8). While it certainly did replicate the *procedural* distinction between “summary proceedings in equity” (§ 6) and formal plenary “suits at law and in equity” (§ 8), it did *not* necessarily replicate English notions regarding the scope of those disputes subsumed within the concept of “all matters and proceedings in bankruptcy” over which the district courts had jurisdiction (under § 6) sitting as a bankruptcy court in a manner analogous to Chancery’s bankruptcy jurisdiction.

Story’s above-quoted statement was an early indication of his view (that would ultimately prevail) that the district courts’ jurisdiction under § 6 of the 1841 Act over “all matters and proceedings in bankruptcy” was much *broader* than English notions of the “bankruptcy proceedings” proper. Story interpreted § 6 as an all-encompassing grant that subsumed even those actions that previously would have been regarded as disputes with adverse claimants—plenary matters. Moreover, and most significantly for our present purposes, he hewed to this view notwithstanding the fact that § 6 expressly authorized adjudication of “all matters and proceedings in bankruptcy” through “summary proceedings in equity.”³⁸

The upshot of Story’s broad interpretation of the scope of § 6, therefore, was that traditionally plenary matters that could only be adjudicated in a full-blown plenary suit in a superior court in England—Story’s reference to “all the relief which a court of equity could administer under the like circumstances, upon a regular bill and regular proceedings, instituted by competent parties”³⁹—could nonetheless be adjudicated by a district court, sitting in bankruptcy, through summary proceedings.

IV. The 1793 AIA and Ancillary Equitable Relief Through Summary Proceedings

If Story’s was the appropriate interpretation of § 6 of the 1841 Bankruptcy Act (and the Supreme Court would subsequently so hold), then the Pfander–

38. This was an anomalous feature of the 1841 Bankruptcy Act. Under English law and subsequent bankruptcy statutes, an assignee or trustee suit to recover money or property from an adverse claimant required a formal plenary suit. See Brubaker, *supra* note 5, at 770–71; Brubaker, *A “Summary” Theory*, *supra* note 35, at 125–26, 128–29. Story’s view, though, regarding a federal bankruptcy court’s broad equity jurisdiction to grant ancillary injunctive relief through summary proceedings (even as against an adverse claimant) endured. See Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1, 22–28 (1998) [hereinafter Brubaker, *Nondebtor Releases*].

39. *Ex parte Foster*, 9 F. Cas. at 512.

Nazemi original–ancillary interpretation of the 1793 AIA, if correct, is profoundly significant. Because the district court exercised its § 6 bankruptcy jurisdiction via “summary proceedings in equity,” whatever equitable relief was available from a district court, sitting in bankruptcy, could be granted upon an ancillary motion or petition through “summary proceedings in equity,” without the need for an original bill, e.g., for a “writ of injunction.” Thus, the relief sought in *Ex parte Foster* was from the district court, by petition, praying “that an injunction may be granted against [the bankrupt’s] attaching creditors, enjoining them from further proceeding against [the attached] property of [the bankrupt], and requiring them to surrender the same to such assignee as may be appointed by this honorable court in the premises.”⁴⁰ Under the Pfander–Nazemi theory, then, because the 1793 AIA simply did not apply to such ancillary relief in the nature of an injunction, it would pose no obstacle whatsoever to the equitable relief requested in *Foster*.

And, indeed, consistent with the Pfander–Nazemi theory, Story expressly analogized the injunctive relief he authorized in that case, at length, to one of the most prominent and well-established instances of ancillary injunctive relief:

There is no novelty in this course. On the contrary, it is the common course in all cases, where upon the application of any creditor, or of an administrator or executor, a court of equity takes upon itself the administration of the assets of a deceased debtor. As soon as the decree for the administration is passed by the court, taking upon itself the administration of the assets, the executor, or administrator, or any creditor, is entitled to an injunction to prevent any other of the creditors from suing the executor or administrator at law, or further proceeding in any suit, already commenced, except under the direction and control of the court of equity, by which the decree is passed; for, under such circumstances, the court will not suffer a race of diligence by different creditors, each striving for an undue mastery, or preference, or priority of payment out of the assets, to prejudice the rights of the others. The decree in such a case is treated as a judgment for all the creditors. But it is not necessary to put it upon that ground; for when once the administration of the assets is taken by the court upon itself, as a matter of duty, it must be of course, that it cannot and ought not to permit any creditor to defeat, or to obstruct, or to interfere, with its own proceedings. Now this is precisely the situation of the district court, as to proceedings in bankruptcy, after a decree in bankruptcy. The court necessarily takes upon itself the administration of all the assets; and it

40. *Id.* at 508.

is its duty to protect the property against all claims of creditors, which are inconsistent with the objects and policy of the act. I have no doubt, therefore, that it is the duty of the district court to issue an injunction in this case to the attaching creditor, directing him not to proceed in his suit, except under the order and direction of the court, until it shall be ascertained, whether there is a decree in bankruptcy, and a discharge of the bankrupt, which may be pleaded in bar of farther proceedings.⁴¹

While Justice Story made no mention of the 1793 AIA and why it would not bar that injunctive relief in *Ex Parte Foster*, within a couple of months, he expressly opined in the case of *Ex parte Carlton*, “as a matter of general practice in cases of this sort, which are growing numerous,” that neither the 1793 AIA, nor the 1807 extension of its restrictions to district court judges (when exercising the circuit court’s power to grant writs of injunction), were applicable to district courts’ equity powers under § 6 of the 1841 bankruptcy statute:

The district court, sitting in bankruptcy, has general equity jurisdiction, and may summarily do whatever a court of equity may do in the ordinary course of its practice and proceedings. . . .

Now, there is no statute of the United States, which imposes the slightest limitation upon the exercise of the power to issue injunctions, or requires notice thereof, unless in cases provided for by the act of congress of the 2d of March, 1793, [§ 5], and the act of congress of the 13th of February, 1807. But neither of these statutes has any application to cases in bankruptcy in the district courts, nor, indeed, to any cases except those which are pending in the circuit court in the exercise of its ordinary jurisdiction. The former act [applies] . . . in causes pending in the circuit court. The latter act confers authority on the district judges to grant injunctions in like manner [and subject to the same restrictions] in all cases pending in the circuit court. These acts, therefore do not touch the jurisdiction of the district court in the administration of equity in bankrupt cases. And as they do not contemplate the classes of cases created by the bankrupt act of 1841, it is obvious that their provisions are inapplicable to it; and leave the jurisdiction [of the district court] to grant injunctions upon the general practice and principles which govern courts of equity.⁴²

41. *Id.* at 519 (internal citations omitted).

42. *Ex parte Carlton*, 5 F. Cas. 86, 87 (C.C.D. Mass. 1842) (No. 2415) (Story, J.) (internal citations omitted). The particular issue raised in the *Carlton* case was the applicability of the notice clause of the 1793 AIA: “[N]or shall a writ of injunction be granted to stay proceedings in any court of a state; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.” Act of Mar. 2, 1793, ch. 22, §

This is certainly consistent with the Pfander–Nazemi theory’s implication that the 1793 statute’s express application to only “writs of injunction” could *not* restrict a federal district court’s grant of injunctive relief on motion or petition under § 6 of the 1841 bankruptcy statute. Moreover, in another case, in response to a direct argument that the 1793 AIA barred a district court, sitting in bankruptcy, from enjoining state court proceedings and citing *Diggs v. Wolcott*,⁴³ the district court flatly rejected that argument by relying, in succession, upon (1) the above-quoted passage from *Ex parte Foster* regarding district courts’ broad equity jurisdiction “authorized by summary proceedings,”⁴⁴ and (2) the above-quoted passage from *Ex parte Carlton*.⁴⁵

Of course, the above-quoted passage from *Carlton* is also consistent with an even broader bankruptcy exemption from the 1793 AIA related to the manner in which the 1807 Act made the AIA’s restrictions applicable to district court judges. Since the Judiciary Act of 1789 gave the federal district courts *no* equity jurisdiction, the 1807 Act itself was an affirmative *grant* to district court judges of “full power to grant writs of injunctions . . . in all cases which may come before the circuit courts within their respective districts . . . under the same rules, regulations and restrictions, as are prescribed by the several acts of Congress,”⁴⁶ such as the 1793 AIA. According to Story, though, district courts sitting in bankruptcy derived their power to issue injunctions

5, 1 Stat. 333, 335. Story’s reasoning in the quoted text, though, clearly concluded that neither the power nor the notice clause of the 1793 AIA “touch the jurisdiction of the district court in the administration of equity in bankrupt cases” (and noted that “nothing is more common than for a court of equity, in its discretion, to grant an injunction *ex parte*, without notice to the other side, the injunction, however, to continue only until the other party chooses to appear and contest it, and move for its dissolution”). *Ex Parte Carlton*, 5 F. Cas. at 87; *see also* ROBERT HENLEY EDEN, A TREATISE ON THE LAW OF INJUNCTIONS 64–65 (1822) (describing such a case of an *ex parte* ancillary motion by the plaintiff requesting restraint of defendant’s suit at law on which “Lord Eldon granted the injunction, the plaintiff undertaking to serve the defendant with immediate notice”).

