

Articles

CONGRESS' TEMPTATION TO DEFECT: A POLITICAL AND ECONOMIC THEORY OF LEGISLATIVE RESOLUTIONS TO FINANCIAL COMMON POOL PROBLEMS*

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Although federal bankruptcy law stays creditors' efforts to pursue their state law remedies of execution and levy, it does not prevent creditors' efforts to lobby Congress to amend or repeal that legislation. And just as a rational creditor's race to levy does not maximize collective interests, a rational creditor's race to amend the bankruptcy laws has not resulted in welfare-maximizing legislation.

This Article describes this political process. Part I briefly reviews scholarship on the politics of bankruptcy law. It concludes that, although many theorists have considered the necessity for bankruptcy law and its normative underpinnings, few have addressed the process by which Congress enacts these laws. Because the predominant metaphor in bankruptcy scholarship compares the creditors of a financially distressed debtor to fishers in a pond they own in common, and justifies the Bankruptcy Code as legislation needed to resolve this common pool problem, Part II draws on game theory to define the circumstances under which a common pool problem occurs and is solved, either through self-help or the enactment of statutory rules of liability.¹ Part III next critically and

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1. Common pool problems can be resolved by the players themselves, or, alternatively, with the assistance of the state. In the latter instance, the state creates and

comparatively describes economic and political theories of legislation. Part IV then combines game theory with public choice and interest group theories in a model of legislative resolutions to common pool problems. It identifies the weaknesses inherent when rules of liability are enacted to resolve common pool problems, generally, and financial common pool problems, specifically, and distinguishes the pressure for their enactment or repeal from the pressure for their revision. Finally, Part V looks at the legislative history of the federal bankruptcy laws from 1800 to date, and finds that, to a large extent, this experience supports the proposed model.

I. ECONOMICS AND POLITICS IN BANKRUPTCY SCHOLARSHIP

Just what does a common pool of fish, or a prosecutor's offer to coconspirators, have to do with bankruptcy theory?² I suppose the answer is everything, or nothing, depending upon whom you ask. Thomas Jackson,³ Douglas Baird⁴ and Robert Scott,⁵ describe the creditors of a balance-sheet insolvent⁶ debtor

enforces legal rules. These legal rules can be rules of property, contract or liability; courts may develop these rules at common law, or legislatures may enact statutory common pool resolutions. This Article focuses on statutorily established liability rules for the resolution of financial common pool problems, namely, the federal bankruptcy laws.

2. The predominant metaphor in bankruptcy scholarship is that of the common pool problem. *See infra* text accompanying notes 3–14 (discussing this literature). Another metaphor commonly employed in bankruptcy theory is that of the Prisoner's Dilemma. *See, e.g.,* Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy As Applied to the Standard for Commencement of a Bankruptcy Case*, 42 AM. U. L. REV. 337, 369 n.142 (1993) [hereinafter Block-Lieb, *Fishing in Muddy Waters*]; Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 862 (1982). The two metaphors are not unrelated. Although the stories of the common pool problem and Prisoner's Dilemma game differ, the point of both stories is the same: actors' self-interested actions do not maximize their collective welfare. *See infra* note 44. Moreover, theorists have described common pool problems as an n-person Prisoner's Dilemma game. *See infra* text accompanying note 39.

How accurate are these analogies? In an earlier article, I argued that a debtor's financial distress *can* sometimes cause a common pool problem for its creditors. *See* Block-Lieb, *Fishing in Muddy Waters, supra*. I argued that, standing alone, insolvency creates only the potential for such a problem, but that a debtor's inability to pay its debts as they come due, whether coupled with balance-sheet insolvency or not, creates a common pool problem for the debtor's creditors. *Id.* at 369–408. In a footnote in that article, I also briefly defined the circumstances under which the choices that confront the creditors of a financially distressed debtor resemble the choices that confront the coconspirators in the standard Prisoner's Dilemma game. *Id.* at 369 n.142.

3. *See* THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 228–48 (1986) [hereinafter JACKSON, *LOGIC AND LIMITS*]; JACKSON, *supra* note 2, at 858–71.

4. *See* DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, PROBLEMS AND MATERIALS ON BANKRUPTCY* 20–30 (2d ed. 1990) [hereinafter BAIRD & JACKSON, *CASES AND MATERIALS*]; Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganization and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 105–07 (1984) [hereinafter Baird & Jackson, *Adequate Protection*]; *see also* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987) [hereinafter Baird, *Loss Distribution*]; Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW &

as enmeshed in a common pool problem.⁷ They compare an insolvent debtor's assets to a jointly owned pool of fish, and the debtor's creditors to self-interested fishermen.⁸ They view creditors' pursuit of their state law remedies of attachment, garnishment, execution and levy as analogous to the overfishing of a common pool: self-interested creditors have every incentive to collect as many of the debtor's assets as quickly as they can, because creditors who are first to collect suffer none of the deleterious effects of their collection actions.⁹

More than simply identify a debtor's insolvency as a common pool problem for its creditors, Jackson and his coauthors point to federal bankruptcy law as resolving this problem.¹⁰ Although they identify legislation as the solution to financial common pool problems, they have little to say about the political processes by which such a statute would be enacted. Instead, they concentrate their model on explaining the fundamental purposes of bankruptcy law, apparently assuming that, once these normative goals are identified, they will be implemented. Rather than assume that bankruptcy laws are imposed upon society by some benevolent dictator, however, Jackson and his coauthors contend that creditors would voluntarily agree to this legislation.¹¹

Moreover, as initially conceived, Baird and Jackson envision bankruptcy law as having only limited normative goals. In their "simple creditors' bargain" model, they contend that bankruptcy law should solely concern itself with the resolution of financial common pool problems and the maximization of creditors' collective welfare.¹² In this model, bankruptcy law maximizes creditors' collections on claims. They contend that bankruptcy law should not serve any other, distributive purposes, on the grounds that redistributive bankruptcy laws create improper incentives for the commencement of a bankruptcy case. Jackson, in

CONTEMP. PROBS. 173, 183-84 (1987) [hereinafter Baird, *World Without Bankruptcy*].

5. See Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 178 (1989) (creating "expanded creditors' bargain model" of bankruptcy).

6. See 11 U.S.C. § 101(32) (1994) (defining an entity as "insolvent" when "the sum of such entity's debts is greater than all of such entity's property, at a fair valuation").

7. See, e.g., BAIRD & JACKSON, *CASES AND MATERIALS*, *supra* note 4, at 20-30; JACKSON, *LOGIC AND LIMITS*, *supra* note 3, at 12-13; Baird & Jackson, *Adequate Protection*, *supra* note 4, at 105-07; Jackson & Scott, *supra* note 5, at 178.

8. See sources cited *supra* note 7.

9. See sources cited *supra* note 7.

10. See sources cited *supra* note 7.

11. The contractarian model they construct describes "bankruptcy as a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position." Jackson, *supra* note 2, at 860. The agreement they have in mind is not an actual agreement. Instead, the agreement they have in mind is a hypothetical agreement among hypothetical creditors—creditors who are assumed to be rational, self-interested, perfectly informed, and risk averse. JACKSON, *LOGIC AND LIMITS*, *supra* note 3, at 10 n.9.

