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Cover Page Footnote

Associate Professor of Law, Temple University. I am grateful to Brad Hansen, Eric Posner, Tom Ward, and the participants at a faculty workshop at Notre Dame Law School for helpful comments; and to Bruce Green and the editors of the Fordham Law Review for inviting me to participate in this symposium.

BANKRUPTCY LAWYERS AND THE SHAPE OF AMERICAN BANKRUPTCY LAW

David A. Skeel, Jr.*

INTRODUCTION

A casual observer would no doubt assume that the United States has always had federal bankruptcy legislation on the books. This impression is understandable, since bankruptcy law has been firmly in place for the entire twentieth century. But this was not always so. In the nineteenth century, bankruptcy legislation was much more the exception than the norm. Congress passed bankruptcy laws in 1800,¹ 1841,² and 1867,³ but lawmakers quickly changed their minds and repealed their handiwork in each instance. It wasn't until 1898 that Congress finally passed a bankruptcy law with staying power.⁴ Though frequently amended, most dramatically in 1938,⁵ the 1898 Act lasted until Congress replaced it with the Bankruptcy Code in 1978.⁶

This much one can find by quickly perusing any of the standard accounts of bankruptcy history.⁷ What one does not find in the bankruptcy law literature is a persuasive account as to why bankruptcy suddenly became permanent in 1898. What was the magic in the 1898 Act that spared it the fate of each of its predecessors?

* Associate Professor of Law, Temple University. I am grateful to Brad Hansen, Eric Posner, Tom Ward, and the participants at a faculty workshop at Notre Dame Law School for helpful comments; and to Bruce Green and the editors of the *Fordham Law Review* for inviting me to participate in this symposium.

1. Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). The 1800 Act lasted three years. See Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 (repealing Act of Apr. 4, 1800, ch.19, 2 Stat. 19).

2. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843). The 1841 Act lasted less than two years. See Act of Mar. 3, 1843, ch. 82, 5 Stat. 614 (repealing Act of Aug. 19, 1841, ch. 9, 5 Stat. 440).

3. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878). The 1867 Act lasted eleven years. See Act of June 7, 1878, ch. 160, 20 Stat. 99 (repealing Act of Mar. 2, 1867, ch. 176, 14 Stat. 517).

4. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

5. Unlike the prior amendments, the Chandler Act of 1938 completely overhauled the 1898 Act. Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed 1978).

6. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C.). This Article uses "Bankruptcy Code" to refer to the provisions of the Bankruptcy Reform Act of 1978.

7. The most prominent book-length discussions of bankruptcy history are Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (1974); F. Regis Noel, *A History Of The Bankruptcy Clause of the Constitution of the United States of America* (1919); and Charles Warren, *Bankruptcy In United States History* (1935). For an excellent overview in article form, see Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 *Am. Bankr. Inst. L. Rev.* 5 (1995) (providing a chronological review of bankruptcy law, with some consideration of associated constitutional issues).

This Article begins by arguing that a pivotal factor was the bankruptcy bar.⁸ This does not mean that the bankruptcy bar cleverly pushed through the 1898 Act for its own benefit. Actually, the story is much more interesting. When the Act was passed in 1898, there had not been a federal bankruptcy law for twenty years, and the bankruptcy bar did not even exist. At that time, commercial organizations, not lawyers, were the principal proponents of bankruptcy law. Because administrative costs were seen by many as the biggest problem with the previous bankruptcy law,⁹ the drafters of the Act pared down the administrative apparatus to an absolute minimum in 1898.¹⁰ This left much more room for bankruptcy lawyers than might otherwise have been the case; and once the bankruptcy bar emerged, the bar itself played a crucial role in stabilizing the new legislation.

This, then, was the magic of the 1898 Act: the Act created the bankruptcy bar, and the bar then reinforced the coalition of commercial interests that had agitated for bankruptcy legislation. It is only a slight overstatement to say that the feedback effect between the Act and the bar was the defining event in American bankruptcy law.

And it was only the beginning. The bankruptcy bar not only helped to assure the permanence of American bankruptcy law; the bar also has had an enormous influence on the Act's subsequent development. Other interest groups, from lenders and other creditors to debtors and potential debtors, have always had a big stake, too. Collective action problems and related considerations, however, have limited the influence of unsecured creditors and debtors. Although banks and other lenders are not similarly constrained, their priority status and ability to adjust their interest rates in response to debtor-friendly bankruptcy laws limit the range of issues they are concerned with. As a result, no other group has had nearly so pervasive an impact on bankruptcy law as the bankruptcy bar. Bankruptcy lawyers' influence on the evolution of bankruptcy law is, in a sense, the rest of the story of bankruptcy in the United States.

Part I of this Article describes the transition from episodic, short-lived nineteenth century bankruptcy laws to a lasting law in 1898. After arguing that bankruptcy's early instability stemmed from a voting dilemma known as "cycling" in the social choice literature, the article

8. This Article uses "bankruptcy bar" as a general term encompassing bankruptcy lawyers, bankruptcy judges and other bankruptcy professionals, and academics. For many decades, bankruptcy judges (originally called "referees") carried on active law practices in addition to their judicial responsibilities. Now, as then, bankruptcy judges are drawn from the ranks of bankruptcy lawyers, and their interests continue to parallel those of the bar in most respects. Academics' interests are more diverse, but the perspectives of most also tend to track those of some portion of the bar.

9. See Warren, *supra* note 7, at 127-28.

10. For citations from the legislative history underscoring this concern, see *infra* Part I.

demonstrates how the 1898 Act created an acute need for bankruptcy lawyers. These lawyers played a crucial role in stabilizing the Act. Part II explores in more detail why bankruptcy lawyers have had so great an influence on bankruptcy law, as compared to other interest groups. Part III then considers the specific ways that bankruptcy lawyers have altered the course of bankruptcy law. The analysis focuses in particular on bankruptcy lawyers' repeated opposition to proposals to create a bankruptcy administrator, and their success in continually expanding the scope of bankruptcy law. Their lobbying effect has created an *ex post* bias in American creditor-debtor relations that is not likely to change anytime soon.

This Article focuses, throughout, on the emergence and influence of the general bankruptcy bar, which for many years was limited to the bankruptcies of individuals and small businesses. Prior to the 1930s, corporate reorganization took place wholly outside the bankruptcy laws, and was the domain of an elite group of New York firms.¹¹ Much as the 1898 Act created the need for a general bankruptcy bar, equity receivership stimulated the growth of the reorganization bar, which led in turn to the first major American law firms.¹² The analysis will allude to the reorganization bar at various points (especially in discussing the New Deal reforms of the 1930s, which brought the two bars together), but the heart of the story concerns the less glamorous but enormously influential general bankruptcy bar.

I. THE PATH TO A PERMANENT BANKRUPTCY LAW

Unlike the recent politics of bankruptcy, nineteenth century bankruptcy debates were extraordinarily colorful. Opponents of bankruptcy included Thomas Jefferson early in the century, and John Calhoun for decades thereafter.¹³ On the other side, Daniel Webster delivered impassioned speeches in support of national bankruptcy legislation.¹⁴ For much of the century, neither position reigned supreme. The status of bankruptcy shifted repeatedly, with short-lived bankruptcy laws repeatedly giving way to longer periods during which there was no federal bankruptcy law.¹⁵

11. The corporate reorganization bar and the equity receivership device the bar used to reorganize troubled firms are discussed in detail in David A. Skeel, Jr., *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 *Vand. L. Rev.* (forthcoming 1998) [hereinafter Skeel, *An Evolutionary Theory*].

12. The leading reorganization firm was one most lawyers will recognize: Cravath, Swaine & Moore. For a discussion of the firm's rise, which was fueled in large part by its role in the early railroad reorganizations, see 2 Robert T. Swaine, *The Cravath Firm and Its Predecessors: 1819-1948* (1948).

13. See, e.g., Warren, *supra* note 7, at 16 (noting Jefferson's opposition as early as 1792); *id.* at 61-62 (explaining that Calhoun opposed the 1841 Act).

14. See, e.g., *id.* at 38 (noting that Webster proposed bankruptcy legislation in 1824).

15. For the dates of the nineteenth century bankruptcy laws, see *supra* notes 1-4.

According to the traditional account, these events can be distilled to a single, recurring pattern: during severe economic downturns, Congress responded by enacting bankruptcy legislation; but when good times returned, Congress repealed its earlier handiwork.¹⁶ Thus, the four nineteenth century bankruptcy laws—1800, 1841, 1867, and 1898—came during periods of notable economic distress, and the first three were repealed once the immediate crisis was over.

