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ON BANKRUPTCY'S PROMETHEAN GAP: BUILDING ENSLAVING CAPACITY INTO THE ANTEBELLUM ADMINISTRATIVE STATE

Rafael I. Pardo[*]

As the United States contends with the economic crisis triggered by the COVID-19 pandemic, federal bankruptcy law is one tool that can be used to resolve the financial distress suffered by individuals and businesses. When implementing this remedy, the question arises whether the law's application should be viewed as limited to addressing private debt matters, without regard for the public interest. This Article answers the question by looking to modern U.S. bankruptcy law's first forebear, the 1841 Bankruptcy Act, which Congress enacted in response to the depressed economic conditions following the Panic of 1837. That legislation created a judicially administered system that nationalized bankrupts' assets, some of which featured prominently in the business of slavery. This Article focuses on a specific episode from New Orleans, which at the time was the nation's third-most-populous city, had the nation's largest slave market, and had one of the nation's largest money markets. One of the bankruptcy cases commenced in that city involved the administration and sale of Banks Arcade, which was a premier commercial exchange for auctioning enslaved Black Americans. This history about how the federal administrative state restructured one component of the U.S. slavery complex should prompt critical reflection on how present-day bankruptcy law manages the fallout from a financial crisis. This Article concludes that courts

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have the authority to permit the public to advocate for its interests in distressed assets redeployed through the federal bankruptcy system.

INTRODUCTION

The United States, like much of the world, currently finds itself on the road to recovery following the severe financial crisis triggered by the COVID-19 pandemic.[1] When the national economy initially cratered, those adversely affected looked to the government for help. Congress fashioned new relief measures specifically meant to target the crisis at hand, such as the Coronavirus Aid, Relief, and Economic Security (CARES) Act,[2] an economic stimulus package exceeding $2 trillion that, according to the U.S. Department of the Treasury, was intended to "provide[] fast and direct economic assistance for American workers and families, small businesses, and preserve[] jobs

1. *See* Press Release, Org. for Econ. Co-operation & Dev. [OECD], G20 GDP Showed a Strong Recovery in the Third Quarter of 2020, but Remained Below Pre-Pandemic High (Dec. 14, 2020), https://www.oecd.org/sdd/na/g20-gdp-growth-Q3-2020.pdf [https://perma.cc/5S2H-AC6T].

2. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

for American industries."[3] But Congress also relied on government programs predating the crisis, in some instances adding modifications responsive to the unique circumstances of the present situation. For example, the CARES Act made a few amendments to the Bankruptcy Code,[4] nearly all of which expressly refer to COVID-related issues.[5] This approach suggests that Congress has deemed the existing bankruptcy system to be sufficiently flexible, even in the context of a global pandemic, to address problems of overindebtedness.[6]

At first blush, such faith may be warranted. The Bankruptcy Code has been in effect for more than four decades,[7] during which time the United States has gone through several recessions, including the Great Recession.[8] If the Code helped financially distressed individuals and businesses navigate those crises, and in particular the latter one, then the Code, with some minor adjustments, should assuredly be ready to meet the exigencies of the severe economic contraction now facing the nation. Or so the argument might go.

Certainly, society has grown accustomed to seeing the federal bankruptcy system in action, from annually granting individual debtors hundreds of thousands of discharges,[9] to reorganizing and liquidating

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3. *The Treasury Department Is Delivering COVID-19 Relief for All Americans*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/cares [https://perma.cc/T5L7-B8M6] (last visited Mar. 1, 2021).

4. *See* CARES Act, § 1113, 134 Stat. at 310–12.

5. *See, e.g.*, 11 U.S.C.A. § 101(10A)(B)(ii)(V) (Westlaw through Pub. L. No. 116-259) (excluding "[p]ayments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act with respect to the coronavirus disease 2019 (COVID-19)" from the definition of "current monthly income" (citation omitted)); *id.* § 1325(b)(2) (same); *id.* § 1329(d) (providing special rules for modifying Chapter 13 plans confirmed before the subsection's enactment pursuant to the CARES Act if "the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic").

6. For an example of a foreign government that has reconfigured its bankruptcy system more extensively (albeit to make it more akin to the U.S. bankruptcy system) in response to the financial crisis the COVID-19 pandemic caused, see *Australia to Overhaul Bankruptcy Laws to Help Firms over COVID-19*, REUTERS (Sept. 23, 2020), https://www.reuters.com/article/us-health-coronavirus-australia-bankrupt/australia-to-overhaul-bankruptcy-laws-to-help-firms-over-covid-19-idUSKCN26F00F [https://perma.cc/7PCN-PLEW].

7. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(a), 92 Stat. 2549, 2682 (providing a general effective date of October 1, 1979, for the Bankruptcy Code).

8. *See US Business Cycle Expansions and Contractions*, NAT'L BUREAU ECON. RSCH. (June 8, 2020), https://www.nber.org/cycles/cyclesmain.html [https://perma.cc/7BLS-VEFJ].

9. *See, e.g.*, U.S. CTS., BAPCPA REPORT — 2019 (2019), https://www.uscourts.gov/statistics-reports/bapcpa-report-2019 [https://perma.cc/2FZN-D3VL].

business enterprises that have been mainstays of our economy at one point or another: Bethlehem Steel, Brooks Brothers, Chrysler, Delta Airlines, Enron, General Motors, Lehman Brothers, Pacific Gas & Electric, Polaroid, RadioShack, Remington Arms, Sears, Texaco, and Washington Mutual, to name just a few.[10] To some extent, it is therefore understandable why society continues on this well-worn path.

But somewhere along the way, many have lost sight (or perhaps never took adequate notice) of the true nature of the bankruptcy system's role within the federal bureaucratic state. This oversight (or perhaps reckless disregard) has fostered an imperfect understanding of what it means to forgive debt pursuant to the federal bankruptcy system. Only after recognizing and acknowledging this limitation can we adequately evaluate whether "business as usual" serves society's best interest.[11] In other words, it may be necessary to rethink the implications of relying on bankruptcy law to respond to financial crises. To place this point in stark relief, let us revisit the fateful days before the end of World War II.

Seventy-five years after the United States detonated an atomic bomb over the Japanese city of Hiroshima, Anne Harrington reflected on Claude Eatherly's involvement in the first nuclear attack in human

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10. Remington Arms Distrib. Co., No. 20-81695 (Bankr. N.D. Ala. July 27, 2020); *In re* BBGI US, Inc., No. 20-11785 (Bankr. D. Del. July 8, 2020) (Brooks Brothers); *In re* Pac. Gas & Elec. Co., No. 19-30088 (Bankr. N.D. Cal. Jan. 29, 2019); *In re* Sears Holding Corp., No. 18-23538 (Bankr. S.D.N.Y. Oct. 15, 2018); *In re* Remington Arms Co., No. 18-10687 (Bankr. D. Del. Mar. 25, 2018); *In re* Gen. Wireless Operations Inc., No. 17-10506 (Bankr. D. Del. Mar. 8, 2017) (RadioShack); *In re* RS Legacy Glob. Sourcing Corp., No. 15-10204 (Bankr. D. Del. Feb. 5, 2015) (RadioShack); *In re* Motors Liquidation Co., No. 09-50026 (Bankr. S.D.N.Y. June 1, 2009) (General Motors); *In re* Old Carco LLC, No. 09-50002 (Bankr. S.D.N.Y. Apr. 30, 2009) (Chrysler); *In re* Wash. Mut., Inc., No. 08-12229 (Bankr. D. Del. Sept. 26, 2008); *In re* Lehman Bros. Holdings Inc., No. 08-13555 (Bankr. S.D.N.Y. Sept. 15, 2008); *In re* Delta Air Lines, Inc., No. 05-17923 (Bankr. S.D.N.Y. Sept. 14, 2005); *In re* Enron Corp., No. 01-16034 (Bankr. S.D.N.Y. Dec. 2, 2001); *In re* Bethlehem Steel Corp., No. 01-15288 (Bankr. S.D.N.Y. Oct. 15, 2001); *In re* Polaroid Corp., No. 01-10864 (Bankr. D. Del. Oct. 12, 2001); *In re* Pac. Gas & Elec. Co., No. 01-30923 (Bankr. N.D. Cal. Apr. 6, 2001); *In re* Texaco, Inc., No. 87-20142 (Bankr. S.D.N.Y. Apr. 12, 1987).

11. *Cf.* Tim Wu, Opinion, *Don't Feel Sorry for the Airlines*, N.Y. TIMES (Mar. 16, 2020), https://nyti.ms/2QkNj3N [https://perma.cc/94RY-C9KB] ("We cannot permit American and other airlines to use federal assistance, whether labeled a bailout or not, to weather the coronavirus crisis and then return to business as usual. Before providing any loan relief, tax breaks or cash transfers, we must demand that the airlines change how they treat their customers and employees and make basic changes in industry ownership structure.").

history.[12] Eatherly, a major in the U.S. Army Air Forces, piloted a B-29 Superfortress to assess weather conditions over Hiroshima and radioed the Enola Gay that conditions were clear to drop the bomb.[13] Harrington filters the story of Eatherly's life-long struggle with guilt over his role in the attack through the lens of the "Promethean gap."[14] The concept, created by German philosopher Günther Anders, focuses on "[t]he discrepancy between the tremendous power of humanity's inventions and the limited ability of any single person to comprehend, let alone control the moral and practical implications of that power."[15] Servicemen like Eatherly "were the prime example of people caught in the Promethean gap."[16] They were "cogs in the atomic machine" who "came closer to connecting with the physical consequences of and responsibility for their actions than any others."[17]

The Promethean gap is recursive. In pursuit of solving problems, whether or not of their own making, humans have repeatedly devised solutions without fully anticipating, appreciating, or understanding their nature and effects. Scientific advancement through the pursuit of nuclear technology undoubtedly constitutes one of the grimmest examples giving rise to a Promethean gap. But we need not look to such extremes to find its manifestations. Even solutions to relatively innocuous problems can create a gap. The capacity of human ingenuity to produce suffering should not be understated or overlooked.

One area likely to produce Promethean gaps is the law, which is often deployed to solve problems that adversely affect the human condition. Legislatures may very well have good intentions when harnessing state power to ameliorate suffering. But the fact remains that legislatures will also fail to comprehend — or worse, turn a blind eye to — the parade of horribles that can sometimes result from interpretation and execution of legal commands. In such instances, actors responsible for giving effect to enacted law will find themselves in a Promethean gap.

Historical study can reveal how prior legal responses to crises have been problematic from the outset by generating a Promethean gap. Moreover, by examining the behavior of those subsequently caught in

12. Anne I. Harrington, *The Hiroshima Pilot Who Became a Symbol of Antinuclear Protest*, N.Y. TIMES MAG. (Aug. 6, 2020), https://nyti.ms/39XjO0G [https://perma.cc/9NZ6-6D3R].

13. *See id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

the gap, we can critically ask whether instituting certain safeguards might have channeled control of the law toward more normatively desirable outcomes. These lessons can enable policymakers to better evaluate whether their prescriptions for solving current crises have been optimally designed.[18]

Returning to the financial crisis spawned by the COVID-19 pandemic, why should we be wary of continuing to rely on the federal bankruptcy system to do the work that it has done without interruption for over 120 years?[19] The answer, simply put, is that policymakers, courts, and participants in the bankruptcy system have generally failed to account for the fact that the system, as presently (and historically) structured, creates a legal entity to resolve the financial distress of debtors. Moreover, that legal entity quite arguably constitutes an instrumentality of the United States. On this view, when we rely on bankruptcy law to solve overindebtedness problems, we do so through "[a] means . . . used by the national government."[20] Consequently, this demands attention to how the choices made in bankruptcy proceedings entail federal policymaking that can have deleterious effects not only on internal stakeholders (e.g., creditors, shareholders) but also on the public.[21] Once we layer these concerns on top of those that traditionally accompany liquidations and reorganizations (e.g., the amount of debt forgiven, the amount and order of creditor repayment), we need to adjust the inputs for the decision-making calculus in bankruptcy and the mechanisms for regulating the conduct of those who administer the law. Simply put, we need to mind the Promethean gap in bankruptcy.

18. *Cf.* Barry Eichengreen, *The Analogy Trap in Economic Policy: A Lesson for the COVID-19 Crisis*, ECON. HISTORIAN, https://economic-historian.com/2020/11/the-analogy-trap-in-economic-policy/ [https://perma.cc/J4PM-3BBC] (last visited Mar. 12, 2021) ("Where comparisons with past crises have value is precisely in highlighting how this crisis is different, and therefore how the policy response should vary.").

19. Prior to the current Bankruptcy Code, the federal bankruptcy system operated pursuant to the 1898 Bankruptcy Act. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978). Congress enacted the Code in 1978, which took effect on October 1, 1979. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(a), 92 Stat. 2549, 2682.

20. *Federal Instrumentality*, BLACK'S LAW DICTIONARY (11th ed. 2019).

21. *Cf.* Lawrence Ponoroff, *Enlarging the Bargaining Table: Some Implications of the Corporate Stakeholder Model for Federal Bankruptcy Proceedings*, 23 CAP. U. L. REV. 441, 455 (1994) ("The collapse of a business enterprise implicates a broad range of diverse interests beyond the interests of those persons with cognizable state law claims against the assets of the business.").

Because of the high concentration of commerce in urban areas,[22] we might expect the effects of bankruptcy's Promethean gap to be especially pronounced in cities.[23] As the severity of a crisis increases, spreading further and further across multiple sectors of the economy, large swaths of urban enterprise will be implicated when sorting out the consequences of default.[24] If there is a silver lining to this type of systemic shock, it is that renewal and rebirth might open the door to a better version of what previously existed.[25] The post-crisis city may emerge stronger than its pre-crisis predecessor. But for that to happen,

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22. *See, e.g.*, Patrick J. Foye & John Samuelsen, Opinion, *The Subways Are Facing a Five-Alarm Fire*, N.Y. TIMES (Sept. 1, 2020), https://nyti.ms/3bjBGDn [https://perma.cc/2HWF-J5JT] ("The downstate New York region — New York City and the surrounding area — accounts for about 8 percent of the nation's gross domestic product.").

23. This is not to say that rural areas are immune to financial crisis. Economic downturns impact such communities, often in ways that merit a context-sensitive policy response. *See, e.g.*, 11 U.S.C. §§ 1201–1232 (providing bankruptcy relief for family farmers and family fishermen).

24. *See, e.g.*, OECD, Cities Policy Responses 6–8 (July 23, 2020), https://read.oecd-ilibrary.org/view/?ref=126_126769-yen45847kf&title=Coronavirus-COVID-19-Cities-Policy-Responses [https://perma.cc/HKB9-TE6X]; Esther Fung, *Malls File for Bankruptcy or Shut Their Doors as Pandemic Pain Spreads*, WALL ST. J. (Nov. 10, 2020, 7:50 PM), https://www.wsj.com/articles/malls-file-for-bankruptcy-or-shut-their-doors-as-pandemic-pain-spreads-11605013664 [https://perma.cc/7M7T-4WG5]; Matthew Haag, *Manhattan Emptied Out During the Pandemic. But Big Tech Is Moving In.*, N.Y. TIMES (Nov. 9, 2020), https://nyti.ms/2GUvrLH [https://perma.cc/CFG2-74UQ]; Patrick McGeehan, *Tourism, Engine for N.Y.C. Economy, May Not Fully Recover Until 2025*, N.Y. TIMES (Mar. 8, 2021), https://nyti.ms/32MIxT6 [https://perma.cc/7TVA-BUKW]; Dana Rubinstein & Jesse McKinley, *Virus Siphons $2.5 Billion in N.Y.C. Property Tax Revenue*, N.Y. TIMES (Jan. 17, 2021), https://nyti.ms/2XFFJUF [https://perma.cc/94CM-3CN2]; Dana Rubinstein, *"We're at War": New York City Faces a Financial Abyss*, N.Y. TIMES (Oct. 16, 2020), https://nyti.ms/3id9fZE [https://perma.cc/2S8L-Q5VG]; Josh Saul & Henry Goldman, *New York Region Sees 40% Bankruptcy Surge, Braces for More*, BLOOMBERG (Sept. 29, 2020, 7:00 AM), https://www.bloomberg.com/news/features/2020-09-29/new-york-city-bankruptcies-2020-pivotal-point-for-business-as-covid-cases-rise [https://perma.cc/W3HT-8XGD].

25. *See* Tim Wu, Opinion, *New York's Commercial Rents Are "Too Damn High,"* N.Y. TIMES (Oct. 11, 2020), https://nyti.ms/2IbCuQi [https://perma.cc/DYJ7-X9YL] ("As the cliché goes, every crisis presents an opportunity. New York City has been hit hard by the pandemic, and economically its small businesses have been hit the hardest. Yet New York, when it needs to be, can be creative: Its recent rapid transformation into a city of great outdoor dining is just one example."); *see also* Fung, *supra* note 24 ("Some analysts said the closure of outdated retail businesses and properties will result in a healthier business environment for both landlords and tenants."); Pete Wells, *9 Ways Outdoor Dining Will Change New York*, N.Y. TIMES (Dec. 15, 2020), https://nyti.ms/3265HTS [https://perma.cc/73VQ-BQGN] ("The stripped-down, nearly instant approval process that allows restaurants to set up sidewalk and street seating turned out to be far more fair than the complicated and expensive former system for getting sidewalk dining permits.").

the right policy tools need to be available, and, just as important, they need to be properly implemented. Anything less could result in a failure to capitalize on a golden opportunity. Worse yet, refusing to make a break with the past might perpetuate preexisting injustice.

To illustrate the problem, we can look to modern U.S. bankruptcy law's first forebear, the 1841 Bankruptcy Act (the 1841 Act or Act),[26] which Congress enacted in response to the depressed economic conditions following the Panic of 1837. New Orleans was among the cities that financially suffered the worst during that crisis,[27] perhaps not surprisingly given its status then as "the only true metropolis in the slave South . . . [and] the chief citadel of southern merchant capitalism."[28] By the time of the Act, it was the nation's third-most-populous city, its slave market was the nation's largest, and its money market was one of the nation's largest, if not the largest.[29] Because the business of slavery featured so prominently in the Crescent City's economy, examining the 1841 Act's execution there reveals many cautionary tales about bankruptcy's Promethean gap.

This contribution to the *Fordham Urban Law Journal*'s 2020 Cooper-Walsh Colloquium, "The Impact of Financial Crisis on Urban Environments: Past, Present, and Future," tells one such story: that of the bankruptcy administration and sale of Banks Arcade, a block-long, three-story building that was one of antebellum New Orleans's premier commercial exchanges for auctioning enslaved Black Americans.[30] Recounting this history about the role of the federal bureaucratic state in restructuring one component of the nation's slavery complex is not just about ensuring that we remember the sins of the past, although that would be a valid end in itself.[31] More broadly, this story is one that should prompt us to think critically in new ways about what it means

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

27. *See generally* RICHARD HOLCOMBE KILBOURNE, JR., LOUISIANA COMMERCIAL LAW: THE ANTEBELLUM PERIOD 157–65 (1980) (discussing the 1837 financial crises in New Orleans, New York, and London); JESSICA M. LEPLER, THE MANY PANICS OF 1837: PEOPLE, POLITICS, AND THE CREATION OF A TRANSATLANTIC FINANCIAL CRISIS (2013) (same).

28. SCOTT P. MARLER, THE MERCHANTS' CAPITAL: NEW ORLEANS AND THE POLITICAL ECONOMY OF THE NINETEENTH-CENTURY SOUTH 16 (2013).

29. Rafael I. Pardo, *Financial Freedom Suits: Bankruptcy, Race, and Citizenship in Antebellum America*, 62 ARIZ. L. REV. 125, 149 (2020) [hereinafter Pardo, *Financial Freedom Suits*].

30. Rafael I. Pardo, *Bankrupted Slaves*, 71 VAND. L. REV. 1071, 1148 (2018) [hereinafter Pardo, *Bankrupted Slaves*].

31. For too long, inattention and unawareness concealed the federal bankruptcy system's complicity in the domestic slave trade. *See id.* at 1094–98.

to manage the financial fallout from capitalistic excess through federal bankruptcy law.

This Article proceeds in two parts. Part I describes how the 1841 Act's provisions created a federal instrumentality for resolving core problems incident to financial failure. Part II provides an account of how the federal government administered Banks Arcade as a distressed asset under the Act. This Article concludes by reflecting on the lessons provided by this historical episode, connecting them to the present, and arguing that courts have the authority to permit the public to advocate for its interests in the redeployment of distressed assets through the federal bankruptcy system.

I. BUILDING BANKRUPTCY INTO THE ANTEBELLUM FEDERAL ADMINISTRATIVE STATE

Any study of the federal bankruptcy system's role during the antebellum era can focus at most on two statutory schemes, the Bankruptcy Act of 1800 (the 1800 Act) and the 1841 Act, each of which Congress quickly repealed after enactment.[32] The 1841 Act's reach far exceeded that of the 1800 Act "by virtue of (1) making the relief available to a much larger class of individuals, (2) allowing individuals to seek such relief voluntarily, and (3) having operative effect at a time when the nation consisted of more states (including ones that permitted slavery) and more people."[33]

The second distinguishing factor particularly warrants conceptualizing the 1841 Act system as "the origin story for modern-day bankruptcy law" in the United States.[34] By permitting debtors to "initiate on their own terms the process for obtaining forgiveness of debt,"[35] the legislation "represented a seminal moment in reorienting bankruptcy law as a mechanism for debtor relief, shifting the focus

32. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. After repealing the 1841 Act, Congress waited until after the Civil War to create the nation's next bankruptcy system. *See* Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

33. Pardo, *Bankrupted Slaves*, *supra* note 30, at 1082.

34. Pardo, *Financial Freedom Suits*, *supra* note 29, at 129.

35. Pardo, *Bankrupted Slaves*, *supra* note 30, at 1084. As a formal matter, the 1800 Act provided that bankruptcy cases could only be commenced by creditors against debtors (i.e., involuntary relief from the debtor's perspective). *See* § 2, 2 Stat. at 21. *But cf.* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 223 (2002) ("Although in form involuntary, in substance the 1800 Act could also be wielded by debtors. . . . [M]any of the filings were clearly collusive or cooperative, the result of insolvent debtors enlisting sympathetic creditors to sue out commissions of bankruptcy against them.").

away from its origins primarily as a creditor-collection device."[36] To be sure, substantive differences exist between the 1841 Act's federal bankruptcy system and its present-day analogue administered pursuant to the 1978 Bankruptcy Code.[37] Despite those differences, the emphasis on debtor relief is one of the primary through-lines linking the two regimes,[38] notwithstanding subsequent amendments to the Code that have sought to make forgiveness of debt less expansive.[39] This conceptual continuity justifies general comparisons between the two systems. Moreover, as Section I.A discusses, specific parallels can be drawn once one considers the institutional-design elements of the two systems. Accordingly, the 1841 Act serves as a useful historical

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36. Pardo, *Bankrupted Slaves*, *supra* note 30, at 1083 (footnote omitted). For further discussion regarding the 1841 Act's primary objective of providing financial relief to debtors adversely affected by the Panic of 1837, see *infra* notes 212–40 and accompanying text.

37. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C.A. §§ 101–1532 (Westlaw through Pub. L. No. 116-259)).

38. *See* Lawrence Ponoroff, *Exemption Impairing Liens Under Bankruptcy Code Section 522(f): One Step Forward and One Step Back*, 70 U. COLO. L. REV. 1, 6–7 (1999) ("[T]here is no doubt that adoption of the Bankruptcy Code in 1978 marked a significant shift in favor of consumer debtor relief in the precarious and elusive balance that American bankruptcy law has long sought to achieve between the fresh start for individual debtors and protection of the legitimate collection rights of creditors."); *cf.* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 365 (1991) ("The pro-debtor orientation of the 1898 act with respect to the discharge also was manifested in a drastic curtailment in the number of statutory grounds for denying the discharge. In section 29 of the 1867 act Congress, reacting to the pro-debtor bias of the 1841 law, had provided an extremely long list of such grounds. Accordingly a large percentage of debtors did not receive a discharge. The pendulum swung back sharply the other way in the 1898 act, which provided very few grounds for denying a discharge." (footnote omitted)).

39. *Compare* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 472 (2007) [hereinafter Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*] ("The panacea for the purported systemic abuse of the bankruptcy laws by individual debtors would be the means test, a formulaic statutory directive pursuant to which courts are to presume abuse of the bankruptcy system by Chapter 7 debtors who appear to have an ability to repay past debts with future income. Such debtors would be subject to having their cases dismissed. In theory, this approach will prevent can-pay debtors from obtaining an immediate discharge in Chapter 7 and instead will direct them to seek bankruptcy relief under Chapter 13 where discharge is granted after completion of a repayment plan."), *with* Rafael I. Pardo, *Self-Representation and the Dismissal of Chapter 7 Bankruptcy Cases*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 87, 106 (Samuel Estreicher & Joy Radice eds., 2016) ("During the five-year period of the 2014 Pardo Study, there were 81,123 Chapter 7 cases commenced by individual debtors in the Western District of Washington, of which 1,474 were dismissed. Of those dismissed cases, only 40 were dismissed on the basis of abuse — that is, only 2.71% of the dismissed cases and a mere 0.05% of all cases.").

frame of reference for thinking about how the Code today resolves financial distress.

This Part sets the stage for understanding the dynamics that shaped the bankruptcy administration and sale of Banks Arcade as a distressed asset nationalized by the federal government. Section I.A describes how the 1841 Act created a legal entity for purposes of resolving the financial distress of debtors. Section I.B argues that this entity constituted a federal instrumentality and explains how this public entity fit into the antebellum federal administrative state, creating the opportunity for residual bankruptcy policymaking by the judiciary.

A. The 1841 Act Bankruptcy Trust

Thomas Plank's work theorizing the "bankruptcy trust" as a legal person is key to understanding how the 1841 Act created a legal entity.[40] His argument focuses on how the Bankruptcy Code's structure and substance create a legal entity whose attributes correspond to, and in some instances are more robust than, those of a business trust, which is deemed to be an artificial legal person.[41] As such, the bankruptcy trust should also be deemed to have the status of a legal entity.[42] Working through the key elements of Plank's argument, this Section shows how they map onto the structure and substance of the 1841 Act, thereby leading to the conclusion that the Act also created a bankruptcy trust that was a legal entity.

i. The Business Trust Baseline

To make the case that "the Code provides for the creation of a separate entity upon the filing of a voluntary bankruptcy petition,"[43] Plank begins his argument with an account of why the business trust is distinguishable from other trust arrangements. In describing the taxonomy of trusts, he notes the distinction between donative trusts and commercial trusts.[44] He then discusses how the latter category can be further divided into two subcategories: (1) traditional trusts used for commercial purposes (e.g., indenture and grantor trusts), which are not constituted to "engage in broader business activities," with the result that "[c]ontract and tort liability incurred in connection with the trust

40. Thomas E. Plank, *The Bankruptcy Trust as a Legal Person*, 35 WAKE FOREST L. REV. 251 (2000).

41. *See id.* at 252–76.

42. *See id.* at 276.

43. *Id.* at 253.

44. *See id.* at 255–56.

is generally the personal liability of the trustee and becomes the liability of the trust estate only in limited circumstances";[45] and (2) business trusts (e.g., real estate investment trusts), which "engage in an unlimited range of business activities" for which the trust, rather than the trustee, will be liable.[46] While the law does not classify donative trusts and traditional commercial trusts as legal entities,[47] "the business trust is designed to be a legal person, similar to a corporation, partnership, or limited liability company,"[48] having "a legal existence separate from the persons who comprise it, the business trust trustee and the business trust's beneficiaries."[49]

After establishing that a business trust constitutes a legal person, Plank then argues that the Bankruptcy Code creates a bankruptcy trust whose attributes correspond to those essential to a business trust.[50] His analysis focuses on three prominent features of the Code's scheme for operationalizing a collective proceeding that distributes a debtor's property for the benefit of creditors:[51] the creation of a bankruptcy estate, the appointment of the bankruptcy trustee to administer the bankruptcy estate, and the scope of the trustee's powers and duties.[52] A historical comparison of the 1841 Act to the Code along these dimensions reveals that the Act likewise

> provide[d] for (1) the creation of a trust estate dedicated to a specific use, (2) the appointment in every case of a person that serve[d] as a trustee who control[ed] and use[d] this estate for the benefit of different classes of persons, and (3) the empowerment of the trustee to engage in a wide range of activities for the liquidation of the debtor's assets . . . , for which the assets of the estate and not the trustee . . . incur[red] liability.[53]

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45. *Id.* at 256–57.