12. Baird, *Loss Distribution*, *supra* note 4, at 830-31; Baird, *World Without Bankruptcy*, *supra* note 4, at 183-89; Baird & Jackson, *Adequate Protection*, *supra* note 4, at 100.

conjunction with Robert Scott, subsequently expanded this “creditors’ bargain” model to justify downstream redistributions among creditors—reallocations of creditor wealth from high priority creditors to low priority creditors intended to spread the risk of loss from a debtor’s insolvency.¹³ Like the “simple creditors’ bargain” model, Jackson and Scott contend that their “expanded creditors’ bargain” model merely describes the risk-sharing agreement that a debtor’s investors would reach in the absence of substantial impediments to such a multiparty negotiation.¹⁴

Both the analogy of the assets of an insolvent debtor to a common pool that presents a problem to its creditors, and the conclusion that bankruptcy law resolves this common pool problem, are hotly controverted among bankruptcy scholars. On one end of the spectrum, critics of Baird, Jackson, and Scott have taken issue with their limited conception of the normative goals of bankruptcy law,¹⁵ as well as the contractarian models they have created to support this

13. See Jackson & Scott, *supra* note 5.

14. *Id.* at 160–61.

15. See KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 243 (1997) [hereinafter GROSS, FAILURE AND FORGIVENESS] (“Bankruptcy can and should further predetermined national social policy issues....”); Block-Lieb, *Fishing in Muddy Waters*, *supra* note 2, at 412–31 (identifying congressional purposes other than maximization of distributions to creditors and contending that analogy of bankruptcy to common pool problem adds nothing to debate on these other normative goals of bankruptcy law); David Gray Carlson, *Bankruptcy Theory and the Creditors’ Bargain*, 61 U. CIN. L. REV. 453, 509 (1992) (criticizing assumptions that underlie Baird’s and Jackson’s “simple creditors’ bargain” model and Jackson’s and Scott’s “expanded creditors’ bargain” model, and concluding that “[t]he expanded creditors’ bargain has not rehabilitated this troubled theory from its earlier problems”); David Gray Carlson, *Postpetition Interest Under the Bankruptcy Code*, 43 U. MIAMI L. REV. 577, 624–31 (1989) (describing Baird and Jackson’s model as “pseudo-law-and-economics”); David Gray Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341 (1987) (unfavorably reviewing Jackson’s *Logic and Limits of Bankruptcy Law*); Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 VAND. L. REV. 713, 823–25 (1985) (questioning assumptions of perfect information and knowledge implicit in creditors’ bargain model of bankruptcy); Karen Gross, *Taking Community Interests Into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031 (1994) (criticizing creditors’ bargain model for failing to include community interests in bankruptcy decision making); Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993) [hereinafter Korobkin, *Foundations of Bankruptcy Law*] (criticizing premises of Jackson’s creditors’ bargain model and developing his own more inclusive contractarian model); Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 WM. & MARY L. REV. 333 (1992) (rebutting contention that non-economic account of bankruptcy is irrational); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991) (developing broader statement of normative goals of bankruptcy than Baird, Jackson, and others); Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is It Anyway?* 70 N.Y.U. L. REV. 993 (1995) (justifying broad goals of bankruptcy law by means of principles of distributive justice); Mark J. Roe, *Commentary on “On the Nature of Bankruptcy”: Bankruptcy, Priority, and Economics*, 75 VA. L. REV. 219–20 (1989) (criticizing Jackson & Scott’s “expanded creditors’ bargain” model); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336 (1993) (expanding on policy purposes of corporate

conception.¹⁶ Although these commentators disagree with Jackson and his coauthors on the normative goals of bankruptcy, they implicitly agree that financial common pool problems are best resolved legislatively,¹⁷ through enactment of a bankruptcy law in some form.¹⁸ Others have criticized the creditors' bargain model at the other end of the spectrum, implicitly agreeing that bankruptcy law should serve only to maximize creditor welfare but explicitly questioning whether legislation better accomplishes this goal than rules of property or contract. These

bankruptcy and reorganization law beyond maximization of distributions to creditors); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (questioning usefulness of law and economics account of bankruptcy).

16. Donald Korobkin, not only criticizes Jackson's contractarian creditors' bargain model of bankruptcy law, but also goes on to develop his own contractarian model of these normative purposes. See Korobkin, *Foundations of Bankruptcy Law*, *supra* note 15. Korobkin's bankruptcy choice model differs from Jackson's creditors' bargain model in two important respects: First, the assembly Korobkin imagines is more broadly inclusive than Jackson's. The assembly Korobkin has in mind includes all of society. *Id.* at 571. Korobkin's bankruptcy choice model, thus, differs from Jackson's creditors' bargain model in that Jackson includes only contract creditors in the assembly. *Id.* at 553-59. Second, the participants in Korobkin's assembly make choices about the normative foundations of bankruptcy knowing less about their ultimate position outside of this assembly than Jackson's participants. Like Jackson's contractarian model, these are hypothetical persons who decide these principles behind a "veil of ignorance." Korobkin's veil is "thicker" than Jackson's, however, for Korobkin's assembly makes decisions without knowledge of:

the particular occasions on which they will be affected by financial distress. Nor do they know their legal status, their position within any particular corporation, their aims, or any other fact about themselves that might lead them to form coalitions or advance purely personal interests. They know, however, the circumstances of bankruptcy and, in that context, that persons seek to advance a plurality of aims.

Id. at 571; see also *id.* at 558-71. By contrast, Jackson "constructs the choice situation so that parties know their legal status relative to a particular corporation." *Id.* at 560 (footnote omitted); see also Jackson & Scott, *supra* note 5, at 160 (conceding that participants in creditors' bargain model possess knowledge of their priority positions and legal entitlements).

17. See, e.g., Korobkin, *Foundations of Bankruptcy Law*, *supra* note 15, at 627-31 (discussing relationship between contractarian models and legislative decision making).

18. Some commentators have suggested that state, not federal, law should govern the liquidation and reorganization of corporate debtors. One would repeal the federal law of corporate bankruptcy and reorganization in favor of state collective collection laws. See David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994) [hereinafter Skeel, *Corporate Law and Corporate Bankruptcy*] (contending that federal corporate reorganization law has "vestigialized" state corporate law). Because the statutory scheme Skeel has in mind involves collective remedies, he implicitly accepts the view that legislation should be relied upon to resolve financial common pool problems. Skeel is clearer about this acceptance in an earlier article. See David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465, 510-20 (1993) [hereinafter Skeel, *Brave New World*] (proposing reforms to law of corporate reorganization that distinguish among closely held and publicly traded corporations and that are sensitive to the need for market and judicial decision making to coexist in bankruptcy context).

commentators have argued that bankruptcy law's liability rules are not necessary to resolve financial common pool problems, and that rules of contract or property are sufficient, and some would argue preferred, methods of resolution.¹⁹

Several commentators *have* applied political theory to bankruptcy law, although, for some, political considerations were not the primary focus of their commentary.²⁰ Frank Easterbrook first introduced political considerations to the