43. 8 U.S. (4 Cranch) 179 (1807). In addressing “the position assumed by the counsel for the mortgage creditors as to the powers and authorities of this court in granting injunctions,” the court stated:

The right of this court to issue injunctions under its chancery powers was not disputed, but it was contended in the argument at the bar that this court has no authority to order injunctions against suitors in a state court, and the counsel rested their argument on the 5th section of the judiciary act of congress of March 2, 1793, which directs that no writs of injunction shall be granted to stay proceedings in any court of a state; quoting, in support of their view of the subject, the decision in the case of *Diggs v. Wolcott*, 4 Cranch [8 U.S.] 179 [1807], to the effect that a court of the United States cannot enjoin proceedings in a state court.

Yeadon v. Planters’ and Mechanics’ Bank, 30 F. Cas. 793, 797 (E.D.S.C. 1843) (No. 18130) (internal citation omitted).

44. *Yeadon*, 30 F. Cas. at 797 (quoting *Ex Parte Foster*, 9 F. Cas. at 512).

45. *Id.* (quoting *Carlton*, 5 F. Cas. at 87).

46. Act of Feb. 13, 1807, ch. 13, 2 Stat. 418.

from § 6 of the 1841 Bankruptcy Act (i.e., *not* the 1807 Act), and, thus, the 1807 Act's incorporation of the 1793 AIA would seem to be completely inapplicable to district courts' bankruptcy injunctions.⁴⁷

Justice Story's opinions, therefore, may support multiple theories as to why the 1793 AIA was inapplicable to district courts' bankruptcy injunctions. Indeed, one can also find support for Professor Mayton's single-justice theory of the 1793 AIA in Justice Story's decisions.⁴⁸ Nonetheless, Story's jurisprudence seems generally consistent with the Pfander–Nazemi account.

V. Justice Baldwin and *Dudley's Case*

Justice Story's *Ex parte Foster* opinion had staked out a very controversial position regarding attachment liens that attracted vehement disagreement from both other lower federal courts and various states' courts. While his position

47. See also *Yeadon*, 30 F. Cas. at 797 (also stating, in response to AIA argument, that “the jurisdiction of this court [sitting in bankruptcy], in cases of application for injunction, does not rest on the act of March 2, 1793, or on that of the 13th of February, 1807”).

48. Professor Mayton argues that the 1793 AIA was applicable only to circuit court writs of injunction granted by a single justice of the Supreme Court while the circuit court itself (composed of a district court judge and a Supreme Court circuit justice) was not sitting (i.e., was “in vacation”) and, thus, did not restrict the ability of the circuit court sitting as a court to grant writs of injunction staying state court proceedings. See generally Mayton, *supra* note 2. In *Ex parte Foster*, immediately after his analogy to recognized instances of ancillary injunctive relief (quoted *supra* at text accompanying note 41), Story also stated:

If, indeed, I entertained any doubt upon this subject, (which I certainly do not) I should not entertain any doubt as to the jurisdiction of the circuit court upon a bill [in a “suit in equity” under § 8 of the 1841 Act], filed by the assignee, after his appointment, to overhaul and control, or set aside all the [state court] proceedings, had in the intermediate time by the attaching creditor against the rights of the other creditors, and in subversion of the policy and objects, of the bankrupt act of 1841. It would, therefore, after all, be but a postponement of the evil day, and a mere change from the equity jurisdiction of one court to the like jurisdiction of another court having full authority to act in the premises.

Ex parte Foster, 9 F. Cas. at 519. Since such a “suit in equity” via a formal bill presumably would pray for a “writ of injunction,” Story's reasoning in that passage might be inconsistent with the Pfander–Nazemi original–ancillary account, but consistent with Mayton's single-justice theory that the 1793 AIA did not restrict the ability of the circuit court as a court to grant a “writ of injunction.” Alternatively, though, perhaps Story believed that the 1793 AIA did restrict the grant of a “writ of injunction” by even a “circuit court *in the exercise of its ordinary jurisdiction*,” *Carlton*, 5 F. Cas. at 87 (emphasis added), by which Story may have meant the circuit court's nonbankruptcy jurisdiction—i.e., that the 1793 AIA was inapplicable to injunctions granted under either § 6 or § 8 of the 1841 Bankruptcy Act. That latter interpretation is inconsistent with Mayton's single-justice theory, but consistent with the Pfander–Nazemi original–ancillary theory. For an example of such a circuit court decision (by the court) enjoining state court proceedings on a formal bill in a suit in equity praying for an injunction under § 8 of the Bankruptcy Act, but without any explanation as to why the 1793 AIA did not bar the injunction, see *McLean v. Lafayette Bank*, 16 F. Cas. 253 (C.C.D. Ohio 1843) (No. 8885).

regarding federal district courts' equity jurisdiction, sitting in bankruptcy, could stand independent of the attachment controversy itself, perceived overreaching by Story with respect to the attachment controversy inflamed federalism sensitivities. The immediate response to *Ex parte Foster*, therefore, invoked the 1793 AIA, but in a limited fashion that is also fully consistent with the Pfander–Nazemi thesis.

A. *The Attachment Controversy Spreads*

In opining that an execution creditor had no lien on the attached property, within the meaning of the lien-saving provision of the 1841 Bankruptcy Act, Justice Story reasoned that even a judgment creditor who had levied execution on the debtor's property prebankruptcy (through the sheriff's seizure of possession) did not have a lien on that property within the meaning of the bankruptcy statute.⁴⁹ Shortly after Story's *Foster* decision, though, Justice Baldwin rendered an opinion (also riding circuit) in *Dudley's Case*⁵⁰ directly implicating and disagreeing with Story's dicta regarding execution creditors.⁵¹

B. *The 1793 AIA and Federal Bankruptcy Courts' Injunctive Powers*

Justice Baldwin's construction of the lien-saving statute was sufficient, in and of itself, to affirm the district court's decision—denying the bankrupt's petition requesting an injunction to restrain execution creditors from proceeding to a postbankruptcy sale of the property on which execution had levied prebankruptcy.⁵² Justice Baldwin went on, though, in the alternative, to opine (at length) that even “if the case was otherwise” and the levy of execution gave the execution creditors *no* lien on the property seized under the process of the state court (as Justice Story had concluded in *Foster*), “we are well satisfied that the district court could not grant the injunction asked for by any authority under the judiciary, or the bankrupt act.”⁵³ This alternative holding apparently was also a direct counter to Story's *Foster* opinion regarding district courts' injunctive powers under the 1841 Bankruptcy Act.⁵⁴

49. However, he subsequently *held* otherwise, protesting that “[i]t has been a matter of surprise to me, to see how greatly the case of *Ex parte Foster* has been misunderstood and misinterpreted.” *In re Cook*, 6 F. Cas. 383, 383 (C.C.D. Mass. 1842) (No. 3152) (Story, J.) (internal citation omitted).

50. 7 F. Cas. 1150 (C.C.E.D. Pa. 1842) (No. 4114) (Baldwin, J.).

51. *Id.* at 1151–56.

52. District Judge Randall had rendered the decision below, and he also sat on the Circuit Court and joined in Justice Baldwin's opinion in *Dudley's Case*. *See id.* at 1150.

53. *Id.* at 1156.

54. Although this portion of Baldwin's opinion does not cite *Ex Parte Foster*, the case was prominently relied upon in argument before the court, *see id.* at 1150–51, and the reporter for the Pennsylvania Law Journal appended a lengthy note after Justice Baldwin's opinion to explain how

Justice Baldwin's point of departure was the backdrop of (1) the Judiciary Act of 1789, which "gave the district court no jurisdiction in cases in equity,"⁵⁵ and (2) the 1793 AIA's ban on writs of injunction to stay state court proceedings.⁵⁶ Justice Baldwin took the preexisting restrictions of the 1789 Judiciary Act and the 1793 AIA as compelling reasons to narrowly construe the scope of § 6 of the 1841 Bankruptcy Act as *denying* district courts, sitting in bankruptcy, the power to enjoin state court proceedings:

Thus restricted, it is most clear that the power of a district judge or court cannot enjoin state process, by any authority of law previous to the bankrupt act of 1841. The bankrupt act of 1800 gave no such power, and the present act is wholly silent on the subject, giving no color for its exercise, but on the contrary, carefully excluding it by the cautious and well defined terms of the sixth section, which specify the jurisdiction of the district court.

. . . .

. . . There is not a word in the sixth section which can be tortured into such a grant of power without a gratuitous interpolation, against all sound rules of interpreting statutes, which prescribe rules of action by courts.⁵⁷

* * * * *

The granting [of] an injunction in any case is the exercise of the highest powers of a court of equity, never done in a doubtful case, or where it is not necessary for the purposes of justice which are not otherwise attainable. No case can occur where so much caution would be necessary as in interfering with the proceedings of the courts of a state, if an authority was given by express words in the law, but on a review of the whole legislation of congress on the subject, it is our opinion, that the power does not exist, and that its exercise is positively prohibited.

. . . .

. . . [S]hould it do so regardless of the prohibition, it would require no small degree of judicial hardihood, to attempt to enforce it by attachment against the plaintiff [creditor], the constable, the sheriff, the magistrate, the judge, or the [state] court, who taking their position on the act of congress, would disobey the order.⁵⁸

"the court, in this case, decides all . . . points against the counsel who relied on [Ex parte Foster, Case No. 4960] the cited decision of Judge Story," *id.* at 1158–60.

55. *Id.* at 1156.

56. *See id.* at 1156–57.

57. *Id.* at 1157–58.

58. *Id.* at 1156–58.