Like most canonical accounts, the good times/bad times view of nineteenth century bankruptcy law is loosely accurate. But (again, like most widely-accepted views) it also raises a variety of puzzles. For present purposes, the most important is this: if bankruptcy laws arrived in bad times and left in good ones, why did this pattern suddenly stop in 1898? Congress continued, and continues, to alter the federal bankruptcy laws; but since 1898, there has always been a bankruptcy law in place. Why did bankruptcy laws finally become permanent?

A number of obvious answers suggest themselves (that the expansion of interstate commerce made federal bankruptcy law crucial; that the earliest bankruptcy laws were temporary by design), but none is particularly satisfying. One can imagine a world without federal bankruptcy,¹⁷ for instance, and the 1898 Act was not the only bankruptcy law designed for permanence—the 1867 Act had had the same aspirations.¹⁸

This Article proposes an alternative way of looking at the nineteenth century bankruptcy debates. For much of the nineteenth century, legislators held, in the language of social choice theory, cyclical or nearly cyclical preferences on bankruptcy law, as reflected in the remarkable instability of legislative outcomes. The bankruptcy bar was both a beneficiary and a cause of the stability that emerged in 1898. Since then, bankruptcy lawyers have served as an ongoing source of “structure-induced equilibrium”¹⁹ in bankruptcy law.

The argument is not nearly so complex as I have made it sound thus far. To see this, we should briefly consider the phenomenon of cycling and the social choice literature it has spawned.²⁰ We then can explore its application to bankruptcy in more detail.

16. See Warren, *supra* note 7, at 9 (noting that “every bankruptcy law has been the product of some financial crisis or business depression”).

17. For an argument that Congress could improve corporate bankruptcy by shifting authority back to the states, see David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 Tex. L. Rev. 471 (1994).

18. See Warren, *supra* note 7, at 109 (recognizing that the 1867 Act was “significant in being the first bill constructed as a permanent piece of legislation”).

19. As discussed below, the term “structure-induced equilibrium” comes from Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 Pub. Choice 503, 512 (1981).

20. For a more detailed discussion (and extensive citations), see David A. Skeel, Jr., *The Unanimity Norm In Delaware Corporate Law*, 83 Va. L. Rev. 127 (1997) [hereinafter Skeel, *The Unanimity Norm*]. See also David A. Skeel, Jr., *Public Choice*

Under most circumstances, we quickly can select a winner from three or more options by holding a series of pairwise votes that pit each option against each of the alternatives. But sometimes three or more decision makers hold preferences that are so inconsistent (more precisely, they are “multi-peaked”)²¹ that attempts to aggregate the decision makers’ preferences lead not to a stable outcome, but to a voting “cycle.” Here is an illustration. Suppose that three friends wish to go out, and they agree to choose among three possible options: going to the art museum (“Art”), going to a basketball game (“Basketball”), or attending a concert (“Concert”). Friend 1 ranks the choices as follows: Art, Basketball, Concert; Friend 2 ranks them: Basketball, Concert, Art; and Friend 3’s ordering is: Concert, Art, Basketball.

The problem is that the friends do not clearly prefer any one of the three options over the other two. Thus, Friends 1 and 3 prefer Art over Basketball; but Friends 2 and 3 prefer Concert over Art; and Friends 1 and 2 prefer Basketball over Concert. On inspection, it quickly becomes apparent that, for any option that a majority (two) of the friends prefer, there is another option that a different majority prefers. Were the friends to hold a series of majority votes on the options, their choice would continually change—that is, their choice would cycle.

Although the intuition behind cycling goes back several centuries,²² it took on particular importance after Kenneth Arrow demonstrated that no voting institution can both satisfy a series of fairness requirements and, at the same time, guarantee that it will always produce a rational outcome.²³ This insight, known as Arrow’s Theorem, has breathtaking implications for voting institutions such as Congress. While high school civics classes depict Congress as the pillar of democracy, operating on the basis of orderly majority votes, Arrow’s Theorem suggests a different picture. As with all voting institutions,

and the Future of Public-Choice-Influenced Legal Scholarship, 50 Vand. L. Rev. 647 (1997) [hereinafter Skeel, *Public Choice*] (reviewing Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* (1997)).

21. Preferences are multi-peaked if they cannot be plotted as a single-peaked curve on a graph. See, e.g., William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 123-28 (1988) (discussing Arrow’s Theorem and its practical significance).

22. One of the first to wrestle with this voting dilemma was the eighteenth century French mathematician The Marquis de Condorcet. See Maxwell L. Stearns, *Public Choice and Public Law: Readings And Commentary* at xxi (1997).

23. See Kenneth J. Arrow, *Social Choice and Individual Values* (2d ed. 1963). Arrow defined an outcome as “rational” if it satisfies the conditions of transitivity. *Id.* at 3. (Thus, if voters prefer choice A to choice B, and choice B to choice C, the outcome is rational if choice A defeats choice C). The fairness requirements, as distilled from Arrow’s analysis by subsequent commentators, are: unlimited range, independence of irrelevant alternatives, nondictatorship, universality, and unanimity, or the Pareto postulate. For an explanation of each requirement, and citations to the literature, see Skeel, *The Unanimity Norm*, *supra* note 20, at 142 n.48.

congressional voting may be deeply unstable due to cycling and related problems.

As they considered the implications of Arrow's Theorem for Congress, a number of commentators noted that, in practice, one rarely sees voting cycles of the sort that the theorem warns about. These theorists, therefore, began to ask why congressional voting had proven so stable.²⁴ How does Congress prevent or solve the problem of cyclical voting?

For the purposes of this article, two answers stand out. First, cycling will only occur if lawmakers (or other decision makers) hold multi-peaked preferences. If lawmakers agree about the general arrangement of the options, they may hold unipeaked preferences even if they sharply disagree over which choice is best. When lawmakers view the options as ranging from liberal to conservative, for instance, and vote accordingly, their preferences will not cycle.²⁵ Second, Arrow's Theorem assumes, among other things, that no individual controls the voting process and voters are free at all times to vote for any of the possible options; that is, the theorem assumes pure democratic voting.²⁶ Relaxing these assumptions may reduce or eliminate the risk of cycling,²⁷ even if lawmakers do in fact hold cyclical preferences. Several commentators demonstrated that Congress employs a variety of voting rules that have precisely this effect, and tend to produce "structure-induced equilibrium."²⁸ Limitations on lawmakers' ability to offer amendments and the agenda control that Congressional committees enjoy are prominent examples. Both rules enhance stability by replacing truly democratic voting with a more restricted voting structure.

To a remarkable extent, bankruptcy history reflects each of these social choice insights. For much of the nineteenth century, lawmakers held cyclical—or nearly cyclical—preferences as to the desirability of bankruptcy law. As commentators have noted, there were at least three distinct views on bankruptcy issues.²⁹ One group of lawmakers (principally Southern lawmakers) were sharply opposed to passing any bankruptcy law—they insisted that insolvency issues should be

24. Gordon Tullock provoked much of the debate with a widely-cited article. See Gordon Tullock, *Why So Much Stability?*, 37 *Pub. Choice* 189 (1981).

25. See, e.g., Riker, *supra* note 21, at 124 (noting the absence of cycling if preferences are unipeaked). Under unipeaked voting, outcomes will gravitate toward the views of the median voter. This outcome will remain stable so long as the preferences of the relevant decision makers do not change. For an extensive discussion (and qualifications), see Dennis C. Mueller, *Public Choice II* (1989).

26. See Arrow, *supra* note 23, at 6-8.

27. There is a cost to this, however: Limiting voters' options tends to diminish the perceived fairness of the voting process.

28. See Shepsle & Weingast, *supra* note 19, at 507-14.

29. Warren chronicles the debates among lawmakers holding each of the views in detail. See Warren, *supra* note 7, at 103. For simplicity, I have condensed Warren's typology from four views to three.

left to the states.³⁰ A second group of lawmakers (mostly Northern lawmakers) believed that federal bankruptcy legislation was essential to the American economy.³¹ Still another group was willing to vote for bankruptcy legislation, but only if the law was limited to voluntary bankruptcy—that is, it did not give creditors the right to force a debtor into bankruptcy against her will.³²

As we have just seen, the existence of three distinct views does not by itself raise the specter of cycling. If lawmakers agreed that no bankruptcy law was one polar view, voluntary-only bankruptcy was the middle view, and expansive bankruptcy (including both voluntary and involuntary components) was the other extreme, their preferences would be unipeaked.³³ In reality, this appears not to have been the case. Some lawmakers whose first choice was no bankruptcy law, for instance, preferred expansive bankruptcy rather than voluntary bankruptcy as a second choice.³⁴

The most dramatic illustration of voting instabilities, and possible cycling, on bankruptcy issues was the Bankruptcy Act of 1841.³⁵ In 1840, the Whigs had won the presidency on a platform that placed particular emphasis on the need for bankruptcy legislation. One year later, they achieved this goal through a logroll that involved unusually blatant vote trading.³⁶ But the legislation quickly proved unpopular, and within a few months the coalition supporting it had fallen apart.³⁷ Congress repealed the 1841 Act in 1843,³⁸ once again giving the upper hand to the lawmakers who opposed federal bankruptcy legislation.³⁹

By the final decades of the nineteenth century, when this pattern finally came to an end, the expansion of interstate commerce had broadened the support for federal bankruptcy legislation somewhat.