19. See, e.g., Barry E. Adler, *The Theory of Corporate Insolvency*, 72 N.Y.U. L. REV. 343 (1997) (distinguishing between *ex ante* and *ex post* resolutions of corporate financial distress); Barry E. Adler, *Finance's Theoretical Divide and the Proper Role of Insolvency Rules*, 67 S. CAL. L. REV. 1107, 1108 (1994) [hereinafter Adler, *Role of Insolvency Rules*] (contending that financial distress of corporate debtors is more efficiently resolved by means of contract than through bankruptcy legislation); Barry E. Adler, *A World Without Debt*, 72 WASH. U. L.Q. 811, 811 (1994) (expanding on his argument that "there is no collective action problem" and, therefore, "in principle no need for corporate bankruptcy [law]"); Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 314 (1993) [hereinafter Adler, *Financial and Political Theories*] (describing "chameleon equity" as efficient substitute for law of corporate reorganization); Block-Lieb, *Fishing in Muddy Waters*, *supra* note 2, at 397-405 (noting that law of secured transactions may resolve some financial common pool problems); James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27 (1991) (arguing that bankruptcy law is unnecessary because debtors are most efficient distributors of their assets); James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097 (1990) (arguing that debtor is most efficient liquidator of its own assets, and that federal bankruptcy law is therefore unnecessary); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992) (contending that chapter 11 reorganization provisions of Bankruptcy Code should be replaced with pre-insolvency contractual provisions, which they call "contingent" equity); Randal C. Picker, *Security Interests, Misbehavior, and Common Pools*, 59 U. CHI. L. REV. 645 (1992) (discussing resolution of financial common pool problems by means of Article 9 security interests and arguing that existence of law of secured transactions makes law of corporate reorganization unnecessary); Robert K. Rasmussen, *The Ex Ante Effects of Bankruptcy Reform on Investment Incentives*, 72 WASH. U. L.Q. 1159 (1994); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992) [hereinafter Rasmussen, *Menu Approach*] (initiating argument that law of corporate reorganization should be conceived of as default rule, and advocating adoption of "menu" approach to such law by which owners of firm would make *ex ante* bankruptcy choice; "no bankruptcy" among options on menu).

20. More than several commentators have reported on the politics involved in the enactment, repeal, and revision of the federal bankruptcy laws, without reference to political or economic theories of legislation. Legal historian, Charles Warren, discussed, at considerable length, the political machinations involved in the enactment and repeal of the early Bankruptcy Acts. See CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935) (tracing legislative history of Bankruptcy Acts of 1800, 1841, 1867, and 1898). More recently, others have discussed the politics involved in enactment of the current Bankruptcy Code and its 1984 and 1994 omnibus amendments. See, e.g., Susan Block-Lieb, *Using Legislative History to Interpret Bankruptcy Statutes*, in *BANKRUPTCY PRACTICE AND STRATEGY 2-1* (Alan N. Resnick ed., 1987) (providing legislative history of Bankruptcy Amendments and Federal Judgeships Act of 1984); Kenneth N. Klee, *Legislative History of*

question of corporate bankruptcy law's efficiency.²¹ He concluded that chapter 11 is efficient, and, thus, should not be repealed, in part, on public choice grounds. He noted that creditors were influential in seeking the enactment of the Bankruptcy Code, and have not lobbied Congress to replace corporate reorganization with corporate auctions; from this lack of political action, Easterbrook inferred complacency with an efficient statute.²² Several commentators have questioned Easterbrook's assertion that the continued existence of chapter 11 should be treated as an indication of its efficiency.²³ They instead argue that political influences have

the New Bankruptcy Code, 54 AM. BANKR. L.J. 275, 293 (1980) (detailing legislative history of current Bankruptcy Code); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (discussing legislative history of all federal bankruptcy laws, including 1994 amendments to Bankruptcy Code); see also, e.g., Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 821–27 (1983) (discussing amendments sought by National Coalition for Bankruptcy Reform and political pressure brought by these lobbyists); Leslie T. Gladstone, *Retiree Benefits Bankruptcy Protection Act of 1988: Welfare Benefits in Need of Reform*, 65 AM. BANKR. L.J. 427, 447 (1991) (complaining of influence of special interest groups on bankruptcy legislation); Daniel Keating, *Bankruptcy Code § 1114: Congress' Empty Response to the Retiree Plight*, 67 AM. BANKR. L.J. 17, 17 (1993) (noting that section 1114 was added to Bankruptcy Code "in direct response to LTV corporation's cutoff of retiree medical benefits"); Kenneth N. Klee, *Bit by Bit, Special Interests Eat Away at Bankruptcy Code*, 11 LEGAL TIMES 17 (1988) (describing Bankruptcy Code as subject to frequent amendments to exempt favored groups from its application); Rosalind Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.J. 293, 312–21 (1984) (discussing political pressure by organized labor to reverse Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984)).

21. See Frank H. Easterbrook, *Is Corporate Bankruptcy Efficient?*, 27 J. FIN. ECON. 411 (1990).

22. *Id.* at 413. In arguing that chapter 11 is efficient, Easterbrook also relied on empirical research that suggests that the costs of bankruptcy may be less than the costs of auctioning off the firm. *Id.* at 415 (citing Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority Claims*, 27 J. FIN. ECON. 285 (1990)). For a refutation of this empirical argument, see Rasmussen, *Menu Approach*, *supra* note 19, at 88–89.

23. Although Easterbrook focuses on creditors' lobbying abilities, Robert Rasmussen describes this focus as misguided. He argues that "[a]ny pressure for change would...have to come from potential equity holders." Rasmussen, *Menu Approach*, *supra* note 19, at 89 ("The assertion that passing legislation would be easy is questionable. The inefficiency of the bankruptcy contract term is passed along to the equity holders. Equity holders, however, have an incentive only to seek a change in the legal rule before they invest in a firm. Once a firm has paid for the inefficiency in current law through a higher interest rate, the firm's equity holders have little incentive to change the law. Such a change would simply deprive the equity holders of the benefits they received in exchange for the higher rate. Any pressure for change would thus have to come from potential equity holders."). Applying public choice theory, Rasmussen concludes that equity holders are unlikely to act as a group and lobby for repeal, and that, in any event, corporate managers, whom he views as the primary beneficiaries of chapter 11, would effectively oppose any such effort. *Id.* at 89–90 ("It is highly unlikely, however, that such a diffuse and amorphous

impeded repeal of corporate reorganization law.²⁴

Peter Alces and David Frisch also have commented unfavorably on the politics of bankruptcy law.²⁵ In contrasting the politics of Article 9 of the Uniform Commercial Code with those of the Bankruptcy Code, Alces and Frisch conclude that bankruptcy law "is so riddled with legal rules designed to benefit the narrow preferences of discrete interest groups rather than those of the public-at-large that it has compromised the potential rehabilitation of many financially distressed companies."²⁶ They optimistically suggest that the creation of the National Bankruptcy Review Commission may diminish the political influence of organized interests and improve bankruptcy legislation, but do not provide any theoretical framework to support their high hopes.²⁷

group would be able to act together to lobby for new legislation. Indeed, the legislative process in corporate law is often thought to promote the interests of managers, who are a well-defined and concentrated group. As discussed above, managers benefit from the current universal availability of Chapter 11.").

