The Genius of the 1898 Bankruptcy Act

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I. INTRODUCTION

The year 1898 was a watershed year in American history. It is the end of 1998 as I write, and one of the most widely reviewed books of the year is entitled simply *1898*.[1] From the vantage point of one century later, 1898 is still the year when Teddy Roosevelt and the Rough Riders stormed San Juan Hill in Cuba. The famous charge not only assured Roosevelt a permanent place in the American imagination, but it also marked America's coming of age as a nation. After a comparatively provincial start, America's economy had become one of the world's most important, and America's military exploits in Cuba served as notice that America intended to be a serious player on the world stage.

Although *1898*, the book, has nothing to say about bankruptcy, the year 1898 was also a crucial one for bankruptcy. For the first century of the nation's existence, there had never been a stable bankruptcy law. Under its constitutional authority to enact "uniform laws on the subject of bankruptcy,"[2] Congress had passed three different bankruptcy laws—in 1800,[3] 1841,[4] and 1867.[5] But the life of each was, to borrow from Thomas Hobbes, "nasty, brut-

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[1] *See* DAVID TRAXEL, 1898: THE BIRTH OF THE AMERICAN CENTURY (1998).

[2] U.S. CONST. art. I, § 8.

[3] *See* Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 [hereinafter 1800 Act], *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

[4] *See* Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 [hereinafter 1841 Act], *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

[5] *See* Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 [hereinafter 1867 Act], *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

ish, and short."[6] Then in 1898, the clouds suddenly cleared (well, not so suddenly, as we shall see). Congress passed the 1898 Act, and the rest is history. The 1898 Act endured, and bankruptcy law has expanded—rather than contracted or been repealed—ever since.

There is a standard story about the nineteenth century bankruptcy laws that were just mentioned, and the story goes like this.[7] Under ordinary circumstances, there was not enough political support to keep a permanent bankruptcy law in place. But the nation was periodically thrown into turmoil by deep economic depressions. These depressions provoked loud cries for bankruptcy legislation. Congress responded to this pressure by passing bankruptcy laws, but it then repealed the laws when the depression passed and support for federal bankruptcy regulation receded.

This story is true enough, as far as it goes, but it leaves several puzzles unanswered. First, it does not tell us why 1898 was so special. How did the 1898 Act emerge, and why did it survive the post-Act backlash that toppled each of its predecessors? Second, why did the Act take a form so different from the English bankruptcy system that developed under apparently similar circumstances across the Atlantic Ocean. In contrast to the pro-creditor, administrative English approach, the 1898 Act favored debtors' interests in many respects and assumed that the parties and their lawyers, rather than government officials, would run the bankruptcy system.

This Article attempts to address each of the puzzles described above, and thus to pinpoint the "genius" of the 1898 Act.[8] Simply put, the Article argues that the genius of the Act came from the interaction of creditor groups and federalism prior to the Act and the influence of the new bankruptcy bar after the Act.[9] This analysis

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[6] The 1800 Act lasted over three years, the 1841 Act lasted less than two years, and the 1867 Act lasted approximately eleven years. For the dates of repeal, see *supra* notes 3-5.

[7] The theme of the story, along with the importance of sectional rivalries to the bankruptcy debates, is the central motif in CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935). It also figures prominently in the other most prominent book-length accounts of bankruptcy history. *See* F. REGIS NOEL, HISTORY OF THE BANKRUPTCY LAW (1919); PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900 (1974). For a good survey of bankruptcy history in article form, see Charles Jordon Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995).

[8] As those familiar with the corporate law literature will recognize, the author borrowed this term from Roberta Romano. *See* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993).

[9] Playing an important supporting role was an unusually long period of Republican

begins by describing the puzzles posed by the 1898 Act and then considers the reasons it proved to be special.

II. TWO PUZZLES OF THE 1898 ACT

As mentioned at the outset, the standard story of American bankruptcy history is a tale of bust and boom. On this view, we have the Depression of 1793 to thank for the 1800 Bankruptcy Act; and the Panics of 1837, 1857, and 1893 to thank for the 1841, 1867, and 1898 Acts. Once the first three acts had done their initial work and economic conditions improved, Congress repealed the federal legislation and left insolvency law to the states.

To say that the early bankruptcy laws responded to economic distress is, of course, to vastly oversimplify the politics of their passage. The 1800 Act was enacted and then repealed in the midst of a sustained struggle between the Federalists and the Jeffersonian Democrats over the future direction of the nation.[10] The Federalist vision of a national economy based on trade rather than agriculture won out with the passage of the 1800 Act, only to meet a quick death when Jefferson was elected. The debates that led to the next act, in 1841, were in many respects the most memorable, with important speeches by Daniel Webster, Henry Clay, John Calhoun, and Thomas Benton spicing up proceedings that once again served as a referendum on the national economy.[11] The 1867 Act was enacted in the aftermath of the Civil War, and Southerners' outrage at its implementation by "carpetbagging" federal judges would figure prominently in the debates that ultimately produced the 1898 Act.

On most legislative issues, political differences are resolved over time, with one of the competing positions, or some stable compromise, winning out. Yet it took a hundred years for Congress

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control at the turn of the century.

[10] For an excellent account of this struggle as it influenced the early bankruptcy debates, see DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 178-84 (1980).

[11] Even at the end of the century, in the debates over the 1898 Act, both proponents and opponents of bankruptcy reform repeatedly quoted the speeches Webster and Clay gave in 1840. Proponents emphasized their support for federal bankruptcy legislation, whereas opponents focused on their support for an amendment that would have limited the act to voluntary bankruptcy only. *See, e.g.*, 25 CONG. REC. 2878 (1893) (statement of Rep. Brosius) (describing Webster's support for federal bankruptcy); 31 CONG. REC. 1940 (1898) (statement of Rep. Bailey) (stating that both Webster and Calhoun voted in favor of the Clay amendment that would have eliminated the involuntary bankruptcy provision in 1841).

to fall into line on bankruptcy. There are several reasons why the instability lasted so long. Most frequently mentioned is the long-standing geographical conflict over federal bankruptcy law. Whereas Northeastern lawmakers long advocated bankruptcy legislation as essential to developing a national economy, Southern and Western lawmakers resisted, due to their constituents' fear that bankruptcy would threaten farmers' property and livelihood.[12] The sectional differences roughly tracked, though not completely, the opposing views of the Federalists/Whigs (and later, Republicans), most of whom supported bankruptcy, and the Jacksonian Democrats, who did not.

