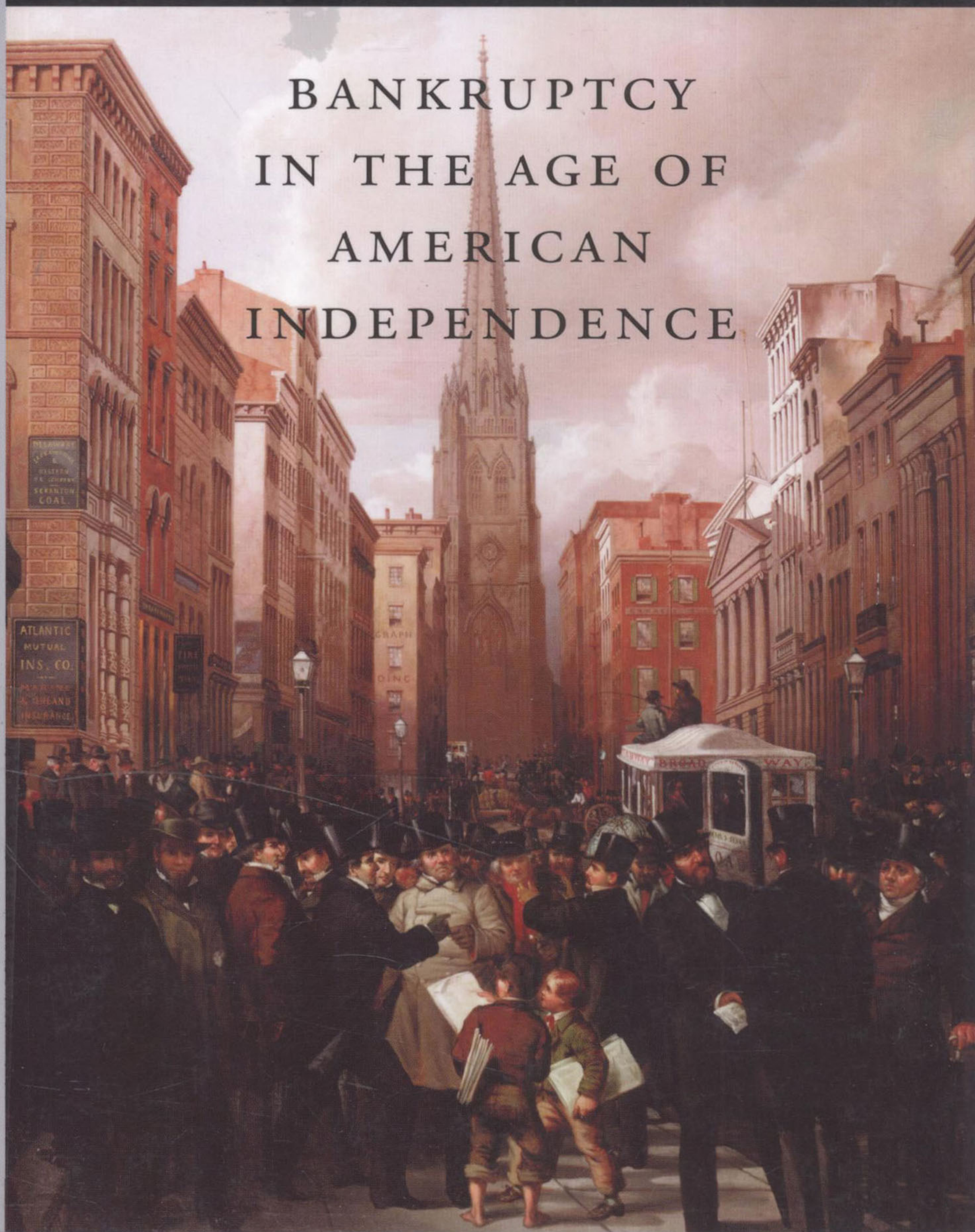


BRUCE H. MANN

# REPUBLIC OF DEBTORS

BANKRUPTCY  
IN THE AGE OF  
AMERICAN  
INDEPENDENCE





# REPUBLIC OF DEBTORS

*Bankruptcy in the Age of  
American Independence*



BRUCE H MANN

HARVARD UNIVERSITY PRESS

*Cambridge, Massachusetts*

*London, England*

2002

Copyright © 2002 by the President and Fellows of Harvard College

All rights reserved

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Mann, Bruce H.

