Chapter One

THE PATH TO PERMANENCE IN 1898

CONGRESS'S AUTHORITY to regulate bankruptcy derives quite explicitly from the Constitution, which states in Article I, section 8 that Congress may pass "uniform laws on the subject of bankruptcies." The Founding Fathers included the provision almost as an afterthought. Charles Pinckney of Rhode Island proposed the Bankruptcy Clause late in the constitutional convention of 1787, and it was approved with little debate.[1] Almost the only contemporary evidence of the meaning or importance of "uniform bankruptcy" comes in the Federalist No. 42. Written by James Madison, Federalist No. 42 describes federal bankruptcy legislation as "intimately connected with the regulation of commerce," and necessary to prevent debtors from fleeing to another state to evade local enforcement of their obligations.[2]

Despite its inauspicious beginning, bankruptcy became one of the great legislative battlegrounds of the nineteenth century. The most famous lawmakers of the century, from Thomas Jefferson early on, to Daniel Webster and Henry Clay for many years thereafter, all weighed in on bankruptcy. Bankruptcy pitted farm interests and states' rights advocates against those who favored a more national economy, and it was repeatedly proposed as a remedy for economic depression. For all the discussion, the debates never seemed to reach a stable conclusion. Prior to 1898, Congress passed a series of bankruptcy laws, each of which quickly unraveled and led inexorably to repeal. In the absence of federal regulation, state insolvency laws filled the gap. But state laws suffered from serious jurisdictional limitations, and each new crisis brought calls for federal legislation. With the Bankruptcy Act of 1898, the instability suddenly came to an end. Although lawmakers often amended this act, most dramatically in the 1930s, and it was replaced altogether in 1978, federal bankruptcy has been a permanent fixture ever since. For individual and small-business debtors, then, the first age of bankruptcy consisted of a century of instability that finally led to a permanent federal law in 1898.

The dramatic transition from episodic bankruptcy to a permanent law in 1898 poses an obvious puzzle: what was the magic of the 1898 act? Why did the instability finally stop? To answer this question, we must briefly go back to the beginning, to the decades of debate that preceded the act. A common theme running through the bankruptcy debates was party politics. Throughout the nineteenth century, Democrats and their predecessors often resisted federal bankruptcy legislation, whereas Republicans and their predecessors were its most fervent advocates.[3] Viewing the debates as a conflict between Democrats and Republicans only begins to explain why Congress could not reach a stable resolution, however. Within each party, for instance, lawmakers often held strikingly different views of bankruptcy—Republicans in the commercial Northeast were far more enthusiastic about bankruptcy legislation than their southern and western colleagues, and roughly the reverse held true for the Democratic opposition. Adding to the confusion was the fact that the legislators faced a series of options on the bankruptcy issue. Rather than just favoring or opposing bankruptcy, lawmakers divided into at least three separate camps and sometimes more.

To more fully explain the early instability, I will borrow several basic concepts from the political science literature known as social choice. I will argue in particular that legislators held inconsistent and possibly "cyclical" preferences, no one of which commanded a stable majority: some lawmakers did not want a federal bankruptcy law, some (including both Democrats and Republicans) wanted only voluntary bankruptcy, and some wanted a law that provided for both voluntary and involuntary bankruptcy. We will then go on to consider how this instability was overcome, and how the Republican support for bankruptcy finally won out. The most important development was the emergence of organized creditor groups throughout the country at the end of the nineteenth century. To secure a federal bankruptcy law, creditors were forced to make numerous adjustments to pacify prodebtor lawmakers in the South and West. One of these adjustments, the adoption of a minimalist administrative structure, together with an unusually long period of Republican control, would inspire the rise of the bankruptcy bar. The unique American mix of creditors, prodebtor forces such as populism, and bankruptcy professionals has provided the recipe for every U.S. bankruptcy law that has followed.

We will focus throughout the chapter, as did nineteenth-century lawmakers, on individual and small-business debtors. Chapter 2 will explore the very different approach that emerged for reorganizing railroads and other large, corporate debtors.

The Bust-and-Boom Pattern of Nineteenth-Century Bankruptcy Legislation

The nineteenth-century bankruptcy debates have long been seen as fitting a loose, bust-and-boom pattern. In times of economic crisis, Congress rushed to pass bankruptcy legislation to alleviate widespread financial turmoil.[4] Once the crisis passed, so too did the need for a federal bankruptcy law. Like Penelope and her weaving, Congress quickly undid its handiwork on each occasion, only to start all over again when hard times returned. The traditional account is inaccurate in some respects and, as we will see, it does not explain why bankruptcy suddenly became permanent in 1898. But it provides a convenient framework for describing the first century of bankruptcy debate.

Agitation for bankruptcy legislation rose to a fever pitch at roughly twenty-year intervals throughout the nineteenth century. A depression starting in 1793 led to the first federal bankruptcy law in 1800—an act that Congress repealed three years later.[5] Congress went back to the drawing board in the 1820s, when financial crisis and the controversy over the Bank of the United States prompted calls for another bankruptcy law. The debates never came to fruition, however, and it was not until 1841, following the Panic of 1837, that Congress passed its second bankruptcy law. The 1841 act lasted only two years, when defections from the party that had won its passage, the Whigs, led to repeal. The cycle came around once more on the eve of the Civil War, with the Panic of 1857 putting bankruptcy back on the agenda, and setting the stage for the 1867 act. The 1867 act lasted longer than its predecessors, with a movement for repeal leading to amendment instead in 1874. But by 1878, the nation was once again without a federal bankruptcy law.

All told, then, Congress passed three federal bankruptcy laws prior to 1898: the Bankruptcy Acts of 1800, 1841, and 1867. Together, the acts lasted a total of sixteen years. The absence of a federal bankruptcy law did not leave a complete vacuum in debtor-creditor relations, of course. Most states had insolvency laws on the books.[6] Some of them, like Massachusetts's, predated the Revolution. In times of financial panic, states also responded by passing stay laws imposing moratoria on creditor collection. Proponents of federal bankruptcy legislation emphasized both the wide variation in these laws and their serious constitutional limitations, such as the inability of state law to bind out-of-state debtors.[7]

To recite the dates of passage and repeal of the nineteenth-century bankruptcy laws cannot even begin to suggest the urgency and importance that attended lawmakers' deliberations on bankruptcy—especially for a generation like ours that can scarcely remember the last depression. Here is Ralph Waldo Emerson's account of the desperate conditions of 1837. "Society has played out its last stake; it is checkmated. Young men have no hope. Adults stand like day-laborers idle in the streets. None calleth us to labor. . . . The present generation is bankrupt of principles and hope, as of property."[8]

In the early decades of the nineteenth century, commentators characterized the nation's periodic financial panics as acts of God. As recently recounted by a business historian, the Reverend Joel Parker "provided a brief history lesson" for his congregation in 1837 "to illustrate how the financial panic was a direct reproof for the 'peculiar sin' of greed, just as the flood had been a reproof for violence, famine for pride, captivity for sabbath breaking, the destruction of the temple for the rejection of Christ and, more recently, cholera for intemperance." Twenty years later, with the Panic of 1857, commentators looked less to God than to "metaphors of floods, typhoons, tide and hurricanes."[9]

Panics increasingly were seen in naturalistic terms, but they remained both devastating and unpredictable.