While these conflicts ensured that the bankruptcy debates would be sharply contested, what made matters worse was that lawmakers held not just two, but three distinct views on bankruptcy (and a wide range of additional variations).[13] Some lawmakers would vote for bankruptcy so long as it was strictly voluntary (that is, a debtor could file for bankruptcy but his creditors could not throw the debtor into bankruptcy involuntarily). Others insisted on a "complete" bankruptcy law, with both voluntary and involuntary bankruptcy. And a final group opposed bankruptcy altogether.

The competing views exacerbated the difficulty of settling on a single, consistent approach to bankruptcy.[14] Congress enacted a

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[12] As a concession to this sentiment, proponents of bankruptcy excluded farmers from involuntary bankruptcy, so that farmers could invoke the bankruptcy laws but could not be forced into bankruptcy by creditors. But farm advocates still were not satisfied. Even if farmers were technically immune, they argued, Eastern wholesalers could file involuntary petitions against the small retail merchants who sold crucial supplies to farmers. The merchants' trustees would then bring pressure on the merchants' farm debtors, with devastating effects on farmers. *See* 25 CONG. REC. 2873-74 (1893) (statement of Rep. Kyle) (hypothesizing about vulnerability of farmers if merchants forced into bankruptcy).

[13] For a more detailed account, see David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 502-503 (1998).

[14] The three views were unusually difficult to reconcile because there was no obvious relationship among them. One might think that complete bankruptcy would belong at one pole, voluntary in the middle, and opposition to bankruptcy at the other pole. But this was not the case. Many lawmakers who supported complete bankruptcy, for instance, viewed a voluntary-only law as even worse than no bankruptcy legislation at all.

Drawing from social choice theory, the author has argued elsewhere that the multiplicity of views reflected a voting perversity referred to as "cycling." *See* Skeel, *supra* note 13. In the absence of stable ("single-peaked") legislative preferences, legislators shifted back and forth among the three options until the forces considered in Parts III and IV finally ushered in a new era of stability. For an argument that current bankruptcy legislation has often involved partial defections from the overall bankruptcy system for the benefit of narrow interest groups, see Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic* "complete" (although principally voluntary) bankruptcy law in 1841, which after being repealed, was followed by more than twenty years without any bankruptcy law. Congress next passed the 1867 Act, which again included both voluntary and involuntary bankruptcy. In the bankruptcy debates of the 1880s and 1890s, the three views continued to jostle for supremacy,[15] until the 1898 Act settled the debate in favor of a "complete" bankruptcy system.

The first and most obvious puzzle raised by the 1898 Act is why 1898 was the year that the century-long game of musical chairs finally came to a stop. Why did "voluntary-only" and "no bankruptcy" disappear as perceived alternatives?

Commentators have had surprisingly little to say about this puzzle. The only explanation one finds in the existing literature is that the expansion of commerce in the United States had made federal bankruptcy legislation inevitable.[16] On this view, proponents of an agrarian vision for America were the opponents of bankruptcy, whereas the advocates of commerce supported it; and by the end of the nineteenth century, America had become a commercial nation once and for all.

Focusing on the emergence of America as a commercial nation is a useful starting point, but it tells us little about how expanding commerce translated into a permanent bankruptcy law (and tells us even less about narrower questions such as why 1898 was the magical year, rather than, say, 1890 or 1895). To better understand the significance of 1898, we will need a more particularized account of the political components of the 1898 Act.[17]

Developing a more precise account is even more crucial to explaining the second great puzzle of the 1898 Act: its overall shape. Although it was promoted by creditors, the 1898 Act was in many respects strikingly debtor-friendly—most obviously, in its generous discharge provisions.[18] Another striking feature of the 1898 Act was

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Theory of Legislative Resolutions to Financial Common Pool Problems, 39 ARIZ. L. REV. 801 (1997).

[15] The House passed a voluntary bill (the "Bailey Bill") in 1894, and the Senate Bill (the "Nelson Bill") that was reconciled with its very different House counterpart (the "Henderson Bill") permitted involuntary bankruptcy only in limited circumstances, such as fraudulent behavior by the debtor.

[16] For a particularly explicit adoption of this view, see Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291 (1994).

[17] *See id.*

[18] James Olmstead referred to the overall effect of the 1898 Act as a "jubilee" for debt-

its minimalist administrative structure. The principal bankruptcy officials, referees and trustees, were paid on a fee basis, not by salary, and had only limited powers.[19]

This second puzzle, the general contours of the 1898 Act, is best appreciated by contrast to the English bankruptcy framework that developed at roughly the same time. Throughout the nineteenth century, American lawmakers paid close attention to developments across the Atlantic. English bankruptcy law was an obvious point of reference, because of both America's history as an English colony and England's status as a preeminent world power.

In one sense, England was the picture of stability by comparison to the American bankruptcy debates. Whereas the United States went long periods without federal bankruptcy, England had national bankruptcy laws on the books throughout the nineteenth century. But bankruptcy law was a source of considerable dissatisfaction in England, as in the United States, which prompted a series of reforms over the course of the century. A very brief overview will give the flavor, and underscore the remarkable differences between English and American bankruptcy law.

In 1831, Parliament enacted a bankruptcy law that introduced "officialism" to English bankruptcy law.[20] Previous bankruptcy acts had largely been creditor collection devices, invoked and pursued by individual creditors. Often referred to as "Lord Brougham's Act" after the reformer most influential to its enactment, the English Bankruptcy Act of 1831 replaced creditor control with a governmental official who would administer the bankruptcy system. Rather than individual creditors, the bankruptcy official would be the principal overseer of the bankruptcy process.

Although initially viewed as a success, the 1831 Act had come under attack by the 1850s. (Both the complaints and the principal proponents for reform will sound very similar to developments in America, as we will see in the next part.) The principal proponents for change were business organizations that had begun to form in

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ors in a much-cited attack on the Act. *See* James Monroe Olmstead, *Bankruptcy: a Commercial Regulation*, 15 HARV. L. REV. 829, 843 (1902). The legislative compromises on discharge are discussed in more detail in Part IV, *infra*.