Republic of debtors : bankruptcy in the age of American independence / Bruce H. Mann.

p. cm.

Includes bibliographical references and index.

ISBN 0-674-00902-9

1. Debt—United States. 2. Consumer credit—United States. 3. Bankruptcy—United States. I. Title.

HG3766 .M29 2002

332.7'5'0973—dc21

2002068619

# REPUBLIC OF DEBTORS



Detail from *The Forlorn Hope*, newspaper masthead, ca. 1800, negative number 49720. Collection of the New-York Historical Society.

*For Elizabeth*



## ACKNOWLEDGMENTS

For their unfailing helpfulness and good cheer as I passed countless happy hours in their collections, I am grateful to the librarians, archivists, and staffs of the Historical Society of Pennsylvania, the Library Company of Philadelphia, the Pennsylvania Historical and Museum Commission, the Philadelphia City Archives, the New-York Historical Society, the New York Public Library, the New York City Municipal Archives, the Manuscripts Division of the Library of Congress, the National Archives—Northeast Region (Boston), the American Antiquarian Society, the Massachusetts Historical Society, the Boston Public Library, the Baker Library of the Harvard University Graduate School of Business Administration, the Harvard Law School Library, the Virginia Historical Society, the Library of Virginia, the Connecticut Historical Society, the Connecticut State Library, the Maryland Historical Society, the Historical Society of Delaware, the Firestone Library of Princeton University, the Missouri Historical Society, the Huntington Library, and the Historic New Orleans Collection. In a more material vein, I am indebted to the National Endowment for the Humanities, the University of Pennsylvania Research Foundation, and the University of Pennsylvania Law School for their generous support of my research.

The project first took shape as a book at the Rockefeller Foundation Study Center in Bellagio, surely the most perfect place to write one can imagine. Unsuspecting colleagues at the Columbia University Seminar in Early American History and the laws schools of Washington University in St. Louis and Harvard, Syracuse, and Yale universities invited me to try out various ideas at their seminars and workshops. I am particularly grateful to my friends and colleagues at the remarkable McNeil Center for Early American Studies, upon whom former director and founding father, Richard S. Dunn, inflicted me not once, but twice—both times to my great benefit, if not to theirs. An earlier version of Chapter 5 appeared in the *William and Mary Quarterly*, where then-editor Michael McGiffert shepherded it with his customary enthusiasm and attention to detail. Serendipitously, the manuscript arrived at Harvard University Press just as Kathleen McDermott did, to my good fortune. Richard Audet was an admirably meticulous copyeditor.

Christine Leigh Heyrman and Christopher L. Tomlins have been good friends as well as kind readers. That I finished the book at all owes much to their encouragement. Once I did, Cornelia Hughes Dayton read the manuscript closely and made numerous valuable suggestions. Elizabeth Warren doubtless rues the day she asked the question that lengthened this project—an innocent inquiry about why Congress took so long to enact a bankruptcy law—but she deserves the dedication anyway. Those who know her know some of the reasons why. Those who know us know others. She, I hope, knows the rest.



# CONTENTS

Acknowledgments	vii
Introduction	i
1 Debtors and Creditors	6
2 The Law of Failure	34
3 Imprisoned Debtors in the Early Republic	78
4 The Imagery of Insolvency	109
5 A Shadow Republic	147
6 The Politics of Insolvency	166
7 The Faces of Bankruptcy	221
Conclusion	254
Notes	265
Index	349