46. *Id.* at 258–59; *see also id.* at 262–63.

47. *See id.* at 257.

48. *Id.* at 260.

49. *Id.* at 261.

50. *See id.* at 264.

51. *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 413–14 (2005) ("Two principles generally provide the metric against which bankruptcy law and policy are tested for their soundness: (1) a fresh start for the debtor (the fresh start principle) and (2) equal treatment of similarly situated creditors (the equality principle). . . . The equality principle . . . accords procedural relief to creditors in the form of an orderly, collective process that administers the assets of a debtor to its creditors as a response to the common pool problem that arises when a debtor has insufficient assets to repay his or her debts." (footnotes omitted)).

52. *See* Plank, *supra* note 40, at 264–77.

53. *Id.* at 264–65.

As such, if one considers the Code to establish a bankruptcy trust that is a legal person, then the extensive functional overlap between the Code and the Act warrants concluding that the Act correspondingly created a bankruptcy trust that was a legal person.

ii. The 1841 Act Bankruptcy Estate

The Code provides that the filing of a petition commences a bankruptcy case,[54] which immediately triggers other legal effects,[55] among them the creation of an estate comprising various categories of property, "wherever located and by whomever held,"[56] including "all legal or equitable interests of the debtor in property as of the commencement of the case."[57] Plank describes the bankruptcy estate as "a trust estate dedicated to a specific use,"[58] repeatedly emphasizing that this estate consists of a collection of property interests, but that it is not a legal person,[59] even though the language of some Code provisions might suggest otherwise.[60]

Unlike the Code, the 1841 Act did not include a stand-alone provision that operationalized the bankruptcy estate. That said, a functional analysis of the structure and substance of the Act's provisions indicates that Congress did indeed provide for the creation of a bankruptcy estate under the Act.

While the filing of a bankruptcy petition commenced an 1841 Act case, it did not have the legal effect of creating a bankruptcy estate; rather, such action merely set in motion the process for having the

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54. *See* 11 U.S.C. §§ 301(a), 302(a), 303(b).

55. *See, e.g.*, *id.* § 362(a) (providing that the commencement of a case "operates as a stay, applicable to all entities," that prohibits a variety of conduct against the bankruptcy estate's property, the debtor's property, and the debtor).

56. *Id.* § 541(a).

57. *Id.* § 541(a)(1).

58. Plank, *supra* note 40, at 264.

59. *See id.* at 265 (noting that the Bankruptcy Code provision creating the bankruptcy estate "specifies [its] assets," but that "[it] does not purport to create the estate as a legal person"); *id.* at 266 ("Although many commentators and courts have treated the 'estate' as a legal person, it is neither necessary nor appropriate." (footnote omitted)); *id.* at 277 ("The Code does not expressly create the estate as a legal person with power to act on its own behalf. The estate by definition is a collection of property interests under the control of the bankruptcy trustee." (footnote omitted)); *id.* at 281 (stating that, "[b]y definition, the estate is a collection of assets").

60. *See id.* at 265–66 ("A few provisions of the Code, however, appear to treat the estate as a person who may act. . . . This usage could suggest that the estate is a person that owns a property interest. In other cases, the use of the term 'estate' is compatible with either the estate as a collection of property interests or the estate as a legal person." (footnote omitted)).

debtor declared a bankrupt by the court.[61] Notably, the Act required a voluntary petition (i.e., one filed by the debtor) to be accompanied by "an accurate inventory of [the debtor's] property, rights, and credits, of every name, kind, and description, and the location and situation of each and every parcel and portion thereof."[62] Among other purposes, this information enabled administration of the debtor's property in the event that the court deemed the debtor eligible to seek relief under the Act,[63] a point underscored by decisional law stating that inadequate disclosure would preclude the court from declaring the debtor to be a bankrupt.[64] If the court issued such a decree, then

> all the property, and rights of property, of every name and nature, and whether real, personal, or mixed, of every bankrupt . . . [would], by mere operation of law, ipso facto, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever, and the same [would] be vested, by force of the same decree, in such assignee . . . appointed by the proper court for this purpose.[65]

To be sure, the express language of this specific 1841 Act provision formally vested the bankrupt's property in the assignee, the individual analogous to today's Chapter 7 bankruptcy trustee.[66] But the Act's other provisions indicate that the bankruptcy decree had the effect of creating a bankruptcy estate to be administered by an assignee. Moreover, the language employed by participants in the 1841 Act bankruptcy system — that is, those who enforced, practiced, and commentated on the law — further evidences that the system's contemporaries viewed the legal landscape in this light.

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61. *See* Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 440 (repealed 1843).

62. *Id.* at 441. This disclosure was to be "verified by oath," or alternatively "by solemn affirmation," if the debtor were "conscientiously scrupulous of taking an oath." *Id.*

63. *See, e.g.*, *In re* Frisbee, 9 F. Cas. 959, 960 (S.D.N.Y. 1842) (No. 5,130) ("Counsel must thus see the importance attached to the inventory. By the act, the assignee must have such a description of the property as would fix its location and enable him to identify it."); BANKR. D. KY. R. X ("In the inventory of effects, the several parcels of the petitioner's immovable property . . . shall be separately set forth, and so described that, by means of the calls for notorious objects and accessible documents, each of them may be found, on reasonable inquiry and proper examination, and their boundaries and extent certainly ascertained.") (repealed), *reprinted in* S. DOC. NO. 27-19, at 84 (1842).

64. *See, e.g.*, *In re* Plimpton, 19 F. Cas. 874, 874 (S.D.N.Y. 1842) (No. 11,227) ("Another objection is, that the petitioner does not set out an accurate inventory of his property and every portion of it. This is a question of fact, and if he has not set it out properly, it would be fatal to his application.").

65. § 3, 5 Stat. at 442–43.

66. *See infra* Sections I.A.ii–iii.

First and foremost, the 1841 Act repeatedly conceptualized the bankrupt's surrendered property as an estate.[67] Courts likewise adopted this view. U.S. Supreme Court Associate Justice Joseph Story, writing for the majority in *Ex parte Christy*, argued that "[t]he obvious design of the Bankrupt Act of 1841 was to secure a prompt and effectual administration and settlement of *the estate of all bankrupts* within a limited period."[68] In discussing who would be accountable for the costs of administering an 1841 Act case, the U.S. District Court for the Southern District of New York noted that, "[i]f any assets are realized, the expenses will ultimately fall *on the estate*."[69] The U.S. District Court for the District of South Carolina referred to its "right . . . to issue injunctions against any persons who may interfere with the due administration of the assets of *the bankrupt's estates*."[70] In conducting its review of certain 1841 Act cases pending before it, the U.S. District Court for the Eastern District of Louisiana noted "that in

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67. *See* § 4, 5 Stat. at 444 (referring to "a false or fictitious debt against [the debtor's] estate" and to the bankrupt's "full disclosure and surrender of all his estate"); § 6, 5 Stat. at 445 (referring to "the assignee of the estate" and to "the final distribution and settlement of the estate of the bankrupt"); § 11, 5 Stat. at 447 (referring to "any debts, or other claims, or securities due or belonging to the estate of the bankrupt"); § 12, 5 Stat. at 447 (referring to dividend produced by the bankrupt's "estate"); § 13, 5 Stat. at 448 (referring to "the proof of any debt or other claim of any creditor or other person against the estate of the bankrupt"); § 14, 5 Stat. at 448 (referring to the separate estates of partners in trade who jointly filed for relief under the Act).

68. *Ex parte* Christy, 44 U.S. (3 How.) 292, 312 (1845) (Story, J.) (citation omitted).

69. *In re* Greaves, 10 F. Cas. 1067, 1068 (S.D.N.Y. 1842) (No. 5,744) (emphasis added).

70. Yeadon v. Planters' & Mechs.' Bank, 30 F. Cas. 793, 797 (D.S.C. 1843) (No. 18,130) (emphasis added). The federal reporter that includes the *Yeadon* opinion identifies the deciding court as "District Court, E.D. South Carolina." *Id.* at 793. In 1898, the Supreme Court pronounced that the 1823 federal legislation creating the Eastern and Western Districts of South Carolina had the effect of "not . . . dividing the state into two judicial districts, as indicated in the title of the act, but into two districts in the sense of geographical divisions, which is in harmony with the language used in the body of the act." Barrett v. United States, 169 U.S. 218, 228 (1898). In other words, "the state constituted *but one judicial district*, containing two divisions." *Id.* (emphasis added). The Supreme Court's view on this issue comported with the manner in which the federal district court's clerk reported statistics to Congress regarding the district's 1841 Act cases. *See* H.R. DOC. NO. 29-223, at 14 (1846) (setting forth "[s]tatement exhibiting the number and amount of applications for relief under the act of Congress of August 19, 1841, . . . and the proceedings had thereon, in the *district court of the United States for the district of South Carolina*" (emphasis added)). Accordingly, consistent with *The Bluebook*, the citation in this footnote to the *Yeadon* opinion refers to the deciding court as the District of South Carolina. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.4, at 105–06 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) (providing that, for citations to federal district court cases, the citation should indicate the deciding court by "giv[ing] the district *but not the division*" (emphasis added)).

various bankrupt estates in this Court no final reports have been made and no final accounts have been rendered by the Assignees of *their administration of the property belonging to said Estates*."[71] Furthermore, in exercising their bankruptcy rulemaking authority under the 1841 Act,[72] federal district courts repeatedly promulgated rules referring to the bankruptcy estate.[73] Finally, in a letter to

71. 6 U.S. DIST. CT. FOR THE E. DIST. OF LA., BANKRUPTCY ACT OF 1841 MINUTES, 2/1843–1/1861, at 515 (located in Record Group (RG) 21, The National Archives at Fort Worth, Texas); *see also* 5 *id.* at 85 ("It is therefore Ordered by the Court that Decrees in Bankruptcy be entered in their [i.e., the petitioning debtors'] favor respectively. And the several assignees hereinafter named be appointed to take charge of their Estates . . . ."); 3 *id.* (including minutes of September 20, 1843, on which date the federal district court ordered in connection with several cases "that the Clerk be authorized to pay to A.S. Robertson, U.S. Marshal, any money deposited to the credit of the Estate, the amount due him in each respective Estate"). The minute books for the 1841 Act cases filed in the Eastern District of Louisiana consist of "records of proceedings held in [those] cases." *Bankruptcy Act of 1841 Minutes, 2/1843–1/1861*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4510563 (last visited Dec. 18, 2020).

72. *See* § 6, 5 Stat. at 445–46 (stating that "it shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy").

73. *See, e.g.*, BANKR. D.D.C. R. 47 ("The assignee shall keep succinct, clear, and separate accounts of the estates respectively assigned . . . .") (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA, FOR THE SAID DISTRICT 11 (Washington, D.C., Peter Force 1842); BANKR. D. KY. R. CXLIV ("The clerk will keep a bank and deposite [sic] book, and enter therein, to the credit of an account for each bankrupt estate, the sum reported as having been deposited therein by the assignee, and charge the same in an account against the deposite [sic] bank . . . .") (repealed), *reprinted in* S. DOC. NO. 27-19, at 109 (1842); BANKR. D. MASS. R. XVIII ("And every assignee shall within sixty days after receiving the same, pay all moneys which come to his hands, belonging to the estate, into court.") (repealed), *reprinted in* PELEG W. CHANDLER, THE BANKRUPT LAW OF THE UNITED STATES 51 (Boston, James H. Weeks 1842); BANKR. D.N.H. BANKR. R. IX ("The assignee . . . shall have full right . . . to contest the validity and amount of any debt or other claim, made by any creditor or creditors, at any time before a dividend is declared of the estate . . . .") (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW HAMPSHIRE 6 (Concord, Isaac Hill & Sons 1842) [hereinafter D.N.H. BANKRUPTCY RULES]; BANKR D.S.C. R. 65 ("The assignee shall keep succinct and clear accounts of the estate assigned . . . .") (repealed); BANKR. S.D. MISS. R. 14 ("The assignee or assignees . . . shall also be allowed out of the estate, all necessary and proper disbursements made by them in the execution of their trusts, for the various clerks, attorneys and other agents necessarily employed by them, subject to the approval of the court.") (repealed), *reprinted in Rules, Regulations, and Forms of Proceedings in Bankruptcy, for the District Court*, MISS. FREE TRADER & NATCHEZ WKLY. GAZETTE, Feb. 10, 1842, at 3 [hereinafter *S.D. Miss. Bankruptcy Rules*]; BANKR. E.D. PA. BANKR. R. 26 ("All monies paid into the court shall be entered by the clerk of the court to the credit of the particular estate in bankruptcy in a book to be kept for that purpose . . . .") (repealed), *reprinted in* RULES AND FORMS IN BANKRUPTCY, IN THE DISTRICT COURT, OF THE EASTERN DISTRICT OF

Secretary of State Daniel Webster commenting on the operation of the 1841 Act in the District of Kentucky, Judge Thomas Bell Monroe observed that "[t]he economy of both money and time, with *the faithful administration of the bankrupt estate*, so important in a system of bankruptcy, are, it is believed, attained in Kentucky and will be improved."[74]

Assignees also adopted the view that the 1841 Act created an estate for administration, as evidenced by documents filed in cases before the U.S. District Court for the Eastern District of Louisiana.[75] William Christy, the assignee in *In re Andrews*, indicated in an accounting report that, on May 1, 1843, he had "paid [fifty dollars to] Geo. W. Christy att'y at law for legal services rendered in the affairs of said Estate."[76] Robert Cammack, the assignee in *In re Cucullu*, represented in a sale petition that

> Seraphin Cucullu at the time of his Bankruptcy was seized and possessed of the estate and property in the schedule hereto annexed . . . [and] that it will be for the benefit of the said estate and of all parties having interest therein, that the same should be sold, transferred and assigned.[77]

And Joseph Reynes, the assignee in *In re Bergamini & Cestia*, filed a memorandum of law discussing the "engagements contracted by the assignee for expenses attending the keeping selling etc. of the bankrupt

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PENNSYLVANIA 26 (Philadelphia, J. Young 1841) [hereinafter E.D. PA. BANKRUPTCY RULES]; BANKR. S.D.N.Y. R. 63 ("Any party interested in the estate, or the bankrupt himself, dissatisfied with the amount of effects designated and set apart by the assignee from the assignment, may except thereto at any time before the sale of the estate, and within ten days after the determination of the assignee."), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW-YORK 14 (New York, John S. Voorhies 1842) [hereinafter S.D.N.Y. BANKRUPTCY RULES].

74. Letter from Thomas Bell Monroe, U.S. J., Dist. of Kentucky, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 25, 1842) [hereinafter Letter from Thomas Bell Monroe to Daniel Webster], *in* S. DOC. NO. 27-19, at 145.

75. U.S. DIST. CT. FOR THE E. DIST. OF LA., BANKRUPTCY ACT OF 1841 CASE FILES, 1842–1843 (located in Record Group (RG) 21, The National Archives at Kansas City, Missouri). These manuscript records include

> petitions, inventories of the petitioner's property, orders, petitions for the discharge of the bankrupt, reports of the assignee who administered the estate, proofs of debts, depositions, petitions by creditors for the appointment of an assignee, rules, notices, schedules listing the assets and liabilities of the petitioner, motions, oppositions, and attachments.

Bankruptcy Act of 1841 Case Files, 1842–1843, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4513381 (last visited Feb. 21, 2021).

76. Account Current of Assignee, *In re* Andrews, No. 260 (E.D. La. May 11, 1843).

77. Petition of Assignee to Sell Estate of Bankrupt, *In re* Cucullu, No. 248 (E.D. La. July 9, 1842).

estate," and noting that the assignee "can & is authorised to make the necessary expenses required by the estate to bring it to a proper conclusion."[78] The Eastern District's 1841 Act case files abound with similar examples, and there is every reason to believe that assignees appointed in other federal judicial districts held similar views.[79]

Lastly, commentators at the time understood the bankruptcy process as one that would entail the creation of an estate. When the New Orleans Chamber of Commerce urged Congress in January 1841 to enact federal bankruptcy legislation enabling those in financial ruin to once again "contribute to the general wealth and prosperity of the nation,"[80] the organization also lobbied for provisions that would "afford ample protection to the rights and privileges of the creditors; among which privileges, is the highly-important and vital one of appointing the assignee . . . to take charge of and manage the bankrupt's estate."[81] After Congress passed the 1841 Act, one treatise writer's enumeration of "[t]he general powers and duties of the district court in respect to matters of bankruptcy"[82] included the power and duty "[t]o appoint assignees of the estates of bankrupts."[83] Another treatise writer remarked that an assignee's powers to redeem and discharge mortgages and to compound debts were "indispensable in

78. Remarks of the Assignee, *In re* Bergamini & Cestia, No. 3 (E.D. La. July 27, 1842).

79. *See, e.g.*, *Assignee's Sale*, BANGOR DAILY WHIG & COURIER, June 9, 1843, at 1 ("By virtue of several Decrees of the District Court of the United States for the District of Maine, I shall sell . . . all the right, title and interest I have as Assignee, in and to the following described property belonging to the Estates of the several persons hereinafter named in Bankruptcy . . . ."); *Assignee's Sale*, CHARLESTON COURIER, Feb. 13, 1843, at 3 ("[I]n pursuance of an order of his Honor Judge Gilchrist, made in the Bankrupt Court on the 11th inst., will be sold . . . [t]he property of the Assigned Estate."); *Assignee's Sale*, VT. WATCHMAN & STATE J. (Montpelier), Sept. 12, 1842, at 1 (announcing sale of various assets "[b]y virtue of sundry decrees in Bankruptcy, issued out of the District Court of the United States for the District of Vermont, vesting in me [i.e., the assignee] the several and joint estates of the Bankrupts therein set forth"); *Notice of Sale by Assignee in Bankruptcy*, SAVANNAH DAILY REPUBLICAN, Apr. 8, 1842, at 3 (announcing sale of various assets "belonging to the assigned estate of James A. Fawns, a declared and decreed Bankrupt"). Bankruptcy commissioners, who were appointed under the Act to assist the court with certain matters, such as receiving proof of debts, *see* Act of Aug. 19, 1841, ch. 9, § 5, 5 Stat. 440, 445 (repealed 1843), also likely viewed the Act to create an estate, *see, e.g.*, Report of Jos Bancroft Commissioner, *In re* Bryan, No. 115 (D. Ga. Feb. 10, 1845) ("I respectfully report that I have examined the Books and papers of the General or Official Assignee in Bankruptcy in regard to the several amounts of money received by him from the Estate of the petitioner . . . .").

80. S. DOC. NO. 26-123, at 1 (1841).

81. *Id.* at 2.

82. CHANDLER, *supra* note 73, at 8.

83. *Id.* at 9.

many cases to enable the assignees and the court to bring estates to a final settlement."[84] And, in a critique of the Act's provision granting the court authority to appoint assignees, one law journal argued that the "bankrupt's business creditors" would have been better situated to "select the person, whose character and business knowledge and capacity, and whose position in relation to the creditors, *to the estate* and to the bankrupt, especially fit him to be assignee."[85]

The historical record clearly indicates that the 1841 Act created an estate to be administered by an assignee. One can assume that, like the estate created by the Code, the 1841 Act estate was a collection of property interests that did not constitute a legal entity.[86] But as we shall see, the appointment, powers, and duties of the assignee in relation to the estate created a bankruptcy trust constituting a legal person.[87]

iii. Appointment of the Bankruptcy Assignee

Here, the Article focuses on Plank's discussion of the appointment of a trustee appointed in Chapter 7 liquidation cases, given that Congress designed the 1841 Act to permit administration of cases only pursuant to a liquidation framework.[88] Plank observes that, in Chapter 7 cases, "[t]he Code provides for the prompt appointment of a bankruptcy trustee"[89] and that the appointed individual "has the same fiduciary duties of loyalty and care that any trustee of a traditional trust or business trust has."[90]

The 1841 Act provided that the bankruptcy decree would have the effect of vesting the bankruptcy estate "in such assignee as from time

84. J.B. STAPLES, THE GENERAL BANKRUPT LAW 33 (New York, John S. Voorhies 1841).

85. *The Bankrupt Law*, 4 LAW REP. 403, 405 (1842) (emphasis added).

86. *See supra* text accompanying notes 58–60. It should be noted that, just as today's Code adopts a geographically expansive view of the property interests included in the bankruptcy estate, a similar view existed under the 1841 Act. *Compare* 11 U.S.C. § 541(a) (providing that the bankruptcy estate consists of certain categories of property interests, "wherever located and by whomever held"), *with* BANKR. D. KY. R. CCXLII (providing mechanisms for the assignee to reach "any property or right of property, situated out of the United States and their territories," which "the bankrupt owned or claimed, at the time of his petition filed, or at the time of the decree of his bankruptcy") (repealed), *reprinted in* S. DOC. NO. 27-19, at 141 (1842).

87. *Cf.* Plank, *supra* note 40, at 266 (stating that, while the bankruptcy estate itself does not constitute a legal person, "[t]he other sections of the Code provide the essential ingredients for creating a bankruptcy trust as a legal person").

88. *See* Act of Aug. 19, 1841, ch. 9, § 10, 5 Stat. 440, 447 (repealed 1843).

89. Plank, *supra* note 40, at 267.

90. *Id.* at 267–68.

to time shall be appointed by the proper court for this purpose."[91] The legislation, however, left many gaps regarding the appointment process, as noted by one treatise writer.[92] That same writer observed that the federal district courts would have to use their bankruptcy rulemaking authority to fill those gaps,[93] stressing that the Act imposed a duty on the courts "to appoint the assignees *immediately* after the order or decree of bankruptcy"[94] and that "the appointment of the assignees must *immediately* ensue, in order that some authorized person may have the charge of which the bankrupt has been divested."[95] As envisioned, some federal district courts promulgated rules for the immediate appointment of an assignee.[96] Others

91. § 3, 5 Stat. at 443.

92. *See* STAPLES, *supra* note 84, at 27 ("The act is silent as to the particular mode of the appointment of the assignees, or the form of the order for their appointment; and as to their number, and also as to their manner of proceeding.").

93. *See id.* ("The courts are to establish forms and rules on these subjects, as they have full power, and it is made their duty to do, by this and other sections of the act."). The 1841 Act provided that "it shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy." § 6, 5 Stat. at 445–46.

94. STAPLES, *supra* note 84, at 26 (emphasis added).

95. *Id.* at 26–27 (emphasis added); *cf.* A COMMENTARY ON THE BANKRUPT LAW OF 1841, SHOWING ITS OPERATION AND EFFECT 35 (New York, Henry Anstice 1841) (noting that the order of "the decree of bankruptcy . . . will probably contain the appointment of the assignee").

96. *See, e.g.*, BANKR. D. CONN. R. 22 ("There shall be appointed one assignee in each county in this district, who shall act in all the cases in bankruptcy in such county . . . .") (repealed), *reprinted in* RULES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF CONNECTICUT, IN BANKRUPTCY; TOGETHER WITH A LIST OF THE APPOINTMENTS BY THE COURT, AND A TARIFF OF FEES 8 (Hartford, J. Holbrook 1842) [hereinafter D. CONN. BANKRUPTCY RULES]; BANKR. D. KY. R. LVII ("On the adjudication, the case being found within the statute, and in sufficient form, the decree of the petitioner's bankruptcy will be pronounced, the assignee appointed, the penalty of his bond with the number of the sureties fixed, and all entered in the following form . . . .") (repealed), *reprinted in* S. DOC. NO. 27-19, at 96 (1842); BANKR. D. MO. IX ("*Immediately* after a decree declaring the debtor a Bankrupt, an assignee shall be appointed." (emphasis added)) (repealed), *reprinted in Rules, Regulations, and Forms of Proceedings in Bankruptcy in Missouri*, RADICAL (Bowling Green), Mar. 12, 1842, at 2 [hereinafter *D. Mo. Bankruptcy Rules*]; BANKR. D. VT. R. 52 ("Whenever a party is declared a bankrupt, the clerk shall *the same day* cause to be delivered to the assignee, a certified copy of the decree of the court." (emphasis added)) (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE DISTRICT OF VERMONT 9 (Rutland, White & Guernsey 1842) [hereinafter VT. BANKRUPTCY RULES]; BANKR. N.D.N.Y. R. 62 ("The following named persons are designated as assignees in cases of bankruptcy, to act as such within their respective counties . . . .") (repealed), *reprinted in* RULES REGULATING PROCEEDINGS IN BANKRUPTCY, ADOPTED BY THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF NEW-YORK 16 (Albany, Wm. & A. Gould & Co. 1842) [hereinafter N.D.N.Y. BANKRUPTCY RULES].

promulgated rules providing for the prompt appointment of an assignee.[97] Thus, the timing of an assignee's appointment under the 1841 Act closely tracked that of a Chapter 7 trustee's appointment under the Code.

Moreover, Congress envisioned that assignees would serve in a capacity partially corresponding to that of a nonbankruptcy trustee, as indicated by the 1841 Act's language declaring that the bankrupt's property would be surrendered "for the benefit of his creditors."[98] In other words, bankrupt estates, which assignees administered,[99] were to be held in trust for certain beneficiaries, including the bankrupt's creditors.[100] The federal district courts likewise conceived of assignees serving in a trust capacity, as evidenced by decisional law,[101] in addition to some of the bankruptcy rules that they promulgated.[102]

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97. *See, e.g.*, BANKR. D. MASS. R. VIII (stating that, "[a]s soon as conveniently may be after the decree declaring a party a bankrupt . . . , the court will proceed to the appointment of an assignee of the bankrupt's estate") (repealed), *reprinted in* CHANDLER, *supra* note 73, at 42; BANKR. D.N.H. R. VIII (same) (repealed), *reprinted in* D.N.H. BANKRUPTCY RULES, *supra* note 73, at 6.

98. § 4, 5 Stat. at 443.

99. *See supra* Section I.A.ii.

100. *See* BANKR. S.D. MISS. R. 17 ("Upon every dividend made to creditors, the costs, fees and expenses of their trust, chargeable to the estate of the Bankrupt, which shall have accrued, shall first be reserved and paid, and the balance divided *pro rata* among the creditors, after the payment of privileged claims under the act.") (repealed), *reprinted in S.D. Miss. Bankruptcy Rules*, *supra* note 73; Coleman v. Tebbetts, 20 N.H. 408, 409 (1845) ("The act contains other provisions, which it is not necessary to indicate particularly, but which, in connection with those parts which have been cited, show the plain purpose of the act to have been to vest the property of the bankrupt in the assignee, in trust, after deducting the necessary charges, for the ratable payment of the bankrupt's debts, or, if sufficient, the entire payment of them."). As will be discussed below, an 1841 Act bankrupt also qualified as a potential beneficiary of the Act's bankruptcy trust. *See infra* notes 149–50 and accompanying text; *infra* Section I.B.i.

101. *See In re* Greaves, 10 F. Cas. 1067, 1068 (S.D.N.Y. 1842) (No. 5,744) ("The assignee stands as trustee in [the creditors'] behalf, stimulated by his personal interest, to search out and collect for their benefit every species of property belonging to the bankrupt . . . .").

