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Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law

Throughout the nineteenth century, merchants and manufacturers involved in interstate commerce sought federal bankruptcy legislation to overcome diverse and discriminatory state laws that raised the cost of credit and impeded interstate trade. In the last two decades of the nineteenth century, they formed a national organization to lobby for bankruptcy legislation. While many scholars have seen the passage of federal bankruptcy legislation as a response to the economic depression of the 1890s, this article shows that it was the formation of this national organization, rather than the economic crisis, that was the primary force behind the Bankruptcy Act of 1898.

In the late nineteenth century, the expansion of communication and transportation networks transformed the American economy and made possible a truly national economy. The transformation of the American legal system in response to these changes has received much attention.¹ However, one neglected aspect of this story is the enact-

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¹ See Tony Freyer, "The Federal Courts, Localism, and the National Economy, 1865-1900," *Business History Review* 53 (Autumn 1979): 343-63; Philip Merkel, "The Origins of an Expanded Federal Court Jurisdiction: Railroad Development and the Ascendancy of the Federal Court," *Business History Review* 58 (Autumn 1984): 336-58; Charles McCurdy, "American Law and the Marketing Structure of the Large Corporation, 1875-1890," *Journal of Economic History* 38 (1978): 631-49, and "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," *Business History Review* 53 (Autumn 1979): 305-42; William Graebner, "Federalism in the Progressive Era: A Structural

Business History Review 72 (Spring 1998): 86-113. © 1998 by The President and Fellows of Harvard College.

ment of federal bankruptcy legislation in 1898. The Act to Establish a Uniform System of Bankruptcy is generally characterized as the result of the demands of debtors made insolvent by the depression of the 1890s. That is, the history of bankruptcy law is typically told from the debtor's perspective, and interpreted as a response to immediate circumstances. Creditors, particularly merchants and manufacturers that provided mercantile credit, were also concerned with bankruptcy law in the late nineteenth century. They began holding national conventions on bankruptcy in 1881, and they formed a national organization to lobby for bankruptcy legislation. The law which was eventually enacted was based on a bill they had drafted in 1889.² This paper shows how merchants and manufacturers used commercial associations to organize and lobby for a federal bankruptcy law.

The need for a federal bankruptcy law arose from the inadequacies of state laws in the face of expanded interstate trade. A federal law was needed to overcome discriminatory state laws, reduce the number of commercial failures, and lower the cost of providing credit. The key to the ability to organize nationally was the dramatic growth in commercial associations in the last three decades of the nineteenth century. Chambers of commerce, boards of trade, trade associations and other commercial associations were formed at an unprecedented rate in that period. Although these associations were not created with the intention of seeking federal legislation, they provided a means for organizing business people from all over the country. Because these associations already existed, proponents of bankruptcy legislation did not have to incur the expenses of organizing business people in cities throughout the country. The national organization that sought bankruptcy legislation in the late nineteenth century could not have existed without the growth of commercial associations in the preceding decades.

Bankruptcy Law in United States History

Although the Constitution empowered Congress to establish "uniform laws on the subject of bankruptcy," for most of the nineteenth century

Interpretation of Reform," *Journal of American History* 64 (Sept. 1977): 331-57; Donald J. Pisani, "Promotion and Regulation: The Constitution and the American Economy," *Journal of American History* 74 (Dec. 1987): 740-68; Harry Scheiber, "Federalism and the American Economic Order, 1789-1910," *Law and Society* 10 (Fall 1975): 57-118; James Willard Hurst, *Law and Markets in United States History* (Madison, Wis., 1982).

² Legislators commonly referred to the bill as the Torrey bill, i.e., the bill drafted by Jay Torrey, the president of The National Convention of Representatives of Commercial Bodies, *Congressional Record*, 55th Cong. 2nd sess., 1898, 1905, 6296, 6429.

this power was not exercised. A federal bankruptcy law was in effect for only sixteen of the first one hundred years of United States history. Bankruptcy laws were passed in 1800, 1841, 1867, and 1898. The first three were each repealed after a few years. In contrast, the 1898 Bankruptcy Act, although amended many times, remained in effect until it was replaced by the Bankruptcy Reform Act of 1978. In the absence of a federal bankruptcy law, state laws and the common law governed debt collection and insolvency. While federal bankruptcy law provided a discharge to the debtor and a pro rata distribution of assets among unsecured creditors, states had only a limited ability to discharge debts and tended to distribute assets either on a first-come, first-served basis, or in a manner that preferred local creditors.³ Under a first-come, first-served rule creditors are paid in the order in which they file claims, so that the first creditor to file a claim may be fully paid while the last receives nothing. In contrast, under a pro rata rule creditors each receive a share of an insolvent debtor's assets based on the percentage of the debt owed to them.

Since the mid-nineteenth century, observers of bankruptcy law have often emphasized its ability to provide a discharge to insolvent debtors. In a debate on the 1867 Bankruptcy Act, Senator Reverdy Johnson noted that "No bankruptcy law has ever been passed except because of the large amount of existing debts which were depressing the industry of the country and ruining the debtor."⁴ In an 1890 treatise on mercantile credit, P. R. Earling, a Chicago merchant, described how the past three bankruptcy laws had resulted from periods of crisis: "At each of these periods, the provisions of the Bankrupt Law were invoked for the benefit of the debtor class, who by severe panic had become hopelessly involved. The interests of commerce, its life and vitality, demanded relief for a large number of helpless, though otherwise active and useful, members of the business community."⁵ Thus, by the late nineteenth century bankruptcy law in the United States was perceived to be linked to the history of financial crises and depressions.

Writing during the Great Depression, the legal historian Charles Warren shared this interpretation in his *Bankruptcy In United States*

³ On the Constitutional limitations of state laws see R. Kent Newmeyer, *The Supreme Court Under Marshall and Taney* (New York, 1968), 79-80, 85-6; Jamil Zainaldin, *Law in Antebellum Society* (New York, 1983), 39-40; Hollis R. Bailey, "An Assignment in Insolvency and Its Effects Upon Property and Persons Out of State," *Harvard Law Review* 7 (1893): 281-99; and "A Discharge in Insolvency and Its Effects Upon Non-Residents," *Harvard Law Review* 6 (1892): 349-68.

⁴ *Congressional Record*, 39 Cong., 2nd sess., 1867, 1004.

⁵ P.R. Earling, *Whom to Trust: A Practical Treatise on Mercantile Credits* (Chicago, 1889), 217.

History (1935), declaring, "Every bankruptcy law has been the product of some financial crisis or depression."⁶ Subsequent legal scholars and historians have relied upon Warren's work, and the view that the history of bankruptcy law is governed by economic crises has become a standard part of the legal literature. For example, Douglas Baird and Thomas Jackson state of the 1898 bankruptcy law that, "Like its predecessors, the financial swings in the decade before led to its passage."⁷ Rhett Frimet in a recent paper reaffirmed that "Each of these bankruptcy laws was enacted during a time when the nation was in dire financial straits."⁸ And in their study of consumer bankruptcy Teresa Sullivan, Elizabeth Warren, and Jay Westbrook claimed, "When the first permanent bankruptcy law was enacted in 1898, Congressional debate centered on the plight of the oppressed debtors, usually farmers and small businessmen, caught in the latest economic recession."⁹

Unfortunately, most economic and business historians have devoted little attention to bankruptcy legislation. Robert Higgs, for example, recognized the importance of bankruptcy legislation, but seemed to assume that the issue was settled with the enactment of the Constitution. In considering the impact of the Constitution on economic growth in the nineteenth century he declared: "Its provisions for security against foreign and domestic threats, for post offices and roads, for duty free interstate trade, and for uniform bankruptcy laws directly helped to promote trade and specialization."¹⁰ Yet as mentioned previously, a uniform bankruptcy law was in effect for only a relatively short period after the enactment of the Constitution.

Because of this emphasis on seeing bankruptcy law as a relief for insolvent debtors, not enough attention has been given to the interests of mercantile creditors in the late nineteenth century. Warren made only brief mention of one of the organizations that drafted and lobbied for bankruptcy legislation, the National Convention of Representatives of Commercial Bodies, and mistakenly referred to it as the National Convention of Commercial Organizations. Subsequent authors have relied upon Warren to the extent that they continue to misname this

⁶ Charles Warren, *Bankruptcy in United States History* (Cambridge, Mass. 1935), 9.