## INTRODUCTION

When news reached the New Gaol in New York late in March 1800 that Congress had passed a bankruptcy bill, the debtors imprisoned there gathered “to celebrate the auspicious event.” They enjoyed “a rich repast of social conversation, on the prospect of returning to the world, and the bosom of our relatives and friends,” then drank a series of seventeen formal and volunteer toasts: “The Bankrupt Law, this Godlike act.” “God forgive those of our creditors, who have reviled us and persecuted us, and spoke all manner of evil against us, for the sake of money.” “May imprisonment for debt, with its corrupt and destructive consequences, no longer deface God’s image.” “May the pride of every debtor be to pay his just debts, if ever in his power; and shun offers of credit in future as destructive to his life, liberty, and property.” “May wisdom and justice draw the line between the honest and fraudulent debtor.”<sup>1</sup>



“This Godlike act” was the controversial, short-lived Bankruptcy Act of 1800—the high-water mark of debtor relief in the eighteenth century. “Controversial” because it enabled debtors to escape debts they could not repay and, moreover, granted that boon only to commercial debtors whose success had allowed them to amass debts that were beyond the means of less prosperous debtors. “Short-lived” because it was too ideologically charged to survive the Jeffersonian revolution. The tide of reform quickly receded, but the Act nonetheless marked a transformation in the moral and political economy of eighteenth-century America. Virtually every toast offered in its honor by the debtors imprisoned in New York turned deeply rooted attitudes toward insolvency and bankruptcy on their head. Earlier in the century, bankruptcy relief was not so much controversial as unthinkable. By 1800 debtors and creditors alike desired it.

Whether a society forgives its debtors and how it bestows or withholds forgiveness are matters of economic and legal consequence. They also go to the heart of what a society values. Consider, for example, Samuel Moody, minister at York, Maine, who in 1715 related to his congregation the scriptural lesson of the widow who approached the prophet Elisha, distressed that “the Creditor is come to take unto him my two Sons to be bond men.” When Elisha learned that she had no property left save one pot of oil, he instructed her to gather all the empty vessels she could and fill them from that one pot, which she did. When she returned to Elisha with news of the miracle, he told her, “Go, sell the oyl, and pay the debt, and live thou and thy children of the rest.” From this text Moody drew seven doctrines, three of which run throughout the eighteenth century and, therefore, throughout this book: “That it is a sad and lamentable thing to be deeply in Debt.” “Debts must be paid, tho’ all go for it.” And “Such as are Distressed by reason of Debt, are Objects of Pity and Charity; and Good People will Compassionate their Condition, and Consider what may be done for them.”<sup>2</sup>

Moody assumed the existence of a moral economy of debt. Although that moral economy weakened as the eighteenth century unfolded and never held sway unchallenged even when it was strongest, it nonetheless established the ideal against which debtors and creditors measured them-



selves and each other and to which they gave legal expression. It was an ideal that presupposed the dependence of debtors and the omnipotence and inherent justness of creditors. Within that framework inability to pay was a moral failure, not a business risk. Like other moral failures, such as fornication or drunkenness, it called forth sanctions that to modern eyes were disturbingly punitive.

Moody's words fell on the ears of people who were unavoidably in debt. The homiletic injunction "neither a borrower nor a lender be" expresses an ideal that has never described reality in commercial societies. More to the point, it never could. Unless commerce consists of simultaneous exchanges of goods or services and the payment for them—that is, unless buyers immediately pay sellers in cash or in kind—people must conduct business on promises. In America in the eighteenth century the promises could be oral promises to pay, entries in account books, promissory notes jotted on scraps of paper, formal bonds on printed forms, or bills of public credit, to name the most common kinds. Whatever their form, the promises created debts and transformed the people who made and received them into debtors and creditors.

Debt was an inescapable fact of life in early America. One measure of how thoroughly this was so is the pervasiveness of debts owed and owing in probate inventories.<sup>3</sup> Another is the predominance of debt actions in civil litigation, not to mention the vast number of account books that have survived that never found their way into litigation.<sup>4</sup> Still another is that promises to pay were themselves a medium of exchange, circulating as money through factoring of open accounts and assignment of notes and bonds. Debt cut across regional, class, and occupational lines. Whether one was an Atlantic merchant or a rural shopkeeper, a tidewater planter or a backwoods farmer, debt was an integral part of daily life.