Ever mindful of their constituents' trauma, some of the finest lawmakers to walk the halls of Congress turned their attention to bankruptcy at regular intervals. Even in the most dire years, one group viewed federal bankruptcy with deep suspicion and fought hard to preserve the status quo. John Calhoun, the great senator from South Carolina, insisted that "[t]he distress of the country consists in its indebtedness and can only be relieved by the payment of its debts."[10] Not just concern for the repayment of debts, but a belief that local debtors were better served by state regulation of insolvency fueled the ongoing opposition to federal bankruptcy legislation.

On the other side, Daniel Webster, senator from Massachusetts, argued strenuously for federal regulation as necessary for both creditors and debtors.

> I believe the interest of creditors would be greatly benefitted [by passing bankruptcy legislation] . . . and I am quite confident that the public good would be promoted. . . . I verily believe that the power of perpetuating debts against debtors, for no substantial good to the creditor himself, and the power of imprisonment for debt . . . have imposed more restraint on personal liberty than the law of debtor and creditor imposes in any other Christian and commercial country.[11]

(A century later, Harvard Law School Professor James McLaughlin referred to Webster's speech as one of the great moments of American political oratory.)[12]

The two senators just quoted, Calhoun from South Carolina and Webster from Massachusetts, illustrate the geographical lines along which the debates tended to divide. Because southerners feared that northern creditors would use bankruptcy law as a collection device to displace southern farmers from their homesteads, the strongest opposition to federal bankruptcy came from the South. Many western lawmakers opposed bankruptcy legislation for similar reasons. Lawmakers from the commercial northeastern states, by contrast, were much more likely to view federal bankruptcy legislation as essential to the promotion of commercial enterprise.[13]

In addition to geography, lawmakers' views on bankruptcy also tended to divide along party lines. The Federalists (later Whigs, and then Republicans) promoted bankruptcy as essential to the nation's commercial development. Jeffersonian Republicans (later Democratic Republicans, and then Democrats), on the other hand, sought a more agrarian destiny and insisted that bankruptcy legislation would encourage destructive speculation by traders. Northeastern Federalists were the leading cheerleaders for federal bankruptcy legislation, and southern and western Jeffersonians were the staunchest opponents.

As we shall see, the conservative campaign for a permanent bankruptcy law was underwritten by increasingly well organized creditors groups by the end of the nineteenth century. Although rural interests lobbied in a relatively organized fashion on some issues—such as railroad rate legislation—opposition to bankruptcy came less from organized lobbying than from lawmakers who viewed themselves as representing agrarian interests, together with a few ideological entrepreneurs (such as Representative Bailey of Texas, who figured prominently in the 1890s).

Early in the century, constitutional issues figured especially prominently in the bankruptcy debates. Because the Constitution uses the term *bankruptcy* without further elaboration, some lawmakers insisted that the drafters intended to preserve the distinction in earlier English law between "bankruptcy" laws and "insolvency" laws. As distinguished from insolvency laws, which were designed to help debtors, they argued, bankruptcy laws only applied to traders and could not permit voluntary bankruptcy—that is, Congress could not give debtors the right to invoke the bankruptcy laws on their own behalf. Bankruptcy, on this view, was designed solely to help creditors round up a debtor's assets and use them for repayment. These lawmakers insisted that Congress simply did not have the authority to enact more sweeping bankruptcy legislation. Lawmakers who supported a broader bankruptcy law rejected this distinction, arguing that the Bankruptcy Clause used the term *bankruptcy* as a shorthand that referred to any legislation designed to deal with financial distress.

As the nineteenth century wore on, the Supreme Court rejected several of the arguments for a narrow reading of the Bankruptcy Clause.[14] In an important early case, the Supreme Court cast cold water on the claim that Constitution permitted "bankruptcy" but not "insolvency" laws. "Th[e] difficulty of discriminating with any accuracy between insolvent and bankruptcy laws," wrote Chief Justice Marshall, makes clear that "a bankrupt law may contain . . . insolvent laws; and that an insolvent law may contain [provisions] which are common to a bankrupt law."[15] By 1867, it was evident that Congress could enact both voluntary and involuntary laws, and that its powers were not limited to traders. As in other areas, an increasingly conservative and federally minded Supreme Court paved the way for an expansive bankruptcy law.[16] In Congress, however, deep divisions remained as to whether the nation needed a permanent bankruptcy law.

The obstacles for proponents of bankruptcy were not just philosophical, but also practical. The 1800, 1841, and 1867 bankruptcy acts all were administered through the federal district courts. Unlike state courts, which could be found in every county, federal courts were generally located in urban areas. The federal courts were especially inconvenient for potential debtors, many of whom lived far from the nearest city.[17] The problems were compounded by the costliness of the administrative process itself. After a debtor paid fees to the clerk of court, the official who administered his assets, and various others as well, the debtor's creditors often wound up with little or nothing.

The administrative difficulties of the first three bankruptcy acts made each deeply unpopular, not just with opponents but often with the very lawmakers who had most energetically supported them. With continuous opposition, especially from the South and West, and these prickly practical difficulties, the cycle of enactment and repeal continued throughout the nineteenth century. Even as of 1898, it was not obvious that anything had changed.

The Bankruptcy Debates as Legislative Cycling

I have suggested thus far that the nineteenth-century debates pitted opponents of bankruptcy against bankruptcy advocates. In actuality, the debates were much more subtle. Rather than two positions, lawmakers divided into at least three camps, and sometimes more—and these camps crossed party lines. By considering the competing views in slightly more detail, and by analogizing these views to a voting irregularity that political scientists call *cycling*, we can begin to see how deeply unstable bankruptcy was for over a hundred years.

We have already seen proponents of two of the views. Daniel Webster, like the famous Supreme Court justice Joseph Story, argued for an expansive and permanent federal bankruptcy framework. John Calhoun embodied the opposing view that federal bankruptcy legislation would be a serious mistake. Not coincidentally, Webster was a Whig from a commercial state, Massachusetts, whereas Calhoun was a states' rights advocate from the agrarian South.

Senator Henry Clay of Kentucky, a Whig and member along with Webster and Calhoun of the "Great Triumvirate" of famous senators, represented a third, and similarly influential, view of bankruptcy. Clay was willing to support bankruptcy legislation, but only if the law was limited to voluntary bankruptcy.[18] Clay shared the fear of many bankruptcy opponents that northern creditors would use bankruptcy to displace southern farmers from their homesteads, but he believed voluntary bankruptcy would minimize this risk while enabling financially strapped debtors to obtain relief.

Still other lawmakers adopted variations of these views. Democrat Thomas Hart Benton, another prominent senator and grandfather of the twentieth-century artist with the same name, was a vocal opponent of bankruptcy. Here, as elsewhere, he frequently found himself allied with John Calhoun. But Benton also insisted that, if Congress did pass a bankruptcy law, it needed to include corporations as well as individuals. Bankruptcy, in his view, might be one way to reign in the excesses of the nation's growing corporate sector.