Agreeing with and expanding upon Rasmussen, Barry Adler also concludes that "[c]orporate bankruptcy survives because its costs are too dispersed to overcome the concentrated interests of those who benefit from the bankruptcy process or the laws that preserve it." Adler, *Financial and Political Theories*, *supra* note 19, at 341-42. Adler describes not only investors, but also tort victims, as the primary beneficiaries of the repeal of chapter 11 and, like Rasmussen, argues that these diffuse groups are unlikely to be effective lobbyists for reform. *Id.* at 342 (arguing that tort victims, because scattered and not identifiable in advance, face huge organizational impediments, and that investors, although more likely to form trade associations and lobby for desired legislation, are unlikely to seek repeal of chapter 11 because diversified portfolios diminish bankruptcy costs enough to make the cost of lobbying for repeal prohibitive). Like Rasmussen, he also describes the likely opponents of a repeal effort—not only incumbent corporate managers, but also attorneys who practice bankruptcy and corporate law, and politicians who barter tax benefits for campaign contributions—as well-organized and effective lobbyists. *Id.* at 343-46.

24. Adler, *Financial and Political Theories*, *supra* note 19, at 343-46. *But see* Skeel, *Brave New World*, *supra* note 18, at 494-503 (criticizing Adler's public choice analysis and concluding that it is debatable whether repeal of chapter 11 is politically infeasible).

25. Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217, 1217-29 (1996). In this article, Alces and Frisch respond critically to Robert Scott's public choice analysis of the process by which the uniform law of secured transactions has been enacted and revised. *See* Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1803-10 (1994) (arguing that the institutional structure by which the UCC is promulgated exacerbates financiers' influence on the lawmaking process). For a more detailed discussion of Scott's political theory of private lawmaking, see *infra* text accompanying notes 134-56.

26. Alces & Frisch, *supra* note 25, at 1238; *see id.* at 1238-43 (providing examples of special interest bankruptcy legislation and noting that their "examples provide just a small sampling of special interest legislation netted from the Bankruptcy Code as it stood prior to the 1994 Amendments").

27. *Id.* at 1243-44 ("[T]he establishment of a National Bankruptcy Review Commission to review the Code might be defended as a frank recognition that, at times, a study group similar to the NCCUSL model is uniquely well situated to make relevant policy

Most recently, Eric Posner has provided us with an extensive political history of the 1978 Bankruptcy Reform Act.²⁸ He argues that compromises among competing interest groups affected the content of the 1978 Code in important ways, and relies on public choice theory to explain occurrence of these compromises.²⁹ But because Posner's study is limited to the 1978 Code, our understanding of the political economy of federal bankruptcy law remains incomplete.

With these limited exceptions, commentators have not sought to explain the enactment, repeal or amendment of bankruptcy legislation, and this gap is striking. Although the Bankruptcy Clause of the United States Constitution permits Congress to enact "uniform Laws on the subject of bankruptcies,"³⁰ there were federal bankruptcy laws in this country during fewer than twenty years of the eighteenth and nineteenth centuries.³¹ While there have been federal bankruptcy laws continuously in effect during the twentieth century, these laws have been amended repeatedly during this period. Most notably, since 1978, Congress has made countless changes to the Bankruptcy Code. And in at least two of these instances the amendments were accomplished through omnibus bills, with each omnibus bill containing hundreds of amendments covering numerous distinct issues of bankruptcy law.³² Moreover, because it appointed a National Bankruptcy Review Commission, Congress seems poised to consider yet another round of revisions to the Bankruptcy Code.³³

Since at least 1984, commentators have complained that organized interests have exerted their political influence on the Bankruptcy Code.³⁴ It is

decisions. This assessment is not a mechanical exercise to uncover general legislative superiority. It calls for a judgment about comparative competence, undertaken in light of the statutory structure and the applicable considerations of both fact and policy. Special interest group politics poses no more significant challenge to the PL process than it does to lawmaking as a whole." PL refers to "private legislatures." See *infra* note 135.

28. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. (forthcoming Oct. 1997) (manuscript on file with the author).

29. *Id.* (manuscript at 3) (Posner claims "that the allocation of powers to bankruptcy judges and trustees resulted from efforts by Congress to increase its patronage opportunities; that the provisions on exemptions resulted from a conflict between federal and state officials over the power to make transfers to local interest groups; and that the provisions on business reorganization resulted from efforts by managers' lawyers and large creditors to maximize their influence on the reorganization of distressed firms, at the expense of other interests, such as equity and small debt.").

30. U.S. CONST., art. I, § 8, cl. 4 (giving Congress the power "to establish a uniform Rule of Naturalization, and uniform Laws on the subject of bankruptcies throughout the United States").

31. See generally WARREN, *supra* note 20 (providing legislative history of early Bankruptcy Acts).

32. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

33. See §§ 601-610, 108 Stat. at 4147-50 (establishing National Bankruptcy Review Commission).

34. See *supra* note 20 (listing several such commentators); see also Posner, *supra* note 28 (explicitly applying public choice theory to the legislative history of the 1978

tempting to argue that public choice theory fully explains the influence of interest groups on federal bankruptcy legislation, but that theory provides only an incomplete model of this legislation.³⁵ Public choice theory may explain the inclusion of provisions of the Code that benefit organized interests, but it does not satisfactorily explain how and why bankruptcy legislation came to be enacted in the first place. It also does not fully explain why organized interests have been successful in revising the Code, but either unsuccessful or disinterested in lobbying for its repeal.

This Article proposes a coherent theory of the pressures for enactment, repeal and revision of the bankruptcy laws by combining game theory with public choice theory. Game theory is important to the model because bankruptcy legislation purports to resolve the common pool problem that a debtor's financial distress otherwise presents its creditors. Game theory, thus, provides a framework for understanding creditors' incentives to obtain bankruptcy legislation, as well as their continuing incentives to obtain individualized exemptions from these rules of liability. Public choice theory supplements the conceptual framework of this game theoretic model by adding to it a richer understanding of players' motivations. The resulting model of bankruptcy legislation is complex—messy and relatively indeterminate—but it provides a more realistic and comprehensive political and economic theory of the Bankruptcy Code than one which relies solely on either public choice theory or game theory alone.

II. THE GAME THEORY OF COMMON POOL PROBLEMS AND THEIR RESOLUTIONS

Economists define a common pool problem as existing when the use of exhaustible public goods causes negative externalities that cannot be resolved by the definition of property rights.³⁶ The paradigmatic common pool problem involves a jointly owned pond of fish.³⁷ In this pond, self-interested anglers have every incentive to catch as many fish as they can because the deleterious effects of overfishing are suffered by all who fish rather than merely those who overfish. A common pool, thus, presents a *problem* to its joint owners when their self-interested actions cannot be relied on to maximize their collective welfare.³⁸

Bankruptcy Code).

35. Cf. E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985) (similarly concluding that public choice theory only incompletely explains environmental law, and constructing statutory biography of these laws).

36. See, e.g., HAL R. VARIAN, *INTERMEDIATE ECONOMICS: A MODERN APPROACH* 552–55 (2d ed. 1990).

37. See, e.g., BAIRD & JACKSON, *CASES AND MATERIALS*, *supra* note 4, at 39–43 (discussing common pool problem by analogy); H. Scott Gordon, *The Economic Theory of Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954) (discussing common pool problem created by open access to fishing grounds).