[19] For a discussion of the shift from salaried to fee-based officials, see *infra* notes 54-58 and corresponding text.

[20] The overview that follows is drawn from the lengthy discussion in V. MARKHAM LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND 41-59 (1995).

the mid-nineteenth century.[21] The most frequent complaint was cost. Administrative expenses, such as the cost of compensating the bankruptcy officials, ate up much of the bankruptcy estate, leaving little to distribute to creditors.[22]

In response to these concerns, creditors' groups drafted and began lobbying for a creditor-run system. Rather than a governmental official, the creditors' proposal called for a creditor-appointed trustee (the "assignee") to oversee the bankruptcy process. With the English Bankruptcy Act of 1861, the creditors' groups agreed to a compromise reform.[23] Buoyed by favorable reports about the success of the creditor-run system in Scotland, creditors' groups then achieved a more complete victory in 1869. With the English Bankruptcy Act of 1869, "officialism" gave way to creditor control.[24]

To the surprise of many, England's Bankruptcy Act of 1869 proved to be a complete failure. In cases with small amounts at stake, creditors had little interest or incentive to participate.[25] Many observers believed that debtors were not being scrutinized carefully enough, and there were loud complaints about a variety of abuses.[26] In 1883, the pendulum swung once again. Although many creditor groups continued to lobby for a creditor-run system, the Bankruptcy Act of 1883 brought a return to "officialism." 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.[27] Unlike its predecessors, the Bankruptcy Act of 1883 endured and established what are still the basic parameters of English bankruptcy law.

The English system bears little resemblance to the framework

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[21] *See, e.g., id.* at 64-65 (discussing reforms proposed by merchants in 1840s). The organizations that figured most prominently in the debates of the late 1850s and 1860s were the National Association for the Promotion of Social Science, an organization of businessmen, politicians, doctors and lawyers and the Associated Chambers of Commerce. *See id.* at 123-33.

[22] *See id.* at 133.

[23] The English Bankruptcy Act of 1861 gave enhanced powers to the creditors' assignee, but omitted reforms to the appellate structure that creditors had sought. *See id.* at 143-44.

[24] *See id.* at 155-63.

[25] *See id.* at 173-74.

[26] *See id.* at 182-83.

[27] *See id.* at 195-97 (describing a Board of Trade bill that was subsequently enacted); *see also id.* at 204-205 (proffering adjustments to bill as it was enacted limiting some power of the Board of Trade).

Congress adopted for the United States in 1898. The wide ranging authority of the official receiver—who personally investigates each debtor (generally without debtor's counsel present), oversees the appointment of a trustee, and makes recommendations to the court—gives the English system a pervasively governmental and administrative character. English bankruptcy also is far less generous to debtors than its American counterpart. A debtor who files for bankruptcy in England is subject to searching scrutiny, and courts routinely delay the debtor's discharge for a period of several years.[28]

Thus, shortly after England adopted a heavily administrative approach to bankruptcy, America moved in precisely the opposite direction. American bankruptcy cases would be staffed by part-time officials, leaving the process largely to the parties and their lawyers. Unlike the almost punitive British system, the 1898 Act was repeatedly defended as protecting the "honest but unfortunate" debtor. The question, and the second great puzzle of 1898, is: why?

III. BEFORE THE ACT: CREDITORS AND FEDERALISM

To understand why the 1898 Act proved permanent, and why American bankruptcy law traveled down a different path than its British counterpart, we need to consider two time periods: the period leading up to the Act, and the years immediately after. In between, and connecting the "before" and "after," was an unusually long period of Republican control.

The single most important interest group agitating for bankruptcy legislation was unsecured creditors, particularly wholesale firms; and the most important development was the emergence of business organizations to lobby for their interests. By 1878, when Congress repealed the 1867 Act, chambers of commerce and boards

[28] For a recent account of these features of English bankruptcy law, see Douglas G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69 (1982). American reformers have periodically sought to introduce English-style administrators and closer scrutiny of debtors to American bankruptcy law. An active, early proponent of this approach was William Douglas, who emphasized the virtues of a careful study of debtors in a series of depression era articles. *See* William Clark et al., *The Business Failures Project—A Problem in Methodology*, 39 YALE L.J. 1013, 1015-16 (1930) (stating that in England, "[t]he antecedents of failure are delved into with marked thoroughness . . ."). These reforms have invariably failed in the United States, however, due to the political factors we will consider in the remainder of the Article.

of trade had begun to form in numerous localities.[29] Because these businessmen felt underprotected by state debtor-creditor laws, which often permitted debtors to favor relatives and other preferred creditors, the members of these groups had a strong, unified interest in federal bankruptcy legislation.[30]

In 1881, these business organizations hired Judge John Lowell of Massachusetts to draft proposed legislation.[31] At the first of three conventions held by their bankruptcy umbrella organization, the National Convention of Representatives of Commercial Bodies, the creditors enthusiastically endorsed Judge Lowell's handiwork.[32] The Lowell bill was introduced in Congress in 1882, and its supporters persuaded the Senate to pass it in 1884, but that was as far as the legislation went. In 1889, the creditors went back to the drawing board and hired Jay Torrey, a lawyer and later one of the Rough Riders,[33] to revise their proposed legislation. As with the Lowell Bill, the creditors gave their vigorous approval to Torrey's draft at a meeting of the National Convention of Representatives of Commercial Bodies—this time in 1889.[34] Torrey tirelessly campaigned for the Torrey Bill for the next nine years, until Congress finally enacted it in revised form in 1898.[35]

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[29] For a detailed discussion and statistical analysis of the emergence of these business organizations and a description of their influence on the 1898 Act, see Bradley Hansen, *Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law*, 72 BUS. HIST. REV. 86 (1998).

[30] The treatment of preferential transfers was a heated issue throughout the bankruptcy debates. Whereas lawmakers sympathetic to federal bankruptcy legislation echoed creditors' insistence that preferences must be prohibited, some opponents of bankruptcy defended preferences. In their view, debtors had a moral obligation to prefer creditors such as family members over other creditors. *See* 17 CONG. REC. 5134 (1886) (statement of Rep. Brown) (defending preferential payments as "debts of honor"); *see also* Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3 (1986) (characterizing the debate as reflecting confusion about the morality of commerce and bankruptcy).