Because he ultimately rested his decision on an interpretation of the terms of § 6 of the 1841 Bankruptcy Act, however, Justice Baldwin did *not* posit the 1793 Act as a direct limitation on district courts' power to grant ancillary injunctive relief upon motion or petition under § 6. Indeed, Justice Baldwin's assumptions regarding the interplay between the 1793 AIA and the 1841 Bankruptcy Act are consistent with the Pfander–Nazemi interpretation of the 1793 Act.

C. The 1793 AIA and Ancillary Equitable Relief Through Summary Proceedings

Justice Baldwin's *Dudley* opinion expressly assumed that the 1793 AIA would be an effective bar to any stay of state court proceedings by either a district court or a circuit court in a plenary suit in equity under § 8 of the 1841 Bankruptcy Act.⁵⁹ That assumption is, of course, entirely consistent with the Pfander–Nazemi theory that the 1793 AIA barred original bills for writs of injunction in suits in equity. Moreover, as the above-quoted passages make clear, Baldwin also assumed that if § 6 of the 1841 Bankruptcy Act *did* grant district courts, sitting in bankruptcy, the power to enjoin state court proceedings (“the said jurisdiction to be exercised summarily . . . [via] summary proceedings in equity”⁶⁰), then that injunctive power would *not* be subject to the restrictions of the 1793 AIA.⁶¹ That assumption, likewise, is fully consistent with the Pfander–Nazemi interpretation of the 1793 AIA as *permitting* injunctive relief via ancillary motion or petition—the summary process by which the injunction was sought from the district court in *Dudley's Case*.⁶²

59. “The provision of the eighth section is most wise and just; it puts cases at law and in equity as therein defined, (though between citizens of the same state,) on the same footing as patent and other cases arising under the laws of the United States,” and in such a plenary suit in equity, the “court is prohibited by the act of 1793, from granting an injunction to stay proceedings in any court of a state,” even “on the clearest case for an injunction according to the settled rules of courts of equity.” *Id.* at 1158. In that regard, Baldwin's construction of the 1793 AIA seems inconsistent with Mayton's single-justice theory. *See* Mayton, *supra* note 2. Because he assumes that the 1793 AIA would also restrict a district court's equity jurisdiction under § 8 of the 1841 Bankruptcy Act, Baldwin's interpretation of the 1793 AIA also seems inconsistent with the broad-based “bankruptcy exception” theory discussed *supra* at notes 46–47 and accompanying text—that the 1793 AIA only restricted district judges from issuing injunctions as a circuit court judge “in vacation” under the 1807 Act.

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

61. *See Dudley's Case*, 7 F. Cas. at 1157–58. Conversely, by interpreting § 6 as *denying* the district courts the power to enjoin state court proceedings, it “does not leave the rights of purchasers [at state court execution sales] and creditors dependent on the summary order of a single judge.” *Id.* at 1158.

62. *See id.* at 1150.

This disagreement between Justices Story and Baldwin regarding district courts' injunctive powers under § 6 of the 1841 Bankruptcy Act, and Justice Baldwin's invocation of the 1793 AIA merely as a counsel for interpretive restraint, provide helpful context for understanding the Supreme Court's subsequent decisions in *Ex parte Christy*⁶³ and *Peck v. Jenness*.⁶⁴

VI. Justice Story and *Ex parte Christy*

In *Ex parte Christy*, the debtor (Walden) had borrowed \$200,000 from the City Bank of New Orleans and given the Bank mortgages on a plantation and town lots.⁶⁵ About a year later, Walden sued the Bank in state court to have the mortgages invalidated as usurious. After trial, the state court declared the mortgages to be valid, and on Walden's appeal, the Supreme Court of Louisiana affirmed the judgment for the Bank. The Bank then initiated state court foreclosure proceedings, the state court entered a judgment of foreclosure (alternatively referred to as an order of seizure and sale), and the sheriff effectuated seizure by levy on the premises. Approximately one month later, Walden filed a voluntary petition for bankruptcy relief in the U.S. District Court for the District of Louisiana, and he was adjudicated a bankrupt.

Because the mortgaged property was already in the possession of the Louisiana state court *before* Walden's federal bankruptcy proceedings, there could be *no* automatic stay of the state court proceedings under the principles of exclusive in rem jurisdiction discussed above.⁶⁶ Thus, in the interim one-month period between the date Walden filed his bankruptcy petition and the date the federal district court adjudicated him a bankrupt, the mortgaged premises were sold in execution of the previous judgment of foreclosure, and the Bank was the successful purchaser of the property, presumably by bidding in its mortgage debt.

After Walden was adjudicated a bankrupt, his assignee filed a petition in the federal district court, in its capacity as a court of bankruptcy, seeking to have both the postbankruptcy sale of the mortgaged premises and the mortgages themselves invalidated on the bases, *inter alia*, that fraud and illegality were involved in the foreclosure sale and the mortgages were usurious. In response to the assignee's petition, the Bank argued that the district court lacked jurisdiction to entertain the assignee's petition.

63. 44 U.S. (3 How.) 292 (1845).

64. 48 U.S. (7 How.) 612 (1849).

65. The procedural posture of the case is set forth by the reporter, 44 U.S. at 293–97, by Justice Story in his majority opinion, *id.* at 308–11, and by Justice Catron in his dissent, *id.* at 322–25.

66. *See supra* Part II(A).

At that point, the district court adjourned specified questions into the circuit court, and the circuit court (via Justice McKinley) certified as its answers to those questions, *inter alia*, the following:

That the said District Court has, under the statute of bankruptcy, full and ample jurisdiction of all questions arising under the petition of William Christy, assignee of Walden, to try, adjudge, decree, and determine the same between the parties thereto. . . . [A]nd that said last-mentioned court has full power and authority to try and determine the validity of said mortgages, and if proved upon the trial void according to the laws of Louisiana, to make a decree accordingly.⁶⁷

Thereafter, the Bank directly filed a motion for a writ of prohibition in the Supreme Court, arguing that the federal district court, sitting in bankruptcy, was proceeding without jurisdiction, but the Supreme Court (in an opinion by Justice Story) denied the requested writ on the ground that the district court was *not* exceeding its bankruptcy jurisdiction. There are several very noteworthy aspects of the Court's decision, as regards the Pfander–Nazemi interpretation of the 1793 AIA and its original–ancillary distinction.

A. *An Equitable Relitigation Action*

The *Christy* majority held that the federal district court had jurisdiction to relitigate the validity of the Bank's mortgages in the assignee's action, notwithstanding the previous judgments from the Louisiana state court that the mortgages were valid (in suits in which only the debtor, Walden, and *not* Walden's bankruptcy estate, was party). Thus, the federal district court had jurisdiction "to inquire into and ascertain the validity and extent of such liens, mortgages, and other securities, and to grant the same remedial justice and relief to all the parties interested therein as the state courts might or ought to grant," upon the assignee's allegations that the Bank was "attempting to enforce a mortgage asserted to be illegal and invalid, and to procure a forced sale of the property by the sheriff, in an illegal and irregular manner" threatening "irreparable injury, or loss, or waste, of the assets."⁶⁸

B. *Summary Proceedings Against an Adverse Claimant*

A significant aspect of that decision as regards the Pfander–Nazemi interpretation of the 1793 AIA relates to the Bank's objection that the assignee had improperly requested relief by motion through summary proceedings (under § 6 of the 1841 Bankruptcy Act) that could only be granted via an

67. 44 U.S. at 295.

68. *Id.* at 316, 319.

original bill in a plenary suit in equity (under § 8). The Court, however, held to the contrary—that the federal district court *could* grant the requested relief in summary proceedings initiated by motion or petition under § 6, in lieu of a separate plenary suit on a formal bill under § 8.

Against the background of the established distinction between summary bankruptcy proceedings (on motion or petition) and plenary suits at law or in equity against adverse claimants (on a formal complaint or bill), everyone in *Christy* acknowledged, and Justice Story expressly assumed, that the Bank (as regards the relief the assignee was seeking against the Bank) was an adverse claimant. Yet, the federal district court, acting on a petition filed by Walden’s assignee (rather than an original bill), was proceeding by “summary proceedings in equity.”⁶⁹ And that was the crux of the Bank’s objection to the federal district court’s jurisdiction:

To the supplemental and amended petition the bank put in an answer or plea, denying the jurisdiction of the District Court to take cognisance thereof, and insisting . . . that the District Court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under the act of Congress [§ 6 of the 1841 Bankruptcy Act], ought not to take cognisance of the petition and supplemental petition, inasmuch as all jurisdiction over the premises is by law vested in and of right belongs to the Circuit Court of the United States for the eastern district of Louisiana, holding jurisdiction in equity [under § 8], and proceeding according to the forms and principles of chancery as prescribed by law, or to the District Court of the United States, proceeding in the same manner, and vested with concurrent jurisdiction [under § 8] over all suits at law or in equity brought by an assignee against any person claiming an adverse interest

. . . .

One ground urged in the declinatory plea of the bank to the supplemental petition, and also in argument here, is, that the District Court would have had jurisdiction in equity over the present case, if the suit had been by formal bill and other plenary proceedings according to the common course of such suits in the Circuit Court [under § 8], but that it has no right to sustain the suit in its present form of a summary proceeding in equity [under § 6].⁷⁰

Justice Story (for the Court), however, rejected that argument and held that § 6’s grant to the federal district courts of jurisdiction over “all matters

69. *Id.* at 319.