38. Not every common pool is a problem in this sense, however; some involve the mere potential for inefficient overfishing. See Block-Lieb, *Fishing in Muddy Waters*, *supra* note 2, at 374–79 (distinguishing common pool potential from common pool

Common pool problems are often viewed as an n-person Prisoner's Dilemma game.³⁹ In the two-person Prisoner's Dilemma game, a prosecutor separates two coconspirators and independently offers both an opportunity to testify in exchange for a reduced sentence.⁴⁰ If the coconspirators stick together, with neither testifying, the prosecutor will have a more difficult time proving her case.⁴¹ The temptation to testify is strong, however, due to the prosecutor's promise of a reduced sentence.⁴² The dilemma lies in the knowledge that if both confess, both will suffer substantial prison terms.⁴³

The story line differs between the Prisoner's Dilemma and the common pool problem, but the moral of both stories is the same. In both, self-interested actors cannot be relied upon to achieve a result that jointly maximizes their welfare.⁴⁴ Pursuing their self-interest, actors are tempted to defect by the payoff that follows if this strategy is unique; if both actors defect, however, both do worse than they would have if both had cooperated. Game theorists often diagram a Prisoner's Dilemma game in matrix form.⁴⁵

problem).

39. See RUSSELL HARDIN, *COLLECTIVE ACTION* 16-37 (1982) [hereinafter HARDIN, *COLLECTIVE ACTION*] (comparing collective action problems to n-person Prisoner's Dilemma games); Russell Hardin, *Collective Action as an Agreeable n-Prisoner's Dilemma*, 16 BEHAV. SCI. 472, 472-81 (1971) (same). Depending on the context, game theorists may also describe a common pool problem as an Assurance game or a game of Chicken. See Block-Lieb, *Importance of Metaphor*, *supra* note 2 (discussing variation of game theoretic metaphors for collective action problems).

40. See, e.g., DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 31-35 (1994) (defining Prisoner's Dilemma game and extending it to analogous circumstances); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 28, 38 (1989) (defining basic Prisoner's Dilemma game).

41. BAIRD ET AL., *supra* note 40, at 33-35; RASMUSEN, *supra* note 40, at 28. Thus, the cooperate/cooperate strategy maximizes the players' joint welfare. BAIRD ET AL., *supra* note 40, at 33-35.

42. BAIRD ET AL., *supra* note 40, at 33-35.

43. *Id.* The defect/defect result is, thus, said to be the "dominant strategy equilibrium" to a Prisoner's Dilemma game. RASMUSEN, *supra* note 40, at 28-29. A "dominant strategy" is a player's best response to any strategy that the other player might pick. *Id.* Thus, a "dominant strategy equilibrium" is the "strategy combination consisting of each player's dominant strategy." *Id.* at 28. Defect/defect is the dominant strategy equilibrium whether players are assumed to act simultaneously or one after the other, and whether or not players commit to a strategy before playing. *Id.* at 28-29.

44. See MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 3 (1987) (defining "collective action problems"—which he views as inclusive of common pool problems, Prisoner's Dilemma games, and other situations—to refer to those situations in which "rational egoists are unlikely to succeed in cooperating to promote their common interests").

45. The exact prison terms that appear in this matrix are unimportant to the Prisoner's Dilemma game; it is the relationship among these values that matters. In order for the matrix to represent a Prisoner's Dilemma game, rather than some other game, the following must hold true: $T > R > P > S$ and $R > (T + S)/2 > P$. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 206 (1984). The values that appear in Figure 1 are measured in years of prison time and are negative in most cases to reflect the loss of liberty associated

Figure 1

	cooperate (omerta)	defect (testify)
cooperate (omerta)	R= -1, R= -1 Reward for mutual cooperation	S= -5, T= 0 Sucker's payoff, and Temptation to defect
defect (testify)	T= 0, S= -5 Temptation to defect, and Sucker's Payoff	P= -3, P= -3 Punishment for mutual defection

The diagram illustrates the incentives for mutual defection. If I think that you will honor your pledge of omerta, I have every Temptation to defect and testify against you. If I instead think that you will testify, I have every incentive to avoid the Sucker's payoff by testifying as well. Because you face the same incentives that I do, game theory suggests that both prisoners will testify.

With an n-person Prisoner's Dilemma game, the story stays the same, while the number of conspirators increases.⁴⁶ Although there are different

with such time. The titles assigned to these values are attributed to Axelrod. *Id.* at 9-10.

Where players instead face an Assurance game, the relationship among the payoffs changes to the following: $R > T > P > S$. Thus, in a two-person Assurance game, cooperate/cooperate and defect/defect both constitute Nash equilibria, with the cooperate/cooperate Nash equilibrium pareto preferred. See TAYLOR, *supra* note 44, at 39 (defining Assurance games).

Where players face a Hawk/Dove game, this relationship changes again to the following: $T > R > S > P$ and $T + S < 2R$. There are two Nash equilibria to this Hawk/Dove game: defect/cooperate and cooperate/defect. See RASMUSEN, *supra* note 40, at 73. But unlike the Assurance game, neither of these Nash equilibria is pareto preferred.

46. See, e.g., TAYLOR, *supra* note 44, at 15-16 (defining n-person Prisoner's Dilemma game); THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 217-19 (1978) (same). An n-person Assurance game is defined such that (i) universal cooperation is preferred over universal defection by all n players, and (ii) each player prefers cooperation over defection if at least a certain number of other players cooperate, but otherwise prefers defection. As a result, there are only two equilibria: universal cooperation and universal defection. TAYLOR, *supra* note 44, at 40. Because universal cooperation is preferred to universal defection by all players, Taylor does not view an n-person Assurance game as presenting a collective action problem. *Id.* Others, however, view n-person Assurance games as presenting collective action problems because free-riding is more prevalent with n-person Assurance games than with two-person versions of these games. See, e.g., Carlisle Ford Runge, *Institutions and the Free Rider: The Assurance Problem in Collective Action*, 46 J. POL. 154, 169 (1984). In an n-person game of Chicken or Hawk/Dove, (i) universal cooperation is preferred over universal defection by all n players, but (ii) there exist numerous nonuniversal defection equilibria. See TAYLOR, *supra* note 44, at 40 (defining n-person Chicken games). Free-rider problems plague resolution of an n-person game of Chicken. *Id.*

versions of the multiplayer Prisoner's Dilemma game,⁴⁷ they all assume (i) that the universal choice to defect dominates the game,⁴⁸ (ii) that the payoff from universal cooperation is superior to the payoff from universal defection,⁴⁹ and (iii) that the payoffs from nonuniversal defection and nonuniversal cooperation both increase with the number of cooperators.⁵⁰ Expanding from a two-person Prisoner's Dilemma game to one that involves a number of players, thus, does not improve its result. In the two-person game that is played only once, both players must cooperate in order to maximize their joint welfare;⁵¹ in the n-person one-shot game, welfare maximization occurs only if all n players cooperate.⁵² In either case, universal defection strongly dominates in the one-shot Prisoner's Dilemma game.⁵³

Distinct from the two-person game, however, unanimous cooperation may not be required for players in the n-person Prisoner's Dilemma game to improve on the payoff from universal defection.⁵⁴ Thomas Schelling argues that nonuniversal cooperation pays off in an n-person Prisoner's Dilemma game when a critical mass of players adopts a cooperative strategy.⁵⁵ Because the total payoff increases with the number of cooperators and the payoff from universal defection is less than the

47. Typically, the n players have two choices: defect or cooperate. *See, e.g.,* TAYLOR, *supra* note 44, at 15–16 (describing n-person Prisoner's Dilemma game involving binary choices). In a Generalized Prisoner's Dilemma game, players instead face a range of choices. They can decide to defect, cooperate, or choose from a spectrum of other choices ranging between defection and cooperation. *See id.* (describing generalized n-person Prisoner's Dilemma game involving finite range of choices); Peter S. Fader & John R. Hauser, *Implicit Coalitions in a Generalized Prisoner's Dilemma*, 32 J. CONFLICT RESOL. 553 (1988) (same).