[31] For overviews of the legislative history described below, see, for example, WARREN, *supra* note 7, at 128-41.

[32] *See* Hansen, *supra* note 29, at 98.

[33] Perhaps inevitably, the limited prominence Torrey had in the nation at large came much less from his tireless promotion of bankruptcy legislation than from his exploits in Cuba. *See* Hansen, *supra* note 29, at 98.

[34] *See* Hanson, *supra* note 29, at 99.

[35] Both proponents and opponents of the Torrey Bill referred with some regularity to his efforts on behalf of the bill. *See, e.g.*, 30 CONG. REC. 628 (1897) (statement of Rep. Stewart) (stating, as a critic of the bill, "Mr. Torrey is a very sharp lawyer. He has been employed for a long time by interested parties").

What exactly were creditors looking for in a bankruptcy law? Like their counterparts in England, American business groups wanted bankruptcy to be run by creditors, not a government official.[36] They believed that a debtor's assets should be distributed by a trustee chosen by the creditors rather than a permanent official.[37] To the extent the law required new officials to act, in effect, as judges, these officials were given a set salary to prevent some of the abuses of the 1867 Act.[38] Substantively, creditors were adamant that the legislation prohibit preferential transfers, and that it include involuntary bankruptcy. They also wanted the law to be relatively tough on debtors, particularly those who had defrauded their creditors.

If creditors had been the only force in the bankruptcy deliberations, the 1898 Act might have looked much like English bankruptcy law.[39] But a cluster of opposing forces, unique to the United States, had a crucial restraining effect on the creditors' aspirations. These will be referred to as pro-debtor forces,[40] which stem from the overlap between state and federal government in American lawmaking (and the influence of the states even in the federal sphere),

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[36] An 1882 speech by Senator Ingalls, who had proposed a bankruptcy bill that would vest bankruptcy authority in the equity jurisdiction of the federal courts, underscores the affinities between American and English creditors' groups. Ingalls contended that the Lowell Bill was drawn from England's Bankruptcy Act of 1869, and emphasized the complaints in England about that legislation. *See* 14 CONG. REC. 38, 39 (1882). Senator Hoar, the floor manager for the Lowell Bill, did not deny the connections. Instead, he insisted that the weaknesses of the English law had been addressed by the Lowell Bill. *See id.* at 40.

[37] *See generally id.* at 38-42 (statements of Sen. Ingalls and Sen. Hoar) (debate between Senator Ingalls and the floor manager of the original Lowell Bill, Senator Hoar, as to whether creditor control would be more effectual than judicial intervention).

[38] The 1867 Act required debtors (or the bankruptcy estate) to pay set fees for filing and for a variety of tasks, such as notifying creditors. Many observers believed that the fees were needlessly multiplied by bankruptcy officials. In introducing the Lowell Bill, Senator Hoar extolled its reliance on salaries rather than fees as one of the most important advances of the Bill. *See id.* at 147. Although the bill did not initially specify the amounts of the officials' salaries, proponents quickly inserted numbers: supervisors would receive $3000 per year and registers would receive $2000 per year. *See id.* at 43.

[39] The author does not suggest that creditors were the sole influence on the English bankruptcy law. To the contrary, Lester suggests that the influence of creditor interest groups had waned by the time Parliament passed the Bankruptcy Act of 1883, which set the tone of English bankruptcy law for the next century. *See* LESTER, *supra* note 20, at 208. The point, instead, is that the bill that American creditors proposed, the Lowell Bill, looked much more like the English system than the legislation that finally passed in 1898.

[40] Whether a lenient bankruptcy law genuinely "favors" debtors is, of course, debatable, since creditors will respond by adjusting credit terms. But the lawmakers who voiced the views described in the text saw their position as unequivocally pro-debtor.

loosely as "federalism."[41]

The most obvious effect of federalism was to give voice to pro-debtor views that might not otherwise have played a substantial role.[42] The agrarian and populist movements of the nineteenth century were largely local in nature, but the influence of farmers at the state level quickly translated into national influence through the states' representatives in Congress.[43] In the bankruptcy debates, populist rhetoric surfaced in attacks on the harshness of the creditors' proposals, and complaints that farmers and small merchants would be ruined. The Torrey Bill was frequently linked to Northeastern sympathy for the gold standard, which populists attacked as devastating for their debtor constituents.[44]

Closely related to agrarianism and populism was the states' rights movement. Throughout the nineteenth century, advocates of states' rights had criticized bankruptcy reform as federalizing issues that would otherwise be regulated by the states. Two particular concerns were the amount of litigation that would be shifted from state to federal courts and the specter of a vast new government bureaucracy.[45]

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[41] Federalism plays a similarly prominent role in Mark Roe's political account of the separation of ownership and control in publicly held U.S. corporations. *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS 45-46 (1994).

[42] As will become clear below, the factors referred to as "federalism" include both ideology and interest group activity, as they were shaped by the sharing of authority between Congress and the states in the United States. For a more general discussion of interest group influence, see David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647 (1997).

[43] One of the best accounts of agrarianism and populism is RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955). Local movements are particularly influential in the Senate, because each state has two senators, regardless of population. *See, e.g.*, JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 44-45 (1950). Moreover, state legislatures selected the states' senators throughout the nineteenth century. *See* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1008 n.6 (1994) (citing U.S. CONST. art I, § 3, cl. 1 (amended in 1913 with the ratification of the Seventeenth Amendment)). Rural movements such as agrarianism and populism were aided in the House by subtle factors such as lawmakers' tardiness in reapportioning Congress to reflect increasing urbanization in the late nineteenth century. *See* HOFSTADTER, *supra*, at 116-17.

[44] A good illustration, complete with a populist history of recent U.S. monetary legislation, is a speech by Representative Gunn in 1898. *See* 31 CONG. REC. 1911-13 (1898) (statement of Rep. Gunn).