⁷ Douglas Baird and Thomas Jackson, *Cases, Problems and Materials on Bankruptcy* (Boston 1985), 27.

⁸ Rhett Frimet, "The Birth of Bankruptcy in the United States," *Commercial Law Journal* 96 (1991): 160-88.

⁹ Teresa Sullivan, Elizabeth Warren, and Jay Westbrook, *As We Forgive Our Debtors* (Oxford, 1989), 231.

¹⁰ Robert Higgs, *The Transformation of the American Economy, 1865-1914* (New York, 1971), 53.

organization.¹¹ The reasons merchants and manufacturers wanted bankruptcy legislation, the means by which they were able to form a national organization, and the extent of their influence on the legislative process have been largely neglected.

This neglect contrasts sharply with the attention given to mercantile demands for a uniform bankruptcy law in the first half of the nineteenth century. Both Drew McCoy and Tony Freyer portray struggles over federal bankruptcy law in the first half of the nineteenth century as an important part of a larger conflict over the nature of the American political economy.¹² As early as 1800, some merchants and manufacturers had advocated the passage of a uniform federal bankruptcy law. They complained that not only was there too much diversity among state laws, but that these laws often discriminated against creditors from outside the state. On the other hand, opponents of a federal bankruptcy law complained that it would transfer power from state courts to federal courts and benefit big business at the expense of small, local businessmen. The conflict over bankruptcy law was part of the conflict between those who wished to promote a commercial society on a national scale and those who wished to preserve local autonomy—a conflict, to use Freyer's terms, between producers and capitalists.

The efforts of early advocates of bankruptcy law were further hindered by the obvious defects of the bankruptcy laws that were passed during the period. Both the 1800 and the 1841 Bankruptcy Acts raised complaints from all sides because of their high costs of administration and the costliness of travel to federal courts. Consequently, a federal bankruptcy law was in effect for only six years during the first half of the nineteenth century. Similar complaints of excessive fees and expenses later arose under the 1867 Bankruptcy Act as well.¹³

In the late nineteenth century merchants and manufacturers involved in interstate trade still sought federal bankruptcy legislation to

¹¹ Frimet, "The Birth of Bankruptcy in the United States"; Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt and Bankruptcy, 1607-1900* (Madison, Wisc., 1974), 29; and Lawrence Friedman, *A History of American Law* (New York, 1973), 551.

¹² Tony Freyer, *Producers versus Capitalists: Constitutional Conflict in Antebellum America* (Charlottesville, N.C., 1994), 86-90; and Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Chapel Hill, N.C., 1980), 178-84.

¹³ On the operation of the bankruptcy laws before the Civil War, see Barbara Matthews, "Forgive Us Our Debts: Bankruptcy and Insolvency in America, 1763-1841" (Ph.D. diss., Brown University, 1994); Edward J. Balleisen, "Vulture Capitalism in Antebellum America: The 1841 Federal bankruptcy Act and the Exploitation of Financial Distress," *Business History Review* 70 (Winter 1996): 473-516. On the expenses of the 1867 Act, see *Expenses of Proceedings in Bankruptcy*, 43rd Cong., 1st sess., Executive Document 19, 1873, serial 1580.

overcome the diversity and discrimination of state laws. They still had to overcome the opposition of those who wished to curb federal power and to protect local business from interstate competition. Furthermore, they had to overcome prejudices against bankruptcy law brought on by the costliness and inefficiencies of the previous bankruptcy acts. Though these were considerable obstacles, the growth of interstate commerce steadily increased the number of business people who favored a bankruptcy law, and the growth of commercial associations eventually provided them with the means to form a national organization that their predecessors had not had.

Mercantile Credit and the Demand for Bankruptcy Legislation

Many merchants and manufacturers in the late nineteenth century believed that a federal bankruptcy law was essential for the promotion of interstate trade. They were concerned with bankruptcy law because of their position as providers of unsecured mercantile credit to their customers. In his study of distribution, Harold Barger noted: "The granting of credit is a service that customers have expected—and in large part obtained—from merchants. Traditionally, the wholesaler financed the retailer and the retailer financed the consumer."¹⁴ Because of the small amount of funds needed to begin in the retail business, the wholesaler was often the primary or sole creditor of a retailer. For example, a study of retailers in Oshkosh, Wisconsin, between 1890 and 1912, found that most had started with between \$300 and \$1,000 (saved from an inheritance or another occupation) and as much credit as they could obtain from wholesalers.¹⁵ Well into the twentieth century, most retailers remained dependent on wholesalers or manufacturers for credit.¹⁶

The credit provided by merchants and manufacturers tended to be informal and unsecured. The most common form of indebtedness was

¹⁴ Harold Barger, *Distribution's Place in the American Economy since 1869* (Princeton, N.J., 1955), 33. For a description of the role of Chicago wholesalers as creditors, see William Cronon, *Nature's Metropolis: Chicago and the Great West* (New York, 1991), 322-23.

¹⁵ Paul Nystrom, *The Economics of Retailing* vol.1 (New York, 1924), 405.

¹⁶ Theodore Beckman and Nathaniel Engle, *Wholesaling: Principles and Practice* (New York, 1924), 158. In 1987 trade credit still accounted for 15 percent of nonfarm, nonfinancial business liabilities, see Gregory Elliehausen and John D. Wolken, "The Demand For Trade Credit," *Federal Reserve Bulletin* 79 (1993): 929-30.

the book account. These accounts had the disadvantage that they could not be discounted at banks or commercial paper houses, as promissory notes could. However, they were a simple and inexpensive means of providing credit. Moreover, most wholesalers did grant cash discounts if payment were made within a specified period of time. Retailers typically received a discount for paying within ten days, and paid the full posted price of the goods within thirty days. If a debt were not paid after thirty days a promissory note would generally be required.¹⁷

Under normal circumstances retailers could be counted on for timely repayment as it was in their interest to maintain a good reputation. In 1895, a prominent dry goods wholesaler described the trade as follows: "Mutual confidence exists, and forms the basis of the immense volume of business of the present day. The aggregate transactions of a single day in any one of our large houses often reach hundreds of thousands of dollars, and many of them are based upon the simple word of honor."¹⁸ In most cases word of honor was sufficient. According to Dun and Bradstreet, less than 2 percent of businesses in the late nineteenth century failed to pay off their creditors when they discontinued operation.¹⁹ Even the vast majority of businesses that failed could be counted on to pay their debts.

In short, merchants and manufacturers were accustomed to providing unsecured mercantile credit to their customers. In the event of default, their claim to the debtors' assets depended upon the provisions of the law. The more uncertain they were about being repaid, the more heavily they had to discount the debt; thus, as Representative Charles Grosvenor observed, "the credit of an individual is determined not only by the amount of money he possesses but by the provisions of the laws under which he lives."²⁰ While many debtors favored a federal bankruptcy law because it provided a discharge, mercantile creditors

¹⁷ On the terms and conditions commonly used for trade credit, see Harold Barger, *Distribution's Place in the American Economy* (Princeton, N.J., 1955), 33; Roy A. Foulke, *The Sineus of American Commerce* (New York, 1941), 158; James Hagerty, *Mercantile Credit* (New York, 1913), chaps. II and IV; and Theodore Beckman, *Credits and Collections in Theory and in Practice* (New York, 1924), chaps. II and V.

¹⁸ Chauncey Depew, *One Hundred Years of Commerce* (New York, 1895), 559.

¹⁹ For the rate of commercial failures, see U.S. Census Bureau, *Historical Statistics of the United States: Colonial Times to 1957* (Washington, 1974), series V 23. This failure rate is calculated from Dun and Bradstreet's records and counts as failure only firms that failed to pay their creditors. For the rate of business discontinuance, see *Investigation of Concentration of Economic Power: Hearings Before the Temporary National Economic Committee, Economic Prologue* (Washington, D.C., 1939), 227.

²⁰ Charles Grosvenor, Representative from Ohio, *Congressional Record*, 55th Cong., 2nd sess., 1898, 1899.

were interested in a federal bankruptcy law because they believed it was necessary to facilitate interstate trade.