48. *E.g.,* SCHELLING, *supra* note 46, at 218; TAYLOR, *supra* note 44, at 15–16, 83–84. Thus, in a one-shot n-person Prisoner's Dilemma game, universal defection is the dominant strategy equilibrium. *Id.* at 15–16.

49. *E.g.,* SCHELLING, *supra* note 46, at 218; TAYLOR, *supra* note 44, at 15–16, 83–84. Thus, universal defection is Pareto inferior to universal cooperation among these n players. *Id.* at 15–16.

50. *E.g.,* SCHELLING, *supra* note 46, at 218; TAYLOR, *supra* note 44, at 15–16, 83–84. Condition (iii) leads some theorists to conclude that there is a number that identifies a critical mass of cooperators, and that the payoff from cooperation by this critical mass is superior to the payoff from universal defection but inferior to the payoff from universal cooperation. SCHELLING, *supra* note 46, at 218; Per Molander, *The Prevalence of Free Riding*, 36 J. CONFLICT RESOL. 756, 759 (1992). *But see* TAYLOR, *supra* note 44, at 83–84 & n.2 (leaving open question of whether payoff from cooperation by critical mass exceeds payoff from universal defection); Philip Pettit, *Free Riding and Foul Dealing*, 83 J. PHIL. 361, 365–66 (1986) (criticizing this assumption because it eliminates the possibility that the lone defector causes cooperators to be made worse off than under universal defection).

51. *See* BAIRD ET AL., *supra* note 40, at 31–35; RASMUSEN, *supra* note 40, at 28–29.

52. *See* SCHELLING, *supra* note 46, at 218; TAYLOR, *supra* note 44, at 82–83; Molander, *supra* note 50, at 759.

53. *See* SCHELLING, *supra* note 46, at 217–19; TAYLOR, *supra* note 44, at 105.

54. *See* SCHELLING, *supra* note 46, at 218.

55. *Id.* (identifying variable that constitutes critical mass of cooperation in n-person game such that payoff from nonuniversal cooperation by critical mass exceeds payoff from universal defection).

payoff from universal cooperation, Schelling argues that nonuniversal cooperation among a critical mass of players permits them to improve upon the payoff from universal defection, although other players reap the benefits of nonuniversal defection.⁵⁶ Michael Taylor disagrees with this analysis.⁵⁷ Conceding that nonuniversal cooperation is an equilibrium in an n-person Prisoner's Dilemma game,⁵⁸ Taylor emphasizes that it is only one of many possible equilibria.⁵⁹ Other theorists argue that the occurrence of a nonuniversal cooperative equilibrium in an n-person Prisoner's Dilemma game depends, not only upon the size of the group, but also upon the nature of the collective action problem.⁶⁰ For example, in an n-person Prisoner's Dilemma story, a single defector may escape punishment altogether by testifying against all (n - 1) coconspirators. When the story instead involves a common pool problem, a single angler, alone fishing faster than the optimal rate, is unlikely to cause extinction or even to affect the other anglers.

Moreover, cooperation by a critical mass of players may be difficult to achieve in an n-person Prisoner's Dilemma game. First, it may be difficult to identify the number of cooperators needed to reach this critical mass.⁶¹ Second,

56. *Id.*

57. See TAYLOR, *supra* note 44, at 192 (questioning propriety of Schelling's conclusion that nonuniversal cooperation by critical mass of players in n-person Prisoner's Dilemma game exceeds payoff from universal defection, on the grounds that it "partly removes the 'dilemma' in the Prisoner's Dilemma"). Taylor also contends that the concept of a critical mass of cooperators is irrelevant to an n-person Assurance game because he understands universal cooperation and universal defection to be the only equilibria. No matter how many players there are in the n-person Assurance game, according to Taylor, no other result is consistent with the payoff structure. *Id.* at 40. Not every commentator agrees. See Runge, *supra* note 46, at 169.

58. TAYLOR, *supra* note 44, at 104 (admitting "that even when some of the players insist on unconditional Defection throughout the supergame, Cooperation may still be rational for the rest"). He reaches this conclusion provisionally, however, arguing that nonuniversal cooperation constitutes an equilibrium only assuming that "there are *some* players who Cooperate conditionally on the Cooperation of *all* the other Cooperators, both conditional and unconditional, and that all the Cooperators' discount rates are not too great." *Id.* at 109.

59. *Id.* at 104 ("But even when strategies of this sort are equilibria, it is difficult to say confidently what the outcome will be, because there are many such equilibria and each player prefers an outcome in which he is an unconditional Defector to one in which he is a Cooperator."). Ultimately, Taylor concludes that these multiple equilibria create games of Chicken that nest within the n-person Prisoner's Dilemma supergame. *Id.* For a definition of Chicken games, see *id.* at 18, 36-37.

60. See HARDIN, COLLECTIVE ACTION, *supra* note 39, at 50-89 (distinguishing among collective action problems caused by: "(1) collective good versus collective bad, (2) step (especially binary) contribution versus continuous levels of individual contribution, and (3) step (especially binary) provision versus continuous levels of provision of the good or bad"); Pettit, *supra* note 50, at 365-66 (distinguishing Prisoner's Dilemma games where many defectors cause cooperators to be worse off than if they had all defected from Prisoner's Dilemma games where a single defector causes the same thing).

61. See Molander, *supra* note 50, at 760 ("Schelling's analysis relies on the distribution function $F(i)$ = number of players willing to cooperate if at least i others cooperate, ($i = 0, 1, \dots, n-1$). In general, F cannot be assumed to be known. Possible

assuming this number is known, reaching it in a one-shot Prisoner's Dilemma game requires advertent coordination or coalition building—a result that is most likely in a game that permits the enforcement of agreements to cooperate.⁶² Where these agreements are not enforceable, the payoff from defection is likely to be so tempting as to preclude even a critical mass of players to cooperate in the one-shot game.⁶³

Although Prisoner's Dilemma games seem intractable, obviously they are not. There are simply too many examples of cooperative behavior in history and in nature for pessimistic versions of these models to be right all of the time.⁶⁴

Players may be able to "resolve" Prisoner's Dilemma games on their own if players repeat the game an indefinite number of times.⁶⁵ Robert Axelrod has shown that a conditional TIT FOR TAT strategy (in which a player cooperates in the first game, and either cooperates or defects in later games depending upon whether the other player cooperated or defected in the prior game)⁶⁶ "wins"⁶⁷

numbers of cooperators are given by the intersections between $y = F(i)$ and the straight line $y = i$. The meaning of this condition is simply that the search for an equilibrium ends when the actual number of cooperators coincides with that which is required by the players. Depending on the shape of F , there may be one or several points of intersection. Without further assumptions, the outcome will therefore not be uniquely determined; in fact, most of Schelling's analysis is devoted to separating out the feasible equilibria.").