30. Early in the century, opponents of bankruptcy often framed their objection in constitutional terms, arguing that the Constitution allows only “bankruptcy” laws, as distinguished from “insolvency” laws. *See id.* at 7. The Supreme Court rejected this distinction, which derived from earlier English jurisprudence, in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 129 (1819).

31. Daniel Webster and Joseph Story were the most prominent proponents of this view. *See Warren, supra* note 7, at 55-60.

32. *See id.* at 103.

33. As noted earlier, the median view would tend to prevail under these circumstances. *See supra* note 25 and accompanying text.

34. *See Warren, supra* note 7, at 103-04 (describing factions); *see also infra* note 48 (describing conflicts within coalitions as chronicled in house reports prior to 1898 Act).

35. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

36. *See Warren, supra* note 7, at 76-77.

37. The Whig party, which had invested enormous political capital to secure the passage of the 1841 Act, was disappointed by the public response, and later participated in the movement to repeal it. *See id.* at 83-84.

38. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

39. For evidence of coalitional instabilities in connection with the 1898 Act, *see infra* note 48 (noting coalition shifts on Judiciary Committee in 1893 as reflected in house reports).

With commercial enterprise expanding into the South and West, these regions were less monolithically opposed to bankruptcy than in the past. The most important outgrowth of this was the emergence throughout the nation of commercial trade organizations, one of which, the National Convention of Representatives of Commercial Bodies, drafted and served as the principal advocate of the 1898 Act.⁴⁰

To enhance the political viability of bankruptcy legislation, its proponents limited its scope in two important ways. First, rather than regulating a debtor's exemptions (that is, the property the debtor can exclude from the bankruptcy estate) directly, the Act simply incorporated state exemption law.⁴¹ The beauty of this approach to exemptions, which was constitutionally suspect until 1902,⁴² was that it gave state lawmakers a substantial say in how their debtors were treated.

The second, and more pivotal attribute of the proposals that led to the 1898 Act, was the approach to bankruptcy administration. The administrative costs of the prior act had made it widely unpopular,⁴³ so the commercial organizations pushing for bankruptcy reform knew that they had to keep costs as low as possible.⁴⁴ To minimize costs and address concerns about the federalizing effect of bankruptcy, the administrative apparatus was pared down to an absolute minimum.⁴⁵

40. For an insightful analysis of commercial associations' role in securing 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. (forthcoming 1998) [hereinafter Hansen, *Commercial Associations*].

41. The 1867 Act had also incorporated state exemptions, but only those enacted before 1864. See Noel, *supra* note 7, at 152. The retroactive feature was aimed at Southern states, whom Northern lawmakers suspected would abuse the state exemption-making prerogative. See Warren, *supra* note 7, at 103 (noting that incorporation of state exemptions was crucial to Western support); see also Tabb, *supra* note 7, at 20 (stating that the incorporation of state exemptions was an important benefit to debtors of the 1867 Act).

42. The Bankruptcy Clause in the Constitution requires that bankruptcy laws be "uniform," and many observers believed that this precluded Congress from incorporating diverse state exemption laws. See U.S. Const. art. I, § 8, cl. 4. In *Hanover National Bank v. Moyses*, the Supreme Court finally put these concerns to rest, holding that the Uniformity Clause required only "geographical" uniformity, not "personal" uniformity. 186 U.S. 181, 188 (1902).

43. The administration of the 1867 Act proved costly for a variety of reasons, including the necessity of conducting the process before an often inconvenient federal court, and the fees generated by the examiners and other officials provided for by the Act. See, e.g., Noel, *supra* note 7, at 153 (discussing federal courts); Warren, *supra* note 7, at 127 (discussing excessive costs and unbearable fees).

44. This concern is immediately apparent in the congressional reports issued during the debates leading up to the 1898 Act, which were at pains to show that the new legislation would not (or according to opponents, would) be as cumbersome as the 1867 Act. *But see, e.g.*, H.R. Rep. No. 52-1674, at 7-8 (1892) (minority report) (claiming that proposed bill required just as many officials; it simply changed their names).

45. Southern lawmakers were especially apprehensive, since they and their constituents viewed the federal judges who had implemented the 1867 Act as unwelcome carpetbaggers. See Warren, *supra* note 7, at 127.

Most cases would require, at most, a “referee” to act as judge, and a bankruptcy trustee.⁴⁶

Even with all these adjustments, the 1898 Act was far from pre-ordained. Starting in 1881, proponents introduced it year after year, and often secured favorable votes from either the House or Senate.⁴⁷ But lawmakers continued to hold multiple, inconsistent views on the legislation,⁴⁸ and for a variety of reasons, it repeatedly fell short. Only when the Republican party controlled the presidency and both houses of Congress did the 1898 Act finally become the law of the land.⁴⁹

The Act’s staying power derived, quite accidentally, from the minimalist administrative structure its proponents had been forced to adopt. With no federal administrator to oversee the process, and no full-time officials of any kind,⁵⁰ the principal players were the parties and their lawyers. Bankruptcy lawyers quickly rushed into the vacuum in most cities, and soon had a large stake in the survival of the Act. Continued Republican control kept the law in place long enough for the bar to develop. Bankruptcy lawyers, together with the creditors that had originally proposed the Act, then served the principal bulwark against repeal.

The legislative history contains tantalizing evidence of the emerging influence of the bankruptcy bar. In the years leading up to the 1898 Act, lawyers played a very limited role in lobbying for or against proposed legislation. The speeches and memoranda that appear in the records almost uniformly come from lawmakers, trade groups, and or-

46. See, e.g., H.R. Rep. No. 47-1401, at 2 (1882) (enumerating revised bankruptcy procedures). *But see* H.R. Rep. No. 52-1674, at 7-8 (1892) (minority report) (complaining that the 1892 version of the legislation merely changed the names of the officials from “register” and “assignee” to “referee” and “trustee”). Although early drafts of the legislation had provided for salaried referees, the final version paid them on a fee basis. See Bankruptcy Act of 1898, ch. 541, § 40, 30 Stat. 544, 556 (repealed 1978). Not until 1946 did Congress finally shift to a salary approach.

47. For a brief review, see *Proceedings of National Association of Credit Men*, S. Doc. No. 55-156, at 1-2 (1898).

48. The legislative reports offer a fascinating window on the unstable shifts among coalitions. See, e.g., H.R. Rep. No. 53-67, at 1 (1893) (minority report) (noting that minority members disagree whether there should be any bankruptcy law, but agree that there should not be a law providing for involuntary bankruptcy); H.R. Rep. No. 53-206, at 1-2 (1893) (additional report) (stating that the majority includes some who favor voluntary-only law, and some who would prefer universal bankruptcy but think it is not politically feasible).

49. See Brad Hansen, *The Political Economy of Bankruptcy: The 1898 Act to Establish a Uniform System of Bankruptcy of 1898* (unpublished manuscript, on file with the *Fordham Law Review*) (arguing that political alignment led to 1898 Act, rather than economic depression as claimed by the traditional theory). Hansen also emphasizes the role that creditors’ groups played in spearheading and promoting the legislation. See *id.*; see also Hansen, *Commercial Associations*, *supra* note 40 (discussing the role of creditor organizations in the development of 1898 Act).

50. Recall that even the bankruptcy judges (called referees) were paid fees rather than salaries, and most served only part-time.

ganizations such as the chamber of commerce.⁵¹ Once the 1898 Act was in place, however, lawyers assumed an increasingly prominent role in the debates. Within a few years, the debates on proposals to amend or repeal the Act were dominated by bankruptcy lawyers and references to their interest in the bankruptcy law.⁵²

In social choice terms, the emergence of a bankruptcy bar created a structure-induced equilibrium that reinforced the influence of commercial organizations, and made it all but impossible to eliminate (or even sharply curtail) federal bankruptcy law. Absent the input of lawyers, the views of lawmakers and their constituents might have continued to cycle, with some preferring no bankruptcy legislation, others preferring voluntary only, and still others supporting expansive bankruptcy.⁵³ But bankruptcy lawyers quickly became such a broad-based and influential interest group, that their presence precluded the possibility of eliminating federal bankruptcy law altogether.