[45] The apprehension about expanding the federal bureaucracy was shared even by many lawmakers who supported federal bankruptcy legislation. *See, e.g.*, 14 CONG. REC. 168 (1882) (statement of Rep. Bayard). Concern for state authority had also been a major reason the first three federal bankruptcy laws did not include corporate bankruptcy. Opponents

Both of these factors—populist concerns for farmers and small merchants, and opposition to federalization—were reinforced by concerns (also shared by creditor groups) about the cost of the bankruptcy process. Even more than widespread allegations of fraud, the costs of administration had left a bad taste in lawmakers' mouths after the 1867 Act. Over and over, opponents complained, and proponents conceded, that debtors' estates had been eaten up by administrative fees that compensated the officials handsomely but left little for anyone else.[46] Although cost is a concern in any bankruptcy regime, it raised particularly serious problems in the United States due to the nation's geography (which lawmakers contrasted to the compact geography of England) and the decentralized nature of the courts that would implement bankruptcy law.[47]

A final aspect of federalism is the role of banks. Federalism gives unusual clout to local banks, which have long parlayed their influence at the state level into legislative protections.[48] Given their interest in commerce, one might expect banks to have played a prominent, supportive role in the struggle for national bankruptcy legislation. In actuality, they did not.[49] One reason for this, alluded to by lawmakers on both sides, was that local banks often were the

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including corporations insisted that, since states regulated other aspects of corporate law, states should also regulate corporate insolvency. For a detailed discussion on this issue, see David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994).

[46] Examples of such complaints are legion in the legislative history. For a relatively thorough discussion of the fees charged under the 1867 Act and a defense of the proposed legislation as solving the problem, see 28 CONG. REC. 4612 (1896) (statement of Sen. Burton) ("[T]he crowning evil of the law of 1867 was the enormous fee bill which the register in bankruptcy and the assignee in bankruptcy were enabled to tax up against the estate of a bankrupt"). *See also Letter from Attorney General in Compliance with Senate Resolution of Feb. 24, 1873*, S. EXEC. DOC. NO. 19 (1874) (reporting bankruptcy costs in the United States under the 1867 Act).

[47] *See, e.g.*, 25 CONG. REC. app. at 539 (1893) (statement of Rep. Lane) (contending that costs of the English system are 40% of all assets, and due to the differences in geography, the costs in the U.S. would approach or exceed 75% of assets).

[48] The United States has had an unusually fragmented banking system at least as far back as the National Bank Act of 1863, which both reflected and reinforced the strength of local banks. Local banks are a key factor in Mark Roe's influential political analysis of U.S. corporate governance. *See* ROE, *supra* note 41.

[49] Unlike merchants and other businesses, banks rarely appear in the lists of memorials for (or against) bankruptcy legislation. A list of supporters of bankruptcy included in the Congressional Record in 1898, for instance, includes only one or two banks among the hundreds of individuals and firms included. *See* 31 CONG. REC. 1904-1907 (1898) (lists appended to statement of Rep. Grosvenor).

beneficiaries of the preferential prebankruptcy transfers that proponents of federal bankruptcy were so anxious to prohibit.[50] In addition, both local and national banks were less exposed in bankruptcy than other creditors, because they could lend on a secured status. As a result, even national banks had less to gain from bankruptcy legislation than might otherwise have been the case;[51] and many local banks were more sympathetic to the populist opposition to bankruptcy than to the creditors who supported it.

As economic conditions deteriorated in the 1890s, many of the lawmakers who were sympathetic to farmers and small merchants rallied behind proposals for bankruptcy law that included only voluntary bankruptcy.[52] But creditors' groups were deadset against a voluntary-only bankruptcy law, which many saw as benefitting only debtors and, therefore, worse than no bankruptcy law at all.[53] If creditors' groups wanted to pass a bankruptcy law that included both voluntary and involuntary bankruptcy, however, they would have to respond to at least some of the concerns of the lawmakers sympathetic to farmers and small merchants. And this is precisely what they did. The give-and-take between creditors' groups and the forces spawned by federalism can be seen in three important areas. The first is the administrative structure of bankruptcy. From their earliest proposals, creditors advocated a strikingly pared down administrative structure. In place of the maze of fees required by the

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[50] *See, e.g.*, 31 CONG. REC. 1898 (1898) (statement of Rep. Bell) (arguing that it is important to protect local bankers and wholesale merchants).

[51] National banks do generally appear to have supported federal bankruptcy legislation. But they did not figure in the debates in any significant way—their support was mixed. They clearly were more concerned about uniform federal standards on commercial law issues than they were with bankruptcy. For examples of bankers' views, see, for example, *Proceedings of the Convention of the American Bankers Association National Convention* 85 (Aug. 13, 1880) (statement by C.C. Bonney) (arguing that the "necessity of a National Bankruptcy Law is now almost universally admitted"). *But see id.* at 90-91 (statement of T.H. Hinchman) ("[The] history of bankrupt laws show them to have been very unjust and unsatisfactory, subjecting both creditor and debtor to great unnecessary loss.").

[52] The highwater mark of this trend came in 1894, when a Democrat-controlled House passed Senator Bailey's voluntary-only bankruptcy bill. *See* 26 CONG. REC. 7598 (1894). In later years, these lawmakers rallied around Senator Nelson's bill, which included only a limited involuntary bankruptcy option. The Nelson bill passed the Senate, but the involuntary provisions were tightened up in the conference with the House, which had passed a version of the Torrey Bill. *See* 31 CONG. REC. 6296-97 (1898) (statement of Sen. Nelson) (comparing the two bills); *see also id.* at 6299 (Senate passes conference committee bill that reconciled the two bills).

[53] *See, e.g.*, 28 CONG. REC. 4637 (1896) (statement of Rep. Ray) (arguing that voluntary-only bill would destroy credit).