A vexing problem when lawmakers (or decision makers of any kind, for that matter) hold a multiplicity of views on a single subject is that their voting may lead to irrational or unstable outcomes. At its extreme, the competing views can lead to the phenomenon of cycling. In a pathbreaking book, the economist Kenneth Arrow demonstrated that no voting institution based on democratic principles can guarantee that voting irregularities of this sort will not arise. If everyone has an equal vote, and every option is available, the voting process may lead to chronically unstable results.[19]

The views of nineteenth-century lawmakers on bankruptcy legislation provide a convenient illustration of the voting problems I have just described. Although the views will be described in stylized form, the overall pattern is not simply hypothetical. The senators I will use for purposes of illustration held views very close to the positions I will attribute to them, and Congress's ever-shifting stances on bankruptcy law in the nineteenth century may well have reflected the kinds of uncertainties we are about to explore.

Assume that three senators, Benton, Webster and Clay, must choose among three options: not passing any bankruptcy law (No Bankruptcy); passing a complete bankruptcy law, including both voluntary and involuntary bankruptcy (Complete Bankruptcy); or passing a law that permits only voluntary bankruptcy (Voluntary Only). As the careful reader will note, I have omitted a fourth option: providing for involuntary but not voluntary bankruptcy. As it turns out, the 1800 act adopted precisely this approach. Both for simplicity and because involuntary-only disappeared as a viable option by the middle of the nineteenth century, however, I will banish it from our discussion.

Of the three options we are considering, Benton would prefer not to pass any bankruptcy law (No Bankruptcy). If a bankruptcy law must pass, his next choice would be a complete bankruptcy law that included involuntary bankruptcy and brought corporations within its sweep (Complete Bankruptcy). His least favorite alternative is Voluntary Only.

As a fervent nationalist, Daniel Webster strongly favors an expansive bankruptcy law that provides for both voluntary and involuntary bankruptcy (Complete Bankruptcy). So strongly does he believe in the importance of bankruptcy to the health of the national economy that he would accept Voluntary Only bankruptcy as a second choice. His least favorite option is No Bankruptcy.

Henry Clay sees voluntary bankruptcy as an opportunity to alleviate the dire financial straits of many of his constituents. But he strongly opposes involuntary bankruptcy, fearing that many debtors who might otherwise recover from their financial distress would be hauled into bankruptcy court by their creditors. Clay's first choice is thus Voluntary Only, his second choice No Bankruptcy, and his last choice Complete Bankruptcy.

The senators' views are illustrated in table 1.1. The problem here is that the senators hold unstable preferences. To see this, consider what would happen if they held a series of votes on the three options and each voted in accordance with his preferences. In a vote between No Bankruptcy and Complete Bankruptcy, the winner would be No Bankruptcy, since both Benton and Clay prefer No Bankruptcy over Complete Bankruptcy. If the Senators then pitted the winner, No Bankruptcy, against Voluntary Only, Voluntary Only would emerge victorious on the strength of votes from Webster and Clay. At this point, Voluntary Only appears to be the winner. But if the senators held a vote

TABLE 1.1
Cycling among Bankruptcy Options in the Nineteenth Century

Senator	*First Choice*	*Second Choice*	*Third Choice*
Benton	No Bankruptcy	Complete Bankruptcy	Voluntary Only
Webster	Complete Bankruptcy	Voluntary Only	No Bankruptcy
Clay	Voluntary Only	No Bankruptcy	Complete Bankruptcy

between Voluntary Only and Complete Bankruptcy in order to complete the comparisons, both Benton and Webster would vote for Complete Bankruptcy. The senators prefer Complete Bankruptcy over Voluntary Only, but they like Complete Bankruptcy less than another option (No Bankruptcy) that Voluntary Only defeats.

If we were to study the alternatives a bit more closely, we would quickly see that Benton, Webster, and Clay could never choose a stable winner among the three alternatives. A familiar line from an old song, "Anything you can do, I can do better," neatly describes their dilemma. For each option that two of the senators favor, there is always a choice that two of the senators like better. If the senators continued to vote and voted in accordance with their preferences, the votes would go around and around forever—that is, they would cycle.

This kind of voting irregularity can arise in either of two ways. If a group of existing voters hold inconsistent views, cycling can occur at the time of a particular vote, as in the illustration we have just considered. But cycling can also take place intertemporally. Even if a clear majority of legislators held Benton's views today, next year's majority might hold the views I have attributed to Webster; and two years down the road might be a Clay year.

I should emphasize—as several readers of this book emphasized to me—that true cycling only occurs under the restrictive conditions defined in Arrow's Theorem. If lawmakers agreed that one option belongs on the left, one in the center, and one on the right, for instance, their preferences would not be cyclical even if they sharply disagreed about the best choice.[20] In view of this, let me emphasize that the principal point of this section is simply that the multiplicity of views contributed to Congress's inability to reach a stable outcome on federal bankruptcy legislation throughout the nineteenth century. Whether lawmakers' inconstancy reflected true cycling, or merely a garden-variety case of shifting legislative outcomes, the point remains the same.

Moreover, it is quite possible that the bankruptcy debates did indeed reflect true legislative cycling. If legislators hold consistent preferences, they will ordinarily gravitate toward a stable outcome even if there are sharply divergent views on what the outcome should be. Yet no such outcome emerged in the bankruptcy debates until late in the century. One is hard-pressed to think of another legislative issue on which Congress flip-flopped so continuously and for so long. (The closest analogue may be the debates whether to base the currency on gold alone, or to include silver as well; but these debates involved fewer shifts and moved more quickly to a relatively stable outcome.)

Rather than receding, the instability of the bankruptcy debates actually got worse as the century wore on. Ironically, as lawmakers came to see the Bankruptcy Clause as an expansive source of authority, and as this was vindicated by the Supreme Court, Congress's broad powers tended to complicate the debate rather than to simplify it.[21] Although the debates prior to the 1800 act were extremely controversial, most lawmakers viewed themselves as having only two options. They could pass a bill that provided only for involuntary bankruptcy, or not pass any bill at all. Because it put more options at lawmakers' disposal—most importantly, the possibility of a Voluntary Only bill—the expanding view of Congress's powers exacerbated the existing instabilities.

From the 1830s on, lawmakers' views were repeatedly splintered among the options we have considered—Complete Bankruptcy, Voluntary Only, and No Bankrupty—along with variations on these themes. In the twentieth century, Congress has developed institutional structures that can assure stability even in the face of inconsistent preferences.[22] One of these, delegation of gatekeeping authority to a committee, dates back to the early nineteenth century. Because the relevant oversight committee determines whether existing legislation is reconsidered, committees have the power to prevent a new Congress from promptly reversing the enactments of its predecessor. In theory, the Judiciary Committee, which has overseen bankruptcy issues since 1821, could have served this purpose. But committees played a less prominent role in the nineteenth century, in part because both Congress and congressional committees operated on a part-time basis. Neither the Judiciary Committee nor any stable block of lawmakers in Congress was in a position to act as agenda setter and provide the kind of stable outcome we see in other contexts where lawmakers hold inconsistent preferences.

Even a brief overview of the debates that led to the 1841 and 1867 acts gives a flavor of the instability that came from the multiplicity of views. The 1841 act was the brainchild of the Whig party, which had made bankruptcy law a crucial plank in the platform that brought them the presidency and control of the Senate the year before. In the face of strong opposition, the Whigs secured the necessary votes for enactment through a controversial logrolling campaign that obtained votes for bankruptcy in return for votes on a land distribution bill. (Logrolling is another possible solution to cyclical preferences. Rather than voting their true preferences, lawmakers permit one bill to pass in return for a favorable vote on other legislation.)