As a historical matter, this article may seem to overstate the stabilizing effect that bankruptcy lawyers have had on federal bankruptcy law. After all, the adoption of permanent bankruptcy legislation occurred during roughly the same time period as Congressional lawmaking had stabilized in many other areas due, among other things, to Congress's increasing reliance on committees.⁵⁴ These factors no doubt contributed to the unprecedented durability of the 1898 Act.⁵⁵ But they cannot have been the principal factor. The Judiciary Committee's influence as the gatekeeper for bankruptcy legislation pre-

51. See, e.g., S. Doc. No. 54-237 (1896) (assembling newspaper clippings supporting the proposed legislation, and memorials from local boards of trade and chambers of commerce).

52. See, e.g., *Hearings on H.R. 13266 of the House Comm. on the Judiciary*, 60th Cong. 31, 41 (1908) (statement of George Whitelock, American Bar Association on Commercial Law) (explaining that the ABA opposes any proposal to repeal or eviscerate the Act); H.R. Rep. No. 57-1698, at 2-3 (1902) (minority report) (arguing for repeal and listing bankruptcy lawyers and bankruptcy professionals as advocating retention of the existing law).

53. An alternative possibility is that lobbying by bankruptcy lawyers altered lawmakers' preferences, rather than simply masking preferences that otherwise would have continued to cycle. The effect is the same either way: bankruptcy lawyers gave bankruptcy a stability it had previously lacked.

54. Although Congress began to establish committees early in the nineteenth century, it was not until much later that committees were given the often-exclusive gatekeeping authority we associate with them now. Because the relevant oversight committee can prevent an issue from being reconsidered, committees provide stability even when lawmakers' preferences are unstable. See, e.g., Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. Pol. Econ. 132, 143-48 (1988) (discussing the influence of committees).

55. Other important factors included the incorporation of state exemptions, as discussed earlier, and the fact that commercial creditors continued to support the Act despite its relatively lenient discharge of debtors.

dated the 1898 Act by many years,⁵⁶ for instance, which raises doubts as to whether committee structure played an important role in the Act's permanence. More importantly, the Judiciary Committee came out in favor of repeal during the infancy of the Act.⁵⁷

Much more than committee structure or other possible factors, it was bankruptcy lawyers who solidified the coalition in support of federal bankruptcy legislation. It is lawyers we have to thank for the long life and, even more, the shape of bankruptcy law.

II. WHY ARE BANKRUPTCY LAWYERS SO INFLUENTIAL?

What has been shown thus far is that the 1898 Act had the effect of creating a bankruptcy bar, and that bankruptcy lawyers have played a prominent role in bankruptcy legislation ever since. This elicits an important question, of course: why is it that bankruptcy lawyers, rather than some other interest group, are the principal influence on bankruptcy law? To answer this question, we will start from an interest group perspective,⁵⁸ then briefly consider some of the other factors that come into play when lawmakers talk about bankruptcy.

Even a simplified list of the groups who are affected by bankruptcy would include at least four different interests. In addition to debtors, nondebtors also have a stake in the existence or nonexistence of bankruptcy. Secured creditors—that is, creditors who hold collateralized obligations—are a third group; and (as we have seen) unsecured creditors such as suppliers are a fourth.⁵⁹ Thus, bankruptcy lawyers are hardly alone when it comes to bankruptcy. But even a brief inspection makes clear that none of these groups has both the power and the incentive to eliminate or sharply curtail the scope of bankruptcy.

Consider first the perspective of debtors. Debtors and potential debtors may benefit if there is a generous bankruptcy law in place. But any future changes are unlikely to affect the bankruptcies of current debtors;⁶⁰ although reform does affect future debtors, such debt-

56. The Judiciary Committee had exercised jurisdiction over bankruptcy since the early nineteenth century. See Lauros G. McConachie, *Congressional Committees 213* (1973) (describing the formation of the Judiciary Committee in 1813 and the scope of its jurisdiction).

57. See H.R. Rep. No. 58-4397 (1905) (advocating repeal).

58. Interest group analysis assumes that organized interest groups exercise disproportionate influence over legislative outcomes, because they—unlike general voters—participate actively in the legislative process. For a more detailed overview, see Skeel, *Public Choice*, *supra* note 20, at 651-52.

59. In corporate bankruptcy, organized labor has also figured prominently from time-to-time, most recently in the debates that prompted Congress to pass 11 U.S.C. § 1113, which regulates collective bargaining in bankruptcy. A wide range of other groups also have left their mark on isolated sections of the Bankruptcy Code.

60. Bankruptcy reform during the Great Depression was, in a sense, the exception that proves the rule. A few corporate debtors, particularly railroads, did lobby in the hope that reform would influence their cases. See Skeel, *An Evolutionary Theory*, *supra* note 11, at 53-63. But their numbers were quite small and their participation

ors nevertheless exert little influence in the legislative process. Many potential debtors do not realize that they are likely to wind up in bankruptcy; and even if they did, both collective action problems⁶¹ and the disinclination to announce their financial distress to the world make their participation unlikely.

Unlike debtors, nondebtors do not profit from expansive bankruptcy protection. Because a nondebtor's creditors will charge higher interest rates or restrict credit if bankruptcy offers an easy escape from credit obligations, nondebtors fare better if bankruptcy is strictly limited.⁶² Yet, nondebtors face even more of a collective action problem than debtors do. The benefits of reform are sufficiently small, and the costs of direct involvement sufficiently high, that nondebtors have little incentive to participate in the development of bankruptcy law. And for the most part, they do not. The only exception to this is the occasional participation of organizations—such as local chambers of commerce—whose membership includes many nondebtors; and even these organizations often see themselves principally as creditors rather than nondebtors.⁶³

One group that does lobby actively is secured creditors, such as banks.⁶⁴ Because they hold large claims, both in the aggregate and in individual cases, banks do not face the kinds of severe collective action problems that undermine debtor and nondebtor participation.⁶⁵ Banks, therefore, are well-situated to counterbalance the influence of lawyers on the shape of bankruptcy law. Banks do, in fact, play this role, yet their interests are limited in crucial respects. Because secured creditors have priority both inside bankruptcy and out, secured creditors are not so concerned about large issues such as the restrictiveness or generosity of bankruptcy law—or even whether bankruptcy law should be retained or repealed. Their principal concern is

limited. Individual debtors did not lobby at all, although lawmakers clearly took their perceived interests into account.

61. Because potential debtors are widely scattered, and each has a relatively small stake in bankruptcy reform, they cannot organize effectively. *See generally* Mancur Olson, Jr., *The Logic Of Collective Action* (1965) (finding that large groups are unlikely to act collectively absent "selective incentives" that facilitate organization).

62. In effect, nondebtors subsidize debtors if creditors cannot easily distinguish between the two *ex ante*, since creditors will raise their interest rates on all loans to compensate for the expected cost of debtors' defaults.

63. The chambers of commerce who lobbied for the 1898 Act emphasized that bankruptcy legislation would enhance business by curbing debtor fraud and providing a consistent response to financial distress.

64. Although I focus in this paragraph on banks' role as secured lenders, most banks also lend on an unsecured basis (and even their secured loans are often undercollateralized). In their role as unsecured creditors, banks' interests are somewhat similar to the unsecured creditors discussed subsequently.

65. Bankers lobby actively through organizations such as the American Bankers Association. Other kinds of financial institutions are similarly active. For a description in the context of the 1978 Bankruptcy Code, see Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 Mich. L. Rev. 47, 55 (1997).

to assure that the bankruptcy process is as smooth as possible, lest their recovery be diminished by administrative and other costs.⁶⁶

The final group is small unsecured creditors. Because debtors are almost always insolvent when they file for bankruptcy⁶⁷ and unsecured creditors do not enjoy priority, these creditors have a more pervasive interest in the shape of bankruptcy law. Indeed, in corporate bankruptcy there is a strong argument that unsecured creditors have the best perspective of any constituency. They, after all, are the ones who benefit most if a debtor's troubles are resolved efficiently, and suffer the most from inefficiency.⁶⁸

Although unsecured creditors played a central role in the 1898 Act, and still lobby actively from time to time, their current influence is much weaker than one might predict. Part of the explanation for this is that unsecured creditors, like debtors and nondebtors, face collective action problems. But this cannot be the principal explanation, since many unsecured creditors are repeat players in bankruptcy—a supplier can expect a number of its customers to file for bankruptcy at some point, for instance—and unsecured creditors are represented by trade groups and other organizations.⁶⁹

Rather than collective action problems, the biggest reason for unsecured creditor silence is that is that creditors can “price out” many (though not all) of the effects of an efficient or inefficient bankruptcy regime in the credit terms they offer to debtors. If bankruptcy is generous, creditors can charge higher interest rates, and they can reduce these rates where there is a stricter regime.⁷⁰ In view of this, unsecured creditors worry a lot about the magnitude of transition effects—how much is at stake with credit they have already extended—and not so much about the effect on future loans. The few instances

66. Banks may also take an active interest with respect to issues that affect their market share vis-à-vis other kinds of lenders. See, e.g., Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 Emory L.J. 587, 644-48 (1995) (describing competition between banks and finance companies).