There were three features of state debtor-creditor laws that troubled merchants and manufacturers involved in interstate commerce. First, the details of the laws varied from state to state. Second, many state laws discriminated against foreign creditors—that is, creditors that were not citizens of the state. Third, many of the state laws provided for a first-come, first-served distribution of assets rather than a pro rata division. Merchants and manufacturers voiced their frustration with the state laws at bankruptcy law conventions, and in memorials and petitions to Congress. Typical of many of these protests was the testimony of James Buchanan, the delegate from the Trenton, New Jersey, Board of Trade to the National Convention of Boards of Trade in 1881. Buchanan began by pointing out that members of his association were responsible for the manufacture of nearly one-half of all the pottery produced in the United States and that their sales extended throughout the country. He then went on to observe that:

They are engaged in the collection of their claims over the whole of the country and we find this difficulty about them. If there is any difficulty about a claim we have got to employ an attorney in every instance or become state lawyers ourselves—not simply for one state but for thirty odd States—and they find as the result of their experience that they have more difficulty in making their collections under state proceedings; that it takes longer; that it costs more than the proceedings under the old bankruptcy law, bad as it was.²¹

The procedures for filing claims varied from state to state, as did the rights of debtors and creditors. “It would simplify and abridge credit, increase the security of creditors and diminish the temptation for fraud by debtors, if clear and uniform laws regulated their respective rights and duties, and if creditors were not required by the aid of local counsel to investigate the laws of every state in which they give credit,” declared Lucius Eaton, a member of the St. Louis Merchants Exchange.²² Creditors had to be familiar with the provisions in each

²¹ *Testimony and Arguments in Relation to a Uniform System of Bankruptcy*, 46th Cong., 3rd sess., 1881, H. Misc. Doc. 9.

²² Lucius Eaton to Merchants Exchange of St. Louis, Miscellaneous Correspondence, Merchants Exchange Collection, Missouri Historical Society, 18 Oct. 1881. See *Memorial of Many Commercial Bodies for Passage of Torrey Bankrupt Bill*, 54th Cong., 2nd sess., 1897, S. Misc. Doc. 182, serial 2907 for a description of the variety in state laws.

state in which they operated, or employ a local lawyer. In either case the expenses of providing credit were increased by the variety of laws.

In addition to the difficulties of operating under diverse state laws, merchants and manufacturers frequently complained that out-of-state creditors were treated unfairly under the laws of many states. An 1898 petition from The Retail Grocers and Merchants Association declared that the California statutes "are practically to the effect that all claims on the part of California creditors must be settled by their assignees before any money whatever is to be paid to other creditors."²³ The practice of discriminating against foreign creditors was not isolated to California; many state courts upheld such laws.²⁴ John Bartlett of the Minneapolis Chamber of Commerce observed, "The claim is made, no doubt with some justice, that home creditors have preference in nearly all failures where settlements are made under state laws."²⁵ And, of course, "The manufacturer and the wholesaler who offers his wares in a State where the laws are notoriously inadequate for their protection, must . . . add to their original profit an amount as security, or insurance if you please, against loss in that State."²⁶ Thus, discriminatory laws ultimately raised the costs of foreign creditors and the rates that were charged.

The lack of uniformity and outright discrimination in state laws helps to explain why merchants doing interstate business wanted a federal bankruptcy law. The merchants and manufacturers who sought bankruptcy legislation wanted more than just uniformity, however. They wanted a law to secure a pro rata rule regarding distribution of an insolvent debtor's assets. With the first-come, first-served rule, the first creditor could claim all the assets necessary to pay his debts leaving, potentially, the last to receive nothing. Consequently, the first-come, first-served rule of collection tended to create incentives for creditors to race to be the first to file a claim. The effects of this situation were described by Jay Torrey, President of the National Convention of Representatives of Commercial Bodies. "[I]f a creditor suspects his debtor . . . is in financial trouble, he usually commences an

²³ *Resolution of Retail Grocers Association of Illinois etc. on Bankruptcy*, 55th Cong., 2nd sess., 1897, S. Doc. 155, serial 3600, 19.

²⁴ For a review of state laws as they related to foreign creditors, see Hollis Bailey, "An Assignment in Insolvency and its Effect upon Property and Persons Out of State," *Harvard Law Review* 7 (1893): 281-99; and S. Whitney Dunscomb, *Bankruptcy: A Study in Comparative Legislation* (New York, 1893), 151-67.

²⁵ *Proceedings of the Second Session of the National Convention of Representatives of Commercial Bodies* (St. Louis, Mo., 1899), 87.

²⁶ *Memorial of Convention of Commercial Bodies for Passage of Torrey Bankruptcy Bill*, 51st Cong., 1st sess., 1890, S. Misc. Doc. 245, serial 2700, 4.

attachment suit, and as a result the debtor is thrown into liquidation irrespective of whether he is solvent or insolvent,” noted Torrey. “This course is ordinarily imperative . . . because if he does not pursue that course some other creditor will.”²⁷

This “race of diligence,” as it was referred to, was one of the central concerns of mercantile creditors. They protested that it prevented them from assisting debtors whose troubles were only temporary. Torrey explained, “[U]nder the laws as they exist in most of the States an embarrassed debtor cannot call a meeting of his creditors without inviting his own financial ruin.”²⁸ Many of the memorials to Congress argued that a bankruptcy law would eliminate this “race of diligence” and decrease the number of commercial failures. They declared, “The race of getting in first, which has so often led to vexatious attachments, unnecessary suits and trouble, with consequent loss to creditor and debtor, will have been a thing of the past.”²⁹

Merchants who operated before and after the passage of the 1898 Act observed the change in the methods of business brought about by the law. Writing in the 1920s, Arthur Eloesser, a San Francisco merchant, recalled the days before the bankruptcy act was passed. “There was no federal bankruptcy law and California statute gave an attaching creditor priority for his claim before a second attachment could be satisfied. The consequence was that whenever an account became doubtful, competitors looked at one another with suspicion and a race to the county clerks office was the result.”³⁰ Saunders Norvell of the Simmons Hardware Co. of St. Louis recalled the conditions in the hardware wholesale business prior to the legislation, noting that, “In those days the rule was to ‘attach’ and get the facts afterward.”³¹ He also described failed attempts at cooperation among creditors prior to the enactment of the bankruptcy law.

In the years after the law was passed, many other observers of mercantile credit conditions also perceived that the incentives for creditors to file suits, and thereby initiate liquidation, had diminished. After the Panic of 1907, the National Association of Credit Men reported, “The law undoubtedly stayed the hand of many an anxious creditor who, unable to secure a preference to himself, joined in extending help to

²⁷ *Memorials, Press Clippings, Resolutions and Documents on Torrey Bankruptcy Bill*, 54th Cong., 1st sess., S. Doc. 237, serial 3354, 89.

²⁸ *Memorial of Many Commercial Bodies in Favor of Torrey Bankrupt Bill*, 54th Cong., 2nd sess., 1897, S. Doc. 182, serial 2907, 70.

²⁹ *Ibid.*, 77.

³⁰ Quoted in Roger F. Halsey, “Man to Loan \$1,500 and Serve as Clerk: Trading Jobs for Loans in Mid-Nineteenth Century San Francisco,” *Journal of Economic History* 54 (1994): 56.

³¹ Saunders Norvell, *Forty Years of Hardware* (New York, 1924), 117.

his embarrassed debtor, thus tiding over many a deserving business man." The National Association of Manufacturers Committee on Bankruptcy Laws concluded that, "Many thousands of worthy men were saved by it, who, if it had been absent would have been forced into insolvency and ruin."³² Similar conclusions were reached by the Los Angeles Board of Trade and the journal *Bradstreet's*.³³

The counterpart to this decline in commercial failures was an increase in the private settlement of debts, which was regarded as part of a new business practice of trying to assist debtors. This new effort, as Stanley F. Brewster noted, "contrasted with the hasty and intolerant policy of creditors prior to the enactment of the National Bankruptcy Act."³⁴ The growth in the private settlement of credit problems was reflected in the rise of adjustment bureaus. These bureaus formed in the first decades of the twentieth century to facilitate the extension or adjustment of debt when there were several creditors involved. The idea of an adjustment bureau was not new. The first, apparently, was the adjustment bureau of the San Francisco Board of Trade, founded in 1877. However, only two others are known to have existed prior to the passage of the Bankruptcy Act of 1898—those operated by the Boards of Trade of Portland, Oregon, and Los Angeles, California.³⁵ Figure 1 shows the growth of adjustment bureaus recognized by the National Association of Credit Men from five in 1904 to eighty-four in 1922.³⁶ By 1929, the adjustment bureaus associated with the National Association of Credit Men were handling non-bankruptcy adjustment cases involving total liabilities of over \$31 million.³⁷ The bankruptcy law reduced the incentives for individual creditors to initiate liquidation and made it possible for creditors to assist debtors who were only temporarily insolvent. As the merchants quoted above suggested, it was no longer necessary to race to be first.