Even before the bill took effect, a vote to repeal passed the House when a small group of southern Whigs reversed their earlier support for the legislation, and a similar proposal fell only one vote short in the Senate.[23] The defection of several more Whigs, this time from the Midwest, brought the coalition tumbling down. Less than two years after it went into effect, President Tyler (who had assumed the presidency after President Harrison died) signed the repeal legislation and the 1841 act was gone. Just as the initial vote papered over a variety of strident dissenting views, the repeal illustrated just how quickly a majority coalition can collapse when lawmakers' underlying preferences are unstable.

The debates on the 1867 bankruptcy act, which dated back to the early 1860s, were complicated by the onset of the Civil War. When the war finally ended, the Republicans held large majorities in the House and Senate, which strengthened the support for a bankruptcy bill that included involuntary as well as voluntary bankruptcy. Northern lawmakers were particularly concerned that creditors would find it impossible to collect from southern debtors in the southern state courts.[24] Yet a sizable group of lawmakers continued either to resist any bankruptcy legislation, or to insist that only voluntary bankruptcy be included. Involuntary bankruptcy, argued Representative Dalbert Paine of Wisconsin in a representative though particularly colorful complaint,

> [is] a preposterous and revolting thing. . . . [To force it on debtors] is an intolerable, indefensible wrong. It is peculiarly offensive to the free and easy but honest men of the West whom it will squeeze into the strait jacket so befitting the madmen of Wall Street. The farmers and mechanics of the West will rise against it. . . . No new National collection law is needed.[25]

Although it lasted longer than either of its predecessors, the 1867 act was deeply unstable from the moment it was enacted. In both 1868 and 1872, lawmakers amended the law to soften its effects on debtors, and a move to repeal it led to further concessions to debtors in 1874. By 1878, the act had few defenders, and it was repealed by large majorities of both parties in both houses.

The 1898 act would bring these instabilities to an end, but each of the competing views remained very much in evidence throughout the deliberations that preceded it. Introducing the House bill that would provide the framework for the 1898 act, Representative Henderson of Iowa summed up the "three lines of thought" on bankruptcy in terms that should by now sound extremely familiar.

> First come those who [like himself] favor a law providing for both voluntary and involuntary bankruptcy. . . . There is another school who believe in a law which provides only for voluntary bankruptcy, cutting off all right on the part of the creditor to move in bankruptcy proceedings and giving that right only to the debtor. . . .

> There is still a third class, namely those who are opposed to any bankruptcy law and are in favor of remitting all remedies of creditors against debtors to the State laws. . . . These are the three schools.[26]

As described in more detail below, in debates that began in 1881 and spanned almost two decades, the Senate voted for the first of these views, Complete Bankruptcy in 1884, as did the House in 1890 and 1896, and Complete Bankruptcy finally prevailed in 1898 in the form of the 1898 act. Proponents of Voluntary Only bankruptcy, the second "school," also had their moments, as the House passed a Voluntary Only bill in 1894, and the Senate passed a somewhat similar bill before agreeing to Complete Bankruptcy in 1898.[27] Throughout this time, opponents of bankruptcy managed (sometimes on the merits, sometimes because Congress ran out of time to act) to preserve the No Bankruptcy status quo.

The reports that the Judiciary Committee sent to Congress during the early 1890s offer a particularly vivid map of the shifts among coalitions at the end of the nineteenth century. In October 1893, a majority of the House Judiciary Committee forwarded a bill that provided for Complete Bankruptcy. The majority's report prompted a dissent from a coalition that included both Voluntary Only advocates and lawmakers who opposed bankruptcy altogether (No Bankruptcy). "The undersigned members of the Judiciary," the minority wrote, "while differing among themselves as to the necessity for any bankruptcy law . . . unite in opposing so much of the bill reported by the committee as provides for involuntary bankruptcy for any cause except actual fraud.[28]

Just two months later, the coalitions suddenly changed. Rather than a Complete bill, the Judiciary Committee now forwarded a Voluntary Only bill that brought together some members who preferred Voluntary Only bankruptcy and others who preferred Complete Bankruptcy. The new coalition admitted that they were "somewhat divided in the reasons which induce them to favor a purely voluntary bankruptcy law":

> A minority of the majority favor it because they think that some law ought be passed, and they believe the passage of a bill embracing an involuntary feature impossible, and that to insist upon such a measure will defeat all legislation on the subject. . . . A majority of the majority are opposed to any law providing for involuntary bankruptcy. . . . [I]t appears to them sufficient to say that a law including an involuntary provision has been tried three different times in our history, and each time has proved unsuccessful.[29]

With the emergence of a Voluntary Only proposal, advocates of Voluntary Only bankruptcy suddenly went from minority to majority status. It was as if the committee preferred Complete Bankruptcy over No Bankruptcy, but Voluntary Bankruptcy over Complete Bankruptcy.[30] This Voluntary Only bill eventually passed the House, after speeches by lawmakers holding the complete range of views reflected in the committee report, but the bill was never brought up for consideration in the Senate.

Nineteenth-Century Ancestry of the Twentieth-Century Bankruptcy Bar

By the end of our discussion in this chapter, lawyers will emerge as a central factor in the political economy of U.S. bankruptcy law, and they will retain center stage for the remainder of the book. It may therefore be useful to pause for a moment to describe the predecessors of the twentieth-century bankruptcy bar. We then can put all of the pieces together and develop an explanation why bankruptcy suddenly came to maturity in the final years of the nineteenth century.

Throughout the nineteenth century, the vast majority of lawyers practiced by themselves and handled a wide range of matters. Central to the practice of most was the collection of debts for their creditor clients. Speaking of western lawyers, the preeminent historian of American law notes,

> Another staple of the lawyer's practice [in addition to real estate] was collection work. Lawyers dunned and sued, both for local people and for Easterners who held debts in the form of promissory notes. The lawyer usually paid himself from the proceeds—if he collected. Indiana attorney Rowland, collecting two notes in 1820 for E. Pollard, one "for 100 dollars in land-office money," the other for $100.37, "payable in leather to be delivered four miles from Bloomington," was to receive the customary fees when the money is collected, and if it is never collected then a reasonable fee for [his] trouble.[31]

The short-lived federal bankruptcy acts therefore served, as another legal historian, Edward Balleisen, has noted in his work on the 1841 act, as "an extension of their most basic stock-in-trade."[32] Bankruptcy provided a wealth of opportunity for attorney involvement. Debtors generally retained counsel to prepare their lists of assets and liabilities, to file the bankruptcy petition, and to represent the debtor on any issues disputed by his creditors. Creditors also needed an attorney when they chose to contest or otherwise participate in the debtor's bankruptcy.

A few attorneys seem to have developed a particular expertise in bankruptcy during the brief periods when federal bankruptcy legislation was in place. In the early 1840s, during the brief life of the 1841 act, several New York attorneys even "went so far as to advertise their services in newspapers," a strategy that proved surprisingly successful.[33] Specialization was relatively unusual, however. For thousands of attorneys, the bankruptcy acts provided one or a small number of new cases. When the acts were repealed, the attorneys simply plugged along with their usual assortment of state law collection cases and other matters. Although the 1867 act lasted over ten years, long enough for somewhat more specialization to occur, bankruptcy remained a limited, peripheral practice for all but a few attorneys. The raw materials for a bankruptcy bar were in place, but a true bar could not emerge in the absence of a permanent federal bankruptcy law.