67. Unlike prior bankruptcy law, the 1978 Code does not require insolvency as a prerequisite for filing a voluntary bankruptcy petition. See 11 U.S.C. § 109 (1994) (defining who may qualify as a “debtor” under each chapter of the Code).

68. I and other commentators have made this point at length elsewhere. See, e.g., David A. Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 Va. L. Rev. 461, 494 (1992) (proposing greater unsecured creditor control over several Chapter 11 voting issues).

69. A large number of these trade groups participated in the legislative process during the New Deal, especially in the earliest hearings. See, e.g., *Joint Hearings on S. 3866 Before the Subcomm. on the Judiciary*, 72d Cong. 428 (1932) [hereinafter *1932 Hearings*] (statement of R.P. Shealey, Washington counsel for the National Retail Credit Association); *id.* at 432 (statement of William Funk, Director, National Grocers' Association).

70. Not all creditors have this ability. Tort creditors, for instance, are notoriously unable to take such steps. Unfortunately, these creditors tend to be the ones who do face serious collective action problems and therefore play almost no role as lobbyists. See generally Neil Komesar, *Imperfect Alternatives* 171-77 (1994) (discussing inability of potential tort claimants to lobby).

when unsecured creditors have made their voices heard have tended to be at times when there were substantial transition effects at stake.⁷¹ Credit card companies' recent push to tighten consumer bankruptcy in the wake of unprecedented numbers of filings is a particularly dramatic illustration of this.

To summarize: of the four groups we have considered, secured creditors exert the most influence, but they have relatively narrow interests due to their priority status. Quite counterintuitively, debtors and nondebtors are nearly silent, with unsecured creditors participating more often, but much less than one might predict.

Contrast this to bankruptcy lawyers and bankruptcy professionals, such as judges. Because their livelihood depends on it, bankruptcy lawyers have an enormous interest in all aspects of bankruptcy law. Although bankruptcy lawyers are not immune to collective action problems—bankruptcy lawyers often choose not to participate in the lobbying process, in the hope they can freeride on the efforts of others—many bankruptcy lawyers derive experience and reputational benefits from active involvement.⁷² Bankruptcy lawyers also have long been represented by collective organizations such as the National Bankruptcy Conference, the Commercial Law League and, more recently, the American Bankruptcy Institute.⁷³

It is misleading to speak of the bankruptcy bar as if it were monolithic, of course. Bankruptcy lawyers represent clients, and each lawyer or firm tends to represent a particular set of interests: most broadly, either debtors or creditors. If bankruptcy lawyers were perfect agents for their debtor or creditor clients, their influence on bankruptcy legislation would be laudable, because the competing interests of the lawyers would largely mirror the competing perspectives of

71. Unsecured creditors' roles in the 1898 Act and in the Depression appear to fit this pattern. Not only were the transition effects relatively large at both times—especially in the Depression, with the vast numbers of failing debtors—but unsecured creditor lobbying (with the important exceptions of the National Association of Credit Men and in recent years the credit card lobby) dwindled after the early New Deal.

72. Thus, prominent lawyers such as Kenneth Klee and Harvey Miller who participated actively in the enactment of the 1978 Code have derived enormous professional benefits from their participation.

73. The Commercial Law League is the oldest of the organizations, dating back to the turn of the century. A group of bankruptcy lawyers and academics formed the National Bankruptcy Conference in the 1930s in an effort to promote further reform, and it has played a central role in bankruptcy legislation ever since. The American Bankruptcy Institute emerged most recently, in the bankruptcy boom years of the 1980s.

Similarly, bankruptcy judges have been represented since 1926 by the National Association of Referees in Bankruptcy—now called the National Association of Bankruptcy Judges. See Paul H. King, Letter, 1 *J. Nat'l Ass'n Ref. Bankr.* 1 (1926) (announcing formation).

those affected by bankruptcy.⁷⁴ Thus, debtors' silence would be little cause for concern, since debtors' lawyers would fully represent their interests; and creditors' lawyers would do the same for secured and unsecured creditors.

Bankruptcy lawyers do further their clients' interests on some issues, but in at least one crucial way they may not: all bankruptcy lawyers have an interest in increasing the use of bankruptcy.⁷⁵ Even if creditors would benefit from restrictions on, or elimination of, bankruptcy, a creditors' lawyer might nevertheless discourage such measures if less bankruptcy meant fewer clients. We will explore these issues further below, but for now the important point is that we cannot simply assume that bankruptcy lawyers' interests will mirror those of their clients.

Given how broad a brush this Article has used thus far, it should be noted that one could complicate (and add nuance to) the interest group analysis in a variety of ways. One could, for instance, consider the differing perspectives of the House and Senate on bankruptcy reform.⁷⁶ But the general theme—that bankruptcy lawyers play an enormously influential role—would remain the same.

Factors other than interest group pressure also can affect the legislative process in crucial ways. Of these, the most important is ideology, which has long figured prominently in bankruptcy.⁷⁷ The nineteenth century bankruptcy debates frequently raised issues such as the morality of bankruptcy—whether it is appropriate to discharge one's debts.⁷⁸ In recent decades, there have been frequent ideological debates over how lenient bankruptcy should be, but there is a broad consensus in favor of bankruptcy,⁷⁹ with bankruptcy often being debated in technical, non-ideological terms. Almost no one has seriously argued that the federal bankruptcy laws should be repealed

74. The correlation still would not be perfect, because nondebtors' interests only would be represented if non-bankruptcy lawyers also influenced the legislative process.

75. This is not intended to impugn lawyers' motives in any way. Most bankruptcy lawyers fully believe that the positions they take are the best overall for everyone. But the positions they take also tend to correlate with the interests of lawyers.

76. This is a particular concern of Eric Posner's analysis of the political economy of the 1978 Bankruptcy Code. Posner concludes, among other things, that the debate over whether to give bankruptcy judges Article III status was influenced by lawmakers' interest in patronage opportunities. See Posner, *supra* note 65, at 85-90.

77. For a discussion of ideology's role in corporate bankruptcy, see Skeel, *An Evolutionary Theory*, *supra* note 11, at 41-42.

78. See, e.g., Warren, *supra* note 7, at 62 (noting that Thomas H. Benton complained that a bankruptcy law would "teach the rising generation a facile way to get rid of their obligations").

79. Thus, creditors have argued strenuously that more debtors should be directed into Chapter 13, which requires debtors to contribute their disposable income for three to five years to a wage earner plan. But no one has suggested that Congress should repeal the federal bankruptcy laws.

altogether.⁸⁰ Thus, ideology tends to reinforce bankruptcy lawyers' interest in an expansive bankruptcy regime. Moreover, the complexity of bankruptcy law is likely to give the bankruptcy bar even more influence than they would have if the effects of bankruptcy reform were more obvious to the general public.⁸¹

III. WHAT SHAPE DOES THE INFLUENCE TAKE?

In arguing that bankruptcy lawyers exert particular influence, this Article has suggested that their interests sometimes do, but sometimes do not, parallel those of their clients. The final issue needed to be considered is this: how have bankruptcy lawyers shaped, and will they shape, the bankruptcy laws?

As a general starting point, bankruptcy lawyers have an obvious incentive to lobby for rules that encourage the use of bankruptcy, because more bankruptcy means more work. We might, therefore, expect to see bankruptcy lawyers push for rules that increase the number of bankruptcies. Bankruptcy lawyers also may prefer complex rather than simple rules in order to increase their fees in each given case, although lawyers' interest in complexity is likely to be subject to an important limitation: lawyers would not want the process to become so costly that it discourages bankruptcy filings.⁸²

In addition to expanding the use of bankruptcy, the bankruptcy bar also has an incentive to aggressively challenge measures that undercut their status as the sole source of bankruptcy expertise. That is, bankruptcy lawyers may benefit from restrictions on the supply of bankruptcy expertise, just as they do from any increase in the demand for bankruptcy.

These are precisely the impulses found at work—often simultaneously—if we consider the evolution of American bankruptcy law in this century. To show this, the analysis that follows focuses first on bankruptcy personnel, and then on the overall development of bankruptcy law.

80. At least with respect to personal bankruptcy. A number of commentators have contended that Congress should repeal Chapter 11's corporate reorganization. See, e.g., Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 *Yale L.J.* 1043 (1992) (proposing reform of corporate bankruptcy law by replacing court supervised corporate re-organization with a "market-based" solution). Even here, the arguments have been debated most seriously in academic rather than practical settings. The recent National Bankruptcy Review Commission almost completely ignored them.

81. For a similar argument about banks' influence in banking law, see Jonathan R. Macey, *The Political Science of Regulating Bank Risk*, 49 *Ohio. St. L.J.* 1277, 1288-90 (1989).