102. *See, e.g.*, BANKR. D. KY. R. CCI (referring to "the assignee as *the trustee of the assets*" (emphasis added)) (repealed), *reprinted in* S. DOC. NO. 27-19, at 128 (1842); BANKR. D.S.C. R. 59 (stating that the assignee's compensation would be in addition to "such sum as shall be certified by the Court to be just and reasonable *for his actual and necessary expenses in and about the trust*" (emphasis added)) (repealed); BANKR. N.D.N.Y. R. 62 (referring to "matters pertaining to the business of [assignees'] trust") (repealed), *reprinted in* N.D.N.Y. BANKRUPTCY RULES, *supra* note 96, at 17; BANKR. S.D. MISS. R. 14 ("The assignee or assignees . . . shall also be allowed out of the estate, all necessary and proper disbursements made by them *in the execution of their trusts* . . . ." (emphasis added)), *reprinted in S.D. Miss. Bankruptcy Rules*, *supra* note 73.

Concomitantly, like a nonbankruptcy trustee, a bankruptcy assignee's duties would have been understood to be fiduciary. In one of the Act's provisions, Congress left no doubt that it viewed nonbankruptcy trustees to owe fiduciary duties to trust beneficiaries,[103] a point underscored by the Supreme Court's observation that the provision covered "debts which had been incurred by a violation of good faith," as well as by "[a] misapplication of trust-funds."[104] Given that assignees administered bankruptcy estates held in trust, one can ineluctably conclude that they owed duties of loyalty and care — that is, fiduciary duties — to the bankruptcy trust's beneficiaries. Thus, in certain respects, 1841 Act assignees resembled nonbankruptcy trustees. But they also had powers and duties specific to, and at times exceeding, those of a business trust trustee.

iv. The Powers and Duties of the Bankruptcy Assignee

Plank notes that, under the Code, "[t]he powers and duties of the bankruptcy trustee to engage in wide-ranging activities resemble *and exceed* the powers and duties of a trustee in any business trust."[105] In discussing estate administration powers and duties, he differentiates between (1) those common to all bankruptcy trustees, regardless of the type of case that is administered (e.g., liquidation, reorganization) and (2) those specific to a trustee appointed in a particular type of case.[106] He further differentiates the common powers and duties based on whether they exceed the scope of those of a normal business person.[107] Here, the Article focuses on Plank's discussion of the powers and duties common to all bankruptcy trustees, whether similar to or exceeding those of a normal business person, as well as the powers and

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103. *See* § 1, 5 Stat. at 441 (referring to debts "created in consequence of a defalcation . . . as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity"); *see also* Chapman v. Forsyth, 43 U.S. (2 How.) 202, 208 (1844) ("The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract." (quoting § 1, 5 Stat. at 441)); STAPLES, *supra* note 84, at 21 ("This restriction is intended to prevent and to punish frauds on trust property . . . ."). For further discussion regarding this provision, see Pardo, *Bankrupted Slaves*, *supra* note 30, at 1084 n.59.

104. *Chapman*, 43 U.S. (2 How.) at 207–08; *cf. Duty*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that the definition of "fiduciary duty" includes "[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as . . . a trustee) to the beneficiary (such as . . . the beneficiaries of the trust)").

105. Plank, *supra* note 40, at 270 (emphasis added).

106. *See id.* at 270–76.

107. *See id.* at 274–75.

duties specific to trustees appointed in Chapter 7 liquidation cases. The focus on the latter is warranted given that Congress designed the 1841 Act to permit administration of cases only pursuant to a liquidation framework.[108]

1. Powers and Duties Similar to Those of a Normal Business Person

Regarding the duties and powers common to all bankruptcy trustees and akin to those of a business trust trustee, Plank notes that the bankruptcy trustee's duties include representing the bankruptcy trust and complying with nonbankruptcy law regulating the bankruptcy trust's property.[109] Likewise, the 1841 Act assignee served as the bankruptcy trust's representative.[110] For evidence that the individuals serving as assignees understood themselves to be bound by nonbankruptcy laws regulating property of the bankruptcy trust, one scenario squarely falls within the space where federal bankruptcy law and slavery overlapped: assignees paying municipal taxes on enslaved persons in the 1841 Act cases of bankrupt slaveholders. For example, in the case of Gregorio Curto,[111] R.P. Gaillard, the assignee, paid New Orleans's First Municipality[112] six dollars in 1843 on account of a city property tax assessed for the 1842 tax year on three enslaved persons whom Curto had owned and subsequently surrendered to the assignee.[113] Assignees in other 1841 Act cases also paid taxes incurred

108. *See* § 10, 5 Stat. at 447.

109. *See* Plank, *supra* note 40, at 271.

110. *See, e.g.*, *In re* Greaves, 10 F. Cas. 1067, 1068 (S.D.N.Y. 1842) (No. 5,744) ("The assignee stands as trustee in [the creditors'] behalf, stimulated by his personal interest, to search out and collect for their benefit every species of property belonging to the bankrupt . . . ."); Rugely v. Robinson, 10 Ala. 702, 741 (1846) (referring to the 1841 Act assignee "as the representative of the creditors"); S. DOC. NO. 27-19, at 132 (1842) (referring to the assignee, in material relating to the rules, regulations, and forms of proceedings in 1841 Act cases before the U.S. District Court for the District of Kentucky, "as the representative of the creditors").

111. *In re* Curto, No. 167 (E.D. La. Apr. 13, 1842).

112. For background information on the 1836 division of New Orleans into three separate municipalities, see ROBERT C. REINDERS, END OF AN ERA: NEW ORLEANS, 1850–1860, at 51 (1964).

113. *See* Voucher for $23.50 Annexed to Assignee's Final Account, *In re* Curto, No. 167 (E.D. La. Mar. 3, 1849) [hereinafter *Curto* Voucher] (itemizing a tax of $17.50 on real estate with an assessed value of $3,500 and a tax of $6 on three enslaved persons). As of 1840, New Orleans municipal law provided that "[f]rom and after the first of May, in each year, there shall be levied an annual tax on the lots, houses, slaves and other real property situate within the limits of the city and incorporated suburbs of New-Orleans." New Orleans, La., An Ordinance for Imposing a Tax on Slaves and Real Property in the City of New-Orleans, and Its Incorporated Suburbs art. 1 (Aug. 11, 1829), *reprinted in* JOHN CALHOUN, DIGEST OF THE ORDINANCE AND RESOLUTIONS OF THE SECOND MUNICIPALITY OF NEW-ORLEANS, IN FORCE MAY 1, 1840, at 119 (New

by the bankruptcy trust.[114] While Plank argues that "[t]he taxation of the bankruptcy trust is not relevant to the status of the bankruptcy trust as a legal person,"[115] the example of assignees paying taxes incurred by the 1841 Act bankruptcy trust is relevant to establishing that assignees understood their duties to include compliance with nonbankruptcy law regulating the bankruptcy trust's property.

As for powers common to all bankruptcy trustees under the Code, Plank observes that trustees can (1) sue and be sued, (2) employ professionals, (3) use, sell, or lease estate property, (4) invest the estate's money, (5) borrow money, (6) recover certain property interests from third parties, and (7) examine the debtor.[116] Assignees had similar powers under the 1841 Act. Equivalent to (1) above, the 1841 Act vested assignees with "all the rights, titles, powers, and authorities . . . to sue for and defend" the bankruptcy trust.[117] Analogous to (2) above, bankruptcy rules promulgated by the federal district courts permitted assignees to employ professional persons who would help them carry out their duties under the Act.[118] Corresponding to (3) above, the Act vested in assignees "all the rights,

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Orleans, F. Cook & A. Levy 1840). At that point in time, the tax rate was "[t]wo dollars for every thousand dollars of the assessed value of every real estate" and "[o]ne dollar for every slave." *Id.* art. 3, *reprinted in* CALHOUN, *supra* note 113, at 120. It thus appears that, by the time that Gaillard paid taxes in 1843 on the bankruptcy estate's behalf, the rate had increased to five dollars for every thousand dollars of the assessed value of real estate and two dollars for every enslaved person. *See Curto* Voucher, *supra* note 113.

114. *See, e.g.*, 2nd Report of Assignee, *In re* Maurin, No. 437 (D. La. June 10, 1845) (reporting payment of $160.81 by assignee on April 22, 1844, for "[t]axes due in Natchitoches"). Congress consolidated the Eastern and Western Districts of Louisiana into the District of Louisiana in 1845, *see* Act of Feb. 13, 1845, ch. 5, 5 Stat. 722, and subsequently divided the district once again into the Eastern and Western Districts of Louisiana in 1849, *see* Act of Mar. 3, 1849, ch. 114, 9 Stat. 401. Accordingly, some citations in this Article to court filings in 1841 Act cases originally commenced in the Eastern District of Louisiana involve references to the District of Louisiana as the geographical jurisdiction of the federal district court administering the case.

115. Plank, *supra* note 40, at 276 n.144; *see also id.* at 260 n.51 (explaining that "whether an entity is a separate entity for tax purposes has very little relevance to whether the entity is a separate juridical person for other purposes").

116. *Id.* at 271.

117. Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 443 (repealed 1843).

118. *See, e.g.*, BANKR. D. KY. R. CCXIX ("Where the assignee is not a lawyer, or has a controversy in a court in which he does not practice, he will be allowed the reasonable fees paid by him to counsel necessarily employed . . . .") (repealed), *reprinted in* S. DOC. NO. 27-19, at 138 (1842); BANKR. S.D. MISS. R. 14 ("The assignee or assignees, . . . shall also be allowed out of the estate, all necessary and proper disbursements made by them in the execution of their trusts, for the various clerks, attorneys and other agents necessarily employed by them, subject to the approval of the court.") (repealed), *reprinted in S.D. Miss. Bankruptcy Rules*, *supra* note 73.

titles, powers, and authorities to sell, manage, and dispose of" the bankruptcy estate.[119] Comparable to (7) above, assignees further had the power to examine bankrupts.[120] While assignees also had the power to recover certain property interests from third parties (like (6) above), to borrow money (resembling (5) above), and perhaps even to invest the bankruptcy trust's money (approximating (4) above), drawing those parallels to the Code requires detailed explanation.

First, in support of the proposition that bankruptcy trustees today have the power to "recover certain property interest from third parties,"[121] Plank partly focuses on the Code's provision authorizing the trustee to compel a third party to turn over estate property that the trustee may use, sell, or lease.[122] He also focuses on the Code's provision authorizing the trustee to recover "a debt that is property of the estate and that is matured, payable on demand, or payable on order."[123] Bankruptcy rules promulgated by the federal district courts under the 1841 Act enabled assignees to obtain turnover orders directed at third parties,[124] and the Act also gave assignees the power to recover debts owed to the bankruptcy trust.[125]

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119. § 3, 5 Stat. at 443. As will be discussed below, the assignee's power to lease estate property features prominently in the story about the bankruptcy administration of Banks Arcade. *See infra* Part II.

120. *See, e.g.*, BANKR. D. KY. R. LXXXII, CXIV (repealed), *reprinted in* S. DOC. NO. 27-19, at 100, 105; BANKR. D. MASS. R. X (repealed), *reprinted in* CHANDLER, *supra* note 73, at 44; *cf.* § 4, 5 Stat. at 444 (providing that the "bankrupt shall at all times be subject to examination, orally, or upon written interrogatories, in and before such court, . . . on oath, . . . in all matters relating to such bankruptcy, and his acts and doings, and his property and rights of property, which, in the judgment of such court, are necessary and proper for the purposes of justice").

121. Plank, *supra* note 40, at 271.

122. *See id.* at 271 n.99 (citing 11 U.S.C. § 542(a)).

123. 11 U.S.C. § 542(b); *see also* Plank, *supra* note 40, at 271 n.99 (discussing 11 U.S.C. § 542(b)).

124. *See, e.g.*, BANKR. D.N.C. R. 40 ("[T]he assignee, on proper evidence and by motion to the court, if necessary, may have the requisite order or process of the court, to put him in possession of the bankrupt's estate, books, vouchers, accounts, &c.") (repealed), *reprinted in* RULES AND REGULATIONS IN BANKRUPTCY, ADOPTED BY THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NORTH CAROLINA 7 (Fayetteville, Edward J. Hale 1842) [hereinafter N.C. BANKRUPTCY RULES]; BANKR. D. VT. R. 53 (same) (repealed), *reprinted in* VT. BANKRUPTCY RULES, *supra* note 96, at 10; BANKR. N.D.N.Y. R. 43 (same) (repealed), *reprinted in* N.D.N.Y. BANKRUPTCY RULES, *supra* note 96, at 12; BANKR. S.D.N.Y. R. 54 (same) (repealed), *reprinted in* S.D.N.Y. BANKRUPTCY RULES, *supra* note 73, at 12.

125. *See, e.g.*, BANKR. D. KY. R. LXXX ("The assignee shall, with all convenient despatch, exert every proper means for the collection of every debt and demand . . . ."), *reprinted in* S. DOC. NO. 27-19, at 100; BANKR. S.D.N.Y. R. 55 ("The assignee shall cause to be presented for acceptance all unaccepted bills of exchange immediately after

Second, in support of the proposition that bankruptcy trustees today have the power to "borrow money,"[126] Plank exclusively focuses on the Code's provision authorizing the trustee to obtain credit or incur debt on a variety of terms for the bankruptcy trust's benefit.[127] Just as bankruptcy trustees today obtain unsecured credit or incur unsecured debt on behalf of the bankruptcy trust,[128] so too did assignees under the 1841 Act. For example, on December 8, 1843, Francis B. Conrad, the assignee in *In re Maurin*, paid $571.99 to A. Rivarde & Co., a New Orleans firm of commission merchants,[129] for expenses incurred by the bankruptcy trust while operating a cotton plantation in June, October, November, and December 1843.[130] Or for yet another example, the U.S. District Court for the District of Kentucky promulgated bankruptcy rules permitting the bankruptcy trust to become indebted to creditors who advanced funds enabling the assignee to pursue causes of action or exercise property rights that would enlarge the estate.[131] These examples demonstrate how assignees under the 1841 Act had the power to borrow money on the bankruptcy trust's behalf.

Third, in support of the proposition that bankruptcy trustees today may "invest money of the estate,"[132] Plank exclusively focuses on the Code's provision authorizing a trustee to deposit or invest estate money.[133] That provision specifically authorizes the trustee to "make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment."[134] A leading bankruptcy treatise notes that, "[a]s a fiduciary, the trustee

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the same come to his possession . . . ."), *reprinted in* S.D.N.Y. BANKRUPTCY RULES, *supra* note 73, at 12.

126. Plank, *supra* note 40, at 271.

127. *See id.* at 271 n.98 (citing 11 U.S.C. § 364(a)–(d)).

128. *See* 11 U.S.C.A. § 364(a)–(b) (Westlaw through Pub. L. No. 116-259).

129. *See* NEW ORLEANS DIRECTORY FOR 1842, at 349 (New Orleans, Pitts & Clarke 1842) [hereinafter NEW ORLEANS DIRECTORY].

130. *See* 2nd Report of Assignee, *supra* note 114.

131. *See, e.g.*, BANKR. D. KY. R. LXXXIV (discussing assignee suits to recover property for the benefit of the bankruptcy trust and their funding "by means of the assets of the estate, *or the advances and on security of a creditor*" (emphasis added)), *reprinted in* S. DOC. NO. 27-19, at 101 (1842); *id.* XCII ("If the assignee shall be unable to obtain the money out of the assets, by any justifiable means, to effect the redemption of any valuable property, or right, he shall confer with the creditors, or such of them as he can in proper time; *and if, thereupon, any of them advance the money to effect such redemption, it shall be reimbursed him, with interest, out of the general assets of the estate* . . . ." (emphasis added)), *reprinted in* S. DOC. NO. 27-19, at 102.

132. Plank, *supra* note 40, at 271.

133. *Id.* at 271 n.97 (citing 11 U.S.C. § 345).

134. 11 U.S.C. § 345(a).

must act as a prudent person" and that "[t]he interest or gain realized on the deposit or investment of the estate's funds will in general become property of the estate and thereby increase the recovery of the creditors."[135] Accordingly, trustees may pursue only a limited range of investment opportunities.[136] To the extent that assignees under the 1841 Act could invest the bankruptcy trust's money, they too faced restrictions.

The Act provided that "all assets received by the assignee in money, shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safekeeping and disposition,"[137] and federal district courts promulgated rules requiring such funds to be deposited in a bank.[138] For example, the U.S. District Court for the Northern District of New York required assignees to "deposit all moneys belonging to the bankrupt's estates . . . either in the State Bank at Albany, the Oneida Bank at Utica, the Cayuga County Bank at Auburn, or the Bank of Monroe at Rochester."[139] Moreover, while one of the rules promulgated by the U.S. District Court for the District of Kentucky prohibited the assignee from "loan[ing] to any other person, with or without interest, any portion of the money, or paper in representation thereof, or any evidences of a demand of the estate, which shall come to his hands or control," that same rule provided the assignee with an option that could be viewed as somewhat functionally equivalent to the limited investment opportunity granted to bankruptcy trustees today, stating that "the assignee may, at his own risk, receive bank notes commonly passing as money, at about their current discount; and in such cases, he shall immediately convert them into lawful money, *and account for any gain which may happen*

135. 3 COLLIER ON BANKRUPTCY ¶ 345.01. (Richard Levin & Henry J. Sommer eds., 16th ed. 2020).

136. *See id.* (stating that, while the Code section on investing estate money "provides a trustee with some latitude as to whether to invest funds of the estate," it also "imposes burdens on the party with whom the funds may be invested, *limiting, as a practical matter, the investments a trustee can make*" (emphasis added)).

137. Act of Aug. 19, 1841, ch. 9, § 9, 5 Stat. 440, 447 (repealed 1843).

138. A leading bankruptcy treatise incorrectly states that "[t]he early bankruptcy laws of the United States made no express provision for the custody and safekeeping of the moneys of bankruptcy estates." 3 COLLIER ON BANKRUPTCY, *supra* note 135, ¶ 345.LH[1].

139. BANKR. N.D.N.Y. R. 44 (repealed), *reprinted in* N.D.N.Y. BANKRUPTCY RULES, *supra* note 96, at 12. For other federal district court rules governing the deposit of estate funds in banks, see, for example, BANKR. D. KY. R. XCVIII–CII (repealed), *reprinted in* S. DOC. NO. 27-19, at 103 (1842); BANKR. D. VT. R. 54–55 (repealed), *reprinted in* VT. BANKRUPTCY RULES, *supra* note 96, at 10; BANKR. E.D. PA. R. 25–26 (repealed), *reprinted in* E.D. PA. BANKRUPTCY RULES, *supra* note 73, at 25–26.

thereon."[140] Thus, the possibility did exist for some investment of estate money by assignees under the 1841 Act, albeit under a narrow set of circumstances.

The duties specific to a Chapter 7 trustee further parallel the duties of 1841 Act assignees. Plank notes that Chapter 7 trustees must collect estate property, reduce it to money, and close the estate expeditiously.[141] While the 1841 Act framed these duties as ones imposed on the court,[142] courts and commentators at the time understood these duties to extend to assignees.[143] Plank further notes that Chapter 7 trustees must account for property that they have collected,[144] a duty likewise imposed on 1841 Act assignees.[145] Additionally, just as Chapter 7 trustees must dispose of estate property subject to third-party interests,[146] the 1841 Act called for "a dividend and distribution of such assets as shall be collected and reduced to money, or so much thereof as can be safely so disposed of, *consistently with the rights and interests of third persons having adverse claims thereto*."[147] Plank points out that the Code's Chapter 7 distribution

140. BANKR. D. KY. R. CII (emphasis added), *reprinted in* S. DOC. NO. 27-19, at 103.

141. Plank, *supra* note 40, at 272 & n.103.

142. § 10, 5 Stat. at 447 (stating "[t]hat in order to ensure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable").

143. For example, to compel assignees to settle bankruptcy estates expeditiously, the U.S. District Court for the Eastern District of Louisiana promulgated a bankruptcy rule mandating that "[i]t shall be the duty of the assignee, in all cases, as soon as practicable after his appointment, to file in court a petition for the sale of all the property assigned by the bankrupt, whether real or personal." Transcript of Record at 18, Nugent v. Boyd, 44 U.S. (3 How.) 426 (1845) (No. 158) [hereinafter *Nugent* Record Transcript]. One treatise writer commented that the Act's provision for settling bankruptcy estates "is intended to expedite proceedings under the act, and to make it the duty of the court *and assignees*, and other officers to act with promptness and despatch." STAPLES, *supra* note 84, at 33 (emphasis added).

144. Plank, *supra* note 40, at 272.

145. *See, e.g.*, BANKR. D. MASS. R. XVIII ("And every assignee is hereby required to keep full, exact and regular books of account of all receipts, payments and expenditures of moneys by him; and also of all property, and assets, which have come to his hands, and of all property and rights of property of the bankrupt, which have come to his knowledge, or of which he has received credible information.") (repealed), *reprinted in* CHANDLER, *supra* note 73, at 51; BANKR. D.N.C. R. 51 ("The assignee shall keep succinct and clear accounts of the estate assigned . . . .") (repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 124, at 8; BANKR. E.D. PA. R. 25 (same) (repealed), *reprinted in* E.D. PA. BANKRUPTCY RULES, *supra* note 73, at 25.

146. Plank, *supra* note 40, at 272 & n.105 (citing 11 U.S.C. § 725).

147. § 10, 5 Stat. at 447. On this front, the U.S. District Court for the Eastern District of Louisiana promulgated a rule that permitted, upon court approval of an assignee's petition to sell estate property subject to a mortgage, transfer of the mortgage to the

scheme requires trustees to distribute estate property to creditors and debtors, with distributions to the latter only when surplus funds remain.[148] While the 1841 Act's distribution scheme made express reference to "creditors who ha[d] proved their debts" as the only category of beneficiary entitled to estate dividends and distributions,[149] courts did recognize an 1841 Act bankrupt's entitlement to surplus funds remaining in the estate.[150]

In addition to the marshaling and distribution functions carried out by Chapter 7 trustees, Plank focuses on their duties requiring (1) investigation of the debtor's financial affairs, (2) examination of creditors' proofs of claims, (3) objection to the allowance of improper claims, (4) production of estate administration reports, and (5) contestation of a debtor's discharge, whether before or subsequent to its grant.[151] Similarly, as evidenced by bankruptcy rules promulgated pursuant to the 1841 Act, federal courts envisioned that assignees would investigate a bankrupt's financial affairs,[152] examine proofs of claims and object to their allowance if improper,[153] produce reports on estate administration activities,[154] and presumably object to a bankrupt's discharge request if warranted.[155]

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proceeds generated by the sale of that property. *See* Transcript of Record at 94, Houston v. City Bank of New Orleans, 47 U.S. (6 How.) 486 (1848) (No. 144) [hereinafter *Houston* Record Transcript]; *infra* notes 363–68 and accompanying text.

148. Plank, *supra* note 40, at 272 & n.106 (citing 11 U.S.C. § 726).

149. § 10, 5 Stat. at 447.

150. *See, e.g.*, Cromwell v. Comegys, 7 Ala. 498, 499 (1845); Coleman v. Tebbetts, 20 N.H. 408, 409 (1845). For further evidence that creditors did not constitute the only category of beneficiary under the 1841 Act, see, for example, McLean v. Lafayette Bank, 16 F. Cas. 258, 259 (C.C.D. Ohio 1844) (No. 8,886) ("The assignee not only represents the bankrupts, but their creditors . . . ."); A COMMENTARY ON THE BANKRUPT LAW OF 1841, SHOWING ITS OPERATION AND EFFECT, *supra* note 95, at 34 ("[A]nd in case of breach the bond shall be sued and suable under the order of the court, for the benefit of the creditors *and other persons in interest*." (emphasis added)).

151. Plank, *supra* note 40, at 272.

152. *See, e.g.*, BANKR. D. KY. BANKR. R. LXXXI–LXXXII (repealed), *reprinted in* S. DOC. NO. 27-19, at 100 (1842); BANKR. D. MASS. R. X (repealed), *reprinted in* CHANDLER, *supra* note 73, at 44.

153. *See, e.g.*, BANKR. D. MASS. R. IX, *reprinted in* CHANDLER, *supra* note 73, at 43; BANKR. D.N.H. R. IX (repealed), *reprinted in* D.N.H. BANKRUPTCY RULES, *supra* note 73, at 6; BANKR. E.D. PA. R. 16 (repealed), *reprinted in* E.D. PA. BANKRUPTCY RULES, *supra* note 73, at 20.

154. *See, e.g.*, BANKR. D. KY. R. LXXXV–LXXXVI, XCVII, *reprinted in* S. DOC. NO. 27-19, at 101–02; BANKR. D. MASS. R. XVIII, L, *reprinted in* CHANDLER, *supra* note 73, at 51, 67; BANKR. S.D. MISS. R. 16 (repealed), *reprinted in S.D. Miss. Bankruptcy Rules*, *supra* note 73.

155. For example, an 1841 Act bankrupt's eligibility for discharge partly depended on the bankrupt having made a "bona fide surrender [of] all his property, and rights of property." Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. 440, 443 (repealed 1843). To monitor

Finally, Plank observes that the Code empowers a Chapter 7 trustee to operate the debtor's business upon court authorization.[156] While the Act did not have a provision that expressly referred to the assignee's operation of a bankrupt's business, one can conclude that a statutory basis did exist for such operational authority and that assignees did exercise it. Initially, it should be noted that legal entities, such as corporations, were ineligible for relief under the 1841 Act,[157] thereby limiting the scope of opportunity for an assignee to operate a business to those cases involving natural persons who were engaged in sustained commercial activity.[158] Second, the Act expressly gave assignees authority to "manage" estate property,[159] thus suggesting the possibility of an assignee continuing the commercial activity in which the bankrupt had been engaged, provided that it was in the bankruptcy trust's best interest. Third, evidence from 1841 Act case files reveals

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compliance with this requirement, the U.S. District Court for the Northern District of New York mandated that, "[on] or before the day appointed by the court to show cause why the bankrupt shall not have his discharge and certificate, the assignee shall file with the clerk a report, stating whether the bankrupt has bona fide surrendered to the assignee all his property and right of property." BANKR. N.D.N.Y. R. 49 (repealed), *reprinted in* N.D.N.Y. BANKRUPTCY RULES, *supra* note 96, at 13. Other federal judicial districts had the same rule. *See, e.g.*, BANKR. D.N.C. R. 47 (repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 124, at 7; BANKR. E.D. PA. R. 33, *reprinted in* E.D. PA. BANKRUPTCY RULES, *supra* note 73, at 27. More broadly, the 1841 Act provided standing to object to a bankrupt's discharge "to all creditors who have proved their debts, *and other persons in interest*." § 4, 5 Stat. at 443 (emphasis added); *cf.* BANKR. D. KY. R. CLXXXVI (providing "any creditor, who has proved his debt, *or other person in interest*" with standing to raise a discharge objection against the bankrupt (emphasis added)), *reprinted in* S. DOC. NO. 27-19, at 118.

156. Plank, *supra* note 40, at 272–73. Plank includes the Chapter 7 trustee's power to operate the debtor's business among the duties of such a trustee. *See id.* ("In Chapter 7 liquidations, the trustee has the duty to: . . . if authorized by the court, operate the business of the debtor."). But the Code provision cited by Plank in support of his proposition, *see id.* at 273 n.112 (citing 11 U.S.C. § 721), does not impose an affirmative obligation on a Chapter 7 trustee to operate the debtor's business; instead, that provision entails discretionary conferral of operational authority to the trustee by the court upon the trustee's request. *See* 11 U.S.C. § 721; *In re* Sher-Del Foods, Inc., 186 B.R. 358, 363 (Bankr. W.D.N.Y. 1995); *In re* A & T Trailer Park, Inc., 53 B.R. 144, 147–48 (Bankr. D. Wyo. 1985). Put another way, the provision contemplates the grant of a specific power to the trustee upon the satisfaction of certain conditions. *Cf. Power*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that the definition of "power" includes "[t]he legal right or authorization to act"). Other Code provisions govern the powers and duties of a Chapter 7 trustee who has the authority to operate the debtor's business. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 135, ¶ 721.02.