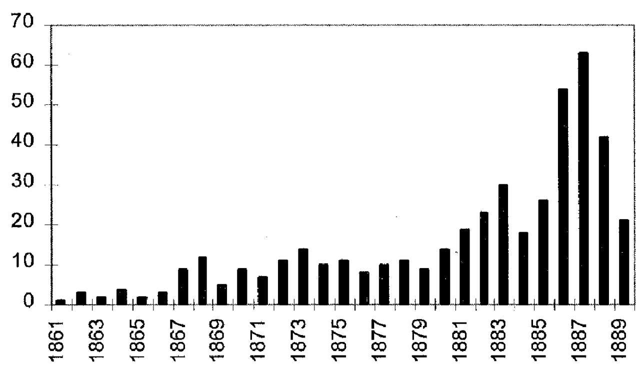
The Rise of Organized Creditors and the Countervailing Influence of Populism

Most of us have childhood memories of a game called musical chairs. In musical chairs, children walk around a circle of chairs as long as the music continues to play. When the music stops, they scramble to sit in the chairs. There are enough chairs for all but one child. With each round of music, the child who fails to grab a seat is eliminated, until finally, when only two children and one seat remain, one child emerges as the winner.

By now, the similarity between musical chairs and the nineteenth-century bankruptcy debates should be obvious. The principal difference was that, rather than one game of musical chairs, the debates became an endless series of such games. The winning alternative one year might give rise to a new approach the next. When the music stopped in 1898, there was no obvious reason to believe the circling was over—that Complete Bankruptcy had won out for good. But it had.

Why, after a century of legislative turmoil, did Congress finally enact a permanent bankruptcy law in 1898? And why did the first permanent U.S. bankruptcy law look so different from the English bankruptcy law that emerged in the same era under apparently similar circumstances? To answer these questions, we first must consider the role of business organizations and the prodebtor interests that opposed them in the years leading up to the 1898 act; and the role of the bankruptcy bar once the act was in place. The backdrop against which the interest group dramas played out was the general Republican support for, and Democratic hostility to, federal bankruptcy legislation.

The most important development in the years before the 1898 act was the emergence of commercial trade groups throughout the country. As Bradley Hansen has shown in his recent work on the 1898 act, prior to the late 1870s, local chambers of commerce and other business organizations were quite rare.[34] Thereafter, numerous commercial organizations arose, both locally and on a more national scale. Based on a study of 129 commercial organizations for which formation information is available, Hansen found that seventy-four were first formed in the 1880s or 1890s. Thirty-four dated to the 1870s, eleven



Source: *Report of the Internal Commerce of the U.S.*, 1st sess., 1890, H. Doc. 6 and National Industrial Conference Board, *Trade Associations: Their Economic Significance and Legal Status* (New York 1925)

Fig. 1.1. Business associations formed, 1861–1889. (From Bradley Hansen, "Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law," 72 *Business History Review* 86, 111 (1998). Used by permission.)

to the 1860, and only eight predated 1860 (see fig. 1.1). The emergence of these trade groups was dramatic evidence of the increasingly commercial nature of the nation, and these organizations would be the driving force behind the 1898 act.

Merchants who engaged in interstate commerce complained bitterly and repeatedly that debtors played favorites when they ran into financial trouble. The favorites were family members and local creditors, not the out-of-state merchants. Sometimes a debtor would simply pay the lucky creditors directly; other debtors would assign their assets to a court-appointed receiver with instructions to use the assets to pay specified creditors. (By contrast, some southern lawmakers defended preferences to family members and other favored creditors. According to one senator, these were "debts of honor," and debtors had every right to pay them first.)[35]

In 1880, representatives of many of the creditor groups came together in St. Louis to form the National Organization of Members of Commercial Bodies, for the express purpose of promoting federal bankruptcy legislation. The merchants had commissioned John Lowell, a federal judge from Massachusetts, to draft a proposed bankruptcy bill. Drawing liberally from the English Bankruptcy Act of 1869, which gave extensive control to creditors, Lowell presented draft legislation the following year. The merchants enthusiastically endorsed Lowell's creation, which became known as the Lowell bill and served as the legislative template for their lobbying throughout the 1880s.

The legislative history of the 1898 act was an eighteen-year odyssey of shifts and near misses. The Senate passed the creditors' Lowell bill in 1884, but the bill failed in House. The bill went nowhere the following year and languished for several years thereafter, prompting the creditors groups to commission Jay Torrey, a St. Louis attorney, to produce a revised bill. The Torrey bill passed the House in 1890, but it too bogged down thereafter. In the mid-1890s, a surge of populist support led the House to reject the Torrey bill and to pass the Voluntary Only Bailey bill in 1894. The final push begin in 1896. In 1897, the House passed a version of the Torrey bill known as the Henderson bill, and the Senate passed a much more debtor-friendly bill known as the Nelson bill. For four months, House and Senate conferees sought to resolve their differences. This they finally did, and President McKinley signed the legislation in July 1898.[36]

A useful yardstick for measuring the role of creditors' groups throughout the legislative process is the letters, known as "memorials," that interested parties sent to Congress to support or oppose federal bankruptcy legislation. Memorials were nineteenth-century interest groups' principal mechanism for weighing in on proposed legislation in the absence of (or in addition to) legislative hearings. For most of the nineteenth century, the missives concerning bankruptcy almost always came from states or cities. By the 1890s, the authorship of the memorials looked entirely different. Rather than states and other governmental bodies, it was chambers of commerce, boards of trade, and other commercial organizations who filled lawmakers' mailboxes with their views.[37]

If memorials reflected the grassroots work of commercial organizations, their public face throughout the 1890s was a single individual: Jay Torrey. After revising the Lowell bill in the late 1880s, Torrey spent the next decade tirelessly campaigning for the bill in the corridors of Congress. Both supporters and opponents of the legislation made frequent reference to Torrey's role. In 1893, Republican congressman Oates of Alabama, the floor manager of the bill, noted that the Judiciary Committee had frequently invited Torrey to come and answer questions about the proposed legislation. Although Democrat William Jennings Bryan of Nebraska opposed the legislation, he had effusive praise for Torrey. "I have never known of any person interested in the passage of a bill," Bryan said on the floor of the House, "who seems to be so fair in the presentation of a case."[38] (The year 1898 proved to be an eventful one for Torrey. In addition to seeing the bankruptcy legislation finally enacted, Torrey achieved a small measure of fame as one of the Rough Riders who was in Cuba when Theodore Roosevelt stormed San Juan Hill.)

The 1898 act was thus a testament to the growing influence of national commercial interest groups and their representatives.[39] To say that these creditors organizations were the principal movers behind the 1898 act is not, however, to say that they got everything they wanted with the act. The best way to appreciate the limits of the creditors' influence is to cast a quick glance at developments in England during roughly the same period.[40] The legislation enacted in England in 1869 had called for creditor control of key issues such as the appointment of the assignee who would oversee the bankruptcy process. When this approach proved disappointing, English lawmakers turned to "officialism"—an administratively run system—with the 1883 act. The Bankruptcy Act of 1883 authorized the Board of Trade to appoint an official receiver to conduct most of the administrative functions of the bankruptcy case. This approach established what still are the basic parameters of English bankruptcy law. Under the English approach, an official receiver exercises wide-ranging authority to investigate each debtor (generally without debtors' counsel present), to oversee the appointment of a trustee, and to make recommendations to the court. These powers give the English system a pervasively governmental and administrative character. English bankruptcy is also quite tough on debtors. A debtor who files for bankruptcy in England is subject to searching scrutiny, and courts routinely delay the debtor's discharge for periods up to several years.