82. This observation parallels Michelle White's conclusion that lawyers benefit most under rules of intermediate complexity, since such rules maximize the likelihood of litigation. Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 *Int'l Rev. L. & Econ.* 381 (1992).

A. *Shaping the Bankruptcy Players: The Case of the Missing Administrator*

If there's a "dog that didn't bark" in American bankruptcy law, it surely is the absence of a governmental official who acts as bankruptcy administrator. The most telling analogy here is to British bankruptcy law, given that the earliest American bankruptcy law and parts of subsequent ones were borrowed directly from Great Britain.⁸³ In Great Britain, the bankruptcy administrator (called the Official Receiver) is a pervasive presence who, among other things, interviews debtors without counsel present, conducts investigations, and issues discharge recommendations.⁸⁴ In American bankruptcy law, no governmental officer has remotely comparable powers.⁸⁵

This isn't for lack of trying. In the 1930s, the Donovan and Thacher reports, which summarized the findings of an extensive investigation into bankruptcy practice, strongly recommended the creation of a bankruptcy administrator based on the British model.⁸⁶ In the hearings on legislation derived from the Thacher report recommendations, small creditors enthusiastically supported this proposal.⁸⁷ Yet bankruptcy lawyers rose as a single voice against the administrator and managed to derail the proposal.⁸⁸

83. See Tabb, *supra* note 7, at 14 (noting that the 1800 Act paralleled the 1732 English Act).

84. For an excellent discussion of this proposition, see Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. Pa. L. Rev. 69 (1982).

85. Recall from part I that nineteenth century political considerations steered lawmakers away from reliance on governmental officials in the 1898 Act. The analysis that follows suggests that bankruptcy lawyers have made sure that lawmakers did not subsequently change their course.

86. See S. Doc. No. 72-65, at 104-07 (1932) (proposing a staff of ten full-time administrators under the Attorney General) ("Thacher Report"); Staff of House Comm. on the Judiciary, 71st Cong., Report on Administration of Bankrupt Estates (Comm. Print 1931) ("Donovan Report").

87. See, e.g., 1932 Hearings, *supra* note 69, at 456-61 (statement of Harry N. Schwartz, Capital Paint & Varnish) (favoring the administrator because small creditors rarely recover anything under the existing bankruptcy laws).

88. The bar's principal arguments were that the administrator would usher in an unwieldy governmental bureaucracy, and that the approach would drastically alter thirty years of settled bankruptcy practice. See, e.g., *id.* at 477 (statement of Jacob M. Lashly, Bankruptcy Committee of ABA) (advocating maintaining the status quo rather than adopting a statute to create an administrator). In subsequent years, lawmakers frequently cited these arguments as the reason the 1932 Bill did not pass. See H.R. Rep. No. 75-1409, at 1-3 (1937) (statement of Rep. Chandler) (describing the Chandler Bill).

While the general bankruptcy bar thwarted the movement for a bankruptcy administrator, the elite corporate reorganization bar did not. As part of the sweeping Chandler Act reforms of 1938, Congress gave the Securities and Exchange Commission a prominent role in the reorganization of publicly held firms. As it turned out, the SEC's role proved to be temporary. For an extensive discussion and analysis, see David A. Skeel, Jr., *The Rise and Fall of the SEC in Bankruptcy* (1998) (unpublished manuscript, on file with the *Fordham Law Review*).

Forty years later, the next major bankruptcy study, the National Bankruptcy Commission's report in 1973, once again recommended that lawmakers cede authority to a bankruptcy administrator in order to improve bankruptcy administration.⁸⁹ Yet, the bankruptcy bar responded with vigorous opposition.⁹⁰ By the time Congress overhauled the bankruptcy laws in 1978, the proposed administrator was long gone.⁹¹

Recalling the discussion of bankruptcy lawyers' incentives at the outset of this part, it is easy to see why bankruptcy lawyers are so adamantly opposed to an administrator. A British-style administrator would pose serious threats on each of the issues of particular concern to bankruptcy lawyers. First, the administrator could chill bankruptcy filings, since debtors would think twice about filing if they faced rigorous, skeptical scrutiny from a bankruptcy administrator.⁹² Second, to the extent fact finding is centralized in the administrator, rather than left to the parties themselves, the administrator would also reduce the scope of lawyers' involvement in any given case.

The 1978 Code did provide for one new governmental overseer, the United States Trustee,⁹³ but the U.S. Trustee is best seen as evidence of the bar's influence over bankruptcy personnel, rather than as a defeat. One of the chief criticisms of prior practice was that bankruptcy judges' conflicting roles—their status as both judge and participant—created the appearance of a bankruptcy “ring.”⁹⁴ Like other participants, bankruptcy lawyers as a group would benefit from reform that ceded judges' administrative tasks to another official; this would improve bankruptcy's reputation and perhaps its attractiveness.⁹⁵ But they would not favor a full-scale bankruptcy administrator.

89. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, at 129 (1973).

90. See, e.g., Posner, *supra* note 65, at 83-84 (citing *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 1269-70 (1975-76) (statement of George Ritner, attorney) (complaining that the creation of a bankruptcy administrator would destroy the consumer bankruptcy bar)).

91. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

92. See, e.g., Boshkoff, *supra* note 84, at 80-82 (describing the purposes of an initial examination by the Official Receiver in England).

93. See 28 U.S.C. § 586 (1994).

94. A major concern was that judges' participation in the initial creditors' meeting exposed them to information that might later influence their judicial rulings. George Triester, a prominent bankruptcy attorney, gives a good, succinct discussion of the problems in an influential essay he published in 1966. George M. Triester, *Bankruptcy Jurisdiction: Is it Too Summary?*, 39 S. Cal. L. Rev. 78, 85-90 (1966) (arguing for the separation of judges' judicial and administrative functions).

95. This does not mean that all bankruptcy lawyers welcomed the changes. Some obviously benefitted from the existing framework. For these lawyers, the U.S. Trustee may have been an interference. The important point is that the U.S. Trustee did not undermine bankruptcy practice overall.

The U.S. Trustee fits the bill nicely.⁹⁶ Although the U.S. Trustee now handles the most important administrative tasks, such as overseeing creditors' meetings and appointing trustees, its only additional authority is the right to raise issues neglected by the parties themselves. Bankruptcy lawyers often complain bitterly about the U.S. Trustee's activities,⁹⁷ but the U.S. Trustee has not interfered in any serious way with the bar's hegemony over the bankruptcy process.

To summarize, we need only glance across the Atlantic to Great Britain (or north to Canada) to see that a bankruptcy process overseen by bankruptcy administrators would look very different than the American system. The bankruptcy bar has played a decisive role in steering lawmakers away from such an approach.⁹⁸

B. *Shaping the Bankruptcy Code*

Because bankruptcy lawyers have different kinds of clients, they will not present a unified front on internal issues such as the scope of the preference provisions or nuances of the automatic stay.⁹⁹ They do have, however, a common interest in the expanded use of bankruptcy. Perhaps the most straightforward illustration of this is lawyers' enthusiasm for two issues addressed by the 1978 Code.

The first is jurisdiction. Prior to the current Bankruptcy Code, bankruptcy judges' authority was limited to matters that came within their "summary" jurisdiction. Many issues of real importance did not fall within their summary jurisdiction, thus diminishing the scope and effectiveness of the bankruptcy process.¹⁰⁰ Bankruptcy lawyers had an obvious stake in this, and played a central role in persuading Congress to clarify and greatly expand bankruptcy courts' jurisdiction.¹⁰¹

96. See generally 11 U.S.C. § 1102(a)(1) (1994) (giving authority to appoint creditors committee in Chapter 11); 28 U.S.C. § 586 (1994) (describing the duties of U.S. Trustee).

97. For a critical discussion of the U.S. Trustee's office, see Peter C. Alexander, *A Proposal to Abolish the Office of United States Trustee*, 30 U. Mich. J.L. Reform 1 (1996).

98. Two other efforts by the bankruptcy bar to reinforce bankruptcy lawyers' influence warrant brief mention. First, the American Bankruptcy Institute has developed a bankruptcy certification program in recent years, with the obvious goal of affecting the "supply" of bankruptcy expertise. Second, bankruptcy lawyers have vigorously opposed the encroachment of paralegals and other nonexperts on bankruptcy practice.

99. For example, creditors' lawyers strongly favored the recent amendment of 11 U.S.C. § 550(c), which reversed the effect of *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989), and which curtailed the trustee's right to avoid payments made to lenders, whereas debtors' lawyers might have preferred the status quo.

100. See, e.g., Triester, *supra* note 94, at 79-80 (describing the limits of a bankruptcy court's jurisdiction over property not controlled by the estate, but arguing that judges' jurisdiction was much broader than often believed).