62. See TAYLOR, *supra* note 44, at 192 (criticizing Schelling's assumption regarding critical mass because it assumes away the dilemma in Prisoner's Dilemma games; a remark I take to mean that Schelling's assumption is largely inconsistent with the premise of noncooperative versions of the Prisoner's Dilemma game). Game theorists call a game where agreements can be enforced a "cooperative" game. RASMUSEN, *supra* note 40, at 29. The study of n -person cooperative games is largely the study of coalition building. *Id.* at 242.

63. See TAYLOR, *supra* note 44, at 40 ("If [the n -person Prisoner's Dilemma game] is played only once, there is no more to be said about it: universal Defection will be the outcome."). By contrast, game theorists generally understand a one-shot n -person Assurance game to be resolvable. *Id.* (Taylor argues that "the analysis of the [n -person Assurance game] is unproblematic: universal Cooperation will be the outcome, since of the two equilibria it is preferred by every player to the other.").

64. See AXELROD, *supra* note 45, at 3, 73–105 ("We all know that people are not angels, and that they tend to look after themselves and their own first. Yet we also know that cooperation does occur and that our civilization is based upon it.").

65. Repetition alone is insufficient, at least in the resolution of Prisoner's Dilemma games. The indefiniteness of the number of times that a Prisoner's Dilemma game is repeated is a necessary part of this conclusion. See, e.g., BAIRD ET AL., *supra* note 40, at 50–57, 159–65 (discussing backwards induction and its limits); RASMUSEN, *supra* note 40, at 88–89 (discussing backwards induction); TAYLOR, *supra* note 44, at 62 (discussing backwards induction); Drew Fudenberg & Eric Maskin, *The Folk Theorem in Repeated Games with Discounting or with Incomplete Information*, 54 *ECONOMETRICA* 533, 547–52 (1986) (showing that payoffs that Pareto-dominate a one-shot Nash equilibrium can be sustained in equilibrium of finitely repeated game with incomplete information); Reinhard Selten, *The Chain Store Paradox*, 9 *THEORY & DECISION* 127 (1978) (arguing that where game is replayed *known finite* number of times, backward induction shows that universal defection continues as the dominant solution in a Prisoner's Dilemma game).

66. AXELROD, *supra* note 45, at 31. Those who view an n -person Assurance

computer-simulated tournaments⁶⁸ of iterated noncooperative two-person Prisoner's Dilemma games.⁶⁹ Repetition deters a strategy of defection in this game, because it permits knowledgeable players to alter their strategies in later periods based on their opponent's defection in prior periods.⁷⁰ Repetition, sometimes referred to as iteration, permits players to adopt a conditional strategy—a strategy of cooperation in the event that others also cooperate.⁷¹ Conditional strategies roughly enable players to punish defection.⁷²

These strategies are successful in iterated games only under limited circumstances, however.⁷³ First, because an iterated game occurs over time, it is important to account for differences between the value of payoffs in current as

game as presenting a collective action problem also view strategies of conditional cooperation as its resolution. See Robert J. Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POL.* 226, 231 (1985) ("What is important for our purposes is not to focus exclusively on Prisoner's Dilemma *per se*, but to emphasize the fundamental problem that it (along with [Assurance] and Chicken) illustrate. In these games, myopic pursuit of self-interest can be disastrous. Yet both sides can potentially benefit from cooperation—if they can only achieve it."); Runge, *supra* note 46, at 169 (noting that resolution to an n-person Assurance game is "coordination").

67. See AXELROD, *supra* note 45, at 31 ("TIT FOR TAT, submitted by Professor Anatol Rapoport of the University of Toronto, won the tournament."). Saying that TIT FOR TAT is the "winning strategy" means that it scores highest in a tournament Prisoner's Dilemma game. *Id.* at 30–48 & app. A (providing Tournament results); see also *id.* at 29–69 (discussing tournament results and providing theoretical support for success of TIT FOR TAT in these tournaments). Neither TIT FOR TAT nor ALWAYS DEFECT is the dominant equilibrium strategy in an iterated Prisoner's Dilemma game. RASMUSEN, *supra* note 40, at 89.

68. "Tournaments" are "[g]ames in which relative performance is important." RASMUSEN, *supra* note 40, at 167.

69. AXELROD, *supra* note 45, at 27–69; accord TAYLOR, *supra* note 44, at 60–81 (deriving conditions under which TIT FOR TAT and other conditional strategies achieve equilibrium in two-person Prisoner's Dilemma games).

70. "Knowledge" here requires only that players know what strategy was employed in a prior round of the game. AXELROD, *supra* note 45, at 12 ("Thus the only information available to the players about each other is the history of their interaction so far."). It does not require that a player "know" what strategy its opponent intends to deploy in future rounds. *Id.* at 11–12.

71. See *id.* at 12 ("What makes it possible for cooperation to emerge is the fact that the players might meet again. This possibility means that the choices made today not only determine the outcome of this move, but can also influence the later choices of the players. The future can therefore cast a shadow back upon the present and thereby affect the current strategic situation."); TAYLOR, *supra* note 44, at 65–66 (similarly describing conditional strategies).

72. See, e.g., BAIRD ET AL., *supra* note 40, at 173–74 ("[T]he models do show that repetition itself creates the possibility of cooperative behavior. The mechanism that supports cooperation is the threat of future noncooperation for deviations from cooperation.").

73. These factors affect the success of conditional strategies regardless of whether the strategies are adopted in an iterated Prisoner's Dilemma game, Assurance game, or game of Hawk/Dove.

compared to future rounds of the game.⁷⁴ When players heavily discount the value of future games, a strategy of defection may be preferred to a retributive or other conditional strategy.⁷⁵ Second, conditional strategies prevail in iterated games only if players are assumed to be knowledgeable about their opponent's defection; if defection cannot be discovered, it cannot be countered in subsequent plays of the game.⁷⁶ Even if players have sufficient monitoring capabilities, unless they also possess the means and incentives for punishing transgressors, a strategy of defection is likely to dominate a conditional strategy.⁷⁷

Finally, theorists generally agree that conditional strategies are less likely to succeed in an iterated *n*-person than two-person game, for several reasons.⁷⁸ Increasing the numbers of players both complicates⁷⁹ and increases the costs⁸⁰ of

74. See, e.g., AXELROD, *supra* note 45, at 12–14 (discussing importance of time value of future payoffs in iterated Prisoner's Dilemma games); TAYLOR, *supra* note 44, at 61 (same).

75. See AXELROD, *supra* note 45, at 15–16 (arguing that when “discount parameter, *w*, is sufficiently high, there is no best strategy independent of the strategy used by the other player”); TAYLOR, *supra* note 44, at 60–81 (reviewing two-person Prisoner's Dilemma supergame and concluding, among other things, that if each player's discount rate is sufficiently low, the outcome will be mutual cooperation, but that if either player's discount rate is sufficiently high, the outcome will be mutual defection).

76. See AXELROD, *supra* note 45, at 139 (“The ability to recognize the other player from past interactions, and to remember the relevant features of those interactions, is necessary to sustain cooperation. Without these abilities, a player could not use any form of reciprocity and hence could not encourage the other to cooperate.”). Where players are uncertain or completely ignorant about results in prior plays of the iterated game, cooperation is much less likely to occur. See, e.g., BAIRD ET AL., *supra* note 40, at 174–75 (arguing that uncertainty about other players' strategies leads to universal defection). The destabilizing effects of uncertainty may be remedied by adopting a more forgiving conditional strategy. See Per Molander, *The Optimal Level of Generosity in a Selfish, Uncertain Environment*, 29 J. CONFLICT RESOL. 611 (1985) (arguing that introduction of unconditional generosity can remedy problems associated with uncertainty).