U.S. commercial organizations would have been more than happy to see a similar approach in America. But commercial hopes were not to be met. Not only did it take nearly twenty years for creditor groups and their allies to persuade Congress and the president to push bankruptcy legislation through; but creditors also were forced to make important concessions along the way. The opposition to a creditor-inspired bankruptcy law came from a cluster of prodebtor forces that had a crucial restraining effect on the creditors' bankruptcy proposals—much as their predecessors had had since the early decades of the nineteenth century. A unique product of American politics, these forces derived much of their influence from the nation's federalist political structure.

At the heart of this resistance to a creditor-oriented bankruptcy law in the 1880s and 1890s were the agrarian and populist movements that emerged in the last half of the nineteenth century, and which overlapped with the states' rights movement that remained influential in the South.[41] These prodebtor forces faced substantial obstacles in the legislative domain. They were not nearly as well organized as the business organizations were, and by the late nineteenth century they were swimming against the tide of history: the trend of the nation was commercial rather than agricultural, and urban rather than rural. Despite the obstacles, these movements had widespread popular support in many southern and western states. On some issues, such as railroad rate regulation, farmers themselves engaged in coordinated lobbying. Historian Gerald Berk recounts that, although rural "merchants sent representatives to state assemblies throughout the Midwest, where they introduced no fewer than a dozen bills outlawing rate discrimination," this effort failed until midwestern farmers joined the effort. "It was not until the fabulous growth of the Grange[, an agrarian movement] in 1872 and 1873, he concludes, "that legislative initiatives were successful."[42]

With bankruptcy, farm interests were represented less directly. Unlike creditor organizations, farmers and other rural constituencies did not send memorials to Congress or develop specific legislative proposals. Yet bankruptcy was an extraordinarily prominent issue, and lawmakers from farm states actively promoted the ideological views of their rural constituents. Ideological entrepreneurs such as Representative Bailey of Texas, who spearheaded the campaign for a voluntary-only bankruptcy bill in the mid-1890s, and Senator Stewart of Nevada, provided a public face for the prodebtor perspective.

The American political system (i.e., federalism), with its peculiar division of authority between Congress and the states, magnified the influence of the agrarian and populist movements. Because every state had the same number of senators, the less populous states of the South and West had every bit as much authority in the Senate as New York or Massachusetts.[43] The local orientation of the Senate was reinforced by the fact that, in the nineteenth century, the senators of each state were selected by the state legislature. Although the rural bias was less pronounced in the House, rural interests also enjoyed disproportionate influence in this chamber due to subtle factors such as delays in redistricting.[44]

By the 1890s, populist lawmakers were the standard bearers for the prodebtor perspective, and the debates that led to the 1898 act were full of their exchanges with proponents of a federal bankruptcy law. In the populist imagination, bankruptcy law was often linked with the gold standard as the two greatest scourges of the common laborer. Creditors preferred that America yoke its currency solely to gold in order to minimize inflationary pressures and promote exchange. Populist lawmakers complained that this "sound money" strategy would hurt farmers. In the words of Senator Stewart of Nevada, the gold standard would "depreciate the property and increase the burden of debt" on the common man.[45] (Populists were not worried about the possibility of inflation under a "bimetallist" approach that included silver as well as gold, because inflation would increase property values and decrease the burden on debtors of previously contracted debt.) In the wake of one such populist diatribe, Congressman Sibley, a bankruptcy proponent, summed up the populist lament in particularly colorful terms: "If I understand the gentleman's argument, it is this: That the silver legislation [restricting the use of silver as legal tender] is the seed which was sown to the great crop of ruin, and this bankruptcy bill follows as a harvester and thrasher to enable Shylock to gather in his crop."

Creditors exerted most of their influence within the Republican party, of course, and most agrarians and populists were Democrats. But the Republicans who promoted bankruptcy had to make concessions to prodebtor interests to minimize defections (especially of southern and western Republicans) and to pick up a few Democrat votes. In short, it was the rise of creditor organizations and countervailing influence of prodebtor forces, working within the structure of the two political parties, that produced both the 1898 act and the shape of U.S. bankruptcy law for the century to come.[46]

Shrinking the Bankruptcy Framework and Closing the Deal on the 1898 Act

Other than the imperative somehow to balance the interests of creditors and debtors, the most pressing issue in the debates on the 1898 act was costs. As we saw earlier, the 1867 act had been a disaster in this regard. An assignee commanded the largest fee for managing the overall process. There also had been fees for the clerk who received the debtor's petition and then sent notices to creditors; and a marshal took his cut for administering particular assets. In the vast majority of cases, these officials seemed to make out like bandits, and little or nothing was left over for creditors.[47]

Prodebtor lawmakers tended to view the cost of the bankruptcy apparatus as a fatal problem. The prospect of an expanding federal bureaucracy made matters still worse. "In my judgment," a Texan congressman concluded in 1890, "the people do not want any more Federal officials over them."[48] Hostility to federalization was, of course, a familiar theme from southern and western lawmakers in the annals of nineteenth-century lawmaking, dating back to Jefferson's vision for an agrarian nation and the states' rights movement often associated with Senator John Calhoun. By the late nineteenth century, the states' rights perspective was somewhat nuanced. Southern and western lawmakers actively supported federal railroad rate regulation and intervention by the Interstate Commerce Commission, for instance.[49] With bankruptcy, however, they had much less sympathy, since federal bankruptcy legislation seemed to favor northeastern commercial interests. The cost and inconvenience of the federal courts exacerbated this concern.

Even lawmakers sympathetic to creditors' interests were worried as to whether a cost-effective administrative framework could be devised. Given these concerns, and the sorry legacy of the earlier bankruptcy bills, it was clear from the outset that the creditors' only hope was to propose a bill that pared back the administrative structure to an absolute minimum. The minimalist administrative structure that emerged and the bankruptcy bar it inspired were a crucial legacy of the decades-long battle between creditor groups and their prodebtor opposition.

In the earliest version of the Lowell bill, the creditors groups thought they had preempted these concerns and found an ideal solution—an approach that would assure adequate supervision, and thus protect creditors, while keeping administrative costs at a minimum. Bankruptcy would be administered by the U.S. district courts, but a new set of officials—called "commissioners"—would handle each case on a day-to-day basis. In addition, a group of "supervisors" would oversee the process on a broader, regional level. The Lowell bill proposed that the commissioners and supervisors receive a modest salary for their troubles—three thousand dollars for supervisors and two thousand dollars for commissioners.[50]

As it turned out, even this was not limited enough. When Senator Hoar first introduced the Lowell bill, he extolled its salary approach as an enormous improvement over previous law.[51] Salaried officials, he contended, would have an incentive to move the process along, rather than dragging things out as in a fee-based system. But the opposition to a permanent coterie of bankruptcy officials was immediate and strong. The new officials, Senator Ingalls of Kansas complained in the earliest debate, would be "permanent additions to the already excessive civil service of the government."[52] Complaints about the bureaucracy and its costs (which, as opponents noted, would be far higher than in more geographically centralized England) continued through the entire sixteen years of debate. The early opposition forced bankruptcy advocates to jettison salaries and revert to a fee-based approach. By the time the act finally passed, the proposed supervisors also were long gone. At the heart of the bankruptcy process would be a part-time official—the bankruptcy referee—who was paid a fixed percentage of the assets he distributed in the bankruptcy cases that came before him. Not until 1946 would Congress finally put bankruptcy referees on a salary basis (and only in 1973 would they receive the more flattering title of "bankruptcy judge").