The difficulties of operating under state collection laws always existed to some extent, but had become increasingly prominent as

³² Harold Remington, "Bankruptcy Law and Peaceable Settlements of Business Failures," *Yale Law Journal* 19 (1908): 591.

³³ *Credit Men's Bulletin* (Jan. 1917): 30; *Bradstreet's* (9 Jan. 1909): 25.

³⁴ Stanley F. Brewster, *Legal Aspects of Credit* (New York, 1924), 454.

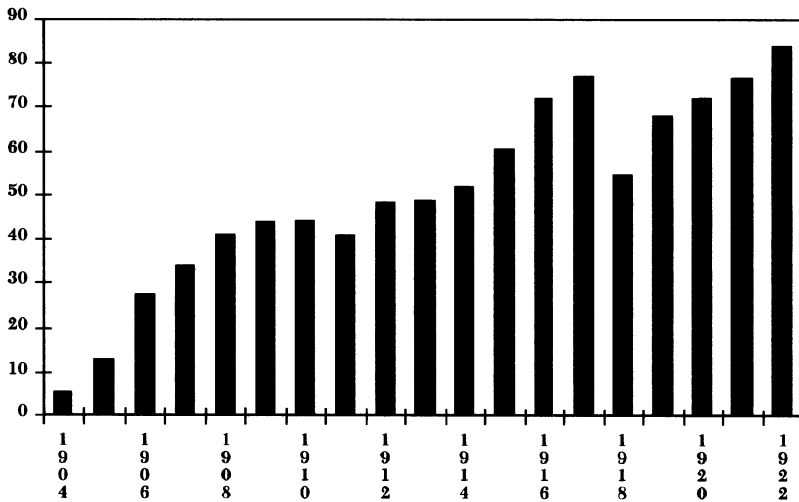
³⁵ On the history of adjustment bureaus, see Thomas Billig, "What Price Bankruptcy: A Plea for Friendly Adjustment," *Cornell Law Quarterly* 14 (1929): 413-46.

³⁶ The figures for the number of adjustment bureaus are from the listings of adjustment bureaus in the Dec. issues of the journal of the National Association of Credit Men, *Credit Men's Bulletin*, later *Credit and Financial Management*; adjustment bureaus were recognized by the Association and were typically associated with a board of trade or chamber of commerce.

³⁷ *Strengthening Procedures in the Judicial System*, 72nd Cong., 1st sess., 1931, S. Doc. 65, 184; see also Thomas Clifford Billig, "What Price Bankruptcy: A Plea For 'Friendly Adjustment,'" *Cornell Law Quarterly* 14 (June 1929): 413-46.

Figure 1

Number of Adjustment Bureaus, 1904-1922



Source: Listings of adjustment bureaus in the December issues of the journal of the National Association of Credit Men, *Credit Men's Bulletin*, later *Credit and Financial Management*.

commerce became more national in scope. Manufacturers and wholesalers used the expanded communication and transportation networks to send their sales people and commercial travelers throughout the country. According to census data the number of merchants doubled from 357,647 to 784,212 during the years from 1870 to 1900, while the number of commercial travelers increased more than tenfold from 7,262 to 92,919.³⁸ As trade expanded, the benefits of a federal bankruptcy law became increasingly apparent—a more level playing field, fewer commercial failures, the ability to privately adjust debt problems, and lower costs of providing credit. But how could this law be attained? How could the influence of merchants and manufacturers be brought to bear on Congress? The problem for proponents of bankruptcy law was compounded by the fact that they were concerned with many of the details of the law, such as the fees and costs of administration.³⁹ Rather than merely issuing an appeal to legislators regarding

³⁸ Bill Moeckel, *The Development of the Wholesaler in the United States, 1860-1900* (New York, 1953), 118.

³⁹ Advocates of the law spoke frequently of the high costs of the last bankruptcy law and the need to ensure that the many fees associated with it were not duplicated; see, for example, *Proceedings of the National Association of Credit Men*, 55th Cong., 2nd sess., 1898, S. Doc. 156, serial 3600, 11.

these issues, it was necessary to present a unified and powerful voice demanding a specific bankruptcy law.

The Bankruptcy Law Conventions

The national campaign by merchants and manufacturers to obtain bankruptcy legislation began in 1881, when the New York Board of Trade and Transportation organized a National Convention of Boards of Trade.⁴⁰ The participants at the Convention, which was held in Washington, D.C., endorsed a bankruptcy bill prepared by Judge John Lowell of Massachusetts. Members of the Judiciary Committees of Congress were invited to the Convention, where delegates from various commercial organizations presented testimony in favor of bankruptcy legislation. The convention presented testimony by delegates from the Philadelphia Board of Trade, the Chicago Commercial Club, the Trenton New Jersey Board of Trade, the New England Shoe and Leather Club and a number of other commercial associations.

For the next several years the New York Board of Trade continued to take the lead in pursuing bankruptcy legislation. One member of the New York Board of Trade estimated that during the 1880s his organization spent over \$150 thousand printing and distributing material on bankruptcy legislation.⁴¹ In 1883, it again contacted commercial bodies throughout the United States proposing that a "final, united and timely effort could result in the enactment of a bankruptcy law."⁴² Along these lines, it scheduled another convention in Washington, and instructed individual members to write their senators and representatives and urge the passage of bankruptcy legislation. On January 16 and 17, 1884, the second convention was held under the name of the Organization of the National Bankrupt Law Convention of Commercial Bodies. At the Convention the representatives of commercial associations reiterated their support for the Lowell bill.

Throughout the 1880s, the Organization of the National Bankrupt Law Convention of Commercial Bodies continued its efforts. Correspondence from Jay Torrey, the president of the organization, to the Merchants Exchange of St. Louis in February of 1885 indicates

⁴⁰ *Testimony and Arguments in Relation to a Uniform System of Bankruptcy*, 46th Cong., 3rd sess., 1881, H. Misc. Doc. 9.

⁴¹ *Proceedings of the Second Session of the National Convention of Representatives of Commercial Bodies* (St. Louis, Mo., 1899), xix.

⁴² New York Board of Trade to Merchants Exchange of St. Louis, Miscellaneous Correspondence, Merchants Exchange Collection, Missouri Historical Society, 26 July 1883.

that he lobbied members of Congress in an effort to obtain a vote on the bankruptcy bill during that session. In addition, Torrey provided a list of Missouri legislators he believed to be opposed to the Lowell bill and recommended that "such members of the Exchange as have customers or correspondents at the home or within the district of opposing congressmen, write them to urge their representatives to forgo their opposition to the bill."⁴³ The local associations not only provided a way to organize the national conventions, but a means to organize lobbying efforts as well.

Despite these efforts, the Lowell bill made little progress in Congress during the 1880s. Although it was passed by a Republican controlled Senate in 1884, it failed in the Democratic controlled House. Consequently, in 1889, the Associated Wholesale Grocers of St. Louis organized a third convention on bankruptcy, the National Convention of Representatives of Commercial Bodies.⁴⁴ Jay Torrey was again elected president of the Convention and recruited to draft another bill. Several of the delegates to the convention in St. Louis had expressed concerns about the cost of bankruptcy administration and were reluctant to endorse a bill unless they were certain that it would be more efficient than the previous law.⁴⁵ Consequently, Torrey devoted particular attention to the administrative features of the bill, specifying in great detail the fees and expenses. In a second meeting that year, held in Minneapolis in September, the delegates to the Convention endorsed the bill drafted by Torrey.⁴⁶ The delegates also established the mechanism by which the work of the Convention would be continued during the 1890s, when they adopted resolutions establishing a five-member Executive Committee, which was to have, "all the powers which the Convention would possess, if in session." The authors of the resolution made it clear that "the work of this body shall not stop with its adjournment, but that the securing of the passage of this law must necessarily be left to an Executive Committee, and that the Committee must be clothed with ample power."⁴⁷

Continuity was also provided by Jay Torrey's continuance as President. Torrey began his association with the bankruptcy law move-

⁴³ Jay Torrey to Merchants Exchange of St. Louis, Miscellaneous Correspondence, Merchants Exchange Collection, Missouri Historical Society, 9 Feb. 1885.