Ubiquity, however, is not uniformity. Debt meant different things to different people. To some, it represented entrepreneurial opportunity. To others, a burdensome necessity. To still others, it signified destitution. Debt could also be different things to the same people at different times, as individual debtors slipped from prosperity. Common to all was the uncertainty that faced both debtors and creditors when indebtedness became



insolvency. What should become of debtors and their property when what they owned was not enough to pay what they owed? Did creditors' claims to repayment of what they had lent extend to the bodies of the debtors to whom they had lent it? Could creditors imprison their debtors or bind them to service? Could insolvent debtors ever hope for release from their debts, short of repayment in full? Samuel Moody answered these questions one way, the festive debtors in the New Gaol another. Between them lay a culture of debt that changed in the eighteenth century, and with it the responses to insolvency.

The book I have written is about those changes. Put briefly, the rapid spread of written credit instruments in the increasingly commercialized economies before the Revolution marked the intrusion of impersonal market relations into lives that until then had been governed more communally. The assignability of notes and bonds severed the connection between debts and their underlying social relations, thereby making possible a transformation in the relations between debtors and creditors. At the same time, paper money permitted more people to participate more freely in the economy, while the sudden emergence of a consumer marketplace created both wants and the promise of satisfying them. These trends, which began before the Revolution, accelerated after it. Large-scale speculation in land and government securities transformed the interdependency between creditor and debtor and had far-reaching social, economic, political, and legal consequences. The rise of speculation as the investment of choice helped redefine insolvency from a moral delict to an economic one for which imprisonment seemed an inappropriately criminal punishment. In part, this was because when speculative schemes failed, as they did in droves in the financial collapse of the 1790s, numerous prominent men found themselves imprisoned for their debts or fugitives from their creditors. Their presence in the pool of insolvent debtors confounded the normal expectations of social and economic status and altered the political dimensions of debtor relief. When Congress, in response, considered bankruptcy legislation that would relieve only large commercial debtors, the resulting debate went to the heart of what the character of the new nation should be.



The fundamental dilemma was that debt and insolvency were the antithesis of republican independence, yet they pervaded all reaches of American society. Everyone stood somewhere on the continuum of indebtedness that ran from prosperity to insolvency, whether in their own right or by their dependence on a husband, a father, a master, or an owner. That had always been the case in early America. But whereas the problem of insolvency had once been limited to relatively simple issues of enforcing debtors' obligations, at century's end it encompassed more complicated questions of commerce and agriculture, vice and virtue, nationalism and federalism, dependence and independence, even slavery and freedom—all of which have particular resonance in the Revolutionary era.

As we shall see, the redefinition of insolvency from sin to risk, from moral failure to economic failure, was not complete by the end of the eighteenth century. Nor is it yet. Although weakened, Moody's moral economy of debt still shaped attitudes toward insolvency in the Revolutionary era, whether as an ideal to be guided by or as a hindrance to be rejected. Its continued influence assured that insolvency could never be simply an economic issue but rather one with religious, moral, social, political, legal, and ideological dimensions as well. In the chapters that follow we will observe debtors, creditors, lawyers, judges, legislators, ministers, writers, and others struggling with how the law should address the inability of men and women to repay their debts, whether through insolvency, bankruptcy, or imprisonment. At bottom, they were struggling with the place of failure in the new republic.





## DEBTORS AND CREDITORS

The most trifling Actions that affect a Man's Credit, are to be regarded . . . Creditors are a kind of People, that have the sharpest Eyes and Ears, as well as the best Memories of any in the World.

George Fisher, *The American Instructor* (1753)

**D**r. John Morgan of Philadelphia understood the essence of credit. His advertisement in the *Aurora* in 1797 informed the public that he “continues practice as usual in the Venereal Disease.” To assure discretion, “[a]n Alley adjoins the house”—particularly useful, since the house stood across Chestnut Street from the Bank of the United States—“and Secrecy with Honor will be duly observed.” He required only that his patients pay in cash at the time of treatment, “as delicacy in the subject precludes all enquiry.”<sup>1</sup> The good doctor knew that he could not conduct his business on credit. After all, one does not extend credit to strangers without first inquiring into their reputation for creditworthiness, which Morgan obviously could not do without creating new, presumably less flattering, reputations for his clients. So cash it was.