157. *See* § 1, 5 Stat. at 440–42 (specifying persons eligible for bankruptcy relief).

158. Under the Code, natural persons and legal entities are eligible for Chapter 7 relief: most categories of persons may be debtors under Chapter 7, *see* 11 U.S.C. § 109(b), and the Code defines the term "person" to include an "individual, partnership, and corporation," *id.* § 101(41).

159. § 3, 5 Stat. at 443.

instances in which an assignee's management of estate property could not be construed as anything other than operating a business.

On this front, reconsider the case of *In re Maurin*, in which the assignee incurred unsecured debt on behalf of the bankruptcy trust in order to continue operating the bankrupt's cotton plantation.[160] While various expenses of the bankruptcy trust stemmed from multiple "[b]ins of sundries" sent by A. Rivarde & Co. to supply the plantation, an especially noteworthy expense was the $400 that the assignee "paid Luc Poché Overseer in full for all claims for wages as Overseer for the year 1844."[161] During the first half of 1844, as a result of the forced labor of enslaved Black Americans, the *Maurin* bankruptcy trust generated more than $4,400 of gross proceeds from the sale of 125 bales of cotton, which A. Rivarde & Co. sold on the bankruptcy trust's behalf for a fee.[162] This type of activity reflects how assignees under the 1841 Act had the opportunity to and did in fact continue operating the businesses of some bankrupts.

In light of the aforementioned general and context-specific considerations under the Code, Plank concludes that "[b]ecause these powers and duties transcend the duties of a trustee of a traditional trust of simply preserving and distributing the trust estate, the bankruptcy trust in a Chapter 7 liquidation resembles a business trust and, thus, qualifies as a legal person to the same extent."[163] Given the high degree of substantive similarities between the Chapter 7 bankruptcy trust and the 1841 Act bankruptcy trust, one ought to conclude that the latter also constituted a legal person. That conclusion becomes even more compelling once one considers Plank's argument that all bankruptcy trustees under the Code have powers and duties whose scope *exceeds* those of a normal business person.[164] The same can be said of assignees under the 1841 Act.

2. Powers and Duties Exceeding Those of a Normal Business Person

In his analysis of a bankruptcy trustee's powers that exceed those of a normal business person, Plank notes that, in addition to authorizing trustees to avoid certain prebankruptcy transfers by the debtor that could similarly have been avoided by creditors under nonbankruptcy

160. *See supra* text accompanying note 130.
161. 2nd Report of Assignee, *supra* note 114.
162. *See id.*
163. Plank, *supra* note 40, at 273.
164. *See id.* at 274–75.

law,[165] the Code grants trustees "powers that . . . further the goals of bankruptcy, such as the power to assume or reject executory contracts, to avoid preferential transfers and certain other transfers, and to abandon to the debtors burdensome or inconsequential property."[166] Along similar lines, the 1841 Act expressly gave assignees the power to avoid the functional equivalent of preferences and fraudulent transfers under the Code.[167] Although the Act did not contain express provisions analogous to the Code's provisions on the assumption, assignment, and rejection of executory contracts and unexpired leases,[168] as well as the abandonment of estate property,[169] courts did recognize assignees as having such powers.[170]

Plank notes that, when trustees exercise these unique powers under the Code, they do so "ow[ing] a fiduciary duty to enhance the bankruptcy estate for the benefit of the creditors and, in the rare case when the assets exceed the liabilities, for the benefit of an individual debtor."[171] Comparatively, the 1841 Act implicitly referred to the assignee's avoidance powers as ones to be exercised for the benefit of the bankruptcy trust's beneficiaries,[172] which included both creditors

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165. *See id.* ("The trustee's prerogatives include powers that the creditors under non-bankruptcy law could exercise, such as the power to avoid unperfected liens or to avoid fraudulent transfers." (footnote omitted)).

166. *Id.* at 275 (footnotes omitted).

167. *See* Act of Aug. 19, 1841, ch. 9, § 2, 5 Stat. 440, 442 ("[A]ll future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person, any preference or priority over the general creditors of such bankrupts; and all other payments, securities, conveyances or transfers of property or agreements made or given by such bankrupt in contemplation of bankruptcy, to any person or persons whatever, not being a bona fide creditor or purchaser, for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy . . . .") (repealed 1843).

168. 11 U.S.C. § 365.

169. *Id.* § 554.

170. *See, e.g.*, BANKR. D. KY. R. LXXXVI–LXXXVII (setting forth rules for the treatment of claims and demands belonging to the estate and abandoned by the assignee) (repealed), *reprinted in* S. DOC. NO. 27-19, at 101 (1842); Smith v. Gordon, 22 F. Cas. 554, 556 (D. Me. 1843) (No. 13,052) (discussing power of the assignee to reject an unexpired lease and to abandon burdensome estate property to the bankrupt); Doremus v. Walker, 8 Ala. 194, 200 (1845) (discussing power of the assignee to abandon burdensome estate property to the bankrupt).

171. Plank, *supra* note 40, at 275.

172. *See* § 2, 5 Stat. at 442 (stating that "the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the [voided transfers] as part of the assets of the bankruptcy").

and the bankrupt.[173] Moreover, federal courts expressly referred to an assignee's correlative duty to augment the estate when exercising their unique powers.[174]

Plank concludes his argument that the bankruptcy trust is a legal person by examining the liabilities of the bankruptcy trust and its trustee. The costs of administering the trust, referred to by the Code as "administrative expenses,"[175] fall squarely on the trust, whether those costs relate to the estate's preservation, debt incurred by the bankruptcy trust, or even torts committed by trustees acting within the scope of their authority.[176] As for the trustee's liability, Plank points out that, "unlike the trustee of a traditional trust, but like a trustee of a statutory business trust, the bankruptcy trustee . . . does not incur personal liability for the activities of the trust unless the trustee violates its duties of loyalty and care."[177] Under the 1841 Act, federal courts promulgated rules generally providing that the bankruptcy trust would be liable for the costs of its administration.[178] Moreover, the Act itself

173. *See supra* notes 149–50 and accompanying text.

174. *See, e.g.*, BANKR. D. KY. R. LXXXIII (mandating that, because the assignee was "charged with the duty of claiming and recovering, for the benefit of the general creditors, any property, money, or such rights, previously transferred, conveyed, paid, or released, by the bankrupt, in violation of the statute, and in fraud of such creditors, and of annulling any security, agreement, or other act, so given, entered into, or executed, it shall be his duty to examine and inquire into the facts of every case having such appearance, and to regard the suggestions of any creditor, touching such transactions; and thereupon to institute suit for the recovery of such property or money, whenever sufficient grounds shall appear, and the assets of the estate shall afford, or the creditor furnish the means of defraying the charges"), *reprinted in* S. DOC. NO. 27-19, at 100–01; McLean v. Lafayette Bank, 16 F. Cas. 258, 259 (C.C.D. Ohio 1844) (No. 8,886) (proclaiming that it was the assignee's "duty to contest the validity of all liens set up by a part of the creditors to the exclusion of others, where there is any reason to suppose that such liens have been created in violation of the bankrupt law"). When an assignee sought to reject an unexpired lease or to abandon estate property, federal courts expressly and impliedly referred to the need for a cost-benefit analysis by the assignee substantiating the exercise of such powers. *See* BANKR. D. KY. R. LXXXVI–LXXXVII (repealed), *reprinted in* S. DOC. NO. 27-19, at 101; *Smith*, 22 F. Cas. at 556; *Doremus*, 8 Ala. at 200. Put another way, the assignee had a duty to determine that the bankruptcy trust would be better off without the property in question.

175. 11 U.S.C. § 503.

176. *See* Plank, *supra* note 40, at 275–76.

177. *Id.* at 276 (footnote omitted).

178. *See, e.g.*, BANKR. D. CONN. R. 24 (repealed), *reprinted in* D. CONN. BANKRUPTCY RULES, *supra* note 96, at 8; BANKR. D.N.C. R. 41 (repealed), *reprinted in* N.C. BANKRUPTCY RULES, *supra* note 124, at 7; BANKR. D. VT. R. 57 (repealed), *reprinted in* VT. BANKRUPTCY RULES, *supra* note 96, at 10; BANKR. E.D. PA. R. 32 (repealed), *reprinted in* E.D. PA. BANKRUPTCY RULES, *supra* note 73, at 27; BANKR. N.D.N.Y. R. 47 (repealed), *reprinted in* N.D.N.Y. BANKRUPTCY RULES, *supra* note 96, at 13; BANKR. S.D. MISS. R. 17 (repealed), *reprinted in S.D. Miss. Bankruptcy Rules*,

imposed liability on assignees only in the event that they breached their fiduciary duties.[179] As such, the 1841 Act allocated liability between the bankruptcy trust and its representative in a way that mirrored today's analogous scheme under the Code.

* * *

Having worked through the key elements of Plank's argument that the Code creates a bankruptcy trust, we can turn to his conclusion, which has corresponding implications for how we should think about the 1841 Act bankruptcy trust:

> The bankruptcy trust has all of the attributes of a business trust that constitutes a legal person. Although it is not created by an express agreement, private parties may create a bankruptcy trust by filing a bankruptcy petition. A trustee in control of trust assets conducts a business, albeit a specialized type of business, of gathering property of the estate and . . . liquidating . . . the debtor and its assets. In the course of this business activity, the bankruptcy trust incurs liability as an enterprise. It is more than just a relationship between the trustee and the beneficiaries of the trust. It is more than just a judicial officer in control of specified assets. It has an existence separate from its settlor, its trustee, and its beneficiaries. Accordingly, the bankruptcy trust should be treated as a legal person.[180]

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supra note 73; BANKR. S.D.N.Y. R. 58 (repealed), *reprinted in* S.D.N.Y. BANKRUPTCY RULES, *supra* note 73, at 12. Some federal bankruptcy rules further provided that the bankrupt would be liable for the costs of administration in cases involving an administratively insolvent estate. *See, e.g.*, BANKR. D. CONN. R. 15, 24, *reprinted in* D. CONN. BANKRUPTCY RULES, *supra* note 96, at 6, 8; *see also In re* Greaves, 10 F. Cas. 1067, 1068 (S.D.N.Y. 1842) (No. 5,744) (stating that the assignee's expenses constituted "one of the charges the bankrupt must meet as necessarily incident to his proceeding" when the bankruptcy estate was administratively insolvent).

179. *See* Act of Aug. 19, 1841, ch. 9, § 9, 5 Stat. 440, 447 (stating that "the court may require of such assignee a bond, with at least two sureties, in such sum as it may deem proper, *conditioned for the due and faithful discharge of all his duties*" (emphasis added)) (repealed 1843); *cf.* BANKR. D. MASS. R. XVIII (providing that the assignee's "wilful or negligent omission to [properly deposit estate funds] . . . shall be deemed a good cause in the discretion of the court for his removal from office") (repealed), *reprinted in* CHANDLER, *supra* note 73, at 51; BANKR. E.D. PA. R. 25 ("Every wilful or negligent omission to comply with these directions [regarding the deposit of estate funds], will be deemed a good cause of removal of the assignee in the discretion of the court."), *reprinted in* E.D. PA. BANKRUPTCY RULES, *supra* note 73, at 26; STAPLES, *supra* note 84, at 33 (stating that, with regard to carrying out the Act's marshaling and distribution functions, "[a]ny unnecessary delay or wilful negligence on the part of the assignee or other officer, will be ground of removal and of the summary interposition of the court").

180. Plank, *supra* note 40, at 276 (footnotes omitted).

As demonstrated in this Section, the substance and structure of the 1841 Act bankruptcy trust significantly overlap with the substance and structure of today's bankruptcy trust. If the latter constitutes a legal person, then so too did the former.[181]

Conceptualizing the 1841 Act bankruptcy trust as an artificial entity is a necessary but insufficient condition for establishing that the Act created a federal instrumentality for resolving core problems incident to financial failure. As discussed in the next Section, that claim depends on an analytical framework for distinguishing between private and public legal entities.

B. Nationalizing Financially Distressed Assets

In discussing the implications of conceptualizing the bankruptcy trust as legal person, Plank identifies federal bankruptcy jurisdiction as an area where the concept can generate significant analytical clarity.[182] His commentary on this point includes the following observations: "The bankruptcy trust is a legal person created specifically pursuant to federal law. In this context, it has all of the attributes of a privately owned railroad chartered under federal law or a national banking association charted under the National Bank Act."[183]

Plank does not explain, however, why the bankruptcy trust should be classified as a private (i.e., nongovernmental) legal entity or, for that matter, how the bankruptcy trust is akin to the private legal entities that he identifies as comparators.[184] Notably, five years before the publication of Plank's article, the U.S. Supreme Court's opinion in

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181. If one accepts the argument that the 1841 Act bankruptcy trust constituted a legal person, then the temporal relationship between the business trust and the bankruptcy trust needs to be reevaluated. Plank dates the innovation of the business trust in the United States to the late nineteenth century. *See id.* at 259 & n.43. His reliance on the business trust as an analogue to the bankruptcy trust suggests that Plank might view the former to be the latter's historical antecedent. *Cf. id.* at 253–54 ("Specifically, the Code creates an entity that has all of the attributes — and more — of a business trust. American law recognizes the business trust as a legal person. Accordingly, the bankruptcy trust should be recognized as a legal person." (footnote omitted)). But if the 1841 Act bankruptcy trust had attributes equivalent to and sometimes exceeding those of the business trust from the late nineteenth century, then the 1841 Act bankruptcy trust ought to be viewed as the business trust's precursor. It is beyond the scope of this Article to consider whether the 1800 Act also created a bankruptcy trust that constituted a legal person. That said, it should be noted that courts that applied the 1841 Act viewed it to be significantly different in substance and structure than the 1800 Act. *See, e.g.*, Carr v. Gale, 5 F. Cas. 118, 120 (C.C.D. Me. 1847) (No. 2,434); Griswold v. Pratt, 50 Mass. (9 Met.) 16, 21 (1845).

182. *See* Plank, *supra* note 40, at 280–82.

183. *Id.* at 281 (footnote omitted).

184. *See id.* at 280–82.

Lebron v. National Railroad Passenger Corp. offered signposts for analyzing when "Government-created and -controlled corporations" might be deemed federal instrumentalities.[185] That opinion surveyed "the long history of corporations created and participated in by the United States for the achievement of governmental objectives."[186] That survey included references to the second Bank of the United States and the Union Pacific Railroad,[187] both of which Plank mentions in his analysis of federal bankruptcy jurisdiction through the lens of the bankruptcy trust.[188] When one considers the indicia of a federal instrumentality identified in *Lebron*, a compelling argument emerges for classifying the 1841 Act bankruptcy trust as a public legal entity.

Initially, it should be noted that the Court in *Lebron* sought to answer whether the National Railroad Passenger Corporation (i.e., Amtrak) constituted "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution."[189] This Article's argument here is not that the *Lebron* framework is definitively apt for determining whether the 1841 Act bankruptcy trust constituted a federal instrumentality. Rather, the argument is that, pursuant to that framework, one would be disposed to conclude that the 1841 Act bankruptcy trust is a federal instrumentality.[190]

Before setting forth the indicia pointing to Amtrak's federal instrumentality status, the Court in *Lebron* emphatically made the following point: "That Government-created and -controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself."[191] In *Lebron*, the critical characteristics for the Court's classification of Amtrak as a federal instrumentality were its

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185. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394 (1995).

186. *Id.* at 386.

187. *See id.* at 386–87.

188. *See* Plank, *supra* note 40, at 281 & n.171.

189. *Lebron*, 513 U.S. at 394.

190. The fact that Congress delegated administration of the 1841 Act bankruptcy trust to the federal judiciary should not affect our understanding of the trust's status as a legal entity. Furthermore, recall that the bankruptcy trust was akin to a business trust, *see supra* Sections I.A.ii–iv, which shares similarities with a corporation, *see supra* text accompanying notes 48–49. Accordingly, the *Lebron* framework strikes me as good as any other potential point of origin for exploring whether the bankruptcy trust should be classified as a public legal entity. *Cf. id.* (stating that the Court's holding on Amtrak's federal instrumentality status "accord[s] with public and judicial understanding of the nature of Government-created and -controlled corporations over the years").

191. *Id.* at 397.

"establish[ment] and organiz[ation] under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees."[192] The Court additionally stressed that the federal government exerted control over Amtrak "not as a creditor but as a policymaker."[193] Twenty years after its decision in *Lebron*, the Court reaffirmed these criteria in holding that Amtrak constituted a governmental entity for purposes of analyzing whether certain metrics and standards issued by the corporation violated the Constitution's separation-of-powers provisions.[194]

Analyzing the 1841 Act bankruptcy trust pursuant to the *Lebron* framework compels the conclusion that the trust should be deemed to have been a federal instrumentality. First, as detailed above, federal law established and organized the trust.[195] And, for the reasons that follow, it is clear that (1) the trust existed for the very purpose of pursuing federal governmental objectives, (2) federal governmental appointees directed and controlled the trust, and (3) the federal government exerted control over the trust as a policymaker.

i. The Purpose of the 1841 Act Trust

Prior work examining the politics leading to the passage of the 1841 Act[196] describes how the legislation constituted part of "a muscular response by the federal government" to the depressed financial conditions following the Panic of 1837 and how the Whigs spearheaded that effort with the hope that it "would reinforce and grow the nation's commercial and manufacturing sectors, which they anticipated would have positive spillover effects throughout the rest of the economy."[197] Members of Congress who advocated for a federal bankruptcy system

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192. *Id.* at 398.

193. *Id.* at 399.

194. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 54–55 (2015).

195. *See supra* Section I.A.

196. *See* Rafael I. Pardo, *Federally Funded Slaving*, 93 TUL. L. REV. 787, 815–23 (2019) [hereinafter Pardo, *Federally Funded Slaving*].

197. *Id.* at 816; *see also* MARLER, *supra* note 28, at 59 (referring to the Whig Party's "support for activist economic policies by the state"); M. SUSAN MURNANE, BANKRUPTCY IN AN INDUSTRIAL SOCIETY: A HISTORY OF THE BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO 20 (2015) ("The idea of a national uniform bankruptcy act was very controversial throughout the nineteenth century. . . . The debate over bankruptcy paralleled a deeper debate over the meaning of America. During the nineteenth century, an ideological battle raged between those who believed expanding commerce and industry promoted a unified American nation able to hold its own on the world stage and those who grounded republican virtue in local institutions and small-scale proprietary capitalism.").

as a key component to the nation's economic recovery repeatedly emphasized that private creditor interests would be subordinated to the federal government's objectives.

Senator Henry Clay from Kentucky argued that "[t]he right of the State . . . to the use of the unimpaired faculties of its citizens as producers, as consumers, and as defenders of the Commonwealth, is paramount to any rights or relations which can be created between citizen and citizen," adding for good measure "that the public rights of the State . . . [are] paramount to any supposed right which appertain to a private creditor."[198] According to Clay, the latter statement represented "the great principle which lies at the bottom of all bankrupt laws, and it is this which . . . imposes upon Congress the duty of enacting a bankruptcy system."[199]

Echoing these sentiments, Senator William Fessenden of Maine argued that "those rights and those interests [arising from the obligation of contracts] must yield to high considerations of public policy," insisting that such rights and interest "must necessarily be made subservient to the good of the state."[200] Lest anyone misunderstand his position on a federal bankruptcy system, Fessenden proclaimed it in no uncertain terms:

> Legislation of this kind must be founded upon higher views, and more commanding principles — principles which look to the general weal — to national objects. When these are brought into action, they necessarily ride over all these considerations which affect individuals merely, and become imperative upon every statesman whose eye is single to the welfare of the whole country.[201]

These sentiments were not limited to lawmakers who pushed the legislation across the finish line.[202] After the Act took effect, the U.S.

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198. CONG. GLOBE, 26th Cong., 1st Sess. app. 847 (1840) (statement of Sen. Clay).

199. *Id.*

200. CONG. GLOBE, 27th Cong., 1st Sess. app. 470 (1841) (statement of Sen. Fessenden).

201. *Id.*

202. Prior to the 1841 Act's passage, interest groups who lobbied Congress to enact a federal bankruptcy system argued that such legislation was a national economic imperative in the public interest. For example, the New Orleans Chamber of Commerce in 1841 warned Congress that,

> unless such a law is passed as will give [debtors] relief, a very large portion of the sufferers will never be able to emerge from it, and, as a necessary consequence, will no longer be able to support their families, or contribute to the general wealth and prosperity of the nation.

S. DOC. NO. 26-123, at 1 (1841). And the year before, the Baltimore Board of Trade opined "that such a law would be beneficial to the citizens of the United States." S. DOC. NO. 26-469, at 1 (1840). A bankruptcy treatise published after the Act's passage

Senate adopted a resolution on December 13, 1842, seeking feedback from those responsible for executing the law.[203] As part of this intelligence-gathering operation, Secretary of State Daniel Webster sent a letter to the federal courts, and the responses soon began flooding back from all quarters.[204] Significantly, several respondents from the judiciary echoed the points made by congressional advocates who championed the 1841 Act, but they did so based on experience rather than theory. U.S. Supreme Court Associate Justice Story, who is credited as one of the principal drafters of the 1841 Act,[205] remarked, "I have not the slightest hesitation in saying that, as far as my observation and experience extend in my own circuit . . . , the system has worked well and been for the public benefit . . . ."[206] U.S. District

but before its effective date expressed similar sentiments. *See* STAPLES, *supra* note 84, at 6 ("There has never been a period since the formation of the Constitution, when a general law on the subject was more imperatively called for, nor when it could exert a more salutary influence than now. A violent and sudden convulsion in the pecuniary affairs of the country has taken place, . . . reducing thousands of our best citizens to hopeless insolvency.").

203. *See* CONG. GLOBE, 27th Cong., 3d Sess. 46 (1842) ("*Resolved*, That the Secretary of State do communicate, with all convenient despatch [sic], with the judicial officers of the United States who have had the execution of the bankrupt law, and ascertain from them the number of applications under the act, both voluntary and involuntary; the number of discharges; the opinions of the judges as to any amendments or modifications of the act; and such other information as he may deem necessary to show the effects and operations of the act; and that he report the same to the Senate, from time to time, as soon as the information shall be received.").

204. *See* Letter from Daniel Webster, Sec'y of State, U.S. Dep't of State, to the U.S. Senate (Dec. 27, 1842) ("In compliance with the resolution of the Senate of the 13th instant, circular letters were addressed by this Department to the judges and clerks of the courts of the United States, and to the district attorneys. Answers to many of these letters having now been received they are herewith transmitted to the Senate."), *in* S. DOC. NO. 27-19, at 1 (1842).

205. *See* 2 LIFE AND LETTERS OF JOSEPH STORY 407 (Boston, William M. Story ed., Charles C. Little & James Brown 1851).

206. Letter from Joseph Story, Assoc. J., U.S. Sup. Ct., to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 24, 1842) [hereinafter Letter from Joseph Story to Daniel Webster], *in* S. DOC. NO. 27-19, at 27. Justice Story repeatedly referred to the 1841 Act as a means for achieving public justice. *See, e.g.*, Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 500 (Story, Circuit Justice, C.C.D. Me. 1843) (No. 9,662) (remarking "that after a little experience in the workings of the system, with the aid of some amendments by congress, the courts of the United States would soon attain punctuality, uniformity, and promptitude, in administering the system, so as to accomplish in the fullest manner all the ends of private, *as well as of public justice*" (emphasis added)); Letter from Joseph Story, Assoc. J., U.S. Sup. Ct., to John McPherson Berrien, U.S. Sen. for Georgia (Apr. 29, 1842) (predicting that the 1841 Act bankruptcy system "will be one of the most lasting benefits ever conferred upon our country" and offering suggestions about the Act "dictated solely by the desire to further a due administration of *public justice*" (emphasis added)), *in* 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 205, at 405.

Court Judge Andrew Judson observed that "[t]he commercial interests of the country are deeply involved in maintaining this law."[207] U.S. District Court Judge Archibald Randall stated that the legislation "has had a beneficial effect on the business community in this district."[208] U.S. District Court Judge Alfred Conkling noted that "the operation of the act appears to me to have been in accordance with those great principles of justice and public policy on which it rests, and to which it was designed to give effect."[209] U.S. District Court Judge Monroe opined that the Act's "operation in the liberation of the citizen, and restoring him to this independence, and thereby exciting him to new industry and self-respect, must improve the public morals; and, in this mode, the law must advance, and contribute to maintain, the general welfare, to every intent."[210] He further predicted that the Act's "continued operation will have the effects of improving the fairness of the transactions of men, and preserving a more healthy action in all our business and commercial operations."[211]

These responses to Secretary Webster's inquiry demonstrate that a segment of the federal judiciary viewed the 1841 Act as positively accomplishing its public policy objective. But what specifically was that objective, and how did Congress design the Act's machinery to accomplish the legislation's purpose? For a contemporary answer to the former question, consider U.S. Supreme Court Associate Justice Henry Baldwin's response to Secretary Webster. He advised that the law should be stripped down to its provisions on involuntary bankruptcy cases, based on the view that the Act's primary objective had been met — namely, providing financial relief to debtors adversely affected by the Panic of 1837.[212]

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207. Letter from Andrew T. Judson, U.S. J., Dist. of Connecticut, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 24, 1842), *in* S. DOC. NO. 27-19, at 32.

208. Letter from Archibald Randall, U.S. J., E. Dist. of Pennsylvania, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 24, 1842), *in* S. DOC. NO. 27-19, at 50.

209. Letter from Alfred Conkling, U.S. J., N. Dist. of New York, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 26, 1842), *in* S. DOC. NO. 27-19, at 67.

210. Letter from Thomas Bell Monroe to Daniel Webster, *supra* note 74, *in* S. DOC. NO. 27-19, at 150.

211. *Id.*, *in* S. DOC. NO. 27-19, at 151.

212. *See* Letter from Henry Baldwin, Assoc. J., U.S. Sup. Ct., to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 30, 1842) ("In taking a general view of the effects and operation of the act, my opinion is, that they have been salutary. A peculiar state of things existed before, and at the time of its passage, which called for appropriate provisions to meet the exigency of the times, by incorporating into a system of bankruptcy the new and anomalous feature of a proceeding on the application of the debtor, whereby he could obtain a discharge without any movement on the part of the creditor. Such a provision is inconsistent with the policy of bankrupt

Other responses to Secretary Webster from those responsible for executing the law confirm that many perceived the Act's main goal to have been the creation of a robust debtor-relief system that relegated creditor interests.[213] U.S. District Court Judge Samuel R. Betts reported that "[c]reditors complain that too many advantages are awarded bankrupts, and that the proceedings are too summary."[214] Joseph C. Potts, the U.S. Court Clerk for the District of New Jersey, observed that "the chief objection urged against the voluntary part of the law, aside from its retrospective operation, is the helpless condition in which it places creditors."[215] John L. Hayes, the U.S. Court Clerk for the District of New Hampshire, commented that "[i]t [wa]s difficult to conceive that so large an amount of indebtment, with so small a proportion of available assets, could ever have been cancelled by any other operation than that of the bankrupt law."[216]

Given that the paramount federal governmental objective under the 1841 Act was debtor relief, what statutory mechanism did Congress rely upon to accomplish this end? The answer, simply put, was the

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laws, and ought not to be retained in a system intended to be permanent. An existing and pressing emergency was deemed to exist, calling for relief to a debtor, as well as providing a remedy to the creditors of a specified class of debtors; but the time has probably arrived when the causes which led to the adoption of a provision for voluntary applications have ceased — the evident object having been rather to afford a relief for the past, than to confer a right for the future debts of the applicants by their discharge. On this subject, my opinion is, that the effect of the act has been favorable, so far as relates to transactions before its passage; but that it will be otherwise as to debts contracted in the future; that so much of it as refers to voluntary applications ought to be repealed . . . ."), *in* S. DOC. NO. 27-19, at 70–71. U.S. District Court Judge Ashur Ware made a similar recommendation to Secretary Webster. *See* Letter from Ashur Ware, U.S. J., Dist. of Maine, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 22, 1842) ("On the whole, looking at the system of voluntary bankruptcy as somewhat in the nature of an experiment, the effects of which can be determined only by longer experience, I should say, that if any substantial alteration is made, at present, it should be by a simple repeal of the law so far as it enables a person to be declared a bankrupt and obtain a discharge by proceedings instituted by himself, leaving it in force without alteration so far as it establishes a system of compulsory bankruptcy."), *in* S. DOC. NO. 27-19, at 23.