⁴⁴ *Proceedings of the First Session of the National Convention of Representatives of Commercial Bodies* (St. Louis, Mo., 1889).

⁴⁵ *St. Louis Post Dispatch*, 3 Mar. 1889.

⁴⁶ *Proceedings of the Second Session of the National Convention of Representatives of Commercial Bodies* (St. Louis, Mo., 1889), xx.

⁴⁷ *Ibid.*, xxi.

ment as the lawyer for the Associated Wholesale Grocers of St. Louis. He continued on as the chief lobbyist for the organization even after leaving St. Louis to join his brother Robert in the cattle business in Embar, Wyoming. Torrey visited Washington during every session of Congress in the 1890s and numerous legislators testified to the persistence with which he lobbied for bankruptcy legislation.⁴⁸ Senator George Hoar of Massachusetts was Chairman of the Judiciary Committee throughout most of the 1890s and a supporter, of first, the Lowell bill, and later, the Torrey bill. Hoar recalled in his autobiography that Torrey “constantly visited different Senators and Representatives and came back to me with glowing accounts of the prospects of the Bill.”⁴⁹ During an 1890 debate in the House, D. B. Culberson of Texas, who voted against the Torrey bill, declared that in his years of service in Congress (fifteen at the time) he had “never known a measure more intelligently, industriously, and persistently lobbied.”⁵⁰ Eight years later, John Lacey of Iowa observed that “no bill has been pushed more persistently than this.”⁵¹ Yet another legislator declared that the only rest they had received from Torrey’s lobbying came during the two years Torrey had served in the Wyoming legislature.⁵²

Ironically, Torrey was also away from Washington when the 1898 Bankruptcy Act was being debated in the 55th Congress. When the Spanish American War began, David Henderson, the sponsor of the Torrey bill in the 55th Congress and later Speaker of the House, helped Torrey obtain permission to establish a Rough Rider Regiment from Wyoming.⁵³ Following the War, Torrey returned to Wyoming where he continued to keep a hand in both business and Republican politics. Although his political aspirations were largely frustrated, his business affairs appear to have met with some degree of success. Shortly before his death in 1920, he had returned to Missouri and purchased over 10,000 acres of land, which he intended to develop into a community called Torreyton.⁵⁴

⁴⁸ Jerald Hoffman, “Colonel Jay L. Torrey And His Rough Rider Regiment,” (M.A. thesis, University of Wyoming, 1967), 4. Hoffman’s thesis provides a biography of Torrey, with an emphasis on his military activities.

⁴⁹ George F. Hoar, *Autobiography of Seventy Years*, vol. II (New York, 1903), 302.

⁵⁰ *Congressional Record*, 51st Cong., 1st sess., 1890, 7570.

⁵¹ *Congressional Record*, 55th Cong., 2nd sess., 1898, 1928.

⁵² *Congressional Record*, 55th Cong., 2nd sess., 1898, 1886.

⁵³ For a detailed account of Torrey’s activities related to the war, see Hoffman, “Jay L. Torrey and His Rough Rider Regiment.”

⁵⁴ *Ibid*, 127.

The organization that Torrey presided over, the National Convention of Representatives of Commercial Bodies, was composed of commercial associations from all regions of the country. The Report of the meeting in Minneapolis contains resolutions in favor of the bankruptcy law from over seventy commercial associations. Among these associations were the Pacific Coast Board of Trade; the Board of Trade of Portland, Oregon; the Omaha, Nebraska Board of Trade; the Wichita, Kansas, Board of Trade; the Merchants Exchange of St. Louis; the Little Rock, Arkansas, Board of Trade; the Chamber of Commerce of Louisiana; the Charleston, South Carolina, Chamber of Commerce; the Boston Merchants Association; the Chamber of Commerce of the State of New York; and the Board of Trade of New Jersey.⁵⁵ An 1898 petition submitted to Congress by the Convention contains the names of an even larger number of such local associations. In addition, the petition contains the names of national and regional organizations, such as the National Wholesale Druggists Association, the National Furniture Manufacturers Association, the American Paper Manufacturers Association, the National League of Commission Merchants, the Paint and Oil Club of New England, and the Western Commercial Travelers Association.⁵⁶

Along with signing the petitions from the National Convention, the local associations submitted proposals of their own, lobbied their local legislators, and sought the support of merchants and manufacturers that had not yet joined the Convention. For example, in correspondence to the Merchants Exchange of St. Louis in 1890, Torrey implored its members to write to their legislators and to seek the support of other commercial associations that had not yet endorsed the bill.⁵⁷ In addition, the local associations that were members of the Convention also continued to address petitions and memorials to Congress on their own, appealing for the passage of the Torrey bill.⁵⁸

⁵⁵ *Proceedings of the Second Session of the National Convention of Representatives of Commercial Bodies* (St. Louis, Mo., 1889).

⁵⁶ *Congressional Record*, 55th Cong., 2nd sess., 1898, 1905; and *Memorial of the National Convention of Representatives of Commercial Bodies*, 51st Cong., 2nd sess., 1890, S. Misc. Doc. 24, serial 2819.

⁵⁷ Jay Torrey to Merchants Exchange of St. Louis, Miscellaneous Correspondence, Merchants Exchange Collection, Missouri Historical Society, 23 Jan. 1890.

⁵⁸ See, for example, *Establishing a Uniform System of Bankruptcy*, 51st Cong., 1st sess., 1890, H. Rep. 1386, serial 2811; *Memorial of National League of Commission Merchants of United States on Torrey Bankruptcy Bill*, 52nd Cong., 2nd sess., 1894, S. Misc. Doc. 92, serial 3167; and *Resolution of Retail Grocers Association of Illinois, etc. on Bankruptcy*, 55th Cong., 2nd sess., 1898, S. Doc. 155, serial 3600.

The merchants and manufacturers of these associations believed that their demand for a bankruptcy law differed from previous ones. They made it clear that they wanted a bankruptcy law not to deal with a period of crisis, but with the everyday needs of trade creditors. At the convention in St. Louis, James Broadhead observed that the tendency to pass bankruptcy laws during periods of crisis had generally resulted in "hasty and improvident legislation."⁵⁹ Even more to the point, the resolution of the National Association of Stove Manufacturers declared that: "Former bankruptcy laws have been passed after periods of panic, when relief for large numbers seemed to justify a legal discharge of their obligations. What we now need is a measure of permanency adapted to the current needs of business."⁶⁰ As historians Freyer and McCoy made clear, similar demands for a permanent bankruptcy law had been made earlier in the century. But in the late nineteenth century, proponents of bankruptcy had a means to organize on a national scale. This organization enabled them to influence the specific features of the law, to speak with a single voice, and to maintain their lobbying efforts year in and year out.

The role of the National Convention of Representatives of Commercial Bodies in the history of American bankruptcy law finds a striking parallel in the English experience with bankruptcy reform of the 1860s. In England, the driving force behind bankruptcy reform was a national organization formed through the amalgamation of boards of trade and chambers of commerce. In his study of Victorian insolvency, Victor Lester attributed the passage of bankruptcy reform to the creation of these organizations. "A large reason for this record of success must be found in the organization of national groups such as the Social Science Association and the Associated Chambers of Commerce that could claim to speak for business on a national basis," wrote Lester. "No longer was the position of business expressed in isolated petitions from individual Chambers of Commerce. With organizations such as the Social Science Association and the Associated Chambers of Commerce, a powerful voice claimed to represent a national consensus. In addition these organizations maintained pressure for reform from session to session of Parliament."⁶¹ Although the

⁵⁹ James Broadhead in *Proceedings of the Second Session of the National Convention of Representatives of Commercial Bodies* (St. Louis, Mo., 1889), 83.

⁶⁰ *Proceedings of the First Session of the National Convention of Representatives of Commercial Bodies* (St. Louis, Mo., 1889), 33.

⁶¹ Victor Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and company Winding-Up in Nineteenth-Century England* (Oxford, 1995), 161.

members of the American association appear to have made no reference to their English predecessors, the two movements bear a remarkable resemblance. The National Convention of Representatives of Commercial Bodies provided the same set of benefits that Lester described: it enabled its members to speak with a unified voice and to maintain pressure for bankruptcy legislation throughout the last two decades of the nineteenth century.