101. See, e.g., Frank R. Kennedy, Oral History 38-39 (1989) (discussing "the inordinate amount of time and energy wasted in litigation over the jurisdiction of powers of the Bankruptcy Court," and his interest "in the project of the National Bankruptcy

A second concern was to take active steps to improve the reputation of bankruptcy.¹⁰² Separating the judicial and administrative functions of judges was one major advance; even more revealing were several adjustments to bankruptcy terminology. Rather than "bankrupts," individuals or firms who file for bankruptcy are now called "debtors," a change designed to help de-stigmatize bankruptcy.

It is easy to see why bankruptcy lawyers pushed for each of these changes. The issue becomes more subtle if we try to generalize about other aspects of the bankruptcy process, such as its overall complexity. The literature on lawyering suggests that there should be a trade-off between complexity and volume. Lawyers benefit if the background rules are complex enough to increase litigation, but not too complex, since excessive complexity tends to discourage litigation.¹⁰³

From this perspective, we might expect bankruptcy lawyers to lobby for relatively complex rules, and they do, but with an important qualification: the trade-off plays out differently for corporate and personal bankruptcy lawyers. Corporate bankruptcy lawyers have an obvious interest in complexity. Their strong support for the enactment in 1978 of Chapter 11, the Bankruptcy Code's corporate reorganization chapter, is a good illustration of precisely this.¹⁰⁴ In place of the much more rigid (read, "clear") provisions of old Chapter X, which replaced a debtor's managers with a trustee and prohibited violations of the absolute priority rule,¹⁰⁵ Chapter 11 substituted a flexible process whose results are determined by often lengthy negotiations among the parties themselves.¹⁰⁶ Bankruptcy lawyers have been a principal beneficiary of the increased length and cost of the bankruptcy process.

Personal bankruptcy practice has developed differently. Perhaps because many potential debtors have few liquid assets, personal bank-

Conference to achieve an improvement in the jurisdictional provisions of the Bankruptcy Act").

Efforts by the bankruptcy bar to expand bankruptcy jurisdiction go back to the earliest years of the 1898 Act, and have been a consistent theme throughout the century. For an early illustration, see *Hearing Before Subcomm. No. 1 of Comm. on the Judiciary on H.R. 18694*, 61st Cong. 31-32 (1910) (statement of Harold Remington, Esq.) (describing the amendments as giving creditors equivalent rights under federal bankruptcy law as under state bankruptcy law).

102. *See id.* at 115 (describing a "deliberate intention" to alter the perception of bankruptcy as being dominated by a "bankruptcy ring or bankruptcy clique" and to "bring in a whole new Bar").

103. *See White, supra* note 82, 383-84.

104. For a discussion of lawyers' support for the flexible approach later enacted as Chapter 11, see Posner, *supra* note 65, at 113-14.

105. The absolute priority rule requires that each class of senior creditors must be paid in full before a lower priority class can receive anything. The absolute priority rule comes into play in Chapter 11, but only for classes that reject a proposed plan. *See* 11 U.S.C. § 1129(b) (1994).

106. *See, e.g.,* Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 Wis. L. Rev. 729 (reviewing studies and concluding that Chapter 11 cases take significantly longer than cases under the prior Bankruptcy Act).

ruptcy is much more of a volume practice than corporate bankruptcy.¹⁰⁷ Personal bankruptcy cases are generally quite short, and bankruptcy lawyers frequently charge a set fee, rather than billing by the hour.¹⁰⁸ Because the volume-complexity trade-off is weighted heavily in favor of volume, personal bankruptcy lawyers are less likely to lobby for complex provisions. This does not mean that personal bankruptcy is simple and uniform throughout the country. Because the Bankruptcy Code incorporates state law on crucial issues such as exemptions, and because of differing local practices, consumer bankruptcy varies substantially among districts.¹⁰⁹ But within any given district, clear patterns tend to emerge¹¹⁰ and, most importantly, cases are processed quickly.¹¹¹

To the extent bankruptcy lawyers influence legislative developments, then, the Bankruptcy Code should develop in ways that increase the attractiveness of bankruptcy. Corporate bankruptcy lawyers also benefit if the bankruptcy process is complex, whereas personal bankruptcy lawyers will prefer rules that are clear enough to maximize volume.

Just as it explains the relentless expansion of bankruptcy law over the last several decades, bankruptcy lawyers' influence also helps to make sense of a puzzle numerous observers have noticed in the rela-

107. The administrative feature that most obviously contributes to the speed of consumer cases is the absence of a creditor vote even in Chapter 13, the chapter that provides for wage-earner plans. See 11 U.S.C. § 1325 (1994) (requiring only judicial approval). This feature dates back to the 1898 Act, which eliminated creditor approval. See, e.g., H.R. Rep. No. 54-1228, at 2-3, 15 (1896) (describing this as a change from the 1867 Act).

108. In her fascinating study comparing the consumer bankruptcy bars in four Ohio and Texas districts, Jean Braucher discusses the standard fee arrangements in each district. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501, 546-47 (1993). The fee structures elsewhere are comparable, though the fees themselves vary from district to district, as they do among the districts Braucher studied.

109. State regulation of exemptions is an illustration of an issue that cannot be attributed to bankruptcy lawyers. Rather than bankruptcy lawyers, federalism explains this longstanding concession to state lawmaking, as discussed in part I. But, as noted below, local variation of this sort may benefit at least some bankruptcy lawyers. In the report it recently forwarded to Congress, the National Bankruptcy Review Commission focused heavily on the variability among districts, and several of its proposals (such as a proposal to establish federal parameters for exemptions) seek to introduce greater uniformity.

110. A good illustration of this is the requirement in Chapter 13 that debtors contribute all of their disposable income to their wage-earner plan. See 11 U.S.C. § 1325(b) (1994). Although the "disposable income" requirement is extraordinarily vague, local practice tends to clarify it a great deal—usually by establishing rough parameters as to what percentage of creditors' claims a plan must, as a minimum, propose to pay. See, e.g., Braucher, *supra* note 108, at 532 (describing minimum payment percentages in each of four districts).

111. Notice that the combination of local variation and generally brief cases may benefit local consumer bankruptcy lawyers, since it enhances the importance of local expertise without making bankruptcy so costly as to discourage bankruptcy filings.

tionship between bankruptcy and the state law (most prominently, the regulation of secured transactions in Article 9 of the Uniform Commercial Code) governing debtor-creditor law. Unlike Article 9, which is largely a secured lender statute, most commentators view bankruptcy as having a pro-debtor bias.¹¹² Although several commentators have speculated that this bias reflects successful lobbying of debtors and unsecured creditors,¹¹³ we have seen that neither of these groups have contributed to the pro-debtor bias—nor do they have strong incentives to do so in the future.¹¹⁴ The obvious explanation for bankruptcy's pro-debtor bias is the bankruptcy bar. However much creditors' and debtors' lawyers may reflect their clients' perspectives on internal bankruptcy issues, both have an enormous stake in increasing the overall use of bankruptcy. It is this common interest in expansive bankruptcy laws that has made all the difference.

C. *The Limits of Lawyer Hegemony*

The analysis thus far has ignored other interests in order to emphasize bankruptcy lawyers' influence on the legislative process. This oversimplifies things, of course. A variety of groups, from creditors and debtors to interest groups with narrower interests, and even lawmakers interested in patronage opportunities, leave their mark on bankruptcy. Even so, what we see if we relax the assumption of lawyer hegemony is that lawyers—or, at the least, their interests¹¹⁵—often seem to shape the victories of other constituencies.

Secured lender successes provide a convenient illustration of how interest group influence is often channeled in a lawyer-friendly direction. In recent years, real estate lenders have lobbied hard (and for good reason) for restrictions on debtors' ability to file for Chapter 11 in single asset real estate cases.¹¹⁶ In 1994, the real estate lobby won an important victory, persuading Congress to adjust bankruptcy's automatic stay provision. Courts now must lift the stay, and let real es-

112. See Robert E. Scott, *The Politics of Article 9*, 80 Va. L. Rev. 1783, 1849 n.215 (1994).

113. See *id.*; see also Clayton P. Gillette, *Politics and Revision: A Comment on Scott*, 80 Va. L. Rev. 1853, 1874 (1994) ("Debtors . . . and unsecured creditors typically are considered to be the winners in bankruptcy rulemaking.").

114. See *supra* notes 58-72 and accompanying text.

115. This is an important caveat. Simply because an amendment seems to benefit lawyers does not mean that lobbying by lawyers secured it. But in some places the cause-and-effect relationship is clear (as in the defeat of proposals for an administrator) and in many other contexts it seems likely.