213. *But cf.* Letter from Ross Wilkins, U.S. J., Dist. of Michigan, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 26, 1842) ("I am satisfied that with both creditor and debtor the law gives very general satisfaction in the district. Every day's experience in its administration produces in my mind the conviction that it requires but little amendment or modification."), *in* S. DOC. NO. 27-19, at 72.

214. Letter from Samuel R. Betts, U.S. J., S. Dist. of New York, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 19, 1842), *in* S. DOC. NO. 27-19, at 10.

215. Letter from Joseph C. Potts, U.S. Ct. Clerk, Dist. of New Jersey, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 19, 1842), *in* S. DOC. NO. 27-19, at 12.

216. Letter from John L. Hayes, U.S. Ct. Clerk, Dist. of New Hampshire, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Jan. 1843), *in* S. DOC. NO. 27-19, at 160.

grant of a discharge under the Act, which cut off the ability of creditors to recover their prebankruptcy debts as a personal liability of the bankrupt,[217] thus severely limiting creditors' postbankruptcy recourse to collect any amounts that remained owing on the bankrupt's discharged debts.[218] A discharge represented the successful outcome of a bankrupt's application for a government benefit,[219] one that was the functional equivalent of a financial grant.[220]

To understand why the discharge granted to bankrupts under the 1841 Act was functionally equivalent to a financial award by the federal government — a government grant — to the bankrupt, consider an immutable characteristic of the bankruptcy discharge that has been true at least since voluntary relief first became available, if not earlier: when a court enters a bankruptcy discharge order, that order "constitutes the court's exercise of its in rem jurisdiction to issue a judgment declaring the debtor's status as a discharged debtor."[221] The

217. *See* Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. 440, 444 (providing that the "discharge and certificate . . . shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever") (repealed 1843). Because the bankruptcy discharge constituted an affirmative defense to a judicial collection effort by a creditor, *see, e.g.*, Fellows v. Hall, 8 F. Cas. 1132, 1133 (C.C.D. Mich. 1843) (No. 4,722), the possibility existed that the defense would be waived if not properly raised, *see, e.g.*, Bank of Mo. v. Franciscus, 15 Mo. 303, 308–09 (1851), thus negating the benefit of discharge with respect to that creditor.

218. One possibility for postbankruptcy collection on a discharged debt included a formal agreement (i.e., a contract) between the parties that the former bankrupt would repay the debt. *See, e.g.*, Bach v. Cohn, 3 La. Ann. 101, 102 (1848) (stating that "the effect of the [discharge] certificate [under the 1841 Act] may be avoided by a new contract, entered into *bonâ fide* by the bankrupt after his discharge").

219. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1361, 1373 (2015) (pointing to the grant of discharge in federal bankruptcy proceedings as one example of "ex parte court proceedings as a method for the determination of government benefit claims in the early Republic"); *cf.* Alec P. Ostrow, *Constitutionality of Core Jurisdiction*, 68 AM. BANKR. L.J. 91, 105 (1994) ("[T]he discharge in bankruptcy is part of a federal regulatory scheme that has no antecedent in the common law, and was enacted by Congress pursuant to one of its enumerated powers. It is in the nature of a government benefit, and is not required to be conferred by the judiciary.").

220. The discussion in *infra* notes 221–39 and accompanying text is excerpted, with some revisions, from Pardo, *Federally Funded Slaving*, *supra* note 196, at 832–35.

221. Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2168 (2014); *cf.* 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, 263 (1999) ("American bankruptcy jurisdiction, of course, developed from an English system, which itself had quite a history. The English model of a jurisdiction in bankruptcy was, very explicitly, an in rem, property-based jurisdiction — centered around the construct of a bankrupt's 'estate.'").

Supreme Court in *Shawhan v. Wherritt*, one of its decisions involving the 1841 Act, described proceedings under the Act as "in the nature of a proceeding *in rem*, before a court of record having jurisdiction."[222] At the turn of the century, in *Hanover National Bank v. Moyses*, a decision involving the Bankruptcy Act of 1898 (the 1898 Act),[223] the Court reaffirmed this principle, relying on its prior decision in *Shawhan*.[224] Two decades later, in *Myers v. International Trust Co.*, also a decision involving the 1898 Act, the Court further specified that "[a]n adjudication of bankruptcy, *or of discharge therefrom*, is a judgment *in rem*."[225] In the twenty-first century, the Supreme Court has continued to hold fast to this principle, stating that "[t]he discharge of a debt by a bankruptcy court is . . . an *in rem* proceeding" and citing to its prior decision in *Hanover*, among others, to support the proposition.[226] It is thus beyond peradventure that "[a]n order of discharge, like an adjudication of bankruptcy, is an in rem determination of status."[227]

Given that an in rem proceeding is one "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing,"[228] we must ask what interest in property is at stake when a court makes a discharge determination. The answer is "the bundle of legal liabilities of the debtor."[229] In the same way that the 1841 Act bankruptcy trust's property included the bankrupt's claims against third parties,[230] the trust also included third-party claims against the bankrupt (i.e., another category of property) in order to resolve the bankrupt's financial distress.[231]

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222. Shawhan v. Wherritt, 48 U.S. (7 How.) 627, 643 (1849).

223. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

224. Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192 (1902) ("Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem* . . . ." (citing *Shawhan*, 48 U.S. (7 How.) at 643)).

225. Myers v. Int'l Trust Co., 263 U.S. 64, 73 (1923) (emphasis added).

226. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) (citing *Hanover*, 186 U.S. at 192).

227. James Wm. Moore, *Res Judicata and Collateral Estoppel in Bankruptcy*, 68 YALE L.J. 1, 23 (1958).

228. *In Rem*, BLACK'S LAW DICTIONARY (11th ed. 2019).

229. Christopher Klein, Lawrence Ponoroff & Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L.J. 839, 889 (2005).

230. *See, e.g.*, Act of Aug. 19, 1841, ch. 9, § 11, 5 Stat. 440, 447 (referring to "any debts, or other claims, or securities due or belonging to the estate of the bankrupt") (repealed 1843); BANKR. D. KY. R. LXXXVI–LXXXVII (setting forth rules for the treatment of claims and demands belonging to the estate and abandoned by the assignee) (repealed), *reprinted in* S. DOC. NO. 27-19, at 101 (1842).

231. *Cf.* Conrad v. Prieur, 5 Rob. 49, 53 (La. 1843) ("Here, every creditor seems to be made, by the law itself, a party to the bankruptcy; all are cited, and there is an issue

When thinking about that resolution process, one of its key features must be noted. The release of personal liability from debts conferred by a discharge order does not have the effect of eliminating them; instead, that order precludes creditors from pursuing personal remedies against the debtor to recover discharged debts.[232] Or, in the language of the 1841 Act, the "discharge and certificate . . . shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever."[233] Accordingly, when a federal district court issued a discharge order under the 1841 Act, that order changed the rights that the bankrupt and the bankrupt's creditors had regarding the bankrupt's bundle of legal liabilities.

With these principles in mind, consider why the discharge given to bankrupts under the 1841 Act was functionally equivalent to a government grant. Imagine a debtor who owed his creditors $10,000 but who had no assets or income — in other words, a debtor with a negative net worth of $10,000. Seeking to give the debtor relief from his debts and others similarly situated, the government might pursue one of two options, among many others, if working on a blank canvas. On the one hand, the government could create a program that would tap the public fisc and provide the debtor with $10,000 that he could then use to pay his creditors in full, thus increasing the debtor's net worth to $0. In this instance, the $10,000 provided to the debtor by the government would constitute a grant, albeit one limited to a restricted use — namely, use of the funds to pay off creditors.[234]

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joined between them and the bankrupt, who, in consideration of the surrender, sues them for his discharge."); Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 9 (1940) ("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.").

232. *See* Moore, *supra* note 227, at 24 & n.122 (citing Zavelo v. Reeves, 227 U.S. 625 (1913); Helms v. Holmes, 129 F.2d 263 (4th Cir. 1942)). *But see* Zarega's Case, 30 F. Cas. 916, 916 (S.D.N.Y. 1842) (No. 18,204) (stating that the 1841 Act's discharge provision "extinguishes the debt"); Fisher v. Currier, 48 Mass. 424, 430 (1844) ("If granted, of course all debts proveable under it are extinguished, and cannot be proved under the insolvent law [of Massachusetts], or be treated in any other way as existing debts.").

233. § 4, 5 Stat. at 444.

234. *Cf.* USF Fed. Credit Union v. Gateway Radiology Consultants, P.A. (*In re* Gateway Radiology Consultants, P.A.), 983 F.3d 1239, 1247 (11th Cir. 2020) ("The PPP [i.e., Paycheck Protection Program] is directed at small businesses and its principal function is to provide potentially forgivable loans to them. It is designed to give loans to eligible businesses and, if the loaned funds are used for specified expenses, to allow those loans to be forgiven. The recipient can receive loan forgiveness if it uses the funds to cover payroll and certain other expenses like mortgage or rent payments and utility expenses. Generally the amount of the loan that is forgiven is the amount used to pay those costs. But the bulk of the funds, at least 60 percent, must be spent on payroll."

On the other hand, rather than tapping the public fisc to give the debtor a stack of money with which to pay off his creditors, the government could instead create a system that would provide the debtor with relief in the form of a court order precluding the debtor's creditors from recovering their debts personally from him — in other words, a liability shield. Although the debts would continue to exist, the debtor would theoretically no longer be accountable for them.[235] The shield option would not increase the debtor's net worth to $0 given that the debtor would have to expend predischarge costs (e.g., court fees and attorney's fees) to obtain the order and possibly postdischarge costs to enforce it.[236] But even when taking into account such costs, the discharge order would generally have the effect of *increasing* the debtor's net worth,[237] thus representing to the debtor a property right with *positive* value.[238] Given that such an order would have been

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(footnote and citations omitted)); Luke Broadwater, Jesse Drucker & Rebecca R. Ruiz, *Buried in the Pandemic Aid Bill: Billions to Soothe the Richest*, N.Y. TIMES (Dec. 22, 2020), https://nyti.ms/2Kkl31F [https://perma.cc/2KFT-Z6Y4] ("The Paycheck Protection Program was the most visible part of the federal government's coronavirus relief efforts in the spring to keep small businesses afloat. So far, the government has distributed more than $500 billion in loans, which could be forgiven and turned into permanent grants as long as the businesses use most of the money to pay workers and keep people employed.").

235. *See supra* note 217 (noting that the bankruptcy discharge under the 1841 Act was a waivable affirmative defense to judicial collection efforts by creditors seeking to recover discharged debts).

236. For a discussion of the direct costs of obtaining bankruptcy relief under the 1841 Act, see Pardo, *Bankrupted Slaves*, *supra* note 30, at 1089 n.87.

237. *Cf.* Martin J. McMahon Jr. & Daniel L. Simmons, *A Field Guide to Cancellation of Debt Income*, 63 TAX LAW. 415, 420 (2010) (discussing the Supreme Court's decision in *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931), which addressed the treatment of cancelled debt as federal taxable income, and stating that the decision "often has been interpreted to be grounded on the rationale that when a debt is discharged for less than full repayment, the portion of the debt cancelled without payment is income because the borrower's net worth has been increased").

238. As analogous support for this proposition, consider modern federal tax law, which generally treats discharge of indebtedness as gross income. *See* 26 U.S.C. § 61(a)(11). Such treatment rests on the basic principle that, "when a borrower receives money in a loan transaction and is later discharged from the liability without repaying the debt, the borrower has realized an accession to wealth." McMahon & Simmons, *supra* note 237, at 417. While gross income does not include indebtedness discharged in a bankruptcy case, *see* 26 U.S.C. § 108(a)(1)(A), Congress created the exception in recognition that bankruptcy's fresh-start policy would be undermined if the law imposed tax liability as a direct consequence of receiving a bankruptcy discharge, *see* S. REP. NO. 96-1035, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 7017, 7025. Such a rationale simultaneously acknowledges that debt forgiveness through a bankruptcy discharge permits a debtor to realize an accession to wealth, but that countervailing policy considerations warrant ignoring the economic benefit for tax purposes.

issued pursuant to "a general system of statutory regulation,"[239] we can functionally conceptualize discharges under the 1841 Act as governmental financial awards to bankrupts that flowed through the bankruptcy trust. Pursuant to this conceptualization, we can conclude that the trust existed for the very purpose of pursuing the federal government's objective of robust debtor relief.[240]

ii. Direction and Control of the 1841 Act Trust

Undoubtedly, the 1841 Act gave the federal district courts full authority to direct and control the bankruptcy trust. In discussing the Act's provision vesting exclusive jurisdiction in the federal district courts "in all matters and proceedings in bankruptcy arising under th[e] [A]ct,"[241] Justice Story observed that "Congress . . . intended to secure the complete administration of the whole system in its own courts."[242] He further emphasized this point by noting that "[s]ound policy . . . and a just regard to public as well as private interests, manifestly dictated

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239. New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U.S. 656, 662 (1875); *cf.* Germain v. Conn. Nat'l Bank, 988 F.2d 1323, 1332 (2d Cir. 1993) (referring to "the public regulatory scheme" created by the Bankruptcy Code). *But cf.* Susan M. Freeman & Marvin C. Ruth, *The Scope of Bankruptcy Ancillary Jurisdiction After* Katz *as Informed by Pre-*Katz *Ancillary Jurisdiction Cases*, 15 AM. BANKR. INST. L. REV. 155, 155 (2007) ("[T]he substantive provisions of bankruptcy statutes are not regulatory laws, and do not apply to the populace at large or mandate or proscribe any action in the course of everyday affairs."). While the Supreme Court used this phrase in describing the Bankruptcy Act of 1867, Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878), there is no reason why the description should not equally apply in this context. *Cf. Ex parte* Christy, 44 U.S. (3 How.) 292, 312 (1845) (Story, J.) (stating that, with respect to the 1841 Act, "it was indispensable that an entire system . . . should be provided by Congress, capable of being worked out through the instrumentality of its own courts").

240. For further evidence of the primacy of debtor relief under the 1841 Act, consider U.S. District Court Judge Henry Potter's advisory opinion on a debtor's eligibility for relief in no-asset cases (i.e., cases in which the debtor did not have any assets for liquidation), which he issued to the general public in a notice printed by the *Fayetteville Weekly Observer* on the day after the 1841 Act took effect. *See Bankrupt Law. United States — North Carolina District.*, FAYETTEVILLE WKLY. OBSERVER, Feb. 2, 1842, at 1 ("It is my opinion, that all persons coming within the purview of the Act, though they may be entirely destitute of property, are entitled to its benefits."); *see also* Act of Aug. 19, 1841, ch. 9, § 17, 5 Stat. 440, 449 (providing that the 1841 Act's effective date would be February 1, 1842) (repealed 1843). Most 1841 Act cases were no-asset cases. *See* Pardo, *Bankrupted Slaves*, *supra* note 30, at 1118–19. For a bankrupt who earnestly announced his no-asset case, consider John Shaw Kennedy from New Orleans, whose asset schedule stated, "None! All having been used in the payment of my debts and Current Expenses." Schedule of Liabilities & Effects of J.S. Kennedy at 1, *In re* Kennedy, No. 383 (E.D. La. Sept. 2, 1842).

241. § 6, 5 Stat. at 445 ("[T]he district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act . . . .").

242. *Ex parte Christy*, 44 U.S. (3 How.) at 320.

to Congress the propriety of vesting in the District Court full and complete jurisdiction . . . in the due administration and final settlement of the bankrupt's estate."[243]

As previously discussed, 1841 Act assignees played a critical role in the bankruptcy trust's administration,[244] albeit one completely subject to the will of the federal district court, which held the power to appoint, direct, control, and remove assignees.[245] As described by the Circuit Court for the District of Ohio, the assignee was "an officer of the law, and bound to discharge his duties under the special direction of the court."[246] Federal bankruptcy rules governing deposits and withdrawals of estate funds exemplify the strict controls imposed by federal district courts on assignees. In conformity with the Act,[247] deposit rules required assignees to promptly (if not immediately) deposit estate funds into bank accounts maintained in the court's name.[248] Moreover, such funds could not be withdrawn without court approval.[249]

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243. *Id.* at 321. Several years before his opinion in *Ex parte Christy*, Justice Story made a similar point when responding to Secretary of State Webster's inquiry about the 1841 Act's operation. *See* Letter from Joseph Story to Daniel Webster, *supra* note 206 (stating that "the judges themselves have the entire supervision of the whole system"), *in* S. DOC. NO. 27-19, at 27 (1842).

244. *See supra* Sections I.A.iii–iv.

245. *See* § 3, 5 Stat. at 443.

246. McLean v. Lafayette Bank, 16 F. Cas. 253, 255 (C.C.D. Ohio 1843) (No. 8,885).

247. *See* § 9, 5 Stat. at 447 (stating that "all assets received by the assignee in money, shall, within sixty days afterwards, be paid into the court, subject to its order respecting its future safekeeping and disposition").

248. *See, e.g.*, BANKR. D. KY. R. XCVIII ("The money which shall come to the hands of the assignee, as assets of the estate, shall be all deposited in the bank designated by the court, *immediately*, or at farthest, within sixty days after it is received, except such small sums as may be indispensable for the payment of the current charges of the proceedings." (emphasis added)) (repealed), *reprinted in* S. DOC. NO. 27-19, at 103; *id.* C ("The deposites [sic] shall be all made to the credit of the *United States Kentucky District Court in Bankruptcy*, with a specification in each entry of the name of the assignee by whom deposited . . . ."), *reprinted in* S. DOC. NO. 27-19, at 103; BANKR. D. MASS. R. XVIII ("And whereas the Act of Congress provides that all assets received by any assignee in money shall within sixty days afterwards be paid into the court, subject to its order respecting its future safe keeping and disposition; the court, in obedience to this injunction, do order, that every assignee shall strictly comply with the same . . . .") (repealed), *reprinted in* CHANDLER, *supra* note 73, at 51; *id.* XIX ("All moneys [paid into the Court] shall be forthwith deposited by the clerk in such bank or banks in the district as shall be designated by the court, in the name and to the credit of the court . . . ."), *reprinted in* CHANDLER, *supra* note 73, at 52.

249. *See, e.g.*, BANKR. D. MASS. R. XIX ("[N]o moneys so deposited shall be drawn from such bank or banks unless upon a check or draft signed by the clerk of the court, stating the date and the sum and the account for which it is drawn, and certified by the judge as allowed by him."), *reprinted in* CHANDLER, *supra* note 73, at 52; BANKR. D. VT. R. 55 ("[N]o deposit shall be withdrawn without the order of the court first entered

The exclusive and extensive power of the federal district court over the assignee, while drawing support from some quarters,[250] also drew criticism from others. On the judiciary's appointment power, one law journal argued that creditor involvement in the selection of the assignee would have been a more optimal procedure.[251] On the judiciary's direction of and control over the assignee's estate administration,[252] the same journal lamented that "the assignee is not left to use the judgment and business talent he may possess."[253] The U.S. Attorney for the District of Massachusetts voiced a similar critique to Secretary Webster, observing that "[a] large discretion is wanted in the assignee as to sales, compromises, &c., preventing so frequent a recurrence to the court, which now makes unnecessary delay and expense."[254] These criticisms aside, the reality was that the federal judiciary directed and controlled administration of the 1841 bankruptcy trust, with assignees essentially serving as agents of the court.[255]

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on the docket.") (repealed), *reprinted in* VT. BANKRUPTCY RULES, *supra* note 96, at 10; BANKR. N.D.N.Y. R. 45 (same) (repealed), *reprinted in* N.D.N.Y. BANKRUPTCY RULES, *supra* note 96, at 12.

250. *See, e.g.*, Letter from H.M. Watts, U.S. Att'y, E. Dist. of Pennsylvania, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 23, 1842) ("Both the assignee and the estate assigned ought, in my humble judgment, to be kept under the control of the court, according to the general provisions of the bankrupt act."), *in* S. DOC. NO. 27-19, at 14.

251. *The Bankrupt Law*, *supra* note 85, at 405. Some federal district courts promulgated bankruptcy rules that permitted creditors to play an active role in the appointment of assignees, but that still preserved the court's ultimate say on the matter. *See, e.g.*, BANKR. D. MO. R. IX ("The creditors may nominate a suitable person for assignee.") (repealed), *reprinted in D. Mo. Bankruptcy Rules*, *supra* note 96; BANKR. E.D. PA. R. 15 ("Every appointment of an assignee by the court, shall be open for reconsideration . . . .") (repealed), *reprinted in* E.D. PA. BANKRUPTCY RULES, *supra* note 73, at 20; BANKR. S.D. MISS. R. 13 ("A majority in value of the creditors, may select the assignee, subject to the approval of the Court or Judge.") (repealed), *reprinted in S.D. Miss. Bankruptcy Rules*, *supra* note 73.

252. *See, e.g.*, § 3, 5 Stat. at 443 (providing that the assignee's "rights, titles, powers, and authorities to sell, manage, and dispose of the [estate] . . . [were] subject to the orders and directions of [the] court"); BANKR. D. MASS. R. XVI ("No sales, transfers, or other conveyances of bankrupt's property, or rights of property, shall be made by any assignee, except at such times and places, and upon such terms as shall be appointed and ordered by the court upon a petition filed for that purpose."), *reprinted in* CHANDLER, *supra* note 73, at 49–50.

253. *The Bankrupt Law*, *supra* note 85, at 405.

254. Letter from Franklin Dexter, U.S. Att'y, Dist. of Massachusetts, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 26, 1842), *in* S. DOC. NO. 27-19, at 26.

255. *See* Letter from Peleg Sprague, U.S. J., Dist. of Massachusetts, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 24, 1842) [hereinafter Letter from Peleg Sprague to Daniel Webster] (referring to "[t]he power with which the district

iii. Residual Policymaking Under the 1841 Act

Scholarship on judicial administration of the Bankruptcy Code observes "that, from the earliest days of the Republic and with every iteration of the bankruptcy laws, Congress tasked the federal courts with administration of the bankruptcy system."[256] This arrangement has repeatedly entailed an intentional choice by Congress "to delegate policymaking power in the bankruptcy arena to the courts rather than an administrative agency."[257] This Section shows how this argument especially applies with respect to the 1841 Act legal regime.

When designing the 1841 Act bankruptcy system, Congress had the option of making the Act either an agency-administered statute or a judicially administered statute. One might be inclined to think that this was merely a theoretical choice given that the federal administrative state was relatively undeveloped at that time.[258] In their analysis of "ex parte court proceedings as a method for the determination of government benefit claims in the early Republic," James Pfander and Daniel Birk observe that "Congress apparently chose to rely on the federal courts to hear such claims in part because of the absence of the sort of federal administrative apparatus available today."[259] They further remark that "[a]side from the postal service, customs collectors, district attorneys, marshals, and lighthouse keepers, early Congresses had little administrative capacity at their disposal and understandably

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court is invested by the statute . . . to appoint *its own officers*" for purposes of carrying out the court's "duty of executing the law" (emphasis added)), *in* S. DOC. NO. 27-19, at 25; *cf. In re* Linton, 136 F.3d 544, 545 (7th Cir. 1998) ("[A] trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code."); Missouri v. Gleick, 135 F.2d 134, 137 (8th Cir. 1943) (describing the bankruptcy trustee under the 1898 Act "as an agent and officer of the court"). Federal district courts also received assistance from other officers of the law who were subject to court control. *See, e.g.*, § 5, 5 Stat. at 445 ("[A]ll such proof of debts shall be made before the court decreeing the bankruptcy, or before some commissioner appointed by the court for that purpose; but such court shall have full power to set aside and disallow any debt . . . .").

256. Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 445 (2012).

257. *Id.* at 386–87.

258. *Cf.* Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 15 (2012) ("One can easily imagine that bankruptcy law would have a different shape if Congress had waited to put it into place. The bankruptcy docket looks on its face like that of many administrative agencies. It resolves huge numbers of cases, and many of them go through a process that is entirely clerical. The typical individual debtor never sees the inside of a courtroom. The issues that are adjudicated are largely those embedded in a complicated federal law. Congress might have created an agency charged with administering the bankruptcy laws.").

259. Pfander & Birk, *supra* note 219, at 1361.

turned to the federal courts to evaluate benefit claims."[260] Notably, their examples of federal judicial administration of government benefit claims include bankruptcy proceedings.[261]

A meaningful choice of delegate, however, did exist at the time of the 1841 Act. Over the course of the prior decade, Congress had initially authorized and subsequently reauthorized on multiple occasions an agency-administered program for the discharge of debt. In March 1831, Congress enacted legislation providing that a debtor who had been insolvent on or before January 1, 1831, and who was "indebted to the United States for any sum of money then due, which he is unable to pay, . . . may make application in writing, under oath or affirmation, to the Secretary of the Treasury, for the purpose of obtaining a release or discharge of the said debt."[262] The legislation further required the Secretary to appoint "commissioners of insolvency" in each federal judicial district to investigate the debtor's application and to issue a report to the Secretary.[263] During this process, the U.S. Attorney for the federal judicial district where the debtor resided would "appear and act before [the commissioners] as

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260. *Id.*; *cf.* Aaron Hall, *Slavery and Emancipation in the Federal Courts*, *in* FED. JUD. CTR., APPROACHES TO FEDERAL JUDICIAL HISTORY 45, 64 (Gautham Rao, Winston Bowman & Clara Altman eds., 2020) ("They [i.e., antebellum federal courts] were instruments of governance at the heart of the American state. They operated primarily to produce order and serve populations who held power — economic, political, cultural, social, and racial."). *But see* Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1643 (2007) ("John Quincy Adams, the last 'Republican' President, bequeathed to Andrew Jackson a General Land Office, thirty-nine local land offices, and a system of administrative land claims commissioners whose adjudicatory output rivaled that of the judiciary."); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE. L.J. (forthcoming 2021) (manuscript at 2), https://ssrn.com/abstract=3696860 [https://perma.cc/9CWV-SSSM] (stating that administration of the 1798 direct tax, "measured by personnel, was the largest federal administrative endeavor, outside the military, of the Constitution's first two decades").

261. *See* Pfander & Birk, *supra* note 219, at 1371–73.

262. Act of Mar. 2, 1831, ch. 62, § 1, 4 Stat. 467, 467.

263. § 3, 4 Stat. at 468. *See generally* Mashaw, *supra* note 260, at 1731 ("From the viewpoint of the first quarter of the nineteenth century, claims adjudication was standard legislative business — when the claims were against the United States. . . . Yet when claims involved a substantial class of persons, such as those applying for relief, Congress often set up commissions to decide the worthiness of claims of particular individual petitioners. . . . These claims commissions not only set precedents that affected the development of the American welfare state; they were also precedents for the use of commissions, rather than courts or Congress, to decide voluminous claims to be paid out of public monies." (footnotes omitted)).

counsel in behalf of the United States."[264] After considering the commissioner report, and upon being satisfied that the debtor did not have the ability to pay the debt due to the United States and had not committed fraudulent acts, the Secretary had the authority to "compromise with the said debtor, upon such terms and conditions as he may think reasonable and proper under all the circumstances of the case, and may execute a release to him or her for the amount of the said debt or debts."[265] Although the legislation initially had been approved to last for only three years,[266] Congress proceeded to amend and reauthorize it,[267] including in May 1840,[268] just slightly more than a year before passage of the 1841 Act.[269] Accordingly, when designing the 1841 Act bankruptcy system, Congress could have sought to build on the agency-administered program for discharging debt that existed at the time. But instead, Congress chose to create a judicially administered system.[270]

Importantly, "statutory gaps in the 1841 Act . . . created ample opportunity for the federal district courts to engage in residual bankruptcy policymaking,"[271] and they often took that opportunity by

264. § 2, 4 Stat. at 467–68.