The Torrey Bill in Congress

Maintaining the pressure for bankruptcy legislation was important because considerable opposition to a federal bankruptcy law still existed in the late nineteenth century. The 1880s and 1890s were an era of extremely partisan politics and the battle over bankruptcy law was no exception. Both the Lowell bill and later the Torrey bill were consistently supported by the Republican party and opposed by the Democratic Party. Furthermore, control of Congress was split for most of the period; Democrats had a majority in the House in every Congress except the 51st (1889-91), but Republicans had a majority in the Senate in every Congress except the 53rd (1893-95). Republicans gained a majority in the House and a plurality in the Senate in the 54th Congress; in the 55th Congress they had a majority in both houses of Congress and controlled the White House as well. The highly partisan voting on bankruptcy, combined with the inability of either party to gain a firm hold over Congress, delayed the enactment of bankruptcy legislation.

The Lowell bill was passed by a Republican-controlled Senate in 1884, but was ignored by the Democrat-controlled House. The Torrey bill was passed by a Republican-controlled House of Representatives in 1890, but the Senate, also with a Republican majority, did not have time to consider the bill, largely because of the press of tariff and monetary concerns.⁶² In the wake of the Panic of 1893, a Democrat-controlled House passed a bankruptcy bill that would have been temporary—two years—and purely voluntary.⁶³ But despite the fact that the country was in the midst of a depression, the Democrat-controlled Senate did not consider the bill. The Torrey bill was passed again when the Republican party regained a majority in the House in 1896,

⁶² *Congressional Record*, 51st Cong., 1st sess., 1890, 10208.

⁶³ *Congressional Record*, 53rd Cong., 1st sess., 1893, 124.

but was again rejected by the Democrat-controlled Senate.⁶⁴ Finally, with a Republican majority in both the House and Senate, bankruptcy bills passed in both chambers during the 55th Congress. Because the Senate passed a simple bankruptcy bill, sponsored by Knute Nelson, while the House passed a version of the Torrey bill, sponsored by David Henderson, a conference committee was established to produce a compromise bill. The conference report was substantially the bill proposed by Torrey and promoted by the National Convention of Representatives of Commercial Bodies. It provided for both voluntary and involuntary petitions in bankruptcy, a pro rata distribution, and detailed provisions for the fees and expenses of bankruptcy.⁶⁵ In 1898, the years of effort by a multitude of merchants and manufacturers finally came to fruition when Congress passed, and President McKinley signed into law, The Act to Establish a Uniform System of Bankruptcy.

Although the bill was passed in the wake of the depression of the 1890s, both the congressional debates and the pattern of voting make clear that the law was the result of the demands of the commercial associations rather than the desire to relieve insolvent debtors. Although Democrats in the House passed a bill to relieve insolvent debtors in the 53rd Congress, Democrats in the Senate did not pass a bankruptcy bill during the entire course of the depression. In 1896, one Democratic legislator declared that despite the high numbers of business failures of the past few years he “did not see the necessity for it [i.e., a bankruptcy law] at this time or the circumstances which call for such enactment. Nobody has asked for it except the boards of trade, chambers of commerce, money kings and such like.”⁶⁶ Joseph Bailey, the author of the bill that was passed in 1894, still saw the need for a bankruptcy bill two years later, but argued that, “a voluntary system of bankruptcy is the only one which will ever be satisfactory in this country, and it ought to be a temporary measure of relief.”⁶⁷ Throughout the 1890s, Democrats were almost unanimous in their insistence that, if there had to be a bankruptcy bill, it must be purely

⁶⁴ *Congressional Record*, 54th Cong., 1st sess., 1896, 4670.

⁶⁵ *Conference Report on Bankruptcy Bill*, Senate Document No. 294, 55th Cong., 2nd sess., 1898, serial 3615. The Nelson bill and the Henderson, or Torrey, bill differed in four ways. The Nelson bill did not specify the administrative features of the law with nearly as great detail, it also contained fewer provisions for involuntary bankruptcy, fewer grounds for imprisonment for fraud, and fewer opportunities for denial of discharge. See *Congressional Record*, 55th Cong., 2nd sess., 1898, 6297 for a comparison of the two bills.

⁶⁶ *Congressional Record*, 54th Cong., 1st sess., 1896, 4752.

⁶⁷ *Congressional Record*, 54th Cong., 1st sess., 1896, 4754.

voluntary and temporary in its nature. Both demands arose out of a broader opposition to laws that expanded federal power, especially the jurisdiction of the federal courts.⁶⁸

In the late nineteenth century, the federal courts were generally regarded as favorable to the interests of interstate commerce and played an instrumental role in removing state barriers to trade, such as anti-drummer legislation. The bankruptcy law would effectively invalidate state insolvency laws that discriminated against out of state businesses, and enable creditors to move their cases into federal courts. Thus, to Democrats the bankruptcy law was yet another example of the "passing away and drawing away of jurisdiction from the home tribunals of the people to the Federal courts."⁶⁹ Robert Lee Henry of Texas went so far as to declare that the bill was an attempt to reverse previous legislation intended to reduce the role of the federal courts. He noted that: "In 1887 and 1888 Congress trimmed down the jurisdiction of the Federal courts by changing the amount in controversy from \$500 to \$2,000. This substitute is an attempt to restore that jurisdiction."⁷⁰ Sometimes the opposition to bankruptcy law as an expansion of the federal courts was stated as a matter of principle. "The people have always jealously guarded their right to trial in their State courts where they can be tried before judges selected by them, and have dreaded the unbridled power of the Federal judiciary," declared Oscar Underwood.⁷¹ On other occasions, however, the practical nature of the opposition came to the fore. In 1898, John Lacey of Iowa, explained that the preferences in collecting debts were the only advantage that local jobbers had. "Every tendency is to concentrate all business in the great commercial centers," lamented Lacey.⁷² Whether it

⁶⁸ On the role of the Federal Courts in promoting interstate commerce, see Tony Freyer, *Forums of Order: The Federal Courts and Business in America* (Greenwich, Conn., 1979); McCurdy, "American Law," 632, and "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," *Business History Review* 53 (Autumn 1979): 305-42; Stanley Hollander, "Nineteenth Century Anti-Drummer Legislation in the United States," *Business History Review* 38 (Winter 1964): 479-500; Donald J. Pisani, "Promotion and Regulation: The Constitution and the American Economy," *Journal of American History* 74 (Dec. 1987): 740-68; and Thomas Cochran and William Miller, *The Age of Enterprise* (New York, 1961), 179.

⁶⁹ *Congressional Record*, 55th Cong., 2nd sess., 1898, 1803.

⁷⁰ *Congressional Record*, 54th Cong., 1st sess., 1896, 4754.

⁷¹ *Congressional Record*, 55th Cong., 2nd sess., 1898, 1793; see also the statements by Mr. Ball, *Congressional Record*, 55th Cong., 2nd sess., 1898, 1886; Mr Bland, *Congressional Record*, 55th Cong., 2nd sess., 1898, 1896; Mr Williams, *Congressional Record*, 55th Cong., 2nd sess. 1898, 1933; and Mr Bodine, *Congressional Record*, 55th Cong., 2nd sess., 1898, 1939.

⁷² *Congressional Record*, 55th Cong., 2nd sess., 1898, 1925.

was thought of broadly as a matter of states' rights or more narrowly as a matter of protecting local business, the removal of insolvency cases from the state courts was opposed by Democrats in Congress.

In contrast, Republicans argued that the bankruptcy bill was a necessary part of the commercial law of the nation, and that its role as a mechanism of debt relief was secondary. William Moody declared that: "Gentlemen talk as if the sole purpose of bankruptcy law was to discharge existing obligations of debtors. Important as that consideration may be, it is but an incident." He went on to explain that he believed it "to be of more consequence that the law we enact shall regulate commercial intercourse—the enormous commercial intercourse within the States and between the States."⁷³ To carry out this function the law had to provide for involuntary as well as voluntary petitions in bankruptcy, as the Torrey bill did, and be a permanent piece of legislation. In this light, the conflict over bankruptcy can be seen as part of wider conflict in the late nineteenth century over access to federal courts. Like other businesses involved in interstate commerce, the proponents of bankruptcy law wanted to be able to take their cases into federal courts. Thus the Democratic party was fundamentally opposed to one of the features that the commercial associations regarded as essential to a bankruptcy law, and this opposition remained unaffected by the depression.