1867 Act, the Lowell Bill called for a small group of salaried officials to oversee the process: assignees to act as trustee, registers to serve in a judicial capacity, and a group of regional supervisors to, as the name suggested, oversee the process as a whole.[54] But even this structure, which echoed in telling respects the approach that soon gave way to officialism with the Bankruptcy Act of 1883 in England,[55] was rejected as too costly and intrusive. The progression is telling. When the Lowell Bill was first introduced, Senator Hoar singled out the proposal to compensate bankruptcy officials on a salary basis for special praise. Paying the supervisors and commissioners a salary, he argued, would eliminate any incentive to needlessly complicate or prolong a bankruptcy case.[56] The Torrey revision of the bill, as introduced in 1890, not only did away with the proposal to appoint overseers, but it also started a shift away from salaries and back to a fee-based approach.[57] In the version that finally passed, the 1898 Act provided only for referees and trustees, and both would be paid strictly by fees.[58]

A second important concession to debtors and federalism was in the division of authority between federal and state lawmakers. Every creditor proposal from the Lowell Bill simply incorporated state law exemptions rather than imposing federal ones. This clearly was not by choice. Creditors would have been much happier to include uniform federal exemptions, thus nullifying the generous exemptions of states such as Texas, but they recognized that federal exemptions would be politically fatal.[59] Creditors also made concessions to the state courts. Although the Lowell Bill had vested relatively expansive jurisdiction in the federal courts, creditors later

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[54] *See* 13 CONG. REC. 5268-74 (1882) (statement of Sen. Hoar) (setting forth bill); *see also id.* at 5274-76 (describing and defending bill).

[55] As noted earlier, the similarities were not lost on lawmakers opposed to the legislation. *See supra* note 36. *See also* 15 CONG. REC. 4308 (1884) (memorial of Louisville Board of Trade) (stating that Lowell Bill was drawn from 1867 Act and England's Bankruptcy Acts of 1861 and 1869).

[56] *See, e.g.*, 14 CONG. REC. 147 (1882) (statement of Sen. Hoar).

[57] The Torrey Bill proposed to pay commissioners, which were then called referees, \$1000 plus a \$10 fee for each case. *See* 21 CONG. REC. 7566-68 (1890) (synopsis of Torrey Bill).

[58] The 1898 Act provided for referees to be paid \$10 plus 1% of dividends paid. *See* The Bankruptcy Act of 1898, § 40, ch. 541, 30 Stat. 544, 556. Trustees received \$5 plus specified percentages of assets distributed. *See id.* at § 48, 30 Stat. at 557-58.

[59] *See Proceedings of National Association of Credit Men*, S. DOC. NO. 156, 55th Cong., 15 (1898) (Torrey characterizes federal exemptions as politically infeasible).

agreed to revisions that required trustees to bring preference and fraudulent conveyance actions in the local state courts.[60]

In the third area, involuntary bankruptcy and the scope of a debtor's discharge, creditors dug in their heels much more strongly. Against opponents' claims that struggling debtors would be thrown into bankruptcy by malicious creditors, the creditors' advocates insisted that creditors had no incentive to wrongfully invoke bankruptcy proceedings and that only with involuntary bankruptcy would creditors be assured a fair share of debtors' assets. Although creditors succeeded both in retaining involuntary bankruptcy, and in precluding discharge from debtors who committed fraud, they also made several important concessions. Unlike under the 1867 Act, a creditor vote would not be required as a prerequisite to discharge.[61] To protect against malicious or mistaken involuntary petitions, several safeguards were added during the course of the debates: the final bill required creditors to post a bond when they filed an involuntary petition; raised the minimum debt requirement to $1000; guaranteed the debtor a trial by jury; and weakened the provisions that authorized the court to detain a debtor.[62] In the extraordinary negotiations that produced the final bill, creditors also agreed to eliminate several of the "acts of bankruptcy" that justified the filing of an involuntary bankruptcy petition.[63]

It took still more for the 1898 Act to pass. By 1898, the economic downturn that began earlier in the decade had lasted so long

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[60] *See* 14 CONG. REC. 169-170 (1882) (statement of Sen. Hoar) (proposing successfully amendment to require that suits by assignees be brought in state court); Bankruptcy Act of 1898, § 23(b), ch. 541, 30 Stat. 544, 552 (requiring trustees to bring suit "in the courts where the bankrupt . . . might have brought or prosecuted them"). This requirement quickly became a point of contention after the 1898 Act passed, as lawyers and referees complained bitterly about the cost and inconvenience of having to bring litigation in state court.

[61] This concession appeared as early as the Lowell Bill and remained in place through the entire course of the debates. *See* 13 CONG. REC. 5268-74 (1882) (setting out bill, including discharge requirements in § 82).

[62] *See* Bankruptcy Act of 1898, § 3(e), ch. 541, 30 Stat. 544, 547 (bond requirement); § 19, 30 Stat. at 551 (trial by jury on issue of insolvency); § 9, 30 Stat. at 549 (limiting power to arrest bankrupts and authorizing detention if bankrupt is about to leave district). Each of these provisions generated substantial discussion in the legislative debates.

[63] As with much of the legislative debate, the conference committee that reconciled the House (Henderson) and Senate (Nelson) bills focused almost entirely on the grounds for involuntary bankruptcy (the "acts of bankruptcy") and the bases for denying discharge. Three of the eight acts of bankruptcy were dropped in conference. An earlier concession had removed a very controversial ninth act of bankruptcy, which made failure for more than thirty days to make payments on commercial paper a basis for an involuntary filing. *See* 31 CONG. REC. 6297 (1898) (statement of Sen. Nelson) (describing changes to discharge).

that nearly everyone agreed on the need for *some* kind of bankruptcy law. The creditors' proposal might have lost out to a temporary voluntary bill if the Republicans hadn't obtained control of both Congress and the presidency in 1898.[64] But pass it did. And from the struggle between creditors' groups and the forces of federalism came the features that would typify American bankruptcy law.[65] In striking contrast to the tough, administrative British framework that emerged at the same time, American bankruptcy would have a minimalist administrative structure and comparatively generous provisions for the treatment and discharge of debtors.

IV. AFTER THE ACT: THE BANKRUPTCY BAR

According to an old saw about negotiations, if both parties complain about the outcome, the negotiations probably were successful. By this standard, the 1898 Act splendidly reconciled the interests of business with the pressures of American federalism. What to some was a law outrageously generous to debtors, others attacked as a heartless creditor collection measure.[66]

Despite these (rather counterintuitive) signs of success, few observers would have predicted with confidence that the 1898 Act was the one that would last. As with each of its predecessors, the 1898 Act faced an immediate legislative backlash. Opponents of the Act mounted vigorous campaigns for more than a decade after its enactment.[67] Yet somehow the Act survived the onslaught. Much of the genius of the 1898 Act lay in compromises we have seen. But

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[64] *See* Bradley Hansen, *The Political Economy of Bankruptcy: The 1898 Act to Establish A Uniform System of Bankruptcy*, ESSAYS IN ECONOMIC AND BUSINESS HISTORY (1997) (discussing the significance of Republican control to passage of 1898 Act). As noted earlier, the bill that passed the Senate (the Nelson Bill) had very restrictive requirements for involuntary bankruptcy, and was favored by many lawmakers who insisted on a voluntary-only bill.