70. *Id.* at 311–14.

and proceedings in bankruptcy” encompassed all claims by or against the bankrupt’s estate (represented by the assignee). Moreover, this subsumed even those actions that previously would have been regarded as plenary suits against adverse claimants that could only be pursued through a separate formal suit at law or in equity, and notwithstanding the fact that § 6 authorized adjudication of such claims in summary proceedings rather than through a formal plenary suit.⁷¹

C. *The 1793 AIA and Equitable Relief Through Summary Proceedings*

The significance of that holding for the Pfander–Nazemi original–ancillary theory lies in the fact that the requested relief in *Christy* is very similar to the kind of equitable relitigation in federal court of a prior state court judgment that Pfander and Nazemi depict as the target of the 1793 AIA.⁷² For example, had the assignee in bankruptcy filed his petition to invalidate the mortgages in the federal district court *before* the state court foreclosure sale took place, his petition undoubtedly would have requested an injunction to prevent the state court foreclosure sale from going forward. The Bank’s above-articulated jurisdictional objection that the assignee could proceed only in a court “holding jurisdiction in equity, and proceeding according to the forms and principles of chancery,”⁷³ therefore, would essentially have maintained that the assignee was required to seek a “writ of injunction” via an original bill in a plenary suit in equity under § 8 of the 1841 Bankruptcy Act, rather than ancillary relief in the nature of an injunction on a mere petition through summary proceedings under § 6.

As regards the Pfander–Nazemi original–ancillary theory, therefore, the holding of *Christy* is a holding that in § 6 of the 1841 Bankruptcy Act Congress expressly authorized an equitable relitigation action in federal court by way of ancillary petition or motion rather than via an original bill. If the 1793 AIA only prohibited stay of state court proceedings via the latter process and *not* the former (as Pfander and Nazemi posit), then the implication of the *Christy* holding is that any injunctive relief available under § 6, granted in “summary

71. See *id.* at 308–14; see also Norton’s Assignee v. Boyd, 44 U.S. (3 How.) 426, 426, 432, 434–37 (1845) (finding federal bankruptcy jurisdiction under § 6 where “controversy was between the bankrupt’s assignee, on one side, and a mortgage creditor and purchasers at the sale under state process of the mortgaged premises, on the other”); Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 496, 499–501 (C.C.D. Me. 1843) (No. 9662) (Story, J.) (finding federal bankruptcy jurisdiction under § 6 in assignee action to collect a debt owing to the bankrupt).

72. See Pfander & Nazemi, *supra* note 1, at 32; Pfander & Nazemi, *supra* note 16, at 187, 198–203.

73. *Christy*, 44 U.S. at 311.

proceedings in equity,⁷⁴ was beyond the ban of the 1793 AIA. Indeed, Justice Story's majority opinion in *Christy* can be fairly read as implicitly adopting that interpretation of the interaction between the 1793 AIA and district courts' injunctive powers under § 6 of the 1841 Bankruptcy Act.

D. Story on Equity Practice and Enjoining State Court Proceedings

Perhaps the most significant aspect of the *Christy* decision as regards the Pfander–Nazemi interpretation of the 1793 AIA is what Justice Story's majority opinion expressly stated about enjoining state court proceedings. While this aspect of Story's opinion has been subsequently portrayed as dicta—a characterization that Pfander and Nazemi apparently accept⁷⁵—it is not entirely clear that it was absolutely immaterial to the requested writ of prohibition before the Court (as Story's contemporaneous *Christy* critics alleged).

It is indeed true that any question regarding enjoining the state court foreclosure sale was moot, given that the sale took place *before* the assignee filed his petition in the federal district court challenging the validity of the sale and the mortgages. If the assignee succeeded in the federal district court in invalidating the Bank's mortgages, however, the assignee would necessarily also be requesting relief from (and essentially an injunction against the enforcement of) the prior state court judgments that the mortgages were valid. One can fully understand, therefore, why Justice Story would expressly opine on the federal district court's power to enjoin state court proceedings in his *Christy* opinion, particularly given Justice Baldwin's prior decision in *Dudley's Case* that § 6 of the 1841 Bankruptcy Act did *not* grant federal district courts any power to enjoin state court proceedings.⁷⁶

According to Justice Baldwin, if an assignee's plenary suit on an original bill for a writ of injunction under § 8 of the 1841 Bankruptcy Act would be barred by the 1793 AIA (as Baldwin assumed was the case, consistent with the Pfander–Nazemi theory), then the assignee could too easily evade the AIA's ban on stays of state court proceedings if § 6 were interpreted to authorize the injunction nonetheless.

Indeed, Justice Story's *Christy* opinion expressly addressed just such an objection to his interpretation of the scope of § 6, although without expressly mentioning the 1793 AIA:

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

75. See Pfander & Nazemi, *supra* note 1, at 31.

76. See *supra* Part V(B). Moreover, New Hampshire Chief Justice Parker had even more recently and defiantly challenged federal bankruptcy courts' power to enjoin state court proceedings in *Kittredge v. Emerson*, discussed *infra* Part VII(C).

It is farther objected that, if the jurisdiction of the District Court is as broad and comprehensive as the terms of the act justify according to the interpretation here insisted on, it operates or may operate to suspend or control all proceedings in the state courts either then pending or thereafter to be brought by any creditor or person having any adverse interest to enforce his rights or obtain remedial redress against the bankrupt or his assets after the bankruptcy.⁷⁷

It is not clear whether the above passage is in direct response to an AIA argument. Given Justice Baldwin's prior decision in *Dudley's Case*, though, there is good reason to believe that Justice Story was indeed responding to an AIA argument. While the reported "extracts" of the argument of the Bank's counsel in *Christy* do not explicitly raise the AIA argument or rehearse Justice Baldwin's AIA reasoning,⁷⁸ the Bank's counsel did cite *Dudley's Case* to the Court several times.⁷⁹ Moreover, Justice Catron's *Christy* dissent reprinted in its entirety a circuit court decision of by-then-recently-deceased Justice Baldwin in which Baldwin also invoked his opinion in *Dudley's Case* for the appropriate interpretation of the jurisdictional provisions of the Bankruptcy Act.⁸⁰ And the New Hampshire cases discussed below, particularly *Kittredge v. Emerson*, which also invoked the 1793 AIA,⁸¹ were very much on Justice Story's mind in writing his *Christy* opinion, as confirmed by a letter to his son the following day:

Yesterday, I delivered the opinion of the Court in a great Bankrupt case from New Orleans, embracing the question of the nature and extent of the jurisdiction of the District Court in matters of bankruptcy. It was an elaborate review of the whole statute, and we sustained the jurisdiction of the District Court over all matters whatsoever, and *recognized (as indeed was one of the points) the right of the Court to grant an injunction to proceedings and suits in the State courts.* The opinion covers the whole ground in *Ex parte Foster*, and also in the New Hampshire cases which have been so stoutly contested in the State courts. . . . I took great pains about it, and the Court fully confirmed all my views. Judge Catron alone dissented.⁸²

77. *Christy*, 44 U.S. at 318.

78. Supreme Court arguments for the Bank were presented by Mr. Wilde and Mr. Henderson. Unfortunately, the reporter had no notes of the argument of Mr. Henderson. *See id.* at 297. Thus, the official reporter reports only "extracts" of the argument of Mr. Wilde, which do not contain the above-quoted argument to which Justice Story is referring.

79. *See id.* at 300, 301, 305.

80. *See id.* at 327.

81. *See infra* Part VII(C).

82. 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 18, at 509 (emphasis added).

Given the ongoing debate over the extent of district courts' injunctive powers under the Bankruptcy Act, which continued even after *Christy* was decided,⁸³ it seems likely that the above-quoted portion of Justice Story's *Christy* opinion was referring to an AIA argument similar to Justice Baldwin's reasoning in *Dudley's Case*. And Justice Story's response was essentially a more succinct restatement of the analogy he had drawn in *Ex parte Foster*⁸⁴ to recognized instances of ancillary relief in the nature of an injunction,⁸⁵ which is, of course, entirely consistent with the Pfander–Nazemi original–ancillary interpretation of the 1793 AIA.

Regardless of whether Justice Story was expressly addressing the 1793 AIA in *Christy*, though, the structure of the argumentation and reasoning on both sides of the statutory construction debate appear to be fully consistent with and, thus, implicitly confirm the Pfander–Nazemi original–ancillary theory regarding the intended scope of the 1793 AIA.

VII. New Hampshire Chief Justice Parker and the Attachment Controversy

The Supreme Court's decision in *Ex parte Christy* did not quell and, if anything, actually escalated the federalism ire that Story's *Ex parte Foster* decision had stoked in the context of the attachment controversy. Even so, the hostile reaction against *Foster* and *Christy*, like Justice Baldwin's decision in *Dudley's Case*, ultimately does *not* undermine the Pfander–Nazemi interpretation of the 1793 AIA.

The New Hampshire Supreme Court,⁸⁶ in a series of opinions from Chief Justice Parker (who would, like Story, also become a member of the Harvard

83. And which was ultimately resolved in Justice Baldwin's favor in *Peck v. Jenness*, which replicates Justice Baldwin's reasoning from *Dudley's Case*. See *infra* Part VIII(B).