Amendments to the bill did nothing to resolve the fundamental partisan conflict. Although the House modified the original Torrey bill, as did the subsequent conference report, most congressmen continued to believe it was, at its core, still the Torrey bill. Mr. Henry of Texas stated that although the bill before the House was called the Henderson bill, "It should be known as the Torrey bill, for that it is in disguise."⁷⁴ Later, David De Armond rendered the same judgement on the conference report: "No man can read a page of it without finding upon that page the indisputable evidence that the bill originated with those who have debts to collect, and to obtain new means for their collection, rather than with those who are overwhelmed with debt and are seeking an avenue of escape from the hopeless burdens which they can not otherwise lift."⁷⁵ The Conference Committee appended to their report a copy of the original report of the House Committee on

⁷³ *Congressional Record*, 55th Cong., 2nd sess., 1898, 1833; see also Mr Howe, *Congressional Record*, 55th Cong., 2nd sess. 1898, 1938; and Mr Henderson, *Congressional Record*, 55th Cong., 2nd sess., 1898, 1790; and Mr Grosvenor, *Congressional Record*, 55th Cong., 2nd sess., 1898, 1899.

⁷⁴ *Congressional Record*, 55th Cong., 2nd sess., 1898, 1803.

⁷⁵ *Congressional Record*, 55th Cong., 2nd sess., 1898, 6429.

the Judiciary, which made explicit the importance of the commercial associations and Jay Torrey as motivating factors behind the Republican push for bankruptcy legislation. "National conventions were held to consider the subject, boards of trade, chambers of commerce and other commercial bodies became active in the consideration of the question, until at last what was known as the Torrey bill was substantially agreed upon throughout the country as one best adapted to meet the requirements of the Constitution and the needs of our growing country," the House Committee noted.⁷⁶ The report went on to point out that although numerous amendments had been made, often with Torrey's assistance, the original Torrey bill put forward in 1890 still formed the basis of the bill in 1898.

A few Democrats were concerned enough with the relief of insolvent debtors that they were willing to accept the conference report as the best deal available. Oscar Underwood, who had opposed bankruptcy law in the 54th Congress, voted for passage of the conference report and appealed to his colleagues. "I can not always get such legislation as I believe to be perfect legislation," said Underwood. "I must adopt for my constituents that legislation that I believe comes nearest to filling the end that they desire."⁷⁷ However, the vast majority of Democrats appear to have agreed with William Terry of Arkansas that "It still gives an extended jurisdiction to the United States Courts that may be used oppressively."⁷⁸ In the end, despite the hardships of the depression and the desires of many for a discharge of their debts, over 80 percent of Democratic votes in the House were cast against the passage of the conference report. Ninety percent of Republicans in the House cast their votes in favor of the report.⁷⁹ In the Senate, of the thirteen votes cast against the report, ten were by Democrats and one by a Populist. Ten Democrats also joined the thirty-three Republicans who voted for the bill, but the largest fraction of Democrats, sixteen, simply did not vote.⁸⁰ Even though the conference report, like the Torrey bill before it, exempted farmers and wage earners from involuntary bankruptcy, the vast majority of Democrats found the permanent extension of the federal courts unacceptable. The conference report also excluded railroads, transportation companies and banks,

⁷⁶ *Conference Report on Bankruptcy Bill*, Senate Document No. 294, 55th Cong., 2nd sess., 1898, serial 3615.

⁷⁷ *Congressional Record*, 55th Cong., 2nd sess., 1898, 6431.

⁷⁸ *Congressional Record*, 55th Cong., 2nd sess., 1898, 6429.

⁷⁹ *Congressional Record*, 55th Cong., 2nd sess., 1898, 6436.

⁸⁰ *Congressional Record*, 55th Cong., 2nd sess., 1898, 6299.

and left them to the laws of the states that had chartered them. A number of Democrats, however, pointed to the numerous railroad receiverships in federal courts to support their argument that the expansion of the federal courts had already gone too far.⁸¹

The line between the advocates of federal commercial law and the advocates of states' rights regarding the bankruptcy law did not disappear after 1898; it remained just as clear in 1902, when Democrats in the House attempted to repeal the law. George Ray of New York argued that "There is no civilized nation on the face of the earth doing great business and having great commercial interests that does not have a bankruptcy law on its statute books."⁸² From the other side of the House, Henry Clayton defied any Democrat to "say that his State can not administer justice, can not prevent dishonesty, can not make men do right, can not distribute assets as well as the Federal courts can."⁸³ Sixty-three Democrats and three Republicans voted in favor of the repeal of the law; eighteen Democrats and 119 Republicans voted against the repeal.⁸⁴

The operation of the bankruptcy law reflected another sort of victory for the commercial associations, a victory over the excessive fees and expenses that had plagued bankruptcy law in the past. In its first year in operation, 22,446 petitions were filed involving over \$350,000,000 worth of liabilities. The average cost per petition in 1899 was \$21.81; the lowest average cost per petition under the 1867 law was \$72 in 1868.⁸⁵ Furthermore, the evidence provided by the expansion of adjustment bureaus indicates that the law also had a measure of success in reducing the "race of diligence" and promoting private settlements.

⁸¹ On the exclusion of banks, railroads, and transportation companies, see *Congressional Record*, 55th Cong., 2nd sess., 1898, 6427. On the argument that railroad receiverships may have indirectly affected bankruptcy legislation by fueling the opposition to expanded federal court jurisdiction, see Frank R. Kennedy, "The Bankruptcy Court," in *The Development of Bankruptcy and Reorganization Procedures in the Courts of the Second Circuit of the U.S.* (New York, 1995); see also *Congressional Record*, 55th Cong., 2nd sess., 1898, 1806. On the development of receiverships, see Albro Martin, "Railroads and Equity Receivership: An Essay on Institutional Change," *Journal of Economic History* 33 (Sep. 1974): 685-709; D. H. Chamberlain, "New Fangled Receiverships," *Harvard Law Review* 10 (Oct. 1896): 139-49; and John Franklin Crowell, "Railway Receiverships in the United States," *Yale Review* (Nov. 1898): 319-30.

⁸² *Congressional Record*, 57th Cong., 1st. sess., 1902, 6940.

⁸³ *Congressional Record*, 57th Cong., 1st. sess., 1902, 6944.

⁸⁴ *Congressional Record*, 57th Cong., 1st. sess., 1902, 6957.

⁸⁵ *Report of the Attorney General of the United States* (Washington, D.C., 1900); and *Expenses of Proceedings in Bankruptcy*, 43rd Cong., 1st sess., Executive Document 19, 1873, serial 1580.

The ability to form a national organization had been crucial to the success of the business people seeking bankruptcy legislation. It enabled them to speak as one about the desirability of such a law and about the specific features the law should contain. The means of organizing these business people, the amalgamation of commercial associations from all over the country, was a key innovation. The local bodies provided a means for the national organization to obtain information about the preferences of their members as well as to organize their lobbying efforts. The system of organization made it possible for a large number of businessmen throughout the country to form a united front on the issue of bankruptcy. This new form of organization had been made possible by the rapid growth of commercial associations after the Civil War.

The Growth of Commercial Associations

Although the existence of a national organization can provide numerous benefits to a group seeking changes in government policy, it can also be costly to create and maintain. This cost is particularly relevant when the group that is seeking change is composed of many people scattered throughout a large country. However, as Davis and North observed, these costs “can be markedly reduced if an arrangement whose organizational expenses have been underwritten for one purpose can be used to effect a second.”⁸⁶ For example, “In the 1870s the costs of organizing a large fraction of the American farm sector into an effective political lobby were very high, but once these costs had been paid by the Grange (a social organization) the much smaller cost of redirection made the innovation of the economic arrangement appear profitable.”⁸⁷ In the movement to obtain a bankruptcy law, commercial associations played the role that the Grange had played in the agrarian movement. The national organization that they formed was created through the amalgamation of commercial associations throughout the country. It was not necessary to incur all of the expenses of organizing businessmen in every city because they were already organized. The number of commercial associations (trade associations,

⁸⁶ Lance Davis and Douglass North, *Institutional Change and American Economic Growth* (Cambridge, U.K., 1971), 43.

⁸⁷ *Ibid.*

boards of trade, and chambers of commerce) had grown rapidly after 1870. These associations had not been formed to seek bankruptcy legislation, but once formed, provided a means to organize the efforts of businessmen throughout the country. This was particularly important because trade creditors were concerned not just with the broader questions, such as whether the law should be voluntary or involuntary, but also with the administrative features of the law, such as the mandated fees and expenses. A national organization made it easier for merchants to share their views about these issues and to stay informed about the features of the various bills before Congress.