In addition to reducing the cost and administrative structure, which concerned both creditors and prodebtor lawmakers, procreditor lawmakers had to make (or retain) crucial compromises on two other issues: exemptions and the grounds for involuntary bankruptcy. Exempt property is the property that a debtor does not have to turn over to his creditors if he files for bankruptcy. Permitting a debtor to keep a few of his things, the reasoning goes, will help him to make a "fresh start" once his debts have been discharged in bankruptcy. In the nineteenth century, state laws often protected items like a debtor's bed, Bible, and work tools. But many southern and western states also provided a generous exemption for the debtor's homestead, which often was his only asset with real value.

In recent years, the television news programs have aired breathless stories about well-heeled debtors who moved to Florida or Texas to take advantage of enormous homestead exemptions when they file for bankruptcy. A favorite example is Bowie Kuhn, the former commissioner of baseball, who bought a $2 million house in Florida. Kuhn's creditors got only pennies on the dollar when he subsequently filed for bankruptcy, while Kuhn himself kept the house and his enviable lifestyle. The exemption that made all this possible dates back to the nineteenth century, as does the general astonishment that a debtor has so much protection against his creditors.

Not surprisingly, creditors would have preferred to pass a bankruptcy law that made exemptions a matter of federal law. The 1867 act had deferred to state exemptions, and creditors complained bitterly about the results. Not only were the exemptions in some states remarkably generous, but several southern states had the audacity to expand their exemptions after the 1867 act was enacted. A single set of federal exemptions would have eliminated the confusion of dealing with laws that varied from state to state, and limited debtors to a more modest safety net. But bankruptcy advocates knew there was no hope of securing enough votes for bankruptcy unless they conceded to prodebtor lawmakers on this issue. The exemptions issue had generated enormous debate before the 1867 act, and incorporating state exemptions was the only way to assure that the legislation would pass. (It also was probably not incidental that the Republican president who signed the legislation, Andrew Johnson, was a southerner.) By the 1890s, lawmakers treated state regulation of exemptions as nonnegotiable.[53] Until 1902, it was not even clear whether deferring to state exemptions satisfied the constitutional requirement that Congress enact only "uniform" bankruptcy laws. Incorporating state law meant that debtors' exemptions would vary from one state to the next, which might easily have been construed as making the bankruptcy framework nonuniform. Nevertheless, constitutional doubts or not, state control of exemptions was a settled policy in each of the bankruptcy bills proposed in the 1880s and 1890s.

On the second set of issues, involuntary bankruptcy and the related issue of grounds for refusing to discharge the debtor's obligations, creditors dug in their heels much more. As against opponents' claims that malicious creditors would use the involuntary provision to throw struggling but financially viable debtors into bankruptcy, the commercial groups and their advocates insisted that creditors had no incentive to wrongfully invoke bankruptcy. And only with involuntary bankruptcy, they insisted, would creditors be assured a fair share of debtors' assets.

Over the course of the debates, creditors agreed to a series of protections to ward off creditor misbehavior. As early as 1882, lawmakers added a provision giving debtors the right to a state court jury trial if creditors filed an involuntary bankruptcy petition. For a rural debtor, this assured a jury of his peers, in the nearby state court rather than the federal court in a distant city. A provision permitting courts to detain a potential debtor was weakened in response to protests by prodebtor lawmakers, and creditors would be required to post a bond in connection with an involuntary petition. On the crucial issue of which "acts of bankruptcy" would justify an involuntary petition, however, creditors were much more grudging. The list of bases for involuntary bankruptcy was distilled by the 1890s to nine "acts of bankruptcy," which generated fierce, ongoing debate. While proponents of Voluntary Only bankruptcy wanted to eliminate the section altogether, or at the most limit it to cases of actual fraud, the creditor groups that supported Complete Bankruptcy refused to scale back.

Not until late in the debates did procreditor lawmakers make any important concessions. The ninth act of bankruptcy, which made failure for more than thirty days to make payments on commercial paper an act of bankruptcy, was removed in 1896. This is where things stood as of 1898.

For four months in 1898, a group composed of representatives from the House and Senate attempted to hammer out a compromise bill that would reconcile the creditor-supported Henderson bill passed by the House and the much more debtor-friendly Nelson bill that had emerged from the Senate.[54] The key issue in the negotiations was the eight acts of bankruptcy. The House team, lead by Senator Henderson, fought to preserve all eight of the acts of bankruptcy in order to protect creditors' right to invoke the bankruptcy laws. Nelson and the Senate team, by contrast, chaffed at any basis for involuntary bankruptcy other than fraud. In the end, the two men reached an eleventh-hour compromise that eliminated three more acts of bankruptcy, reducing the final list to five. The compromise also reduced the grounds for denying a debtor's discharge.

It would be difficult to overstate the importance of scaling back the administrative structure, and of creditors' concessions on exemptions and involuntary bankruptcy, to the tenor of the 1898 act. Rather than a creditor collection device, as most previous bankruptcy laws had been, the first permanent U.S. law would be as sympathetic to debtors' interests as to those of creditors. By downsizing the administrative machinery, the 1898 act set up an adversarial, judicial process as the American model for bankruptcy. In contrast to England, where a governmental official plays a pervasive role, the referees under the 1898 act would have little incentive to get actively involved; and the process would be left largely to the parties themselves. This created an enormous demand for a bankruptcy bar, and, as we shall see, lawyers came out of the woodwork to fill the need. These characteristics—the generally debtor-friendly approach to bankruptcy, and the primacy of lawyers rather than an administrator—distinguish U.S. bankruptcy law from every other insolvency law in the world.

The Sheltering Wing of Republican Control

Neither the creditor organizations that lobbied so long for the 1898 act, nor the bar that the act inspired, explains why Congress finally passed the act in 1898, rather than 1890, 1895, or some other year. Crucial to the timing of the act, and to its early survival, was a simple shift in party politics. Each of the prior bankruptcy acts was enacted in years when the Republicans or their predecessors controlled both Congress and the presidency. The 1898 act was no different. In 1898, the Republican party controlled the presidency and both houses of Congress for the first time in years. The Republicans retained this control for more than a decade, as Theodore Roosevelt took over for President McKinley, and subsequently won a second term. Republican control helped put bankruptcy legislation on the front burner in 1898, and it helped keep the 1898 Bankruptcy Act in place long enough for the bankruptcy bar to develop and cement the coalition in favor of its retention.