Most businesses did not operate under Morgan's peculiar constraints.



Nonetheless, as his advertisement illustrates, credit and reputation were inseparable. Indeed, "reputation" had been among the nonfinancial definitions of "credit" for two hundred years.<sup>2</sup> Advice manuals linked them explicitly, noting that a reputation for punctual payment, industry, thrift, and moderation made one "Lord of another Man's Purse." Although not the intended audience, swindlers and confidence men were among those who took such advice to heart, fraudulently obtaining credit by falsifying reputations for creditworthiness.<sup>3</sup> Credit could be won or lost even on noneconomic reputational matters. Gerard Beekman, for example, a prominent New York dry-goods merchant before the Revolution, took pains to correct his brother's business letters after hearing others remark on his "bad Spelling" and advised him with no apparent self-awareness that "it will be to your own Credit to improv in that Sience." And when the London textile wholesalers and cargo merchants Perkins, Buchanan & Brown learned that "wicked and designing people" were circulating "a most infamous false Report" that they were Catholics to undermine their business, they hastened to restore their reputations—and their credit—by assuring their correspondents in Virginia and Maryland that they and their families "as far back as we have any knoledge of them" were "firme Protestants" and that they had "not one Roman Catholick Relation in the World." Whether Beekman and the London merchants had in mind money or character is a meaningless question—in their world "credit" implied both.<sup>4</sup>

Merchants and traders constantly inquired into the creditworthiness of potential customers. Before Dun & Bradstreet pioneered centralized credit reporting in the nineteenth century, the decision to extend or withhold credit rested on personal ties or experience, or, absent those, on second- or third-hand information reported by someone whom the creditor knew—in short, on reputation, rumor, opinion, even fact. The letters of merchants and their agents or attorneys fairly brim with queries and responses about the probity and financial circumstances of prospective borrowers. Although not yet reduced to a market commodity itself, as it eventually would be, credit information clearly had value, which traders such as Mark Pringle of Baltimore and lawyers such as Harrison Gray Otis of Boston played upon when they offered it as a way of ingratiating themselves with



distant merchants. If, as Pelatiah Webster wrote late in the century, credit “gives hearts ease, it gives wealth, ’tis a nurse of every social virtue,” then determining if the person with whom one was dealing was “of credit” carried particular moment.<sup>5</sup>

The symbiosis of credit and reputation meant that neither could stand without the other. William Black of Williamsburg, Virginia, for example, implored James Mercer in 1771 not to distrain him for a debt that was still yielding interest because such a public step “in a County where, as yet, I am a Stranger . . . woud be very hurtfull” to his reputation and thus to his credit. A generation later, when William Priestman announced that he would auction Michael Krafft’s note at the coffeehouse in Philadelphia—which readers would know meant that Krafft had failed to pay it—Krafft published a letter to the public explaining the circumstances and charging that Priestman had advertised the sale “merely for the purpose of injuring my character.” Similarly, when Noah Webster, a staunch Federalist, sought to impugn the character of Alexander James Dallas, an equally staunch Republican, he did so by publishing a report that Dallas was overdrawn at the Bank of Pennsylvania, which moved Dallas to threaten to sue him for credit libel to redress the injury to his credit and reputation.<sup>6</sup> Even creditors bent on collecting their due could be sensitive to the connection, as was the London creditor who ordered that an attachment be served on a Philadelphia debtor “as privately as” could be managed “so that his character may suffer as little as possible.” In the same spirit, creditors sometimes lent their names to help restore fallen debtors to credit, as George Meade’s creditors did in a published testimonial that he had treated them honestly and impartially in his efforts to repay them, which they hoped would persuade others to do business with him.<sup>7</sup>

Credit and reputation became one when a creditor lent money on nothing more than the debtor’s oral promise to repay, or even on the unstated understanding that the debtor would eventually repay the debt. Debts of that sort, however, were not business debts—they were social ones. For Virginia planters in the mid-eighteenth century, extending credit to neighbors on terms of honor rather than contract was a mark of respect as well as a form of patronage, depending on the recipient. Such loans