265. § 4, 4 Stat. at 468.

266. § 10, 4 Stat. at 469.

267. Act of July 14, 1832, ch. 230, 4 Stat. 595; Act of June 7, 1834, ch. 45, 4 Stat. 676; Act of Mar. 2, 1837, ch. 23, 5 Stat. 154.

268. Act of May 27, 1840, ch. 26, 5 Stat. 381.

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

270. In the 1840 reauthorization of the agency-administered program for the discharge of federal government debt, Congress provided that the program would "apply to cases of insolvency, which shall have occurred on or before the passage of this act [i.e., May 27, 1840], or shall occur during the [ensuing] three years." § 2, 5 Stat. at 381. Comparatively, debtors had the opportunity to commence 1841 Act cases from February 1, 1842, through March 2, 1843. *See* § 17, 5 Stat. at 449; Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. While courts disagreed whether the scope of an 1841 Act discharge included government debts, including those owed to the federal government, the more compelling argument was that such debts were dischargeable. *See* Pardo, *Bankrupted Slaves*, *supra* note 30, at 1087 & n.78. Regardless of which was the correct view, the fact remains that some courts construed the Act to discharge federal government debt. Accordingly, for a window of time, certain individuals indebted to the federal government could pursue one of two paths to obtain financial relief. In 1843, Congress reauthorized the agency-administered program for the discharge of federal government debt for another three-year period. *See* Act of Jan. 28, 1843, 5 Stat. 597.

271. Pardo, *Bankrupted Slaves*, *supra* note 30, at 1108; *cf.* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 7–8), https://ssrn.com/abstract=3512154 [https://perma.cc/W9KE-S832] ("Early Congresses . . . adopted dozens of laws that broadly empowered executive *and judicial actors* to adopt binding rules of conduct." (emphasis added)); Pfander & Birk, *supra* note 219, at 1409 ("[S]cholars agree that courts exercising non-contentious jurisdiction perform somewhat the same role as administrative officers or

using their rulemaking authority under the Act.[272] The judges of those courts understood that their use of that authority enabled them to execute the law by filling its substantive gaps, as demonstrated by the federal judiciary's responses to Secretary Webster's request for information on the Act's operation.[273] U.S. District Court Judge Thomas Irwin reported that "[o]ur rules . . . have met other difficulties, which the act at first presented."[274] U.S. District Court Judge Peleg Sprague noted that, among other tools available to the court,

> [t]he power . . . to make new rules as occasion may require . . . will . . . enable the court to obviate nearly all the practical inconveniences which experience may develop (should it be deemed just by Congress to impose upon that tribunal the continued duty of executing the law).[275]

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agencies."); Ann Woolhandler, *Judicial Deference to Administrative Action — A Revisionist History*, 43 ADMIN. L. REV. 197, 199–200 (1991) ("Historically, however, the courts exercised significant lawmaking powers both under the common law and under nineteenth-century administrative law. The pre-ICC law tends to demonstrate the long pedigree of inelegant allocations of lawmaking authority between courts and agencies that persisted until the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council* transferred significant lawmaking authority from the courts to the agencies." (footnotes omitted)).

272. *See* § 6, 5 Stat. at 445–46 (stating that "it shall be the duty of the district court in each district, from time to time, to prescribe suitable rules and regulations, and forms of proceedings, in all matters of bankruptcy"). More broadly, it appears that some federal district court judges sought to coordinate their efforts in administering the Act with the hope of attaining interdistrict consistency in the law's application, as evidenced by a notice to the public that U.S. District Court Judge Henry Potter from North Carolina arranged for the *Fayetteville Weekly Observer* to publish on the day after the 1841 Act took effect. *See Bankrupt Law. United States — North Carolina District.*, *supra* note 240 ("But I am now engaged in a correspondence with several District Judges, with the view of reconciling, as far as we can, the discrepancies of the Act, and of *aiming*, at least, at something like a uniformity of practice. I shall, however, hold myself in readiness to put the Act in operation, according to its spirit and the best of my ability, whether it be amended or not."); *see also* § 17, 5 Stat. at 449 (providing that the 1841 Act's effective date would be February 1, 1842). During the time of the 1841 Act, each federal district court consisted solely of one judge. *See The U.S. District Courts and the Federal Judiciary*, FED. JUD. CTR., https://www.fjc.gov/history/courts/u.s.-district-courts-and-federal-judiciary [https://perma.cc/S64U-X8GS] (last visited Feb. 18, 2021); *see also* Kellen Funk, *The Handmaid of Justice: Power and Procedure in the Federal Courts*, *in* APPROACHES TO FEDERAL JUDICIAL HISTORY, *supra* note 260, at 27, 33, 40 ("For decades, entire federal districts might be staffed by a single judge who was thereby the sole rulemaker of federal practice in his district.").

273. *See supra* note 204 and accompanying text.

274. Letter from Thomas Irwin, U.S. J., W. Dist. of Pennsylvania, to Daniel Webster, Sec'y of State, U.S. Dep't of State (Dec. 24, 1842), *in* S. DOC. NO. 27-19, at 50 (1842).

275. Letter from Peleg Sprague to Daniel Webster, *supra* note 255, *in* S. DOC. NO. 27-19, at 25.

But perhaps the strongest statement, by a judge who administered the 1841 Act and viewed himself to be vigorously engaged in residual policymaking, was that by Judge Monroe, who ended up promulgating over 260 federal bankruptcy rules for the District of Kentucky:[276]

> The statute having been of necessity the establishment of only the general principles of the system, with the outlines of the machinery for its execution, to be carried out by the judicial courts, the details of the law and mode of its execution, established by the courts, must discover much of its probable operation, and aid as much as almost anything else, at this early stage, in forming an opinion of its probable effects. There will be, therefore, forwarded to you herewith a copy of the rules of the court of this district . . . . It is not supposed that this system is near complete; on the contrary it is apprehended that much remains to be done to meet every branch of the subject, and to cover every case which will occur; but as all the proceedings in this district, thus far, have been had in the mode prescribed, and governed by these rules, they will afford all the information which can be furnished from here by such means.[277]

And despite his perception that more gap-filling work remained to be done, Judge Monroe nonetheless celebrated how his efforts up to that point had enabled the 1841 Act to function smoothly.[278]

In administering the 1841 Act, which required directing and controlling bankruptcy trusts, the federal district courts operated as policymakers. Having addressed the last indicia of the *Lebron* framework for discerning federal instrumentality status, a summary of its application to the bankruptcy trust is in order, as is a consideration of the significance of the trust's classification as a public legal entity.

* * *

The 1841 Act bankruptcy trust, a legal entity created by federal law,[279] existed for the primary purpose of pursuing Congress's objective to provide robust relief to financially distressed debtors through the discharge of debt, which was functionally equivalent to a

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276. *See* S. DOC. NO. 27-19, at 83–143 (setting forth the bankruptcy rules promulgated by Judge Monroe under the 1841 Act).

277. Letter from Thomas Bell Monroe to Daniel Webster, *supra* note 74, *in* S. DOC. NO. 27-19, at 144.

278. *Id.* ("This system of rules has been found to work well. It was and is being put into operation with less inconvenience than was expected; and in the progress of the business, success in the several objects of their construction is witnessed, while their operations are becoming still more facile and satisfactory."), *in* S. DOC. NO. 27-19, at 145.

279. *See supra* Section I.A.

government grant.[280] A bankrupt's request for this government benefit claim was administered through the vehicle of the bankruptcy trust, which the federal district courts directed and controlled with the assistance of their agents (e.g., assignees and commissioners).[281] In exerting control over the trust, the federal district courts used their residual policymaking authority to ensure that the 1841 Act's machinery would properly function.[282] Given the institutional-design features of this system, the bankruptcy trust was a federal instrumentality.

To be clear, the argument here is not that Congress or participants in the bankruptcy system would have necessarily understood the 1841 Act to create a federal instrumentality. Indeed, the example of R.P. Gaillard, the assignee in *In re Curto* who paid municipal taxes on enslaved persons belonging to the bankruptcy trust,[283] is some evidence that the system's participants did not have such an understanding. The ordinance pursuant to which the taxes were imposed did not apply to real property, including enslaved persons, that belonged to the United States.[284] If Gaillard had understood the bankruptcy trust to be a federal instrumentality that owned the enslaved persons taxed by the First Municipality, one would have expected him not to have paid the tax or, alternatively, to have paid it under protest, with evidence of such objection in the *Curto* case file.[285]

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280. *See supra* Section I.B.i.

281. *See supra* Section I.B.ii.

282. *See supra* Section I.B.iii.

283. *See supra* notes 111–13 and accompanying text.

284. *See* New Orleans, La., An Ordinance for Imposing a Tax on Slaves and Real Property in the City of New-Orleans, and Its Incorporated Suburbs arts. 1–2 (Aug. 11, 1829), *reprinted in* CALHOUN, *supra* note 113, at 119–20. Louisiana law defined enslaved persons as real property rather than personal property. *See* LA. CIV. CODE art. 461 (1825) ("Slaves, though moveables by their nature, are considered as immoveables, by the operation of law."), *invalidated by* U.S. CONST. amend. XIII, § 1.

285. *Cf.* United States v. New Mexico, 455 U.S. 720, 735 (1982) ("[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned."); Gagne v. Brush, 30 F. Supp. 714, 716 (D.N.H. 1940) ("I hold that a trustee in bankruptcy is an 'instrumentality of the United States' and not subject to an excise tax under the Social Security Act."). *But cf.* Missouri v. Gleick, 135 F.2d 134, 136 (8th Cir. 1943) ("Only by a strained construction can the phrase 'instrumentality . . . of the United States' be held to include a trustee in bankruptcy. The language in question more aptly describes an administrative agency of some department of the government, or a corporation wholly owned by the government, whose employees are paid directly by the government or some other corporation created as an instrumentality of the United States and which is exempt from such taxation under the terms of a federal statute." (omission in original)).

Even so, Gaillard's tax payment illustrates bankruptcy's Promethean gap in action. Congress created a novel and extraordinary federal bankruptcy system in order to improve the condition of suffering debtors, but it did so without comprehending the nature of its creation and thus the power it had bestowed on those responsible for administering the system's machinery.[286] And, for that matter, those wielding the power, like Gaillard, did not understand it or the consequences of its execution.

Recognizing the public entity status of the 1841 Act bankruptcy trust sheds new light on the meaning of the federal government's reliance on the Act to resolve the financial fallout stemming from the Panic of 1837. As part of the price of discharge, debtors had to surrender all of their property and property rights — with the exception of a limited amount of exempt property meant to support debtors and, if applicable, their families — existing as of the date that the court decreed them to be bankrupts and therefore eligible to request a discharge of debts.[287] As previously discussed, this decree had the effect of creating the bankruptcy estate, with the result that the bankruptcy trust acquired all of the bankrupt's property rights.[288] With respect to property owned by the bankrupt at the time of the bankruptcy decree, this meant that the bankruptcy trust became the owner of the property. Because the trust was a federal instrumentality, it meant that the U.S. government had become that property's owner. In other words, Congress had created a system for resolving financial distress that would entail nationalization of certain bankrupts' assets.[289] And it just so happens that some of these nationalized assets

286. For evidence that Congress may have understood the 1841 Act to create a federal instrumentality, consider that the Act permitted a federal district court to

> require of [the] assignee a bond . . . in such sum as it may deem proper, conditioned for the due and faithful discharge of all his duties, and his compliance with the orders and directions of the court; which bond shall be taken *in the name of the United States*.

Act of Aug. 19, 1841, ch. 9, § 9, 5 Stat. 440, 447 (emphasis added). That the assignee had to indemnify the United States suggests that the federal government could be harmed if the assignee failed to adhere to the district court's direction and control.

287. *See* §§ 3–4, 5 Stat. at 442–43. The price of discharge would also have included the direct costs of obtaining that relief, such as attorney's fees and court fees. *See, e.g.*, H.R. DOC. NO. 27-172, at 17–18 (1843) (setting forth a table of fees under the 1841 Act for an unopposed bankruptcy case in the U.S. District Court for the Eastern District of Pennsylvania, administered in the city or county of Philadelphia, and listing a total amount of $30.45).

288. *See supra* Section I.A.ii.

289. *Cf.* Edward L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 OHIO ST. L.J. 1251, 1251 (1989) ("The growth of federal law at the expense of the states may be referred to as the

featured prominently in the business of slavery,[290] as demonstrated by the story of the bankruptcy administration and sale of Banks Arcade.[291]

II. BUILDING ENSLAVING CAPACITY INTO THE ANTEBELLUM ADMINISTRATIVE STATE

To understand the role of Banks Arcade as an iconic site of the U.S. slavery complex, consider the varying approaches of different localities in constituting their antebellum markets for selling enslaved persons.[292] In her work documenting the geography and architecture of the Southern slave trade, Maurie McInnis identifies various distinctions that made the New Orleans slave trade unique. Its massive scope placed the city among a select group of "cities with a large slave market [that] had a significant infrastructure dedicated to the buying and selling of humans," such as Richmond, in contrast to most other Southern towns and cities where "the trade did not have a permanent physical location."[293] The New Orleans slave trade further distinguished itself from those cities with a dedicated slave-trade infrastructure by "boldly assert[ing] itself as part of the competitive

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'federalization' of our legal system. This term is actually a bit awkward, since it sounds a good deal like 'federalism,' which is largely an opposing tendency. But the most convenient alternative, 'nationalization,' is generally reserved for governmental ownership of previously private property. Nationalization can be a rather powerful device for asserting central government control, but it is not the same thing as federalization, and it has not been a major component of that process in our country." (footnote omitted)).

290. For over a period lasting more than a decade, the federal government ended up owning and selling enslaved persons in 1841 Act cases filed by bankrupt slaveowners. *See* Pardo, *Bankrupted Slaves*, *supra* note 30.

291. Regardless of whether this Article's federal instrumentality claim is correct, it is a historical fact that the federal judiciary (i.e., the U.S. government) had a substantial role under the 1841 Act in directing and controlling the business of slavery. *Cf.* Hall, *supra* note 260, at 57 ("Yet in exercising significant indirect control over the practice, experience, and scope of slavery, federal courts surely wielded a more substantial kind of power. . . . [I]t would seem that federal courts' regulation of the subject of such enormous conflict and consequence for seven decades signifies a particular institutional capacity. Indeed, this record on slavery suggests that a revised understanding of federal courts might be brought into the new history of the American state.").

292. Some of the discussion in *infra* notes 293–306 and accompanying text is excerpted, with revisions, from Pardo, *Bankrupted Slaves*, *supra* note 30, at 1148–49.

293. Maurie D. McInnis, *Mapping the Slave Trade in Richmond and New Orleans*, BLDGS. & LANDSCAPES, Fall 2013, at 102, 102 [hereinafter McInnis, *Mapping the Slave Trade*]; *see also id.* at 103 ("What was particularly distinctive in these larger markets is that cities had dozens of permanent business establishments, both buildings and persons, dedicated to the trade.").

commercial landscape," in contrast to, for example, the Richmond slave trade, which was "tucked away" and "occupied a shadow landscape, largely unseen by the city's elite residents."[294] In short, the New Orleans slave trade was "the most conspicuous" of all the major markets,[295] "tak[ing] place in grand public spaces," such as "in the octagonal bar at the St. Charles Hotel and in the rotunda of the St. Louis Hotel."[296]

Like these two hotels, Banks Arcade also featured prominently in the Crescent City's commercial landscape. Designed for Thomas Banks by architect Charles F. Zimpel and constructed in 1833, the Arcade was located in the American Sector on Magazine Street and ran the entire block between Natchez and Gravier Streets, consisting of a continuous three-story edifice made of red brick "with granite pillars at the first level and a parapet with central pediment."[297] Stores occupied the building's façade on Magazine Street, "behind which [a] glass pedestrian arcade extended through the block."[298] Within the building were "a hotel, offices, the armory of the Washington Artillery (Armory Hall), saloons, a restaurant, and the Toutine, a spacious, lushly decorated coffee house."[299] Additionally, the *New-Orleans*

294. *Id.* at 112.

295. MAURIE D. MCINNIS, SLAVES WAITING FOR SALE: ABOLITIONIST ART AND THE AMERICAN SLAVE TRADE 164 (2011) [hereinafter MCINNIS, SLAVES WAITING FOR SALE].

296. McInnis, *Mapping the Slave Trade*, *supra* note 293, at 113; *see also* FREDERIC BANCROFT, SLAVE TRADING IN THE OLD SOUTH 312 (Univ. of S.C. Press 1996) (1931) ("Nowhere else . . . was slave-trading on a large scale so conspicuous. In New Orleans it sought public attention: slave-auctions were regularly held in its two grand hotels besides other public places . . . . Slave-trading there had a peculiar dash: it rejoiced in its display and prosperity; it felt unashamed, almost proud.").

297. *Architectural Inventory*, *in* 2 NEW ORLEANS ARCHITECTURE: THE AMERICAN SECTOR (FAUBOURG ST. MARY) 93, 183 (Mary Louise Christovich et al. eds., 2d prtg. 1978); *see also* REINDERS, *supra* note 112, at 210–11 (describing Banks Arcade in similar terms). For more on Zimpel, see Ellen Terrell, *Charles Zimpel: Architect, Surveyor, Businessman*, LIBR. CONG.: INSIDE ADAMS (Sept. 24, 2018), https://blogs.loc.gov/inside_adams/2018/09/charles-zimpel-architect-surveyor-businessman/ [https://perma.cc/P2V2-JGXL]. A map of New Orleans produced for an 1845 guidebook, *Norman's New Orleans and Environs*, marks the location of Banks Arcade. That map appears as an inset in the back of the 1976 facsimile reproduction of the guidebook, *see* BENJAMIN MOORE NORMAN, NORMAN'S NEW ORLEANS AND ENVIRONS (Matthew J. Schott ed., La. State Univ. Press 1976) (1845), and can also be viewed online, *Norman's Plan of New Orleans & Environs, 1845*, LIBR. CONG., https://www.loc.gov/item/98687133/ [https://perma.cc/2457-PJES] (last visited Mar. 5, 2021).

298. *Architectural Inventory*, *supra* note 297, at 183.

299. REINDERS, *supra* note 112, at 211.

Commercial Bulletin had its office in the building at the corner of Gravier Street.[300]

The Arcade's proximity to, among other places, the Mississippi River, St. Charles and St. Louis Hotels, and U.S. Custom House, which was home to the Eastern District of Louisiana's federal district court,[301] signified that the Arcade was advantageously situated in the Crescent City's corridor of commerce, information,[302] and government power.[303] Banks thus appears to have fulfilled his vision of creating a premier commercial venue.[304] And like many Southern business enterprises during the antebellum era, Banks Arcade heavily relied on the domestic slave trade. The site would eventually rank as "one of the five or six most popular [slave] marts" in New Orleans.[305] As such, the Arcade constituted one of New Orleans's "very public places [where] . . . the disparity between the refinement that Southern riches allowed and the barbarity of the slave trade on which Southern riches depended was most conspicuously contrasted."[306] Importantly, the 1841 Act introduced a new dimension to this dynamic. As the riches of some Southern debtors who were involved in the business of slavery crumbled away, thereby prompting them to seek relief under the Act, the resulting bankruptcy trusts in those cases provided the federal government with an opportunity to nationalize assets at the heart of the domestic slave trade, including Banks Arcade.

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300. *Architectural Inventory*, *supra* note 297, at 183. For background information on the *Bulletin*, see REINDERS, *supra* note 112, at 227.

301. *See* NORMAN, *supra* note 297, at 89; *infra* Figure 1.

302. *See* LEPLER, *supra* note 27, at 115 (discussing the "local information network" that existed at Banks Arcade).

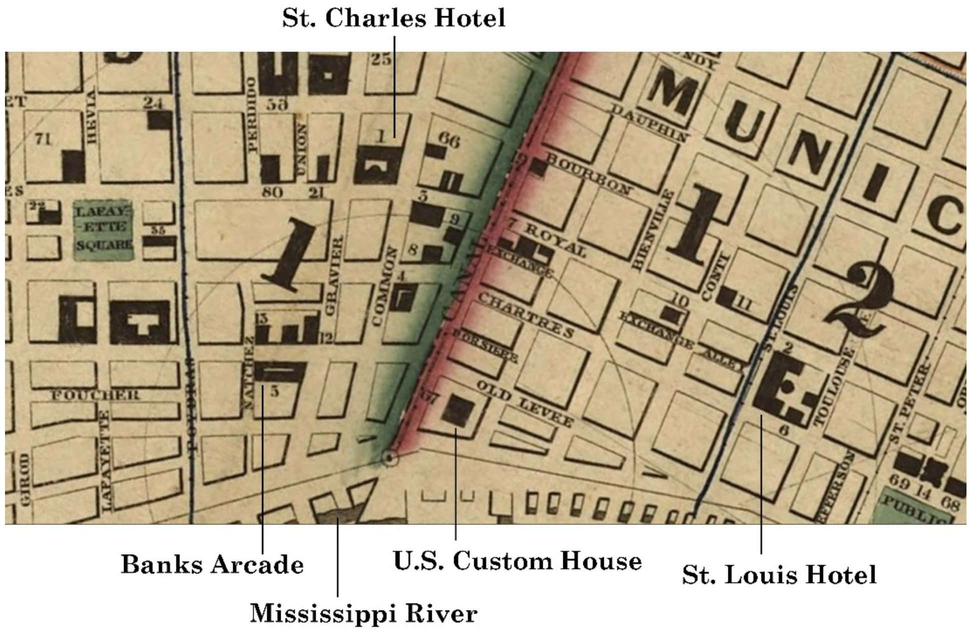
303. For a description of what the impressions of a mid-nineteenth-century visitor to this area might have been, see Leonard V. Huber, *Foreword* to 2 NEW ORLEANS ARCHITECTURE: THE AMERICAN SECTOR (FAUBOURG ST. MARY), *supra* note 297, at vii, vii.

304. *See Architectural Inventory*, *supra* note 297, at 183 (stating that Banks Arcade "was intended to be a gathering place for merchants and to serve the community above Canal [Street] in the same manner as Maspero's Exchange did below Canal"); Mary Louise Christovich & Roulhac Toledano, *Banking and Commerce*, *in* 2 NEW ORLEANS ARCHITECTURE: THE AMERICAN SECTOR (FAUBOURG ST. MARY), *supra* note 297, at 65, 70–71 (stating that "Banks Arcade . . . was envisioned by its promoter, Thomas Banks, as a commercial center on Magazine Street to compete with Maspero's Exchange in the French Quarter").

305. BANCROFT, *supra* note 296, at 324.

306. MCINNIS, SLAVES WAITING FOR SALE, *supra* note 295, at 164.

Figure 1: Location of Banks Arcade[307]



Before turning to the bankruptcy administration and sale of the Arcade, one should recognize that this story is not just about a distressed asset. The Arcade, as a center for the business of slavery, had a gravitational pull that brought many individuals who made a living from the trade into the building's domain, some of whom also commenced 1841 Act cases to escape their burdensome debts. In this regard, the Act at times had a multiplier effect that redoubled the federal government's direct involvement in the business of slavery. To illustrate how this phenomenon unfolded during the bankruptcy administration of Banks Arcade, we can focus on one individual, Joseph A. Beard, also known as "'Major Beard, the great slave-auctioneer of New Orleans,"[308] who quite likely sold more enslaved

307. Figure 1 is a close-up image of the map produced for the 1845 guidebook titled *Norman's New Orleans and Environs*. *See* NORMAN, *supra* note 297. The map has been altered by adding the location labels paired with straight lines pointing to the corresponding locations. The original map is oriented with its upper right-hand corner pointing north and so too is the close-up image. *See Norman's Plan of New Orleans & Environs, 1845*, *supra* note 297.

308. BANCROFT, *supra* note 296, at 324 (quoting JAMES STIRLING, LETTERS FROM THE SLAVE STATES 239 (London, John W. Parker & Son 1857)).

persons during the 1840s and 1850s than anyone else in the city,[309] a particularly ignominious achievement given that New Orleans had hundreds of traders.[310]

Much of Beard's slave-auctioneering activity occurred in Banks Arcade.[311] For example, a *Commercial Bulletin* advertisement on March 24, 1840, announced that he would conduct an auction the following day at the Arcade for the cash sale of 16 enslaved Black Americans, including Grace, a 23-year-old field hand, and her two children, Martha, who was seven years old, and Andrew, who was three years old.[312] Fast forward to February 8, 1842, and yet another *Commercial Bulletin* advertisement announced a Beard auction at Banks Arcade the next day involving (1) the credit-based sale of Nelson and his mother, Mary Ann, a "confidential house girl, first rate cook, washer and ironer," pursuant to which a portion of the purchase price would be financed on a secured basis; and (2) the cash-only sale of John and his mother, Maria, "a first rate French and American cook."[313] Exactly one month after that advertisement, Beard commenced his 1841 Act case,[314] owing creditors a total of \$64,513.67.[315] Five days after seeking bankruptcy relief, his plans for regaining financial stability suffered a major setback when the St. Charles Theatre fire damaged his Camp Street Auction Mart,[316] which was located just a couple of blocks from Banks Arcade.[317]

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309. *Id.*; *cf.* Richard Tansey, *Bernard Kendig and the New Orleans Slave Trade*, 23 LA. HIST. 159, 169 n.30 (1982) ("During the 1855–1856 fiscal year, J.A. Beard sold 569 slaves on his block, charging a two-and-one-half percent commission for each slave.").

310. *See, e.g.*, BANCROFT, *supra* note 296, at 314; STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE 153 (2005).

311. *See* BANCROFT, *supra* note 296, at 324.

312. *Valuable Negroes at Auction*, NEW-ORLEANS COM. BULL., Mar. 24, 1840, at 2.

313. *Superior House Servants*, NEW-ORLEANS COM. BULL., Feb. 8, 1842, at 2. The precise terms set for the sale of Nelson and Mary Ann were "[o]ne half cash, balance at 4 months credit for approved endorsed paper with mortgage until final payment." *Id.*

314. Joseph A Beard & Charles B. Bioren v. Their Individual Creditors & the Creditors of the Firm of Beard & Bioren, *In re* Beard & Bioren, No. 96 (E.D. La. Mar. 8, 1842).

315. Pardo, *Federally Funded Slaving*, *supra* note 196, at 802. This amount would exceed \$2 million in 2019 dollars according to a conservative estimate of relative value based on changes in the Consumer Price Index (CPI). *See* Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount 1790 to Present*, MEASURINGWORTH, https://www.measuringworth.com/calculators/uscompare/ [https://perma.cc/44ML-M8UK] (last visited Feb. 5, 2021). At the other end of the spectrum, if estimating relative value based on changes in per capita gross domestic product (GDP), this amount would exceed \$47 million in 2019 dollars. *See id.*

316. *See* Pardo, *Federally Funded Slaving*, *supra* note 196, at 798–99.

317. *See id.* at 799 fig.2.