84. See *supra* text accompanying note 41.

85. Thus, Story responded as follows:

We entertain no doubt that, under the provisions of the 6th section of the act, the District Court does possess full jurisdiction to suspend or control such proceedings in the state courts . . . through the instrumentality of an injunction or other remedial proceedings in equity upon due application made by the assignee and a proper case being laid before the court requiring such interference. Such a course is very familiar in courts of chancery, in cases where a creditor[s] bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy; and they were without doubt in contemplation of Congress as indispensable to the practical working of the bankrupt system.

Christy, 44 U.S. at 318.

86. At the time, that court was known as the Superior Court of Judicature of New Hampshire.

Law School faculty only a few years later⁸⁷), was particularly vocal and vigorous in actively opposing Justice Story's aggressively stingy interpretation of the lien-saving provision of the 1841 Bankruptcy Act as applied to prebankruptcy state court attachments. Indeed, "his controversy with Mr. Justice Story" was "[t]he event which brought Judge Parker more conspicuously before the public."⁸⁸ What's more, though, the New Hampshire Supreme Court countered *Foster* with the equally (if not more) aggressive stance that the New Hampshire state courts, their officers, and even the litigants themselves should openly defy federal court injunctions—as Justice Baldwin in *Dudley's Case* had earlier warned might well transpire⁸⁹—a position the New Hampshire Supreme Court maintained even *after* the U.S. Supreme Court had expressly opined in *Christy* that federal bankruptcy courts *could* enjoin state court proceedings.

That latter challenge came in a case called *Peck v. Jenness*, which produced decisions from both the New Hampshire and the U.S. Supreme Courts.⁹⁰ The dangerous potential for discord (and even violence) in the wake of such a high-level antagonistic invitation for state and federal "peace" officers to entirely disregard each other's conflicting authorizations may well explain why the U.S. Supreme Court, in its subsequent *Peck v. Jenness* decision, completely called off the confrontation.⁹¹ The Court not only repudiated Justice Story's interpretation of the lien-saving provision of the 1841 Bankruptcy Act, but the Court also entirely ignored its prior *Ex parte Christy* opinion as regards federal bankruptcy courts' injunctive powers and essentially adopted the restrained interpretation of § 6 of the Bankruptcy Act that Justice Baldwin had proffered in *Dudley's Case* (and that is completely consistent with the Pfander–Nazemi interpretation of the 1793 AIA).

A. *Parker's Opening Salvo: Kittredge v. Warren*

An extended, acrimonious back-and-forth between Justice Story and Chief Justice Parker during 1844 and 1845 began with Parker's lengthy New

87. Parker was appointed the Royall Professor of Law at Harvard in November of 1847, and "although not literally Story's lineal successor," Parker "sat in the seat from which [Story] had spoken to his pupils." GEORGE SILSBEE HALE, JOEL PARKER: SOMETIME CHIEF-JUSTICE OF THE STATE OF NEW HAMPSHIRE AND ROYALL PROFESSOR OF LAW IN THE LAW SCHOOL OF HARVARD UNIVERSITY 22, 23 (1876).

88. *Id.* at 9.

89. *See supra* text accompanying note 58.

90. *See* 48 U.S. (7 How.) 612 (1849); 16 N.H. 516 (1845).

91. Hale described the controversy as one that "threatened to reach the magnitude of a conflict between the United States and New Hampshire." HALE, *supra* note 87, at 9.

Hampshire Supreme Court opinion in the case of *Kittredge v. Warren*,⁹² which held that a prebankruptcy attachment in a New Hampshire state court *did* create a lien on the attached property within meaning of the lien-saving provision of the 1841 Bankruptcy Act.⁹³ Parker specifically disagreed with Justice Story's decision in *Ex parte Foster* involving a Massachusetts attachment, which Parker acknowledged was indistinguishable from the New Hampshire attachment process. In the process, Chief Justice Parker may have unnecessarily tweaked Justice Story by opening his opinion with a gratuitous, largely academic exegesis upon the dubious constitutionality of the Bankruptcy Act of 1841 (drafted by Story).⁹⁴

B. Story's Dismissive Response: In re Bellows

Shortly thereafter, Story was presented with a case in the federal circuit court for the District of New Hampshire involving a prebankruptcy attachment by a New Hampshire state court—a case called *In re Bellows*⁹⁵ from the bankruptcy proceedings of William Bellows and Philip Peck. Story's circuit court decision in *Bellows* was rendered before and thus was completely consistent with his Supreme Court opinion in *Ex parte Christy*. Subsequent proceedings in the *Bellows* case, though, ultimately gave rise to the post-*Christy* decisions of *Peck v. Jenness* from both the New Hampshire and the U.S. Supreme Courts.

In *Bellows*, the local New Hampshire sheriff and his deputy, who were in possession of goods and realty attached before the defendant-debtors' bankruptcy proceedings, by petition asked the federal district court for relief from that court's injunctive turnover order (entered in a summary proceeding

92. 14 N.H. 509 (1844).

93. *Id.* at 539.

94. Chief Justice Parker was bothered by the fact that the 1841 statute had no provision for appeals from decisions of the district court, sitting as a court of bankruptcy under § 6 of the Act. *See id.* at 510–11 (arguing that this violated the constitutional uniformity requirement for federal bankruptcy legislation). Justice Baldwin was also bothered by that particular feature of the 1841 Act and cited it repeatedly as yet another reason for a restrained interpretation of § 6 that denied federal district courts the power to enjoin state court proceedings. *See Dudley's Case*, 7 F. Cas. 1150, 1157–58 (C.C.E.D. Pa. 1842) (No. 4114) (Baldwin, J.). Nonetheless, Chief Justice Parker expressly acknowledged that “[n]o exception has been taken by the plaintiff to the constitutionality of the act,” and that “[i]t is no part of our purpose . . . to follow out the argument which thus presents itself, or to express an opinion upon the weight which might ultimately be found due to it.” *See id.* at 510, 513 (but “[w]ere we disposed to raise a question of that description for our own consideration, it would be founded upon . . .”).

95. 3 F. Cas. 138 (C.C.D.N.H. 1844) (No. 1278).

on the petition of the assignee)⁹⁶ in light of the recent decision of the New Hampshire Supreme Court in *Kittredge v. Warren*, so “that your petitioners shall not be put in jeopardy of their persons or property by reason thereof.”⁹⁷ The federal district court certified the sheriff’s petition for decision by the circuit court.

In his decision thereon, not only did Justice Story “consider the whole matter . . . settled in *Ex parte Foster*,” since the “attachment laws of New Hampshire differ from those of Massachusetts in no material respect,” he specifically dismissed as essentially irrelevant “the elaborate opinion of the superior court of New Hampshire[] in the case of *Kittredge v. Warren*.”⁹⁸ Story also added the following federal-supremacy exclamation point:

[I]f the validity of the discharge, as such, is not contested; and the state court should, as in the case of *Kittredge v. Warren*, . . . upon a demurrer, hold the discharge invalid as to the property attached, I have no doubt, that it would be the duty of the [federal] district court [sitting in bankruptcy] to grant an injunction against the creditor, his agents, attorneys, and the sheriff holding the attached property, to restrain the creditor from proceeding to judgment; or, if he has proceeded to judgment and execution, to restrain the sheriff from levying on the property on the execution; and, if the property has been sold by the sheriff, to compel him to bring the proceeds into [the federal district] court. . . . Such I do not scruple to affirm is, and should be, the practice. It would be an utter renunciation of the rightful authority and jurisdiction of the courts of the United States to allow any creditor to avail himself of any unjust and unlawful advantage, merely because his suit is depending [sic] in a state court. The laws of the United States are, to the extent of the constitutional limits, paramount to the authority of those of the states. The courts of the United States are the appropriate expounders of the laws of the United States; and are not bound to follow the exposition of these laws by the state courts, unless so far as they approve themselves to their own judgment.⁹⁹

96. On the summary injunctive nature of a turnover order, see generally Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power*, 33 BANKR. L. LETTER, Aug. 2013, at 1, 3–4.

97. *In re Bellows*, 3 F. Cas. at 139.

98. *Id.* at 139–40. And on one of the finer points of Parker’s reasoning, Story stated that “until I saw the able and learned opinion of the superior court of New Hampshire, in *Kittredge v. Warren*, I confess, that it never occurred to me that it was a matter susceptible of any judicial doubt. I had long laid it up among those maxims of the law, which are uncontroverted and uncontrovertible.” *Id.* at 140.

99. *Id.* at 143.

* * * * *

In respect to the right of the [federal] district court [sitting in bankruptcy] to issue such an injunction, it seems to me clear in principle; and it is a question of which that [federal district] court had exclusive cognizance; and it is not a matter inquirable into elsewhere, whether the jurisdiction was rightfully exercised or not.¹⁰⁰

Story acknowledged that such an ancillary injunction on motion or petition, “directing the sheriff and his deputy to deliver up the property, might involve them in some embarrassment and a double responsibility,”¹⁰¹ but suggested that the appropriate means to avoid such circumstances was through diligent control of the attaching creditors themselves via injunctions and appropriate enforcement thereof by the federal district court.¹⁰²

C. *Parker’s Defiant Riposte: Kittredge v. Emerson*

Story’s *Bellows* opinion clearly offended the New Hampshire Supreme Court, or perhaps more particularly, Chief Justice Parker. Within months, Parker penned *Kittredge v. Emerson*,¹⁰³ another decision involving a pre-bankruptcy attachment. The procedural posture of *Kittredge v. Emerson* was a carbon copy of *Kittredge v. Warren*, so the opinion itself was almost exclusively a direct response to Story’s *Foster* and *Bellows* decisions, and the entire tone of Parker’s lengthy rebuttal was seething with umbrage and indignation. Noteworthy for our present purposes, moreover, is the fact that *no* injunction had issued from the federal bankruptcy court in that case; the defendant-debtor’s bankruptcy was raised only collaterally in an effort to directly quash the plaintiff-creditor’s prebankruptcy attachment in the New Hampshire state court that had effectuated it.¹⁰⁴ The Court, therefore, only needed to address (and disagree with) Justice Story’s interpretation of the lien-saving provision of the 1841 Act in order to hold that the plaintiff-attachment

100. *Id.* at 140.