116. Real estate lenders' concerns are justified because most single asset real estate cases involve two-party disputes between the lender and the debtor, and do not really belong in bankruptcy. The principal effect of bankruptcy is to delay foreclosure. See, e.g., Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 194-95 (1986) (suggesting that filing bankruptcy is inappropriate when used simply to delay foreclosure).

tate lenders foreclose, unless the debtor within ninety days either proposes a reorganization plan or starts making interest payments.¹¹⁷

The benefits to lawyers of this solution are obvious. Rather than excluding single asset real estate cases from bankruptcy, the new provision assures that real estate debtors will continue to file for bankruptcy; and through the simple expedient of proposing a reorganization plan, the debtor can remain in bankruptcy. The provision is something of a compromise, and fits the pattern nearly all Bankruptcy Code compromises take: an amendment ensuring that future cases continue to make their way into bankruptcy.

Equally revealing are the frequent amendments to § 365 of the Code, which authorizes a debtor to assume or reject executory contracts.¹¹⁸ The most sensible approach to executory contracts would be to limit a debtor's right to assume or to reject based on the parties' respective enticements outside of bankruptcy. If nonbankruptcy law gives a nondebtor the right to insist on specific performance, the debtor should not be permitted to reject a contract and relegate the nondebtor to an unsecured damages claim.¹¹⁹ On several occasions in recent years, Congress has amended § 365 to correct flagrant deviations from this principle.¹²⁰ Yet lawmakers continue to make case-by-case exceptions, rather than simply revising the section as a whole to incorporate nonbankruptcy law. Obvious beneficiaries of this approach are bankruptcy lawyers, since more pervasive reform could diminish many debtors' ability to reorganize.¹²¹

The most recent literature addressing interest group influence on rulemaking suggests that lawmakers will adopt clear rules if one group dominates, and murkier rules when there are competing interest groups.¹²² As the illustrations above suggest, the Bankruptcy Code

117. See 11 U.S.C. § 362(d)(3) (1994).

118. See *id.* § 365.

119. This perspective is defended at length in Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. Colo. L. Rev. 845 (1988).

120. The most prominent illustration is § 365(n), which was designed to overturn *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). See 11 U.S.C. § 365(n) (giving licensees the authority to prevent a debtor from rejecting the licensee's rights under a licensing agreement); see also *id.* § 365(h) (stating that a lessee of real estate may retain rights under a lease even if the debtor-lessor rejects).

121. Other beneficiaries may be lawmakers themselves, since continual tinkering with the bankruptcy laws may enable them to maximize interest group support. Cf. Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 Minn. L. Rev. 913, 934-45 (1987) (focusing on legislators' benefits from amendments to the Internal Revenue Code). Similarly, the interest groups that secure these protections sometimes have little interest or stake in bankruptcy reform other than the narrow concern at issue. For a complaint along these lines, see Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 Harv. J. on Legis. 1, 43-44 (1985).

122. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595, 651 (1995). Schwartz and Scott explicitly limit their

loosely confirms this prediction, though with an important caveat: clear rules often take the form of a limited carve-out, and the Code's clear and murky rules both tend to bear the fingerprints of the bankruptcy bar.

D. *Do Bankruptcy Lawyers Promote Efficiency?*

To say that bankruptcy lawyers have influenced the shape of bankruptcy does not necessarily mean that they have prodded it in an inefficient direction. Elsewhere in commercial law, commentators have argued that a dominant interest group actually has an incentive to take its customers' desires into account. Just as a monopolistic manufacturer does best if it offers efficient rather than inadequate warranty coverage and uses its market power solely to charge a higher price,¹²³ secured lenders such as banks arguably have an incentive to seek efficient commercial law if they have influence in the legislative context.¹²⁴ If bankruptcy lawyers are like the manufacturer or banks, they may actually push bankruptcy law in an efficient direction; if not, their influence is more cause for concern.

Unfortunately, bankruptcy lawyers do not have the same incentives for efficiency. One reason for this is that a monopolist has less benign incentives if the rule in question raises the cost of alternative products.¹²⁵ Many of the rules that bankruptcy lawyers support have precisely this effect. Probably the best example is the long-established rule that debtors cannot waive their right to file for bankruptcy,¹²⁶ which dramatically raises the cost of pursuing nonbankruptcy alternatives for dealing with financial distress. The recent proposal to severely restrict pre-petition waivers of the automatic stay is the latest variation on this theme.¹²⁷ Just as bankruptcy lawyers' historical op-

analysis to private legislatures, and their model makes assumptions that do not fully hold with Congressional decision-making, but interest group activity is likely to be similar in many respects in the two contexts. *See id.*

123. *See* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *Yale L.J.* 1297, 1321 n.115 (1981) (citing Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 *Stan. L. Rev.* 548, 548-85 (1969)).

124. *See* George G. Triantis, *Private Law-Making and the Uniform Commercial Code*, in *New Palgrave Dictionary of Economics and the Law* 117, 119-21 (Peter Newman ed., 1998).

125. *See id.* at 119 (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 *Yale L.J.* 209 (1986)).

126. *See, e.g.,* *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) (noting that "an advance agreement to waive the benefits of the Act would be void"); *In re Peli*, 31 B.R. 952, 956 (Bankr. E.D.N.Y. 1983) ("Agreements waiving the right to file a petition in bankruptcy violate public policy and will not be given effect." (citations omitted)).

127. *See* National Bankr. Rev. Comm'n, *Bankruptcy: The Next Twenty Years* § 2.4.5 (1997). A blanket prohibition of stay waivers is quite clearly inefficient, and will draw opposition from asset-based lenders who bear the cost of the pointless bankruptcies that often result. The analysis of this part suggests either that Congress will

position to a bankruptcy administrator can be seen as an effort to preserve their authority inside bankruptcy, their opposition to stay waivers helps to thwart the development of alternative responses to financial distress.

Second, an entity that has market power *will* charge an excessive price,¹²⁸ and the provisions lawyers support often have as much to do with the price as with the quality of the bankruptcy "product." To choose the most obvious example, the liberalization of attorneys' fees in the 1978 Code¹²⁹ increased not only the quality, but also the price of the bankruptcy process.¹³⁰

Just as we cannot assume that bankruptcy lawyers will push bankruptcy law in an efficient direction, it also is important not to overstate their bias toward inefficiency. The bankruptcy bar itself is relatively competitive and, as we have seen, other interest groups make themselves heard in various ways. Consistent with this, it is important to note that some bankruptcy changes (such as expanding the jurisdiction of bankruptcy courts) can be defended on normative grounds. With these caveats in mind, we can summarize as follows: bankruptcy lawyers exert significant influence over the shape of the bankruptcy process, and they have a strong incentive to maximize the use of bankruptcy. This means more rather than less bankruptcy and, particularly for corporate bankruptcy, a more complex process than might otherwise be the case.

CONCLUSION

The United States is notoriously litigation-oriented as compared to otherwise similar nations. The United States has more lawyers than anywhere else, and Americans habitually turn to the legal system to address issues that other countries deal with in other ways. The United States bankruptcy system is, in many respects, a perfect reflection of this. Bankruptcy functions much like the more elaborate social insurance frameworks in place in Europe and elsewhere, and bankruptcy lawyers are the engine that makes bankruptcy laws go.¹³¹

fail to act on this issue (given the competing positions of lenders and lawyers), or will adopt a compromise position upholding some waivers but only after a discretionary ruling by the bankruptcy court.

128. See, e.g., Priest, *supra* note 123, at 1321 (discussing the exploitation theory).

129. See 11 U.S.C. § 328(a) (1994) (authorizing the employment of professionals "on any reasonable terms and conditions").

130. More subtly, quality and price are similarly intertwined in the debtor's exclusive right to propose a reorganization plan. See 11 U.S.C. § 1121 (stating that the debtor-in-possession has the exclusive right to propose a plan for 120 days, and the court can extend this period). Whatever its benefits, exclusivity clearly increases the duration of bankruptcy, and thus increases legal fees.

131. For an analysis of the relationship between bankruptcy and social welfare laws in the United States, see Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. Legal Stud. 283, 307-08 (1995).

This much is common coinage. What is not so obvious is why the United States has such a lawyer-intensive bankruptcy system. This Article has suggested an answer to that question. What we have seen is that the 1898 Bankruptcy Act created the need for many more bankruptcy lawyers than previously had existed. Once the 1898 Act called the bankruptcy bar into being, the bar responded both by assuring the permanence of the Act, and by beginning to reshape American bankruptcy law in its own image. We see this most dramatically in bankruptcy lawyers' repeated success in stymieing proposals to create a bankruptcy administrator, and in the continual expansion of the scope of bankruptcy law.

Bankruptcy lawyers are only one of many groups that have a large stake in the contours of bankruptcy law. But no other group has had nearly so far-reaching an influence as bankruptcy lawyers, and there is little reason to expect this to change anytime soon.