Notwithstanding this adversity, Beard would bounce back, ultimately seeking to re-establish himself by moving his business to the Arcade.[318]

But before we reach that point in the story, we need to return our attention to Banks, who added his name to the steadily growing list of case-filing statistics for the 1841 Act. More precisely, the U.S. Court Clerk for the Eastern District's federal district court (or someone working for him) recorded Banks's case, commenced on July 30, 1842, as case number 353 in the court's 1841 Act docket books.[319] Banks purportedly ended up in financial ruin "because of his support of the Texas Revolution and financial speculations in New Orleans."[320] The schedule of assets that he filed with his bankruptcy petition stated that he owned "[t]he block of three story brick buildings, forming the entire front of Magazine street, between Gravier and Natchez streets, with rear block known as the Arcade Exchange, valued at $350,000.00."[321]

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318. *See infra* notes 330–32 and accompanying text.

319. 1 U.S. DIST. CT. FOR THE E. DIST. OF LA., BANKRUPTCY ACT OF 1841 DOCKETS, 1842–1843, at 353 (located in Record Group (RG) 21, The National Archives at Fort Worth, Texas). Those docket books, which set forth "the case number, name of the petitioner, and a brief abstract of papers filed and actions" taken in each case, *Bankruptcy Act of 1841 Dockets, 1842–1843*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/4513372 (last visited Feb. 5, 2021), would ultimately include a total of 763 bankruptcy cases, *see* Pardo, *Financial Freedom Suits*, *supra* note 29, app. A at 173–75.

320. *Architectural Inventory*, *supra* note 297, at 183.

321. *Houston* Record Transcript, *supra* note 147, at 91. Individuals sometimes referred to Banks Arcade as the Arcade Exchange, just as Banks did in his schedule of assets. For example, an 1842 New Orleans directory includes a listing for "Hewlett & Cenas, auctioneers, 44 Magazine street." NEW ORLEANS DIRECTORY, *supra* note 129, at 196. That address was located in Banks Arcade. *See Houston* Record Transcript, *supra* note 147, at 109. A *Daily Picayune* advertisement on May 1, 1842, announced that Hewlett & Cenas would sell a steamer the following day "at *the Arcade Exchange*, Magazine street." *Auction Notice!*, DAILY PICAYUNE (New Orleans), May 1, 1842, at 3 [hereinafter *Auction Notice! (May 1, 1842)*] (emphasis added). Also, individuals sometimes amalgamated Banks Arcade and the Arcade Exchange into a single name when referring to the building. For example, a *Daily Picayune* advertisement from 1844 announced a sale at "*Banks' Arcade Exchange*, by virtue of and in obedience to an order from the honorable the Probate Court . . . the following described Property, situated in the city of New Orleans, belonging to the succession of P. P. Rea, deceased." *Succession Sale. By J. W. Furness.*, DAILY PICAYUNE (New Orleans), May 1, 1844, at 3. Rea was one of the *Commerical Bulletin*'s publishers. *See, e.g.*, NEW-ORLEANS COM. BULL., Jan. 2, 1843, at 1 (listing "P.P. & T. Rea & J. Beardslee" as the newspaper's publishers). The scheduled value of Banks Arcade would exceed $11.3 million in 2019 dollars according to a conservative estimate of relative value based on the CPI. *See* Williamson, *supra* note 315. At the other end of the spectrum, if estimating relative value based on per capita GDP, this amount would exceed $4.6 billion in 2019 dollars. *See id.* For a contemporary comparison that provides an additional perspective of the scheduled value of Banks Arcade, consider the original St. Charles Theatre, which was built in 1835 at a cost ranging from $250,000 to $300,000 and which at the time was the

On September 5, 1842, U.S. District Judge Theodore Howard McCaleb declared and decreed Banks a bankrupt under the 1841 Act.[322] That same day, Judge McCaleb appointed Francis B. Conrad, an attorney whose office was located in the French Quarter at 29 Exchange Place, just a few blocks away from the federal district court,[323] to serve as the assignee of Banks's estate.[324] Judge McCaleb further ordered Conrad to "give security in a bond to the United States . . . in the sum of thirty thousand dollars, conditioned for the due and faithful discharge of all his duties as such assignee, and his compliance with the orders and directions of the court."[325] Four days later, Conrad filed the bond with the clerk's office of the federal district court, declaring himself to be "held and firmly bound to pay the United States of America in the sum of thirty thousand dollars" and further stating that the bond was "conditioned for the due and faithful discharge of all his duties . . . as . . . assignee, and for his compliance with the orders and directions of the court in the matter of the bankruptcy of . . . Thomas Banks."[326]

Based on the legal principles previously discussed,[327] September 5, 1842, marked the day when the *Banks* bankruptcy trust was created, thereby making the federal government the owner of the Arcade, which Conrad would administer subject to Judge McCaleb's direction and control. The fact that Judge McCaleb used his discretion under the 1841 Act to set Conrad's bond for the eye-popping amount of $30,000 accentuates the importance of that trust to the federal government.[328] To date, I have documented the assignee bond amount for approximately 37% (283 of 763) of the Eastern District's 1841 Act cases. In those cases, the median and mean amounts of the assignee's

fourth largest theatre in the world. *See* Pardo, *Federally Funded Slaving*, *supra* note 196, at 794–95, 794 n.33.

322. *Houston* Record Transcript, *supra* note 147, at 91. For a discussion of Judge McCaleb's role in the Eastern District's bankruptcy slave trade, see Pardo, *Bankrupted Slaves*, *supra* note 30, at 1142–61.

323. *See* NEW ORLEANS DIRECTORY, *supra* note 129, at 88. Exchange Place appears parallel to Chartres and Royal Streets and perpendicular to Canal Street. *See supra* Figure 1.

324. *See Houston* Record Transcript, *supra* note 147, at 91–92.

325. *Id.* at 92.

326. *Id.*

327. *See supra* Part I.

328. This amount would equal $971,000 in 2019 dollars according to a conservative estimate of relative value based on the CPI. *See* Williamson, *supra* note 315. For a discussion of the bonding requirement that a federal district court could impose on an 1841 Act assignee and how that requirement might constitute evidence of Congress's understanding that the Act created a federal instrumentality, see *supra* note 286.

bond were, respectively, $50 and $1,118.[329] The amount that Conrad had to post for his assignee bond in Banks's case was not only 600 times and 27 times greater than, respectively, the median and mean bond amounts in these cases, but it was also the highest amount among all of them. This further underscores the significance and value of the *Banks* bankruptcy trust's assets, including the Arcade.

After Conrad posted his bond and began tackling the work of marshaling and liquidating the trust's assets, Beard announced in a *Daily Picayune* notice dated September 14, 1842, and addressed to "his friends and public generally, that his Auction Office [wa]s removed to No. 45 Magazine street, next to the Arcade Bar-room."[330] Beard further informed his audience about his "services for the sale of Real Estate, Negroes, Syndics' and Bankrupt Estates."[331] He ended by noting that adjacent to his office was "a Broker's Office, for the purchase and sale of every description of property."[332] Beard's relocation from the Camp Street Auction Mart placed him in the heart of the Arcade, as a result of which he would enter into a lease agreement with the *Banks* bankruptcy trust.[333]

Within the first month in his role as assignee, Conrad began evaluating the trust's estate and devising a game plan for marshaling and liquidating its assets. That initial assessment led him to conclude fairly quickly that liquidating the Arcade would present significant challenges, which in turn prompted him to begin the process for obtaining court approval of responsive measures. Conrad's attorney, Judah P. Benjamin, whose law office was closely located to Conrad's office,[334] filed and presented Conrad's initial petition to the Eastern District's federal district court on October 10, 1842.[335] The *Banks* bankruptcy trust could not have had a more elite attorney representing its interests: Benjamin would "emerge as the most prominent New

329. According to a conservative estimate of relative value based on the CPI, the approximate median and mean amounts of the assignee's bond in 2019 dollars would respectively be $1,780 and $37,085. *See* Williamson, *supra* note 315.

330. *Auction Notice!*, DAILY PICAYUNE (New Orleans), Sept. 15, 1842, at 3 [hereinafter *Auction Notice! (Sept. 15, 1842)*]. For background information on the *Picayune*, see REINDERS, *supra* note 112, at 227–28.

331. *Auction Notice! (Sept. 15, 1842)*, *supra* note 330.

332. *Id.*

333. *See infra* notes 370–76 and accompanying text.

334. Benjamin's office was located at 11 Exchange Place, *see* NEW ORLEANS DIRECTORY, *supra* note 129, at 29, and Conrad's office was located at 29 Exchange Place, *see supra* text accompanying note 323.

335. *See Houston* Record Transcript, *supra* note 147, at 93–94.

Orleanian of his century,"[336] serving as one of Louisiana's U.S. Senators,[337] declining a nomination to serve on the U.S. Supreme Court,[338] and serving as Attorney General, Secretary of State, and Secretary of War for the Confederate States of America during the Civil War.[339] On that pleasantly crisp fall day,[340] this high-powered attorney sought to convince Judge McCaleb that it would be in the trust's best interests to delay the sale of Banks Arcade and that a hearing on the matter should be scheduled.

In his petition, Conrad began by noting "[t]hat the property surrendered by [Banks] is very large and valuable, and consists in part of the establishments known in the city of New Orleans as the City Hotel, *the Arcade Exchange*, the National Hotel, and the Commercial Hotel."[341] He explained his rationale for why the circumstances warranted delaying the sale of the properties: "[T]hese establishments are each of such great value that if sold in block, in the present embarrassed state of affairs, so few persons have the means of purchasing, that there would be no competition, and the sale would be attended *with a very ruinous sacrifice*."[342] In order to generate the best return for the bankruptcy trust, Conrad advocated for reconfiguring the properties: "It would be much more advantageous to subdivide said establishments as far as practicable, so as to reduce the value of each property to an amount that would admit of competition amongst bidders at the sale."[343]

This strategy would make it "necessary to have plans made of the property, [and] division walls erected,"[344] all of which would take time. As such, a sale could not take place earlier than the start of the following year, which complicated matters given that the properties were subject to leases, most of which were soon to expire in approximately three weeks' time, on November 1.[345] Relying on his knowledge of the Crescent City's leasing practices, Conrad bolstered

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336. ROBERT DOUTHAT MEADE, JUDAH P. BENJAMIN: CONFEDERATE STATESMAN 44 (1943).

337. *Id.* at 86.

338. *Id.* at 84–85.

339. *Id.* at 161, 208, 235.

340. *See* NEW-ORLEANS COM. BULL., Oct. 11, 1842, at 2 ("The cool weather yesterday was quite favorable for outdoor transactions.").

341. *Houston* Record Transcript, *supra* note 147, at 93 (emphasis added).

342. *Id.* (emphasis added).

343. *Id.*

344. *Id.*

345. *Id.*

his proposed plan of attack by framing it in terms of his business judgment. He contended

> that the usual and most advantageous terms of lease, in New Orleans, are annual leases, terminating on the first of November of each year; that not only will better [prices] be obtained by renting the property for one year from the first November next, but prices more advantageous will be given for property when sold with tenants occupying it, than if not occupied; and that petitioner is therefore desirous of being authorized to lease the property of the bankruptcy for the space of one year from the first of November next . . . up to the thirty-first October, eighteen hundred and forty-three.[346]

Conrad's plan, however, faced a further complication. Banks had mortgaged nearly all of the properties. The mortgage creditors had indicated in their negotiations with Conrad that they would be willing to go along with his proposed plan to delay the sale of the properties, and in the interim partition and lease them for a year, but only "on the condition that the accruing rents shall enure to their benefit under the mortgages, so far as may be necessary to liquidate their claims against the property."[347] However, Conrad anticipated that the mortgage creditors would be willing to divert a portion of the rental income stream for the benefit of the *Banks* bankruptcy trust: "[T]he rents which will accrue will, in the opinion of petitioner, suffice not only to pay the accruing interest on the mortgage debts, but also to extinguish a part of the capital, and defray the expenses of repairs, insurance, plans, &c."[348] Moreover, Conrad represented that he would seek a concession from the mortgage creditors that distributions to them from the rental income would be subordinate to the bankruptcy trust's claim to the income for purposes of paying the expenses of administering the mortgaged properties.[349] These were the terms proposed by Conrad to the court in seeking authority "to compromise with the mortgage creditors" and to lease the properties, "so far as he . . . deem[ed] expedient," for one-year terms ending on October 31, 1843.[350]

346. *Id.* (alteration in original).

347. *Id.*

348. *Id.*

349. *Id.* at 93–94 ("Wherefore, this petitioner humbly prays to be permitted . . . to compromise with the mortgage creditors as follows, viz., that they shall consent to a postponement of the sale until the necessary preparations can be made as hereinbefore explained, on condition that the accruing rents shall, *after payment of the expenses of repairs, insurance, &c.*, be applied towards the satisfaction of the debts secured by mortgage respectively on the property on which such rents shall accrue." (emphasis added)).

350. *Id.* at 93.

Judge McCaleb deemed Conrad's plan sufficiently persuasive to warrant a hearing on the matter. Judge McCaleb ordered Conrad to place notices in the *New-Orleans Bee* and the *Commercial Bulletin* and scheduled the hearing for the morning of October 24, 1842,[351] "when and where the bankrupt, the creditors and all other persons in interest, [could] appear and show cause, if any they ha[d], why the prayer of [Conrad's] petition should not be granted."[352] In addition to issuing this order on October 10, 1842, the court took further action that significantly impacted the administration and sale of the Arcade. On that same day, the court adopted a bankruptcy rule that enhanced an assignee's power to administer a bankruptcy trust's mortgaged property.[353] Although it is unclear whether Judge McCaleb abstractly devised this rule, divorced from any considerations regarding any particular proceeding, including the *Banks* matter before him that day,[354] the timing of the rule's promulgation suggests that the court may have engaged in result-oriented residual policymaking — namely, using the court's rulemaking authority to ensure that Conrad would be able to sell the *Banks* bankruptcy trust's properties, foremost among them the Arcade.[355]

While a bankruptcy trustee today has express authority under the Code to sell the bankruptcy trust's property free and clear of any interest, including a mortgage, upon satisfying certain conditions,[356] the 1841 Act was unclear on the matter. The Act clearly stated that it would not "annul, destroy, or impair . . . any liens, mortgages, or other securities on property" that were valid under state law and undisplaced by any specific provision of the Act.[357] One federal district court opined that this language reflected Congress's "intention . . . that such mortgages should be protected as privileged liens."[358] Furthermore, the Act expressly gave the assignee the "full authority, by and under

351. *Id.* at 94.

352. NEW-ORLEANS COM. BULL., Oct. 15, 1842, at 3.

353. *See infra* text accompanying note 363.

354. To date, I have not located a complete set of the bankruptcy rules promulgated by the U.S. District Court for the Eastern District of Louisiana. The materials that contain excerpts of these rules do not provide any background information indicating what prompted their adoption. *See Houston* Record Transcript, *supra* note 147, at 93; *Nugent* Record Transcript, *supra* note 143, at 18–19.

355. The discussion in *infra* notes 356–65 and accompanying text is excerpted, with some revisions, from Pardo, *Bankrupted Slaves*, *supra* note 30, at 1153–55.

356. *See* 11 U.S.C. § 363(f).

357. *See* Act of Aug. 19, 1841, ch. 9, § 2, 5 Stat. 440, 442 (repealed 1843).

358. Yeadon v. Planters' & Mechs.' Bank, 30 F. Cas. 793, 794 (D.S.C. 1843) (No. 18,130).

the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage . . . , upon any property, real or personal, . . . and to tender a due performance of the conditions thereof."[359] But nowhere did the Act expressly give the assignee the power to sell the bankruptcy trust's mortgaged property free and clear of such interests.

Forced to grapple with the issue of the assignee's sale power, federal courts engaged in residual bankruptcy policymaking to fashion limits on what the assignee could do in such a situation. One district court took the view that, without a mortgage creditor's consent, an assignee's only option for removing a mortgage on the bankruptcy trust's property would be to exercise the redemption power expressly granted by the Act — specifically, by paying the mortgage creditor the balance of the debt owed to it.[360] Alternatively, the same court took the view that, with a mortgage creditor's consent, "the court [could] order a sale of mortgaged premises, where the creditor applies to the court for that purpose, and that, under the decree ordering such sale, a good, valid, and sufficient legal title to the premises may be made to pass to the purchaser."[361] Finally, a federal circuit court held that the sale of mortgaged property by the assignee for an amount less than the amount owed to the mortgage creditor would fail to discharge the mortgage — that is, the third-party purchaser would take the property subject to the mortgage.[362]

Judge McCaleb, however, took a different approach to tackle this issue. The rule that he promulgated on October 10, 1842, provided that, upon the court's grant of an order approving an assignee's petition to sell the bankruptcy trust's property, the court's order would

> *ipso facto annul the mortgages, liens, and privileges existing on the property ordered to be sold*; and the recorders of the mortgages shall, on the presentation of such order, cancel all inscriptions existing on their records against such property, and the mortgages, liens, and privileges shall attach to the proceeds of the sale in the same manner,

359. § 11, 5 Stat. at 447.

360. *See Yeadon*, 30 F. Cas. at 794 ("I understand the law to be that the court in bankruptcy cannot dispose of such security of a creditor *without his consent*, but that the assignee may, under the direction of the proper court in bankruptcy, redeem and discharge the same." (emphasis added)).

361. *Id.* at 794–95.

362. *See Ex parte* Christy, 44 U.S. (3 How.) 292, 326, 332 (1845) (Catron, J., concurring in part and dissenting in part) (incorporating opinion of Justice Henry Baldwin decided in his capacity as Circuit Justice for the Eastern District of Pennsylvania).

> to the same extent, and with the same effect, as to the property sold.[363]

Judge McCaleb thus fashioned a substantive rule that, irrespective of creditor consent, would wipe out a creditor's mortgage on the bankruptcy trust's property and transfer it to the sale proceeds from that property — a decidedly different result than that reached by the Circuit Court for the Eastern District of Pennsylvania.[364] While Judge McCaleb also promulgated a rule that would generally give mortgage creditors the power to dictate the terms for the sale of the property securing their claims,[365] such a rule was tantamount to coerced consent. Put another way, mortgage creditors in the Eastern District of Louisiana could not opt out of the bankruptcy process and exercise their state-law rights in the bankruptcy trust's mortgaged property. Perhaps unsurprisingly, although the district's assignees had relied on the Act's redemption power to deal with mortgaged property prior to Judge McCaleb's promulgation of the mortgage cancellation rule,[366] assignees thereafter routinely relied on the rule when administering bankruptcy trust property subject to a mortgage.[367] And as we will see, Conrad relied on this rule with regard to the sale of Banks Arcade.[368]

Two weeks after the rule's promulgation, Conrad's petition to lease the bankruptcy trust's properties once again came before the court. At the hearing, which was attended by Judah Benjamin representing Conrad and by "certain creditors . . . represented by their attorneys," Judge McCaleb concluded that sufficient cause had not been shown to deny Conrad's requested relief. This conclusion prompted the court to

363. *Houston* Record Transcript, *supra* note 147, at 94 (emphasis added).

364. *See supra* note 362 and accompanying text.

365. *Houston* Record Transcript, *supra* note 147, at 94 ("Creditors by mortgage, lien, or privilege, shall in all cases be permitted to fix the terms of sale of the property subject to their claims; provided, that in no case shall they be permitted, in opposition to the assignee, to fix the terms of credit shorter than those to which the bankrupt himself was entitled.").

366. *See, e.g.*, Petition to Redeem Mortgages and Discount Note, *In re* Layet & Amelung, No. 18 (E.D. La. Apr. 20, 1842) (stating "that by the 11th Section of the Bankrupt Act, the Judge of the District has the power to authorise the Assignee to redeem & discharge all mortgages & liens on real & personal property").

367. *See, e.g.*, Petition of J.P. Benjamin Assignee to Sell the Property & to Erase & Cancel the Mortgages, *In re* Chase, No. 672 (E.D. La. Nov. 10, 1843); Petition to Erase & Cancel the Mortgages, *In re* Nathan, No. 620 (E.D. La. Sept. 20, 1843); Petition of H. Baines Assignee to Raise & Cancel Mortgages, *In re* Mitchell, No. 404 (E.D. La. Feb. 17, 1843); Petition of Wm. Christy Assignee to Erase the Mortgages Liens & to Sell the Property of the Bankrupt, *In re* Andrews, No. 260 (E.D. La. Nov. 11, 1842); Petition of J.A. Durel Assignee to Sell the Property and to Raise the Mortgages Against the Estate of the Said Bankrupt, *In re* Tricou, No. 381 (E.D. La. Oct. 17, 1842).

368. *See infra* text accompanying notes 382–83.

enter an order authorizing Conrad "to rent the property of the bankrupt from the first of November next, for the twelve months following, and to compromise with the mortgage creditors as prayed for in his petition."[369]

Having been given the green light by Judge McCaleb, and with the first of November fast approaching, Conrad immediately turned his attention to leasing the various spaces within Banks Arcade. Recall that, in the month before the hearing, slave auctioneer Beard had announced the relocation of his auction office to 45 Magazine Street,[370] to which was attached his broker's office.[371] Whatever lease arrangement Beard may have had for these offices in the Arcade for the months of September and October 1842,[372] Beard entered into an agreement with the *Banks* bankruptcy trust to lease the offices for a one-year period beginning on November 1, 1842, at the monthly rates of $75 for his auction office and $16.66 for his broker's office.[373]

One of the factors motivating Beard to choose 45 Magazine Street as his new auction office may have been its location adjacent to the Arcade Exchange Room at 44 Magazine Street, the site where auctions took place in Banks Arcade. While the auctioneering business of Hewlett & Cenas had been the tenant at that address during the earlier part of the year,[374] Conrad leased the space on behalf of the *Banks* bankruptcy trust to J.M. Caballero, a commission merchant,[375] for approximately a six-month period — beginning on November 1, 1842, and ending on April 25, 1843 — at a monthly rate that appears to have been $70 for the first two months and $63 for the remainder of the lease

369. *Houston* Record Transcript, *supra* note 147, at 95 (emphasis added).

370. *See supra* text accompanying note 330.

371. *See Auction Notice! (Sept. 15, 1842)*, *supra* note 330 ("Attached to My office is a Broker's Office, for the purchase and sale of every description of property.").

372. Recall that Judge McCaleb did not decree Banks to be a bankrupt until September 5, 1842. *See supra* text accompanying note 322. The possibility thus exists that Banks may have initially leased to Beard the space for his relocated auction office at 45 Magazine Street and his adjacent broker's office. *See Houston* Record Transcript, *supra* note 147, at 152 ("That at the date of said application a great part of his said property was under leases, to expire on or about the 1st day of November then next succeeding, and that the said Banks had received from his tenants promissory notes to himself or order, payable and falling due on or after the date of his said petition in bankruptcy, to the farther amount of twenty thousand dollars and upwards.").

373. *See id.* at 109–10.

374. *See* NEW ORLEANS DIRECTORY, *supra* note 129, at 196; *Auction Notice! (May 1, 1842)*, *supra* note 321.

375. *See* NEW ORLEANS DIRECTORY, *supra* note 129, at 58; *see also* DAILY PICAYUNE, Nov. 10, 1842, at 2 (reporting that, of the $23,673 of specie that arrived in New Orleans on the Creole, $1,030 of that specie "was consigned [to] . . . J.M. Caballero").

term.[376] Not only did Conrad's plan prolong federal ownership of Banks Arcade, but it also further entrenched the U.S. government in the business of slavery given the commercial activity of some of the Arcade's tenants.[377]

After leasing the Banks Arcade properties, Conrad turned his attention to arranging the building's partition in anticipation of its sale. He hired architect James Dakin, whose office was located at 48 Canal Street,[378] to draw up a subdivision plan, which Dakin completed on January 5, 1843, after significant delay.[379] The plan resulted in the reconfiguration of Banks Arcade into 21 separate properties.[380] On January 6, 1843, Judge McCaleb held a hearing on Conrad's petition to sell the bankruptcy trust's properties, including the subdivided lots in Banks Arcade.[381] In approving the petition, the court relied on the mortgage cancellation rule that it had adopted on October 10, 1842:[382]

> [I]n order to convey a title to any purchaser . . . of the property surrendered, it is ordered that the assignee be authorized to cause to be erased and cancelled from the records of the office of mortgages the mortgages recorded in favor of the [bankruptcy trust's mortgage] creditors, reserving to them all their rights in law to the proceeds of the sale upon the distribution thereof.[383]

Ruling on January 15, 1843, on a subsequent petition by Conrad to modify the terms of the court's sale order, Judge McCaleb instructed

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376. *See Houston* Record Transcript, *supra* note 147, at 34, 109–10. The *Banks* bankruptcy trust's statement of receipts from the rental of the Banks Arcade properties, which misspells Caballero's last name as "Cabalero," indicates the following payments made by him for the lease of the lower part of the 44 Magazine Street property: (1) $70 on December 7, 1842, for the November 1842 rent; (2) $133 on February 2, 1843, for the December 1842 rent; (3) $63 on March 6, 1843, for the February 1843 rent; and (4) $63 on April 16, 1843, for the March 1843 rent. *See id.* at 109–10. The statement does not include an entry specifically itemizing Caballero's payment of the January 1843 rent. *See id.* Given that Caballero's payment on February 2, 1843, for the December 1842 rent was $133, and given that each of the next two monthly payments (i.e., for the February and March 1843 rent) was $63, it seems likely that Caballero's $133 payment on February 2, 1843, represented $70 for the December 1842 rent and $63 for the January 1843 rent. If so, then the statement does not properly identify the monthly installments to which the $133 payment corresponded.

377. *See infra* notes 403–07 and accompanying text.

378. NEW ORLEANS DIRECTORY, *supra* note 129, at 99.

379. *See Houston* Record Transcript, *supra* note 147, at 33–34, 95.

380. *See id.* at 33–37.

381. *Id.* at 98.

382. *See supra* text accompanying note 363.

383. *Houston* Record Transcript, *supra* note 147, at 99.

that the sale take place at noon on February 15, 1843, either at Banks Arcade or at the St. Louis Hotel's exchange.[384]

Conrad elected to hold the sale at Banks Arcade.[385] The federal marshal, Algernon Sidney Robertson, conducted the sale,[386] whose scope was massive: the published sale advertisement occupied two and a half columns on the *Bee*'s front page.[387] The advertisement announced that the Arcade had been partitioned into 21 lots, including Lot Nos. 4 and 5, which together constituted the Arcade Exchange Room.[388] The sale terms required winning bidders to make a cash down payment of one-third the purchase price, with the balance payable in five equal installments at six-month intervals.[389] Moreover, the remaining balance would be secured by a mortgage on the property.[390] As a result, the *Banks* bankruptcy trust would assume the role of a secured creditor with respect to the purchased property, which would prolong the U.S. government's involvement with it.

In his representation of some of the auction's winning bidders in Supreme Court litigation over the sale of the Arcade, Henry Clay described the auction as "one of the most notorious and attractive that ever took place in the city of New Orleans, from the conspicuous position, great value, and well-known character of Banks's Arcade."[391] He noted that the event "brought together a vast multitude" and further assured the Court that "it [wa]s beyond a doubt, that the property sold for much more than it would have commanded if it had been put up in block and sold for cash."[392] On this score, the auction results point to the financial significance of the Arcade properties to the *Banks* bankruptcy trust. First, the sale of the 21 partitioned lots generated gross proceeds totaling $123,000.[393] While this amount represented only 35.3% of the value Banks had listed for the Arcade in

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384. *Id.* at 95–96. For a discussion of the various names used to refer to the exchange at the St. Louis Hotel, see Pardo, *Bankrupted Slaves*, *supra* note 30, at 1147.

385. *See Houston* Record Transcript, *supra* note 147, at 33.

386. *See id.* at 38.

387. *See U.S. Marshal Sales*, NEW-ORLEANS BEE, Jan. 25, 1843, at 1. For further information about Robertson and his role in the Eastern District's bankruptcy slave trade, see Pardo, *Bankrupted Slaves*, *supra* note 30, at 1161–65.

388. *See U.S. Marshal Sales*, *supra* note 387.