101. *Id.* at 143.

102. In this regard, Story opined:

When a personal action [against the bankrupt], in which an attachment has been made on the writ, is pending in a state court, at the suit of any creditor . . . it becomes the duty of the [federal district] court [sitting in bankruptcy], upon [the bankrupt’s] own application, or that of his assignee, by petition, to grant an injunction against the creditor, to stay further proceedings in the suit until the further order of the [federal district] court.

Id. And “if such an injunction has been awarded, it is not competent for the creditors to take a single step in their suits in the state court, unless under the direction and order of the [federal] district court; for otherwise it would be a breach of the injunction.” *Id.* at 143–44.

103. 15 N.H. 227 (1844).

104. *See id.* at 228–29. The same was true in *Kittredge v. Warren*. *See* 14 N.H. 509, 509 (1844).

creditor's suit could proceed to judgment, notwithstanding the defendant's intervening bankruptcy, in order to fix and enforce the plaintiff-creditor's lien rights in the attached assets.¹⁰⁵

Nonetheless, Chief Justice Parker felt compelled to address "a farther matter in the opinion in the *case of Bellows & Peck*, of a character which may well astonish, if it does not alarm us, and which we cannot pass by in silence upon the present occasion"¹⁰⁶—the federal bankruptcy court's power to summarily enjoin state court attachment proceedings on motion or petition:

According to that opinion, the [state court] judgment which is to be entered in this case is to be treated as a nullity in the district court of the United States for this district, if the defendant, or his assignee, sees fit to apply there; and that court, by means of injunction and summary process, may not only restrain the parties, and the officers of the law, from executing the final process of the courts here, issued according to the laws of the State, in cases in which those courts have a clear and undisputed jurisdiction over the cause and the parties, but may, also, by some summary process, search the pockets of attorneys and creditors, and take from them, what, under the administration of justice in this State, and in pursuance of the judgments of its courts, has been paid over to them as their property.¹⁰⁷

And as a rather astounding rejoinder to Story's assertion of federal supremacy, Parker defiantly raised the stakes even further, closing his opinion by positively threatening the prospect of dueling injunctions from state and federal courts (fired, even literally, through their respective enforcement officials). Indeed, because it is such a striking specimen of judicial brinksmanship, it is worth quoting Parker's opinion at length:

[T]he property being in the custody of the law, to await the termination of the suit, the sheriff is bound to apply it to the satisfaction of any

105. And as Parker correctly noted, the "weight of authority" was "adverse to the opinion expressed by [Justice Story] in *Ex parte Foster*, as that opinion stands alone, and in opposition to the opinions of . . . the tribunals of New York, Vermont, and the United States." *Kittredge v. Emerson*, 15 N.H. at 241.

106. *Id.* at 256.

107. *Id.* at 256–57. Parker openly acknowledged the fact that he and other state court judges resented federal bankruptcy injunctions that stayed their cases:

Subsequently to the time when the bankrupt act went into operation, it necessarily came to our knowledge that injunctions were, from time to time, issued by the district court, for the purpose of restraining plaintiffs from proceeding in actions pending in the State courts, the defendants having filed petitions in bankruptcy No small impatience was manifested upon the subject

Id. at 265.

judgment which may be rendered in favor of the plaintiff. . . . Entertaining the opinions we do, we must hold him to this responsibility; and while we hold him thus liable, we are bound to protect him in the possession of the property, and in the application of the avails of it, against any such summary process.

We have faith to believe that the learned judge of the [federal] district court will not assume such a control over our dockets, as farther to enjoin the plaintiffs, in actions pending here, from proceeding in such manner as the courts of the State may allow; or such a control over final process here as to attempt to stop its execution.

If our opinions respecting his authority are correct, a resort to coercive measures, to enforce an injunction, or to punish a disregard of it, might possibly not be entirely safe, for those at least who should attempt to execute the order; but this is a matter upon which we shall not enter.

Should our faith on this subject prove unfounded, our course is clear.

If this court is, in these cases, to be “taught what the United States is,” it must be by the regular action of the supreme court of the Union, upon the judgments of the courts of the State, through the operation of a writ of error

. . . .

We disclaim any assumption of power to interfere with any rightful exercise of jurisdiction by the courts of the United States. But we as distinctly claim the right to take such measures as may be necessary to vindicate our own jurisdiction; and to execute our own process, in cases where we have jurisdiction, so long as our judgments stand unreversed. We sincerely deprecate all collision with those tribunals; and to prevent misapprehension, and guard, as far as may be in our power, against any danger of interference, we take occasion to say in conclusion, that if the plaintiffs in this, and other cases similarly situated, shall ask the interference of this court, it will be our duty to enjoin and prohibit the bankrupt, and his assignee, the creditors, and all claimants of the property attached, from attempting to procure any process, from any court which is not acting under the authority of this State, with a view to prevent the entry of judgments in such suits, or to prevent the execution of the final process issued upon the judgments when obtained; and from applying for, or attempting to execute any summary process, order, or decree of any court, with the view and purpose of taking from the creditors, or their attorneys, the fruits of such judgments as they may obtain, on account of any supposed want of right in the court to render those judgments, or any supposed invalidity of such

judgments, so long as they shall remain in full force and unreversed. And it will farther be our duty, on application, to enjoin and prohibit all persons from making any application, or instituting any proceedings, founded on any supposed breach of an injunction, order, or decree, issued by any tribunal not acting under the authority of this State, by reason of any proceedings in the courts of this State, arising after the bankrupt has pleaded his discharge. And if any such injunction shall be issued by us in any case, it will be our duty to punish any infraction of it when brought to our notice, by prompt action, and by all the modes in which such orders are usually enforced.

We shall certainly regard our own judgments, rendered in cases in which we have a clear jurisdiction over the cause and the parties, as valid, and binding, until they are regularly reversed or annulled by some competent authority; and we shall execute those judgments, and protect the officers of the State in their execution, by all the means which the State has placed in our hands for that purpose.¹⁰⁸

Along with Justice Baldwin's decision in *Dudley's Case*, the Bank's attorney in *Ex parte Christy* also cited the recently decided case of *Kittredge v. Emerson* to the U.S. Supreme Court,¹⁰⁹ and Story clearly had that case in mind when deciding *Christy*.¹¹⁰ Hence, Justice Story's relatively more reserved discussion in *Christy*—as compared to his brazen assertions of federal bankruptcy courts' power and, indeed, *duty* to enjoin state court proceedings in *Foster* and particularly *Bellows*—might well also have been responding to *Kittredge v. Emerson*, and perhaps in a deliberately subdued fashion calculated to (rhetorically at least) soften tensions.¹¹¹ If that was Justice Story's design, it was not successful.

108. *Id.* at 278–80. Of course, this may have been nothing more than elaborate (and empty) grandstanding, given that Story had actually *modified* the federal district court's injunctive decree in *Bellows* to permit the sheriff to retain possession of the attached property. *See infra* note 118.

109. *See Ex parte Christy*, 44 U.S. (3 How.) 292, 300 (1845).

110. *See supra* notes 77–82 and accompanying text.

111. This would also explain the extensive reassurances in his *Ex parte Christy* discussion (which did not appear in either *Foster* or *Bellows*) that the federal district court could exercise its ancillary injunctive powers, “not by acting on the [state] courts, over which it possesses no authority; but by acting on the parties,” and that simply “because the District Court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should in all cases be absolutely exercised,” *Christy*, 44 U.S. at 318, and that

in point of fact, as we all know, very few, comparatively speaking, of the numerous suits pending in the state courts at the time of the bankruptcy ever have been interfered with, and never, unless some equity intervened which required the interposition of the District Court to sustain or protect it.

Id. at 319.

D. The New Hampshire Legislature Joins the Fray

Shortly after the New Hampshire Supreme Court's decision in *Kittredge v. Warren* disagreeing with Story's decision in *Ex parte Foster*, "the Governor of New Hampshire sent a message to the legislature, calling attention to these opposing decisions of the State and Federal courts," which "message was referred by the House to a committee of seven"¹¹² The following month, Parker issued his opinion in *Kittredge v. Emerson* and, just days before Justice Story delivered his *Christy* opinion, the New Hampshire legislature acted on the aforementioned committee's report unqualifiedly endorsing Parker's decisions and stating "that these positions have met with the approbation of the legal profession here and elsewhere, and that in our own State they have received the sanction of public opinion."¹¹³ And the legislature overwhelmingly adopted joint resolutions, including the following:

"Resolved, That we highly appreciate and heartily approve the firm and decided stand which has been taken by the judges of our Superior Court in opposition to the unwarrantable and dangerous assumptions of the Circuit Court of the United States in the recent controversy between said courts, growing out of the operation of the Bankrupt Law; and that, in our opinion, they ought to and will be sustained in that stand, if need be, by the united voice and power of the government and people of this State."¹¹⁴

Given the overt threats in Parker's *Kittredge v. Emerson* opinion, presenting the prospect of actual physical hostilities between the United States and New Hampshire, the New Hampshire legislature's approval thereof clearly was *not* designed to dampen tensions.