[65] The bill that finally passed was a remarkably balanced compromise between the debtor-friendly Senate Bill and the House Bill, which creditors preferred. The one dissenting voice on the conference committee was Representative Terry, who was opposed to any bankruptcy law, and even he lauded the efforts of the conference committee. *See* 31 CONG. REC. 6429 (1898) (statement of Rep. Terry) (stating that many of the bill's most objectionable features had been removed).

[66] *Compare* Olmstead, *supra* note 18 (criticizing the bill as an unprecedented "jubilee" for debtors) *with* H. REP. NO. 4397 (1905) (Judiciary Committee Report calling for repeal of 1898 Act because creditors are simply using it for collection).

[67] In 1905, the Judiciary Committee issued a report calling for repeal, and a minority of the Committee had reached the same conclusion in 1902. *See* H. REP. NO. 4397, at 1 (1905) (majority calls for repeal); H. REP. NO. 1698, at 3 (1902) (minority advocates repeal).

the rest of its genius emerged only after the passage of the Act in 1898.[68]

One factor in the Act's survival was simple party politics. Just as Republican control had helped ensure passage of the Act in 1898, continued Republican control diminished the threat of repeal. Under McKinley and Roosevelt, the Republicans held the White House until 1912; and their control extended to both houses of Congress until the Democrats finally regained the House in 1910. With the party that had advocated bankruptcy reform very much in charge, repeal was much less likely than it would have been in an era of Democratic ascendancy.

It is important not to overstate the significance of Republican control. Although bankruptcy had long been a Republican priority, Republicans were not monolithically in favor of bankruptcy, as evidenced by the vote for repeal by a Republican controlled Judiciary Committee in 1905. Moreover, had Republican proponents changed their minds about bankruptcy, they wouldn't have been the first majority party to do so. In 1843, their predecessors, the Whig party, led the charge for repeal of the bankruptcy law they had pushed through only two years earlier.[69]

Rather than directly assuring the permanence of the 1898 Act, the real significance of Republican control was transitional. It was the bankruptcy bar that added the final piece of the bankruptcy puzzle, and Republican control made this possible.[70] To see how, recall for a moment the pared down administrative structure of the 1898 Act. Unlike the British system, with its powerful administrator, the 1898 Act called for trustees and referees with limited powers; the Act's fee-based compensation discouraged them from actively intervening, since spending additional time on a case would only make sense if it produced substantial new assets and thus additional fees.[71] In theory, this minimalist structure left the process to the

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[68] In another context, Jon Macey has described the role legislation plays in shaping subsequent interest group support as the legislation's "ex ante wiring." *See* Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992). The developments described below can be seen as a very similar phenomenon.

[69] For a discussion, see Skeel, *supra* note 13, at 503.

[70] The discussion that follows draws from and expands on my discussion of the role of the bankruptcy bar in Skeel, *supra* note 13.

[71] Fee-based compensation also may have discouraged referees from denying a debtor's discharge, given that dismissing a debtor's petition would also sacrifice the referee's ability to

parties themselves—that is, debtors and their creditors. The more immediate reality, however, was that it created an urgent need for a bankruptcy bar. With creditors and debtors jousting over the propriety of bankruptcy and discharge, and the referee playing a somewhat limited role, the one constant was that everyone needed a lawyer.[72]

Because there had not been a federal bankruptcy law in place for two decades, the bankruptcy bar did not even exist when President McKinley signed the new legislation into law in 1898. This is where Republican control proved especially important. Republican control kept the 1898 Act in place long enough for the bankruptcy bar to get on its feet. By the time the Republicans finally slipped from power after 1910,[73] the bankruptcy referees and bar that owed their existence to the Act were now in a position to help make sure that the Act was not repealed.

Perhaps the best evidence of the growing influence of the bar is in the legislative hearings on bankruptcy in the first decade of the century. Although Congress continued to debate whether the Act should stay or go,[74] leading members of the bankruptcy bar such as Edwin Brandenburg and Frank Remington played an increasingly prominent role as sources of expertise.[75] The credibility they (Remington especially) developed through repeated appearances before the Judiciary Committee gave them particular influence on technical issues and, over time, reduced the likelihood that the Judiciary Committee would call on Congress to repeal the Act.[76]

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look to the estate for fees.

[72] A few lawmakers commented on the demand for lawyers that the proposed legislation would create. But most of the comments were simply off-handed attacks on the legislation as a whole. *See, e.g.*, 28 CONG. REC. 4752 (1896) (statement of Rep. Talbert).

[73] The Democrats took control of the House in 1910. It was not until 1912, when Woodrow Wilson won the presidency, that the balance of power truly shifted in a Democratic direction.

[74] An ongoing concern for proponents of bankruptcy was that their efforts to secure minor amendments to the Act would boomerang and lead to a movement to repeal the legislation altogether. The fear was legitimate, as the advocates of repeal mobilized each time Congress considered amendments. *See, e.g.*, 35 CONG. REC. 6957-58 (1902) (proposed amendment that would simply repeal the Act failed).

[75] Brandenburg wrote the first complete treatise on the new Bankruptcy Act, and Remington followed with a similarly complete treatise thereafter. *See* EDWIN BRANDENBURG, BRANDENBURG ON BANKRUPTCY (1898); FRANK REMINGTON, REMINGTON ON BANKRUPTCY (1908).