389. *See id.*

390. *See id.*

391. Houston v. City Bank of New Orleans, 47 U.S. (6 How.) 486, 494 (1848).

392. *Id.* at 494–95. On the public sensation caused by Clay's appearance and argument before the Court in *Houston*, see CARL B. SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 145–46 (Paul A. Freund ed., 1974).

393. *See Houston* Record Transcript, *supra* note 147, at 34–37.

his asset schedule (i.e., $123,000 of $350,000),[394] the sale of the Arcade generated a much better return relative to the Eastern District's average bankruptcy case involving an asset sale. In such a case, the gross proceeds generated from the sale of assets represented only 6.2% of their scheduled values.[395] Finally, while the Arcade's scheduled value represented only 1.1% of the scheduled value of all assets sold in the Eastern District's 1841 Act cases (i.e., $350,000 of $31,245,495.51), the gross proceeds generated by the Arcade's sale constituted 6.3% of the aggregate gross proceeds from all of the district's 1841 Act bankruptcy sales (i.e., $123,000 of $1,950,168).

Importantly, a significant amount of the proceeds from the sale of the subdivided properties in Banks Arcade came from the sale of the Arcade Exchange Room, which consisted of Lot Nos. 4 and 5, with Lot No. 5 constituting the bulk of the room.[396] William Houston from London, England, purchased both lots.[397] Lot No. 5 generated the most proceeds of any of the 21 lots — that is, $19,500.[398] And the gross proceeds from the combined sale of Lot Nos. 4 and 5 (i.e., $25,150) represented approximately one-fifth of the total gross proceeds generated from the sale of all of the Arcade's lots (i.e., $25,150 of $123,000).[399]

Taking a step back, Figure 2 below reveals that the *Banks* bankruptcy trust owned the Arcade Exchange Room for 275 days — from September 5, 1842, when the federal district court declared Banks a bankrupt under the 1841 Act,[400] to June 7, 1843, when Conrad and Houston executed the act of sale transferring ownership of the room from the federal government to Houston.[401] Furthermore, during a portion of this period of time, the bankruptcy trust leased the Exchange Room, receiving rent payments in return.[402]

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394. *See supra* text accompanying note 321.

395. The clerk for the Eastern District's federal district court reported to Secretary of State James Buchanan that the federal marshal's sales in that district under the 1841 Act generated $1,950,168 of gross proceeds from the sale of assets with a scheduled value of $31,245,495.51. *See* H.R. DOC. NO. 29-99, at 7 & n.† (1847).

396. *See Houston* Record Transcript, *supra* note 147, at 34.

397. *See id.*

398. *See id.* at 34–37.

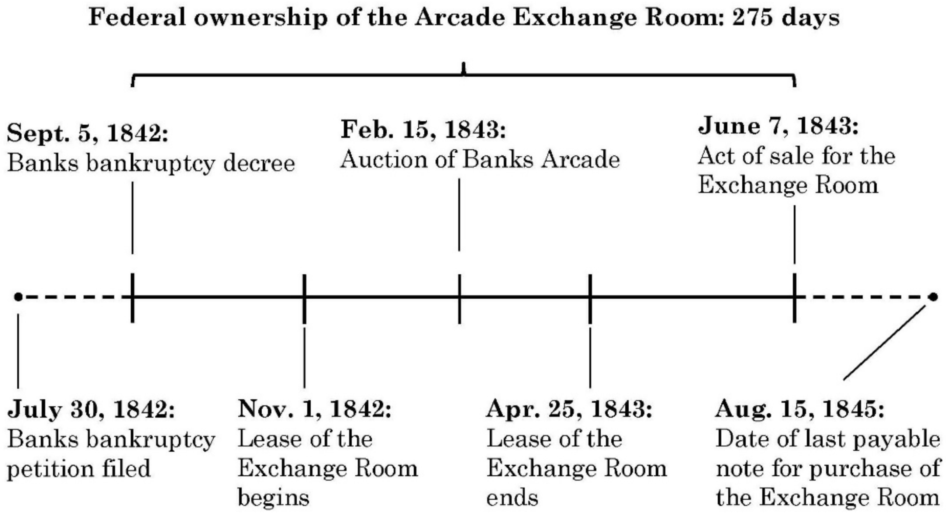
399. *See id.*

400. *See supra* text accompanying note 322.

401. *See Houston* Record Transcript, *supra* note 147, at 51–54.

402. *See supra* notes 374–76 and accompanying text.

Figure 2: Timeline for the Bankruptcy Administration of the Arcade Exchange Room



Critically, during this 275-day period of federal ownership, a significant amount of commercial activity directly involved in the business of slavery took place in the Arcade Exchange Room. In that time span, at least 91 distinct notices appeared in the *Bee*, the *Commercial Bulletin*, and the *Daily Picayune* announcing nonbankruptcy auctions of enslaved persons in the Exchange Room.[403] Notably, approximately 68% of these auctions were to be conducted by Beard, who had leased his auction office adjacent to the Exchange Room from the *Banks* bankruptcy trust.[404] These auctions involved at least 449 enslaved individuals. Moreover, during this period, the federal marshal conducted auctions of enslaved persons who had been owned and surrendered by Eastern District bankrupts pursuant to the 1841 Act.[405] These bankruptcy auctions, which were directed and controlled by Judge McCaleb,[406] involved 74 enslaved individuals and

403. The reported statistics on nonbankruptcy slave auctions scheduled to take place in the Arcade Exchange Room during the period of federal ownership are derived from original data that I collected from advertisements appearing in the columns on auction sales published in the *Bee*, the *Commercial Bulletin*, and the *Daily Picayune*.

404. *See supra* notes 370–73 and accompanying text.

405. The reported statistics on bankruptcy slave auctions scheduled to take place in the Arcade Exchange Room during the period of federal ownership are derived from an original dataset, which is described in Pardo, *Bankrupted Slaves*, *supra* note 30, at 1115–19.

406. *See id.* at 1142–61.

generated gross sale proceeds of at least $13,950. Accordingly, during the 275-day period of federal ownership of the Arcade Exchange Room, at least 523 enslaved persons were likely to have been sold on the premises.

These sales were conspicuously public and utterly dehumanizing to the Black Americans who were the objects of these commercial transactions. On this score, a description by a European traveler who visited Banks Arcade in the early 1850s provides a good sense of what enslaved persons sold in the Arcade Exchange Room during the period of federal ownership likely had to endure:

> To the stranger, one of the most interesting places in the city is the auction-mart in Bank's [sic] Arcade, where negroes are disposed of in the same manner that animals are in England. . . . The auction-mart is a large room, about 150 feet long by 35 feet wide, well lighted, and provided with seats for the slaves, desks for the transaction of business, and an auctioneer's stand. The negroes are placed upon an elevated platform immediately in front of the crier . . . . The auctioneer commenced by reading a printed description of the negro first put up . . . . [T]he bidders caused him to strip his coat off, and began to examine his person. One felt the muscles of his arm; another opened his mouth, and inspected his teeth, as you would those of a horse; and then his joints and bones were examined, to see whether he was in all respects sound. . . . Jests were bandied about at the expense of the poor creature; and after a determined effort on the part to make the most of his man, the boy was sold to the highest bidder and removed from the platform.[407]

Long after the bankruptcy administration and sale of the Banks Arcade, the business of slavery continued there in robust fashion, much of it conducted by Beard.[408] We should not lose sight of the fact that one of the primary locations of the slave trade in New Orleans and that one of the city's most successful slave auctioneers owed much of their financial rehabilitation to the bankruptcy benefits provided by the federal government pursuant to the 1841 Act.[409]

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407. *New Orleans*, 18 CHAMBERS'S EDINBURGH J. 314, 315 (1853).

408. *See, e.g.*, Pardo, *Federally Funded Slaving*, *supra* note 196, at 801–02, 841–42.

409. What remains of the original building today is the St. James Hotel. In describing its history, the hotel refers to the transformation of Banks Arcade over time without ever mentioning the site's prominent role in the business of slavery. Instead, the hotel trumpets that it "maintains the historical charm of a day-gone-by and pays homage to the romance, colors and legends of New Orleans." *About Us*, ST. JAMES HOTEL, https://www.saintjameshotel.com/about-us [https://perma.cc/ZY5W-FXCV] (last visited Feb. 5, 2021). The hotel's ignorance of or indifference to its past connections to slavery perpetuates what former New Orleans Mayor Mitch Landrieu described in his 2017 remarks addressing the removal of the city's Confederate monuments — that is,

CONCLUSION

Having recounted the story of the bankruptcy administration and sale of Banks Arcade, what lessons can we draw from this episode to inform our thinking about the use of bankruptcy law to respond to financial crises, particularly in urban environments? As alluded to in the Introduction,[410] and as illustrated by the story of Banks Arcade, the bankruptcy process has the potential to reinvent critical components of a city's infrastructure, an opportunity that becomes far-reaching when depressed economic conditions adversely affect a greater number of commercial enterprises. And yet, a failure to recognize that a federal instrumentality facilitates such reinvention will have the effect of channeling decisions by the system's administrators away from giving due consideration, if any at all, to the community's interest in how the city might be remade.[411] Viewing the bankruptcy trust's financially distressed property as belonging to the federal government,[412] and thus to the citizenry, makes it imperative that the public have a meaningful opportunity to advocate for its interests in the administration of the bankruptcy trust, for the reason that such input could result in a better redeployment of nationalized assets.[413]

"[o]ne story forgotten or maybe even purposefully ignored." *Mitch Landrieu's Speech on the Removal of Confederate Monuments in New Orleans*, N.Y. TIMES (May 23, 2017), https://nyti.ms/2qTgzmx [https://perma.cc/K78M-FC9G].

410. *See supra* notes 22–25 and accompanying text.

411. *Cf.* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 772 (1991) ("Once the estate is viewed as a dynamic and evolving enterprise, the fundamental question for bankruptcy discourse is altered. The question is no longer 'what to do with the estate,' as the model of the estate as a static pool might suggest. Rather, the question becomes: 'what shall the estate exist to do.' The estate is not merely an economic pie to be deployed and distributed. It is a medium by which the enterprise's moral, political, social, and economic aims are defined and redefined. By debating the aims of the estate as enterprise, participants express and explore the incommensurable values that accompany financial distress.").

412. It is beyond the scope of this Article to analyze whether today's bankruptcy trust, like the 1841 Act bankruptcy trust, constitutes a federal instrumentality. Given the substantial similarities between the statutory schemes responsible for creating the two trusts, the remainder of the Conclusion proceeds on the assumption that the Code's bankruptcy trust is a federal instrumentality. Placing that assumption aside, courts and commentators should, at the very least, adopt Melissa Jacoby's argument that, "[b]y statutory design, the U.S. business bankruptcy system can be conceptualized as a public-private partnership." Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1729 (2018).

413. *Cf. id.* at 1723 ("Even a minimalist government-provided system . . . involves coercive government power. At the very least, the public has a stake in who makes the key decisions in corporate bankruptcy and whether that process comports with basic constitutional and democratic norms. The interests of the public grow alongside the scope of a government-supplied bankruptcy system." (footnote omitted)); Korobkin,

To demonstrate this, let us consider a counterfactual relating to Banks Arcade. This Article has argued that those responsible for administering the 1841 Act found themselves in a Promethean gap. They did not have the perspective to understand that the uniquely innovative Act created a federal instrumentality that nationalized financially distressed assets.[414] Had they understood this, they may have been willing to consider the public interest when determining how the federal district courts should direct and control an assignee's authority "to sell, manage, and dispose of the [bankruptcy trust's assets]."[415] In the case of the Arcade, had Judge McCaleb considered community concerns, the building's history, both during and after bankruptcy, may have been quite different.

In such a scenario, Judge McCaleb would have had to define the relevant community (or communities) whose interests were to be accounted for by the 1841 Act bankruptcy system.[416] For example, would he have looked beyond New Orleans and accounted for regional interests, including the North's, in determining what to do with the Arcade? When it came to selling the properties belonging to the *Banks* bankruptcy trust, Judge McCaleb and Conrad had been willing to

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supra note 411, at 772 ("Modern corporate bankruptcy law allows for realization of the potential of the corporation, whatever form that potential ultimately takes. It does so by replacing the historical corporation with an enterprise constituted not merely by the physical assets or even the business of the corporation, but by the various values and concerns of all the participants in the corporation's financial distress. Bankruptcy law creates conditions for an ongoing debate in which, by expressing these conflicting and incommensurable values, participants work towards defining and redefining the fundamental aims of the enterprise."); Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?*, 70 N.Y.U. L. REV. 993, 1000, 1056 (1995) (arguing "that the government's role in creating and supervising the bankruptcy system entitles it to use any value created by that system to further any legitimate interests of the government" and noting the need "to press the analysis onward to consider what types of policies the government should pursue with the entitlements it garners from its creation and operation of the bankruptcy system").

414. In *Ex parte Christy*, Associate Justice John Catron incorporated into his partial dissent the 1843 opinion by former Associate Justice Baldwin in *In re Kerlin*, which Justice Baldwin decided in his capacity as Circuit Justice for the Eastern District of Pennsylvania. *See Ex parte* Christy, 44 U.S. (3 How.) 292, 326 (1845) (Catron, J., concurring in part and dissenting in part). In *Kerlin*, Justice Baldwin wrote the following: "That the act of 1841 is anomalous in its provisions, unlike any other known in any legislation here or elsewhere, cannot be doubted." *Id.* at 327.

415. Act of Aug. 19, 1841, ch. 9, § 3, 5 Stat. 440, 443 (repealed 1843).

416. *Cf.* KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 211–14 (paperback ed. 1999) (proposing a tripartite test for identifying community interests that should be recognized by a bankruptcy system).

target prospective Northern purchasers,[417] although those plans fell by the wayside.[418] In light of this, Judge McCaleb might also have been willing to consider the North's input on the Arcade's disposition had he deemed community interests to be relevant to that decision-making process.

We can be fairly confident that the North's abolitionists, one of the region's many communities, would have vociferously objected to any disposition of the Arcade in connection with the slave trade given their criticism that the 1841 Act would further implicate the North in the business of slavery.[419] It also seems reasonable to conclude that, as "a willing, able, and active participant in the Eastern District's bankruptcy slave trade,"[420] Judge McCaleb would not have recognized such objections in the first instance.

On the other hand, Judge McCaleb would likely have given serious consideration to input from a community segment consisting of individuals like James Robb, a prominent New Orleanian banker who was among the "'progressive' southern merchant capitalists . . . [advocating for a] close relationship between business and government" in order to encourage "the investments necessary for the city to modernize its economic base, whether through diversifying into industrial enterprises or buttressing and expanding [its] trade territory

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417. *See Houston* Record Transcript, *supra* note 147, at 93 (stating that "it would also be advantageous to have advertisements inserted in the newspapers of some of the northern and eastern cities").

418. *See id.* at 95 (stating "that the creditors in New Orleans, who are chiefly interested in the sale, are most urgent for immediate insertion of said advertisement, and strenuously object to a delay of the sale beyond the fifteenth of next month . . . [and] that an advertisement at the North for a sale on that day would now be useless and productive of expense only, without any corresponding advantage"); *id.* at 95–96 ("[I]t is therefore ordered that the publication of the property of the bankrupt in the northern papers, for sale, be dispensed with; [and] that advertisement of said property be inserted, according to the previous order of this court, in two of the newspapers of this city . . . .").

419. *Cf. Southern Chattels Coming North*, 2 NAT'L ANTI-SLAVERY STANDARD (NEW YORK) 54 (1841) ("We speak advisedly when we assure our readers that the slaves are coming north! They are not coming on foot, as heretofore, 'fugitives from justice,' but in companies — the whole gang of a plantation together! The slaves are coming north, and, as so often predicted, will be found in our stores and banking houses, wherever trade and money making are known! . . . It is now quite well understood that we are to have a General Bankrupt law. Its provisions must require the surrender of all the property of the bankrupt debtor into the hands of his creditor. The South is at least semi-bankrupt. The North is the creditor. So soon, therefore, as the bankrupt law comes in force, at least one half of southern slave property must be consigned to northern creditors. Thus the slaves are coming north.").

420. Pardo, *Bankrupted Slaves*, *supra* note 30, at 1143.

by means of transportation improvements such as railroads."[421] Such feedback might have convinced Judge McCaleb that recommitting the Arcade to its prominent role in the purchase and sale of enslaved persons would unfavorably preserve the status quo, pursuant to which "merchants recycled profits into further commodity speculations, or into conspicuous consumption, slaves, and real estate — but not into factories, nor into railroads."[422] Recognizing the unique opportunity to repurpose the nationalized Arcade, Judge McCaleb might have limited its sale to a buyer committed to bringing a manufacturing enterprise into the building. Thus, even when viewing the issue from the Southern perspective, those in the Crescent City who decried underinvestment in its industrial sector may have deemed the actual administration and sale of the Arcade by the *Banks* bankruptcy trust to have been suboptimal.

Returning to the present, can our current system recognize the public interest when it comes to questions of how the bankruptcy trust may use, sell, or lease estate property?[423] This Article argues that the Bankruptcy Code's statutory language permits such recognition. The Code mandates that

> at any time, on request of an entity that has *an interest in property* used, sold, or leased, or proposed to be used, sold, or leased, . . . the court . . . shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.[424]

The Code does not define "interest in property,"[425] and it "places no explicit limit on the interest being protected" when it comes to the use, sale, or lease of estate property.[426] Statutory guideposts elsewhere in

421. MARLER, *supra* note 28, at 55, 57, 83.

422. *Id.* at 78; *cf.* *"The Gentleman in Black.,"* PICAYUNE (New Orleans), Mar. 9, 1837, at 2 ("Heretofore, some half dozen of the heaviest concerns have done all the principal exchange business — have carried on the greatest monopolies in cotton, sugar, molasses, &c. — now *they* are gone to the devil, the business will be done by ten times the number of men, who, thank God, have not the means, had they the inclination, to monopolize. They will be able to check one another, if attempts are made by any of them to engross too large a portion of the business, and a much more healthy state of things will ensue." (internal quotation marks omitted)).

423. *See* 11 U.S.C.A. § 363 (Westlaw through Pub. L. No. 116-259).

424. 11 U.S.C. § 363(e) (emphasis added).

425. *See* 11 U.S.C.A. § 101 (Westlaw) (providing definitions applicable throughout the Bankruptcy Code); 11 U.S.C. § 363(a) (defining "cash collateral" for purposes of the Bankruptcy Code's provision on the use, sale, and lease of estate property).

426. 3 COLLIER ON BANKRUPTCY, *supra* note 135, ¶ 365.05[1].

the Code indicate that the phrase "interest in property" is sufficiently broad to recognize the public interest.[427]

The Bankruptcy Code mandates that, for application of certain provisions specific to railroad reorganization cases under the Code, "the court and the trustee shall consider *the public interest* in addition to the interests of the debtor, creditors, and equity security holders."[428] This command expressly recognizes that various types of "interests" can be implicated and weighed when administering the bankruptcy system, including those of the public. While a court's mandatory obligation to consider the public interest is limited to the specific context of railroad reorganization cases,[429] this does not mean that a court lacks discretion to consider the public interest pursuant to other Code provisions. As long as the statutory language of the relevant provision can accommodate such a consideration, then a court should be open to such an inquiry under the right set of circumstances.[430] Significantly, the Code's provision governing the bankruptcy trust's use, sale, and lease of estate property expressly requires "due consideration" of the privacy interests of third parties when the

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427. *Cf.* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("The term 'interest in property' certainly summons up such concepts as 'fee ownership,' 'life estate,' 'co-ownership,' and 'security interest' more readily than it does the notion of 'right to immediate foreclosure.' Nonetheless, viewed in the isolated context of § 362(d)(1), the phrase could reasonably be given the meaning petitioner asserts. Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (citations omitted)). *But cf.* GROSS, *supra* note 416, at 227 ("If community is to be recognized, some specific amendments to the Code are needed."); Jay Lawrence Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203, 221 (2020) ("Up to now, it remains unclear that public interests are regarded as legitimate elements of decisions [in bankruptcy cases]. Instead, in the face of the plain meaning rule and the lack of specific language in the statute recognizing the weight to be given public interests, judges may feel precluded from explicitly addressing those interests.").

428. 11 U.S.C. § 1165 (emphasis added). For further discussion of how these specific Code provisions relate to the bankruptcy system's recognition of the public interest and community interests, see GROSS, *supra* note 416, at 219–23.

429. *See* 11 U.S.C. § 103(h).

430. *Cf.* Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503, 519–20 ("[B]ankruptcy rules should maximize collective welfare, not simply the collective welfare of creditors. Creditor welfare offers too narrow a perspective from which to judge bankruptcy law and policy. A bankruptcy system should maximize the welfare of all the parties affected by the debtor's financial distress — not only the welfare of creditors, equity holders, employees, and other parties with standing to appear and be heard in the bankruptcy case; but also, more broadly, the remainder of society affected by the financial failure of the firm." (footnote omitted)).

bankruptcy trust proposes to sell or lease their personally identifiable information if, among other things, (1) the debtor obtained the information when offering, but not necessarily selling, a prebankruptcy product or service to the third parties; and (2) the information is subject to a prebankruptcy policy of the debtor that prohibits the transfer of such information and that is still in effect at the commencement of the case.[431]

When Congress installed this specific framework for protecting privacy interests, a species of what one might refer to as "nonclaim interests,"[432] it did so within a Code section that already included a general mechanism for parties to request adequate protection of their interests in property to be used, sold, or leased by the bankruptcy trust.[433] One would expect the specific framework to have been placed elsewhere in the Code had Congress deemed nonclaim interests to be irrelevant for purposes of the bankruptcy trust's sale or lease of estate property. And even though Congress singled out one such interest for specific treatment, this does not mean that nonclaim interests are beyond the scope of consideration when determining the interests in property that might need to be adequately protected as a result of the bankruptcy trust's use, sale, or lease of estate property. After all, Congress has previously amended Code provisions consisting of general mechanisms to include specific mandatory mechanisms to deal with a particular matter, and courts have used their residual policymaking authority to conclude that such amendments do not preclude consideration of the issue under the preexisting general

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431. *See* 11 U.S.C. § 363(b)(1)(B); *see also id.* § 332(b) (providing examples of the types of considerations that may be relevant to a court's decision to authorize the bankruptcy trust's sale or lease of personally identifiable information, including "the potential losses . . . of privacy to consumers").

432. *See* Westbrook, *supra* note 427, at 213–14. Broadly speaking, a claim in bankruptcy can be based on either a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5).

433. The original Bankruptcy Code provided that,

> at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, . . . the court shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 363(e), 92 Stat. 2549, 2572 (codified as amended at 11 U.S.C. § 363(e)). In 2005, Congress amended the Code's provision for the sale, use, or lease of estate property to provide a specific framework for protecting privacy interests in the personally identifiable information of third parties. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 231(a), 119 Stat. 23, 72 (codified as amended at 11 U.S.C. § 363(b)).

mechanism.[434] Accordingly, pursuant to the residual policymaking authority that Congress conferred on the judiciary to define the scope of what constitutes an "interest in property" meriting adequate protection,[435] courts should deem it appropriate to consider nonclaim interests, including the public interest or community interests, when it comes to determining whether the sale, use, or lease of estate property warrants adequately protecting such interests in the property at issue.[436] To the extent that concerns arise from the recognition of such interests, those concerns can be tempered by the requirement that

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434. *See, e.g.*, Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1260–71 (11th Cir. 2013) (holding that a court may consider whether an individual debtor's bad-faith filing of a Chapter 7 case warrants its dismissal pursuant to Code § 707(a)'s "for cause" standard, notwithstanding Congress's amendment in 2005 of Code § 707(b), which imposed a mandate on courts to consider in certain circumstances whether a consumer debtor's bad-faith filing of a Chapter 7 case warrants its dismissal on the basis of "abuse"); *see also* Pardo & Watts, *supra* note 256, at 404 ("An individual debtor — whether filing for Chapter 7 or Chapter 13 relief — faces the possibility of having the case dismissed 'for cause.' The Code does not define what constitutes cause, but rather provides a non-exhaustive list of factors that could constitute cause for dismissal. Without specific criteria to demarcate the bounds of 'cause,' Congress has given courts substantial discretion to develop policy regarding how wide the gate to the bankruptcy forum ought to be open. For example, although unenumerated as a 'for cause' dismissal factor, courts have deemed lack of good faith to be an appropriate basis for dismissing an individual debtor's bankruptcy case." (footnotes omitted)). *See generally* Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, *supra* note 39, at 473–88 (discussing the evolution of the Code's provision governing the dismissal of Chapter 7 cases).

435. *See* Pardo & Watts, *supra* note 256, at 413 ("In sum, Congress has given courts primary interpretive authority over the Code, which contains substantial gaps. Although scholars often say that courts fill these gaps by using traditional tools of statutory construction to discern Congress's intent, we have demonstrated that courts have ample opportunity to engage in residual policymaking by resolving ambiguities in the Code that Congress either intentionally or inadvertently did not resolve.").

436. *Cf., e.g.*, *In re* Trans World Airlines, Inc., No. 01-00056 (PJW), 2001 WL 1820326, at *14 (Bankr. D. Del. Apr. 2, 2001) ("Finally, there is a substantial public interest in preserving the value of TWA as a going concern and facilitating a smooth sale of substantially all of TWA's assets to American. This includes the preservation of jobs for TWA's 20,000 employees, the economic benefits the continued presence of a major air carrier brings to the St. Louis region, and preserving consumer confidence in purchased TWA tickets American will assume under the sale."). This view is consonant with the idea that the public interest or community interests can be relevant to the application of other Code provisions. For example, recall the provision that authorizes a Chapter 7 trustee to operate a debtor's business. *See supra* note 156 and accompanying text. A leading bankruptcy treatise's discussion of the provision notes that "financial gain to the estate is not the sole basis on which a court may authorize the trustee to operate the debtor's business" and that "if the sudden termination of the debtor's business would cause great hardship *to the general public or innocent third parties*, authorization of the chapter 7 trustee to operate the debtor's business at a loss might be appropriate." 6 COLLIER ON BANKRUPTCY, *supra* note 135, ¶ 721.02 (emphasis added).

anyone seeking adequate protection of those interests will bear the burden of proof to establish their validity.[437]

* * *

This Article has sought to provide a historical perspective that enables us to think about the role of the public interest in bankruptcy from a new vantage. As we encounter opportunities to remake urban enterprise through the bankruptcy system, especially during financial crises, we should keep in mind a key concept: given that "[o]ne way the Government can regulate without accountability is by passing off a Government operation as an independent private concern,"[438] the bankruptcy trust's federal instrumentality status must not go unrecognized; otherwise, we run the risk of not holding the trust properly accountable.[439]

437. *See* 11 U.S.C. § 363(p)(2); *cf.* GROSS, *supra* note 416, at 214 ("Agreeing to consider a community interest does not mean that that interest will prevail."); Ponoroff, *supra* note 21, at 475 n.112 ("Of course, recognizing that non-creditor interests should have 'standing' to press their demands in bankruptcy is not tantamount to saying that their interests must be vindicated in every case."). For a discussion of how standing issues ought to be addressed for purposes of considering nonclaim interests in bankruptcy proceedings, see Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429, 446–61 (1998). *See generally* Pfander & Birk, *supra* note 219, at 1452 ("Whatever sense the Court's three-pronged inquiry makes when one party seeks redress from an opponent following an invasion of his rights, it simply does not fit with the realities of non-contentious jurisdiction as practiced by federal courts. In deploying non-contentious jurisdiction, Congress can create individual rights and enable individuals to bring an ex parte action in federal court to secure formal recognition of the right in question. Such individuals have not suffered an 'injury-in-fact'; rather, they seek to establish a legal interest through the assertion of their claim.").

438. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 57 (2015) (Alito, J., concurring).

439. *Cf.* Jacoby, *supra* note 412, at 1723 (stating that "Congress's exercise of its constitutional authority to create uniform bankruptcy laws . . . triggers the need for accountability and due process safeguards").