The growth of commercial associations in the late nineteenth century has received much attention; both Robert Weibe and Samuel Hays made the formation of associations and organizations a central theme in their studies of turn-of-the-century America.⁸⁸ Although Weibe suggested that most of these associations had “appeared rather suddenly around 1900,” a steady increase in the rate of formation of commercial associations had begun about two decades before that.⁸⁹ A survey conducted for the 1889 Report on Internal Commerce makes it possible to observe this growth in associations in the late nineteenth century.⁹⁰ The List of Boards of Trade and Other Commercial and Industrial Organizations, generated from that survey, contains the name, location, size of membership, and date of formation of 478 associations. The oldest association on the list was the New York Chamber of Commerce, established in 1768, and only twenty-six other associations had dates of formation prior to 1860. Figure 2 shows the number of commercial associations formed in each year from 1860 to 1889. Clearly the majority of associations existing in 1889 had been established in the preceding two decades.

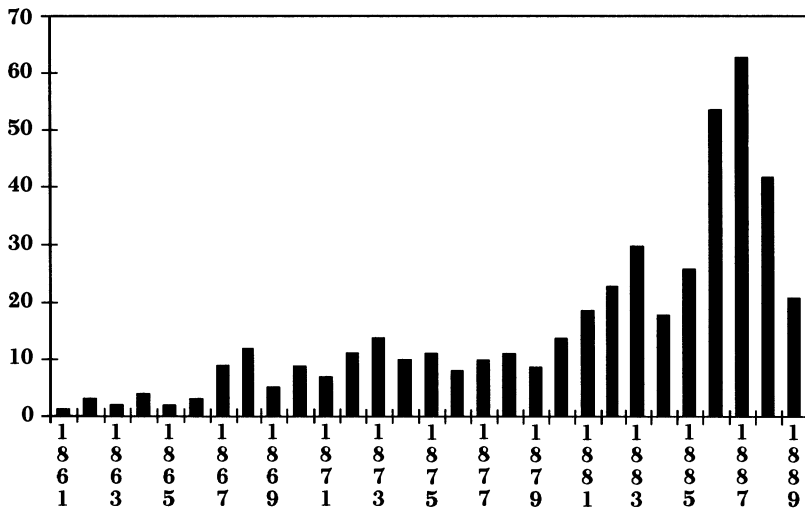
The importance of these newly formed commercial associations in the movement to obtain a bankruptcy law can be ascertained by examining the dates of formation of the associations represented by the National Convention of Representatives of Commercial Bodies. One of the petitions submitted to Congress by the National Convention of Representatives of Commercial Bodies in 1896 contains the names of

⁸⁸ Robert Weibe, *The Search for Order, 1877-1920* (New York, 1967); Samuel Hays, *The Response to Industrialism, 1885-1914* (Chicago, 1957); see also James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, 1956), 85.

⁸⁹ Weibe, 123.

⁹⁰ *Report of the Internal Commerce of the U.S.*, 51st Cong., 1st sess., 1890, House. Doc. 6, serial 2738.

Figure 2
Number of Commercial Associations Formed



Source: *Report of the Internal Commerce of the U.S.*, 51st Cong. 1st sess., 1890, H. Doc. 6, serial 2738; and National Industrial Conference Board, *Trade Associations: Their Economic Significance and Legal Status* (New York, 1925)

304 commercial associations.⁹¹ It was possible to identify the date of formation of 129 of these.⁹² Of these 129 associations, seventy-four were formed in the 1880s or 90s; thirty-four were formed in the 1870s; eleven in the 1860s; and only eight were formed prior to 1860. In other words, the National Convention of Representatives of Commercial Bodies could not have existed before the last quarter of the nineteenth century because its members did not exist.

The list includes a wide array of commercial associations: trade associations, chambers of commerce, and boards of trade. The members of these organizations had banded together for a variety of reasons. Many of the trade associations were formed with the purpose of

⁹¹ *Memorials, Press Clippings, Resolutions and Documents on Torrey Bankruptcy Bill*, 54th Cong. 1st sess., S. Doc. 237, serial 3354.

⁹² Most of the dates (126) were obtained from *Report of the Internal Commerce of the U.S.*, 51st Cong. 1st sess., 1890, H. Doc. 6, serial 2738; the others were found in National Industrial Conference Board, *Trade Associations: Their Economic Significance and Legal Status* (New York, 1925).

controlling competition.⁹³ On the other hand, the members of chambers of commerce, boards of trade, and other commercial clubs often had broader objectives, such as promoting the growth of their communities.⁹⁴ For some associations credit was a prominent concern. For example, the Paint and Oil, and Varnish Clubs formed credit bureaus to facilitate their trade, but seeking bankruptcy legislation was not their reason for existence.⁹⁵ Although these associations had not been formed specifically to seek bankruptcy legislation, their formation made it possible to seek legislation in a way that had not been feasible before. The bankruptcy conventions were able to use trade associations and local commercial associations, such as boards of trade and chambers of commerce, to obtain information about the demand for bankruptcy law, to obtain information about the specific features of bankruptcy law that were considered most important, to pressure legislators to pass bankruptcy legislation, and to encourage other merchants and manufacturers to join them in their efforts.

Conclusion

The 1898 Bankruptcy Act was the result of two currents of change in the American economy in the late nineteenth century. One current was the technological changes that made a national market a possibility—the development of communication and transportation networks, and technologies of mass production. The increased flow of interstate commerce made clear the inadequacies of state laws and fueled the demand for a national bankruptcy law. As markets expanded, more merchants and manufacturers had to contend with the diversity and outright discrimination of state laws. They found themselves unable to assist troubled debtors, or to cooperate in the liquidation of a failed businesses. Instead, they were forced to race to be the first to file claims on insolvent debtors.

⁹³ William H. Becker, "American Wholesale Hardware Trade Associations, 1870-1900," *Business History Review* 45 (Summer 1971): 179-200; and "The Wholesalers of Hardware and Drugs, 1870-1900" (Ph.D. diss., Johns Hopkins University, 1969); Bill Moeckel, *The Development of the Wholesaler in the United States, 1860-1900* (New York, 1986), 203; F. Stuart Fitzpatrick, *A Study of Businessmen's Associations* (New York, 1925); and Henry Foth, *Trade Associations: Their Service to Industry* (New York, 1930).

⁹⁴ See, for example, Kenneth Sturges, *American Chambers of Commerce* (New York, 1915); and Lewis Atherton, *Main Street on the Middle Border* (Chicago, 1954), 331-2.

⁹⁵ Chauncey Depew, *One Hundred Years of Commerce*, 624.

The other current was the growth of associations and organizations throughout the country. Organizations and associations of all types were being formed during the late nineteenth century, including labor unions, farmers' alliances and Granges, as well as professional and business associations. Among these business associations considerable diversity existed. Some were formed along trade lines, while others were formed according to the interests of a community or region. An unintended by-product of this increase in associations was the ability to organize on a larger scale, even to organize nationally. These associations made it possible to coordinate the activities of businesspeople from throughout the country. They further made it possible to form a national organization that could draft and lobby for a particular piece of legislation.

The Act to Establish a Uniform System of Bankruptcy was the result of the confluence of these two currents. It was not simply the response to a temporary economic crisis, as has usually been suggested. The emphasis on the depression of the 1890s has obscured the importance of bankruptcy law as a part of commercial law, and led to the neglect of the role of merchants and manufacturers in obtaining its passage. Thus, in telling this story, I have attempted to examine two neglected aspects of American business history: the evolution of bankruptcy law to fit the changing needs of business, and the role of commercial associations in promoting institutional change.

If, as Charles McCurdy has argued, "a nation is defined in terms of a free trade unit, rather than in terms of an integrated transport network," much of the work of creating a national economy remained to be done after the railroads were built.⁹⁶ Diverse and often discriminatory state laws impeded the flow of goods as surely as high transport costs. McCurdy emphasized the role of the big businesses acting through the courts to eliminate taxes that discriminated against foreign merchants. In contrast, the story of bankruptcy law was one of many business people acting through commercial associations to influence Congress. Despite the differences in these stories they were both part of the same process—the creation a national economy.

⁹⁶ McCurdy, "American Law," 632.