VIII. *Peck v. Jenness*: Resolution of the Attachment Controversy

Justice Catron, in his *Christy* dissent, accused Justice Story of padding his majority opinion with considerable unnecessary dicta that would not be binding upon the district courts sitting as courts of bankruptcy.¹¹⁵ Likewise,

112. HALE, *supra* note 87, at 15.

113. *Id.* at 18.

114. *Id.* at 19 (quoting HARRY HIBBARD, STATEMENT ON THE NEW HAMPSHIRE HOUSE FLOOR, Dec. 26, 1845).

115. *See Christy*, 44 U.S. at 322–23 (Catron, J., dissenting). The bulk of Story's majority opinion in *Christy* was devoted to a discussion of federal district courts' jurisdiction under § 6 of the 1841 Bankruptcy Act, since the stated grounds for the requested writ of prohibition was that the district court below was exceeding its jurisdiction. The majority concluded that "the District Court has not exceeded its jurisdiction in entertaining the present suit," and thus denied the requested writ. *Id.* at 322 (majority opinion). Story added one brief paragraph at the end of the (extremely lengthy) majority opinion addressing "the other question made at the bar, whether this court has jurisdiction

New Hampshire Chief Justice Parker—having dismissed federal bankruptcy injunctions as simply incapable of exercising any legitimate control over state court attachment proceedings in *Kittredge v. Emerson*—also promptly disregarded *Ex parte Christy*'s pronouncements regarding federal bankruptcy courts' injunctive powers in his *Peck v. Jenness* opinion¹¹⁶ and, on further review in the U.S. Supreme Court, so too did that Court.¹¹⁷ The 1793 AIA figured prominently in all of those subsequent decisions, but nonetheless, in a manner consistent with the Pfander–Nazemi interpretation thereof.

A. *N.H. Chief Justice Parker on the 1793 AIA*

Within months of the Supreme Court's *Christy* decision, the New Hampshire Supreme Court decided an appeal by the attachment creditors of Bellows and Peck in *Peck v. Jenness*. Notwithstanding the federal district court's injunctive order compelling the local New Hampshire sheriff and his deputy to turn over to the bankrupts' assignee all property of Bellows and Peck attached prior to their bankruptcy proceedings and Justice Story's affirmance of the propriety of that turnover order in his *Bellows* decision, the sheriff and his deputy (undoubtedly drawing comfort and fortitude from *Kittredge v. Emerson*) evidently did *not* comply with that turnover order.¹¹⁸ When the New

to issue a writ of prohibition to the District Court in cases in bankruptcy, if it has exceeded its proper jurisdiction" and concluded that "the question is not absolutely necessary to be decided" given the Court's conclusion that "the District Court has not exceeded its jurisdiction in the present case." *Id.* Story went on, though, as follows: "But it may be proper to say, as the point has been fully argued, . . . that we know of no case where this court is authorized to issue a writ of prohibition to the District Court, except in the cases expressly provided for by the 13th section of the Judiciary Act of 1789 . . . where the District Courts are 'proceeding as courts of admiralty and maritime jurisdiction.'" *Id.* Justice Catron claimed that this short paragraph was the only precedential holding of the case, notwithstanding Story's contrary characterization and notwithstanding that "a majority of my brethren see proper to go further, and express their views at large on the jurisdiction of the bankruptcy court." *Id.* at 322 (Catron, J., dissenting).

116. 16 N.H. 516 (1845).

117. *Peck v. Jenness*, 48 U.S. (7 How.) 612 (1849).

118. *See Peck*, 16 N.H. at 526 (with respect to the "order of the [federal] district court upon the sheriff, to deliver up the property to the assignee," in the absence of any allegation "that there has been any compliance with the terms of that order, . . . it may, therefore, be inferred that the property attached is still in the hands of the sheriff, and in the custody of the laws of the State"). Indeed, for all of his brash assertions of federal supremacy, in the closing paragraph of his *Bellows* opinion, Justice Story actually directed the federal district court to *modify* its injunctive turnover decree to permit the sheriff to retain possession of the attached property "to await the final action of the state court in the said suits." *In re Bellows*, 3 F. Cas. 138, 144 (C.C.D.N.H. 1844) (No. 1278) (Story, J.). That, of course, is wholly incongruous with the entire point of his *Foster* and *Bellows* opinions, which suggests that Story fully appreciated how rancorous the attachment controversy had become and was anticipating (and facilitating) resolution thereof by the U.S. Supreme Court on a writ of error from a collateral state court attachment suit. Chief Justice Parker, likewise, was pressing for the U.S. Supreme Court to resolve the attachment controversy through precisely that procedural vehicle, which

Hampshire state court subsequently entered money judgments against Bellows and Peck for levy of execution against the attached goods, the debtor-defendants appealed to the New Hampshire Supreme Court, relying exclusively upon the authority of the U.S. Supreme Court's recent decision in *Ex parte Christy*.¹¹⁹

Like Justice Catron's *Christy* dissent, Chief Justice Parker's *Peck v. Jenness* opinion characterized Story's discussion of federal bankruptcy courts' injunctive powers as unnecessary dicta.¹²⁰ As importantly, though, Parker reiterated the view he had articulated in *Kittredge v. Emerson*, very similar to that of Justice Baldwin in *Dudley's Case*, that given the restrictions of the 1793 AIA, the Bankruptcy Act could not be properly construed as authorizing federal district courts to enjoin state court attachment proceedings.¹²¹ Like Baldwin, though, Parker did *not* posit the 1793 Act as a direct restriction on federal district courts' power to summarily enjoin state court proceedings by motion or petition under the Bankruptcy Act. Indeed, Parker expressly assumed that the federal district courts *did* have the power to summarily enjoin state court proceedings on an ancillary motion or petition to the extent necessary to effectuate the Bankruptcy Act, notwithstanding the 1793 AIA.¹²² Given his interpretation of the lien-saving provision of the Bankruptcy Act as applied to prebankruptcy attachments, though, he simply concluded that summarily enjoining state court attachment proceedings on motion or petition was manifestly unnecessary and therefore improper:

If there are rights of property dependent upon the termination of the [New Hampshire state court] suit, and in which the assignee has an interest in behalf of the creditors, he may . . . become a party to the suit, and . . . vindicate all the rights of which he is guardian, by a regular proceeding, in due course of law, without a resort to any

Story made possible with the closing paragraph of his *Bellows* decision. See *Kittredge v. Emerson*, 15 N.H. 221, 227, 238–39, 246, 248, 260–62 (1844); *Kittredge v. Warren*, 14 N.H. 509, 524 (1844). That was the only means by which the U.S. Supreme Court could exercise any appellate review over the attachment controversy because the 1841 Bankruptcy Act did not provide for direct appellate review of the decisions of federal district courts sitting in bankruptcy. See *Christy*, 44 U.S. at 317 (noting that under 1841 Act § 6 “the jurisdiction of the District Court is summary in equity and without appeal to any higher court”); see also *supra* note 94.

119. See *Peck*, 16 N.H. at 517, 522.

120. See *id.* at 516, 523–24.

121. See *id.* at 527; *Emerson*, 15 N.H. at 272–74.

122. See *Kittredge v. Emerson*, 15 N.H. at 272–77. In particular, Chief Justice Parker did not take issue with and conceded “that the district courts might, by virtue of their jurisdiction under the bankrupt act, and from the necessity of the case, restrain proceedings in State courts, until the bankrupt could obtain and plead his discharge” as an affirmative defense. *Id.* at 276. See *supra* note 13, for a discussion of the subsequent express provision for such a federal injunction in the 1867 Bankruptcy Act.

such summary interference [by ancillary injunctive order from the federal district court]. . . . And if he might do this, he could sustain a writ of error [to the New Hampshire Supreme Court and then the U.S. Supreme Court], if the decision [of the state court] should be erroneous.¹²³

Chief Justice Parker's hostile reaction to *Foster* and *Bellows*, therefore, was *not* driven by a view that the 1793 AIA was an absolute bar to federal court injunctions staying state court proceedings.¹²⁴ Rather, Parker's animus was a product of his conviction that Story was grossly distorting the lien-saving provision of the 1841 Bankruptcy Act in a manner that unjustifiably intruded upon the state law rights of attachment creditors.