[76] In the early years of the Act, Remington appeared at nearly every Judiciary Committee hearing. By the end of the first decade, he often acted as de facto bankruptcy expert, in-

In addition to individual representatives, bankruptcy referees figured prominently in the lobbying process,[77] and the bankruptcy bar exerted influence through organizations such as the Commercial Law League and the American Bar Association.[78] Their principal organized ally was the National Association of Credit Men, most of whose members worked in firms' credit departments and which was a successor of sorts to the business groups that had originally lobbied for the 1898 Act.[79] These organizations worked together so closely, and over so many years, that they eventually formalized their relationship by forming the National Bankruptcy Conference in the early years of the New Deal.[80]

The longterm effect of the emergence of a stable bankruptcy bar was to solidify the coalition in favor of a permanent bankruptcy law. Even with continued creditor support and important concessions to the proponents of debtors' interests, the future of the 1898 Act was uncertain for well over a decade. With each passing year, however, the stake of bankruptcy lawyers and referees in its continued existence increased, as did their ability to contribute to that goal. Over time, the bankruptcy bar would become the single most important influence on the evolution of U.S. bankruptcy law. Lawyers have assured that U.S. bankruptcy practice will continue to be dominated by the parties and their lawyers, rather than a govern-

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terjecting repeatedly to clarify fine points about bankruptcy law. *See, e.g.*, *Hearings Before the Subcommittee of the Committee on the Judiciary, United States Senate, on the Bill H.R. 20575*, 61st Cong., 8 (1910) (statement of Harold Remington) (characterizing proposed amendments as simply effectuating the original intent of the 1903 amendments).

[77] *See, e.g.*, 43 CONG. REC. 2006 (1909) (statement of Rep. Sherley) (defending referees' support for bankruptcy amendments).

[78] The Commercial Law League was formed in 1895 by a group of commercial lawyers. For a description of the CLLA's early history, see MORRIS WEISMAN, A HISTORY OF THE COMMERCIAL LAW LEAGUE OF AMERICA 1-5 (1976). Although the League was concerned with a variety of commercial law issues (including the movement for uniform commercial laws), bankruptcy quickly became a dominant concern. The American Bar Association dated back to 1878, and took positions on a wide range of legal issues. The bar exerted influence through the Committee on Commercial Law, whose jurisdiction included bankruptcy.

[79] The NACM was formed in 1896. Most of its members came from the credit departments of business firms.

[80] The NACM, CLLA, and ABA, along with a group of law professors and bankruptcy lawyers, formed the National Bankruptcy Conference in 1934 in an effort to address a wide range of issues (many of them technical in nature) that they felt had been neglected in the early New Deal reforms. The National Bankruptcy Conference had an enormous influence over the shape of the Chandler Act of 1938. For a brief overview by one of its most prominent members, see Reuben Hunt, *The Progress of the Chandler Bankruptcy Bill*, 42 COM. L.J. 195 (1937).

mental official, by thwarting proposals (most prominently, in the 1930s and again in the 1970s) to introduce an English-style governmental overseer. They also have continually pushed to expand the scope of the bankruptcy laws.[81]

The influence of the general bankruptcy bar stands in striking contrast to the corporate reorganization bar that had emerged in the late nineteenth century. The reorganization bar was called into existence by the waves of railroad failures in the 1870s and thereafter. Unlike the general bankruptcy bar, which was far from elite (and in fact, was often controversial due to allegations of bankruptcy "rings"), the reorganization bar included many of the most prominent members of the greatest New York law firms.[82] Yet, when the New Deal reformers overhauled the bankruptcy laws in the 1930s, it was the reorganization bar that they destroyed. The general bankruptcy bar was not only protected, but in some respects expanded its turf. Centered on Wall Street, corporate reorganization practice fell prey to the wave of anti-Wall Street bias unleashed during the New Deal.[83] Thanks to the much more broad-based bankruptcy bar, and the concessions already made to debtor interests, the 1898 Act survived the regulatory impulses of the New Deal.

V. CONCLUSION

If we compare the U.S. bankruptcy laws to those of the nation's original sovereign, England, the contrast could hardly be starker. Unlike the heavily administrative English system, U.S. bankruptcy law is driven by private parties and their lawyers; the English system discourages filing and discharge, whereas the U.S. system tends to

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[81] *See* Skeel, *supra* note 13. There is an obvious analogy between bankruptcy lawyers' influence over bankruptcy law and the literature exploring agency bureaucrats' role in protecting and expanding their agency. *See, e.g.*, WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (emphasizing agencies' incentive to maximize their budgets); William A. Niskanen, *A Reflection on Bureaucracy and Representative Government*, *in* THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE (Andre Blais & Stephanie Dion, eds., 1991) (revising earlier analysis).

[82] The best known example is Paul Cravath, the namesake of Cravath, Swaine & Moore. His similarly prominent successor, Robert Swaine, chronicled the firm's rise and its extensive involvement in early reorganization practice in ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS: 1819-1947 (1946-48).

[83] For an extensive discussion of the effect of the New Deal reforms on corporate reorganization and the reorganization bar, see David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325, 1361-72 (1998).

encourage them.

The year that will forever be associated with the distinctive U.S. system is 1898. That was the year Congress enacted the Bankruptcy Act of 1898, which ended a century of instability and made federal bankruptcy law a permanent fixture on the legislative landscape.

This Article contends that the "genius" of the 1898 Act can be explained by a small group of political factors. The rise of business organizations at the end of the nineteenth century provided the impetus, and the Act was shaped by the interaction of these creditors' interests and the countervailing pressures of American federalism. Thanks to a lengthy period of Republican control, the Act remained in place long enough to spawn a bankruptcy bar. The bar then solidified the coalition supporting the Act.

In retrospect, the forces that came together in 1898 have so great an air of necessity that it seems hard to imagine bankruptcy law taking any other form than the approach that finally passed. Perhaps economic expansion plus the American political framework led inescapably to a lawyer-driven bankruptcy framework rather than an administrative one, but perhaps not. Had insolvency remained the province of the states until the New Deal,[84] for instance, one could imagine the New Deal reformers devising an administrative approach to bankruptcy—possibly tied to administrative reforms such as welfare and social security.

Speculation of this sort is, of course, just that—speculation. The important point is that, at the centennial of the 1898 Act's enactment, we now can see much more clearly than the Act's creators just how special the bankruptcy legislation was. What made the Act special was a unique combination of creditors, American federalism and, as always in the United States, the lawyers that soon followed.

[84] If the Supreme Court had concluded in 1902 that the Act's incorporation of state law exemptions was unconstitutionally nonuniform, the possibility of repeal would have been far greater than it proved to be. As it was, the Court upheld this key compromise with advocates of state regulation. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902) (holding that uniformity requires only geographical, not personal, uniformity).