Party control alone is not enough to assure the permanence of a law whose support is unstable, of course. Party dominance invariably comes to an end, as the Republicans found on losing the House in 1910. Even before this time, Republican support for the 1898 act was far from unanimous. The two Republican bills that were reconciled to create the 1898 act (the Henderson bill in the House, the Nelson bill in the Senate) differed dramatically in tone, as we have seen. Many creditors who had promoted the bankruptcy later chafed at the compromises that had been made to appease debtor-oriented lawmakers, and their disaffection was shared by at least a few Republican lawmakers.[55] Some observers believe that the act might have been repealed if Congress had not taken steps to tighten the discharge in 1903. (The act had also gotten an important boost the year earlier, when the Supreme Court held in 1902 that incorporating state law on exemptions did not violate the uniformity requirement.)[56] In 1905, the fate of the 1898 act was very much up for grabs as the Republican-controlled House Judiciary Committee advocated repeal. But the center held, and the continuing efforts for repeal had lost much of their force by the time the Republicans finally lost control of the levers of power in the second decade of the new century.

The most important effect of continued Republican control was that it enabled a federal bankruptcy bar to develop. Although bankruptcy lawyers immediately answered the call for their expertise, it takes time for a bar to mature. Republican control provided the necessary stability, and that turned out to make all the difference. In less than a decade, bankruptcy professionals supplied the final piece of the bankruptcy puzzle. Together with—and in time, even more than—the commercial interests that had inspired the act, the bankruptcy bar made sure that Complete Bankruptcy prevailed for good.

The Emergence of a Bankruptcy Bar After the 1898 Act

Spurred by the 1898 act, and by the need of both debtors and creditors for bankruptcy attorneys, the bankruptcy bar sprang almost immediately into existence. As we have seen, the ingredients for a bankruptcy bar had long been in place in the collection activities that dominated many lawyers' practice. Perhaps the best testimony on the rapid rise of a distinctive bankruptcy practice comes from the collective activities of lawyers' organizations and the emergence of bankruptcy "stars."

The earliest and most effective voices for the bankruptcy bar were lawyers' organizations such as the American Bar Association and the Commercial Law League. The first, and the first organization to give a nationwide voice to lawyers generally, was the ABA. Formed in 1878, the ABA predated the 1898 act by two full decades and was a somewhat unlikely spokesman for bankruptcy lawyers given the elitist orientation of its membership. In commercial law, the ABA was in the forefront of the movement to produce uniform commercial laws. In 1887, the committee voiced its support for the limited, "equity" bankruptcy bill that had been introduced several years earlier and would resurface in somewhat altered form in the next decade. Once the more expansive 1898 act had been enacted, however, the leading members of the newly emerging (and distinctly nonelitist) bankruptcy bar became a dominant influence on the Committee on Commercial Law—later called the Bankruptcy Committee. In the debates on repeal that began almost as soon as the act went into effect, the ABA consistently weighed in for retaining and expanding the 1898 act.

Unlike the ABA, which includes lawyers of all stripes, the Commercial Law League was, and is, much more directly tied to the bankruptcy bar. The Commercial Law League was first formed in 1895, shortly before Congress enacted the 1898 act. The league was designed as an analogue to general creditors organizations, but with a particular focus on legal issues. The fact that the league emerged during the final round of debates on the 1898 act is not accidental. Although it was (and is) concerned with a variety of commercial law issues, bankruptcy was an overriding concern of the league from its inception. Bankruptcy lawyers quickly became the principal members of the league. From the pages of the league's house organ, the *Bulletin* (later given the name *Commercial Law Journal*), bankruptcy lawyers reviewed bankruptcy developments and debated legislative strategies for promoting and protecting the 1898 act. During the buildup to the 1903 amendments, for instance, the editors of the *Bulletin* emphasized that "the League has uniformly and consistently advocated the principle of national bankruptcy legislation, while admitting the necessity for amendments to the present law in order to insure equity as between creditor and debtor."[57]

An even more vivid illustration was the early emergence and influence of bankruptcy "stars." One of the most prominent in the infancy of the 1898 act was Frank Remington. After practicing as a commercial lawyer in Cleveland prior to the act, Remington became one of the act's early referees. Although serving as a referee was not a particularly prestigious job, Remington quickly made a name for himself by, among other things, publishing one of the first comprehensive treatises on the 1898 act. From its inception in 1908, *Remington on Bankruptcy* quickly became a standard reference, and Remington figured prominently in the early bankruptcy debates.[58]

In some respects, the bankruptcy bar figured even more prominently than the creditors groups that served as its principal allies. The two groups spoke with equal fervor on the importance of an expansive federal bankruptcy law. But when lawmakers put overarching questions to one side in order to discuss the technical details of the act, creditors took less of an active interest. In hearings on issues such as the definition of insolvency and compensation for bankruptcy receivers, nearly all of the witnesses were lawyers and lawyers' groups. Frank Remington played a particularly visible role in these hearings. In addition to testifying, he cast himself, and was cast by the committee, as the expert on existing bankruptcy law. More than anyone else, it is Remington's voice that one hears in the deliberations that led to important amendments in 1903 and 1910.

Summary

The picture we have developed is a mosaic, with a variety of interrelated parts, but a small group of pieces tells much of the story. The backdrop of the 1898 act was decades of instability due to lawmakers' inconsistent views on federal bankruptcy legislation. Lawmakers' views divided loosely along geographical and party lines, with most northeastern and Republican lawmakers favoring bankruptcy, while southern and western lawmakers, and Democrats, were more hostile. Even within these groups, however, lawmakers held divergent views. Some wanted an expansive bankruptcy law, some did not want any bankruptcy law, and others preferred a limited, voluntary-only law. The single most important development at the end of the century was the formation of local chambers of commerce, boards of trade, and other merchant organizations across the country. These organizations provided a nationwide base of support for bankruptcy law and eventually persuaded Congress to enact the 1898 act.

Commercial organizations' support was not by itself enough to stabilize lawmakers' preferences, however. To soften opposition from states' rights, agrarian, populist, and other debtor-oriented lawmakers, the creditors were forced to cede authority over exemptions to the states and to minimize the act's administrative machinery. Creditors also bowed to prodebtor sentiment by offering discharge provisions that were much more lenient than in any previous act. The final hurdle was not cleared until the Republicans gained control of both houses of Congress and the presidency. Republican control assured passage in 1898, and continued Republican control kept the act in place long enough for the bankruptcy bar to develop. It was the emergence of the bankruptcy bar that reinforced the coalition for bankruptcy, a development that assured the permanence of the act.

The rise of the bankruptcy bar sets the stage for much of the rest of the bankruptcy story. Since 1898, bankruptcy professionals have been the single most important influence on the development of bankruptcy law. For readers who are familiar with the political science literature, this point may sound familiar. Political scientists have frequently noted that government agencies have a tendency to become self-perpetuating.[59] Once Congress establishes a new agency and creates jobs for a group of new government officials, these same officials will later serve as the primary bulwark against elimination of the agency. In a sense, the agency becomes its own political constituency. Although the bankruptcy bar is private rather than governmentally run, it has played a rather analogous role.

The influence of the bankruptcy bar was not, and has never been, unbounded, however. The same forces that were melded together to create the 1898 act—organized creditors and the prodebtor ideologies strengthened by American federalism—have continued to set the basic parameters of U.S. bankruptcy law. In chapter 3, we will examine the interest group and ideological dynamic in more detail, through the lens of public choice theory. First, however, we must consider the other half of U.S. bankruptcy law, the emergence of a judicial mechanism for reorganizing railroads and other large corporations.