B. The U.S. Supreme Court Vindicates Justice Baldwin (and Ignores Justice Story)

By the time the *Peck v. Jenness* case made its way to the U.S. Supreme Court, Justice Story had died.¹²⁵ And the Court (sans Story) clearly wanted to eliminate, once and for all, the acrimonious inter-jurisdictional conflict and posturing that the attachment controversy had engendered. In fact, in a comment surely motivated by Chief Justice Parker's clarion call for state court defiance of federal bankruptcy injunctions, the Supreme Court noted that "[a]n attempt to enforce the [injunctive] decree [of the federal district court] . . . would probably have been met with resistance, and resulted in a collision of jurisdictions much to be deprecated."¹²⁶

The U.S. Supreme Court in *Peck v. Jenness*, therefore, readily affirmed the New Hampshire Supreme Court's conclusion that a prebankruptcy attachment *did* create a lien within the meaning of the lien-saving provision of the Bankruptcy Act, and with nary a mention of Justice Story's contrary interpretation in *Ex parte Foster*.¹²⁷ The Court also completely ignored Justice Story's pronouncements regarding district courts' injunctive powers under § 6 of the Bankruptcy Act—without expressly overruling, distinguishing, dismissing as dicta, discussing, or even citing to *Ex parte Christy*.

123. *Emerson*, 15 N.H. at 276–77.

124. *Cf.* Mayton, *supra* note 2, at 345 (stating that the “dogma that section 5 of the 1793 Act was an anti-injunction statute was received from the courts of New Hampshire” in *Kittredge v. Emerson* and *Peck v. Jenness*).

125. And New Hampshire Chief Justice Parker “was lecturing [at Harvard Law School] where Story taught to young men who [later] revere[d] the memory of both.” HALE, *supra* note 87, at 10.

126. *Peck v. Jenness*, 48 U.S. (7 How.) 612, 626 (1849).

127. *Id.* at 619–24.

Considering the question as if writing on a clean slate, then, the Court proceeded directly to “the inquiry, whether the [federal] District Court was vested with any power or authority to oust the [New Hampshire] Court of Common Pleas of its jurisdiction over the cause, and supersede its judgment, by this summary proceeding” on a petition by the bankruptcy assignee for an ancillary injunctive decree.¹²⁸ Counsel had argued to the Court that Justice Story’s *Christy* opinion regarding the district courts’ injunctive powers was flatly inconsistent with the 1793 AIA.¹²⁹ The Court, however, in what Justice Frankfurter claimed “was the [Supreme Court’s] first case which expressly relied upon the” AIA,¹³⁰ did *not* interpret the 1793 Act as an absolute bar to federal court injunctions staying state court proceedings. Instead, Justice Grier’s opinion simply succinctly replicated Justice Baldwin’s reasoning in *Dudley’s Case*:

The act of Congress of the 2d of March, 1793, ch. [22], § 5, declares that a writ of injunction shall not be granted “to stay proceedings in any court of a State.” . . .

It follows, therefore, that the District Court had no supervisory power over the State court, either by injunction *or the more summary method pursued in this case, unless it has been conferred by the bankrupt act*. But we cannot discover any provision in that act which limits the jurisdiction of the State courts, or confers any power on the bankrupt court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from the custody of their officers. . . .

. . . It confers no authority on the District Court to restrain proceedings therein by injunction or any other process, much less to take property out of its custody or possession with a strong hand. An attempt to enforce the [turnover] decree [of the federal district court] would probably have been met with resistance, and resulted in a collision of jurisdictions much to be deprecated.

In fine, we can find no precedent for the [summary injunctive] proceeding [of the federal district court], and no grant of power to make such a decree or execute it, either in direct terms or by necessary implication, from any provisions of the bankrupt act; and we are not at

128. *Id.* at 624.

129. *See id.* at 617 (arguing “that a suit rightfully instituted in a State court, before the institution of proceedings in a court of the United States, cannot be arrested by injunction from any court of the United States,” citing the 1793 AIA).

130. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 134 n.5 (1941).

liberty to interpolate it on any supposed grounds of policy or expediency.¹³¹

C. *The 1793 AIA and Ancillary Equitable Relief Through Summary Proceedings*

In the above-emphasized “unless it has been conferred by the bankrupt act” proviso, Justice Grier expressly assumes that if Congress had, in fact, authorized the federal district courts in § 6 of the 1841 Bankruptcy Act to enjoin state court proceedings via summary process on ancillary motion or petition (as Justice Story had concluded was the case), then the 1793 AIA would have presented no obstacle thereto. He simply agreed with Justice Baldwin, however, that § 6 should *not* be so interpreted.

Moreover, the juxtaposition of alternative processes within the above-quoted phrase “either by injunction or the more summary process pursued in this case,” seems to evoke the Pfander–Nazemi theory’s original–ancillary distinction between writs of injunction via original bill in a plenary suit in equity under § 8 of the Bankruptcy Act, as distinguished from ancillary relief in the nature of an injunction in a summary proceeding on motion or petition under § 6. As Justice Baldwin reasoned in *Dudley’s Case* (consistent with the Pfander–Nazemi interpretation), the 1793 AIA would clearly prohibit a stay of state court proceedings by the former process (under § 8). While the 1793 Act would not, by its terms, prohibit a stay of state court proceedings via the latter process (according to the Pfander–Nazemi account), simply as a matter of interpretive restraint, Justices Grier and Baldwin concluded that the Bankruptcy Act should not be readily construed to grant such a power to enjoin state court proceedings.

IX. Conclusion

As regards the intended scope of federal bankruptcy courts’ injunctive powers under § 6 of the Bankruptcy Act of 1841, whether the interpretation of that statute that ultimately prevailed in *Peck v. Jenness* was the correct one is certainly a matter of legitimate debate. On that score, my own sympathies lie with Justice Story. The Pfander–Nazemi original–ancillary interpretation of the 1793 AIA is so fascinating and compelling, though, because it provides a way to understand and reconcile the Supreme Court’s stark and mysterious turnabout on that issue between *Ex parte Christy* and *Peck v. Jenness*. Most helpfully, the Pfander–Nazemi theory explains how Justice Story could so firmly conclude that federal district courts, sitting in bankruptcy, did indeed

131. *Peck*, 48 U.S. at 625–26 (emphasis added).

have the power to enjoin state court proceedings in the face of the AIA. The Pfander–Nazemi account also explains why the *Christy–Peck* flip-flop turned on a rather nuanced question of the appropriate interpretation of the scope of the § 6 jurisdictional grant, rather than simply a straightforward invocation of the bar of the 1793 AIA (which Story, implausibly, just carelessly overlooked) as the crude, conventional, “sweeping prohibition” account of the AIA might predict.

Pfander and Nazemi draw two AIA themes from *Peck*’s “silent repudiation” of *Christy*, one of which concerns the propriety of “implicit” statutory exceptions to the AIA.¹³² I worry that under Pfander and Nazemi’s preferred approach to the necessary explication of congressional exceptions to the AIA, not even the current statute authorizing bankruptcy injunctions would pass muster, as the statute itself makes no mention of the AIA nor does it specifically authorize enjoining state court proceedings.¹³³ Neither, for that matter, do the Bankruptcy Code’s automatic statutory injunctions—the automatic stay and the discharge injunction.¹³⁴ Of course, bankruptcy injunctions need not rely upon the “expressly authorized” exception to the AIA for their validity if they are properly considered “in aid of jurisdiction” exceptions to the AIA.¹³⁵ That approach, though, requires one to deeply discount *Peck* as simply an aberrational product of its particular time and circumstances and embrace Justice Story’s timeless counsel regarding the full scope of federal bankruptcy courts’ equity powers.

Ultimately, it seems that Story himself undermined his perfectly sensible views regarding the scope of federal bankruptcy courts’ injunctive powers (that have stood well the tests of time and reason) by his unreasonable, strained construction of the lien-saving provision of the 1841 Act. The attachment controversy engendered thereby, and the bitter and defiant reaction of New Hampshire Chief Justice Parker, was something of a replay of the *Morris v. Allen* controversy that Pfander and Nazemi posit as the impetus for the 1793 AIA.¹³⁶ The consequent discord and a simple desire to assuage and avoid undue conflict, more than anything else, seem to explain why the *Peck v. Jenness* Court would so oddly (and transparently) feign ignorance of *Ex parte*

132. Pfander & Nazemi, *supra* note 1, at 32–34.

133. See 11 U.S.C. § 105(a) (2012), discussed *supra* notes 10–11 and accompanying text.

134. See *supra* notes 8–11 and accompanying text.

135. See 28 U.S.C. § 2283 (2006); Brubaker, *Nondebtor Releases*, *supra* note 38, at 15–16 n.65 (noting that “general ‘in aid of jurisdiction’ powers . . . are helpful in defining the scope of a bankruptcy court’s injunctive powers”).

136. See generally Pfander & Nazemi, *supra* note 16.

Christy.¹³⁷ On the long view, *Christy* has proved to be the more durable precedent on the scope of federal courts' bankruptcy jurisdiction and equity powers.¹³⁸ *Peck* is a mere historical dictum.

137. The composition of the *Peck* Court was identical to that of *Christy*, except that Justice Woodbury had replaced Story and Justice Grier had filled the vacancy (extant when *Christy* was decided) created by the death of Justice Baldwin in 1844. See HALE, *supra* note 87, at 22.

138. Indeed, even the explanation of the compilers of the 1874 Revised Statutes for their insertion of the express bankruptcy exception into the AIA echoes Justice Story's position that enjoining state court proceedings is simply an inescapable necessity in properly administering any federal bankruptcy law. See 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE tit. XIII, ch. 12, § 185, at 120 (1872) ("When Congress enacts a bankrupt law, all matters embraced in the act are exclusively of the jurisdiction of the courts of the United States, and the State courts have no jurisdiction to interfere with such action . . . and this seems to authorize injunctions to stay interfering proceedings in the State courts.").