77. See AXELROD, *supra* note 45, at 136–39 (discussing importance of reciprocity to resolution of iterated Prisoner's Dilemma games); Axelrod & Keohane, *supra* note 66, at 235–36 (arguing that “sanctioning problems” occur when players are unable “to identify defectors,” when players are “unable to focus retaliation on defectors” and mistakenly punish cooperators, and “when some members of a group lack incentives to punish defectors”).

78. See, e.g., Robert Axelrod & Douglas Dion, *The Further Evolution of Cooperation*, 242 SCI. 1385, 1389 (1988) (“Increasing the number of players who simultaneously interact tends to make cooperation more difficult.”); Molander, *supra* note 50, at 760 (“A simple but important conclusion is that two-person interaction differs qualitatively from interaction in groups of three or more persons. In the light of this observation, generalizations on the general prospects for cooperation based on two-person game models should be viewed with caution.”).

79. See TAYLOR, *supra* note 44, at 105 (“[M]onitoring becomes increasingly difficult as the size of the group increases.”); MICHAEL TAYLOR, COMMUNITY, ANARCHY AND LIBERTY 53 (1982) (“Unfortunately, [voluntary cooperation]...is less likely to occur in large groups than in small ones, since a conditional cooperator must be able to monitor the behaviour [sic] of others in the group so as to reassure himself that they are doing their parts and not taking advantage of him.”); Axelrod & Keohane, *supra* note 66, at 234–35 (“When

monitoring and punishment. If the costs of identifying and punishing defection exceed the benefits of the cooperation, then the reciprocal strategy will no longer be the winning one.⁸¹ In addition, knowledge and means do not ensure that monitoring will occur or that defection will be punished in an n-person game. Because it is difficult to exclude nonconditional cooperators from the beneficial effects of other players' conditional strategies, the benefits of monitoring and punishment accrue both to those who share in the costs of these activities and those who do not.⁸² As a result, too few players may monitor and punish. Moreover, the free-rider effects that plague incentives to monitor and punish defections from the game are enhanced as the group increases in size. Free-riding is easier to detect and punish in small, homogeneous groups than in those that are large and diverse.⁸³

When self-interested players⁸⁴ cannot resolve these collective action problems on their own,⁸⁵ they may look to the State for help. For example, a

there are many actors,...it may be impossible to identify, much less to punish, defection; even if it is possible, none of the cooperators may have an incentive to play the role of policeman. Each cooperator may seek to be a free-rider on the willingness of others to enforce the rules."); Jack Hirshleifer, *Evolutionary Models in Economics and Law: Cooperation and Conflict and Strategies*, 4 RES. L. & ECON. 1, 25 (1982) (discussing "cost of complexity" that inheres when conditional strategies are adopted in multiplayer games); Molander, *supra* note 50, at 757 ("Reward or retaliation is difficult to target in groups of more than two persons.").

80. See Hirshleifer, *supra* note 79, at 25 ("The Retaliator must be able to recognize Helpers and Nonhelpers, and must also possess both helping and nonhelping capabilities in its repertory of feasible actions. These capacities again probably impose a certain cost upon being a Retaliator rather than pure Helper.").

81. See *id.* ("Then, in an all-Retaliator population ($r = 1$), it would be *strictly* more profitable (rather than only equally profitable) to be a pure Helper, instead. Thus the all-Retaliator population is not an equilibrium, and in fact the final outcome will be an all-Nonhelper population. We are back in the Prisoner's Dilemma.").

82. See Axelrod & Keohane, *supra* note 66, at 235-36 (discussing lack of incentives for every conditional cooperator to participate in punishing defectors and concluding that these free-rider problems may prevent success of strategy of conditional cooperation).

83. See TAYLOR, *supra* note 44, at 105 ("The required monitoring is more likely to be possible in a very small group, especially one with an unchanging or very slowly changing membership, or in a community."). For a similar conclusion in a different context, see *infra* text accompanying notes 102-09, where Mancur Olson's theory of collective action is discussed (noting that Olson concludes that interest groups are more likely to form and influence public policy when they are small and organized around a single narrow issue).

84. Players in the Prisoner's Dilemma game generally are assumed to pursue their own narrow self-interest when determining strategy. See, e.g., TAYLOR, *supra* note 44, at 109 (noting that, for the lion's share of his argument, he assumes players are pure egoists). Where players are instead assumed to act as altruists, Prisoner's Dilemma games are often internally resolvable. See *id.* at 109-24 (discussing effects of various forms of altruism on Prisoner's Dilemma games).

85. The players in Prisoner's Dilemma games generally are assumed to be unable to enter into enforceable agreements. (If players were able to enter into an enforceable agreement to cooperate, they would, since the payoff from mutual cooperation is preferred

Prisoner's Dilemma may be resolved with legislation⁸⁶ that coerces players to cooperate by sanctioning defection.⁸⁷ But if mutual defection strongly dominates Prisoner's Dilemma games, why would a democratic society adopt this sort of legislative resolution to the dilemma? Game theory does not address this question head on. It implicitly assumes that legislation of this sort will be enacted because lawmakers act in the interests of society at large, not in their own self-interest.⁸⁸ In other contexts, however, economic theories of legislation instead typically assume that lawmakers, like other actors, are self-interested "seekers of re-election."⁸⁹ Will self-interested lawmakers enact liability rules that resolve a Prisoner's Dilemma, or will they be Tempted to defect from this legislation like they are Tempted to defect in the Dilemma game they seek to resolve? And even if self-interested lawmakers enact this legislation to resolve a Prisoner's Dilemma game (or common pool problem), won't they be Tempted to repeal or amend it sooner or later? Before addressing these questions in Part IV of this Article, Part III first reviews existing economic and political theories of legislation.

III. ECONOMIC AND POLITICAL THEORIES OF LEGISLATION

Public choice theory, sometimes referred to as the economic theory of legislation, contends that rational self-interested legislators tend to enact legislation that favors organized interests⁹⁰ to the detriment of social welfare.⁹¹ According to

to the payoff from mutual defection.) *Id.* at 14–15. That is, Prisoner's Dilemma games generally are analyzed as *noncooperative games*—games in which the players cannot make binding commitments to each other because there exists no mechanism (like the state) for the enforcement of such commitments. See RASMUSEN, *supra* note 40, at 29 (defining cooperative and noncooperative games).

86. Common law rules can also resolve common pool problems. The stability of these sorts of legal rules are not addressed in this Article because bankruptcy law has historically been largely statutory.

87. This sort of resolute statute works through the adoption of a rule of liability. See *supra* note 1 (distinguishing among common pool resolutions that adopt rules of property, contract and liability, and noting that this Article concentrates on the latter).

88. See, e.g., W.G. Runciman & Amartya K. Sen, *Games, Justice and the General Will*, 74 *MIND* 554, 556 (1965) ("It is finally the legislator who must persuade the [players in a Prisoner's Dilemma game] of their true interest..."). Contractarian models assume that these "lawmakers" act in their own self-interest, but, unlike economic and game theorists, define this self-interested action as taking place behind a (thin or thick) veil of ignorance. Contractarian models of bankruptcy law are no exception. Compare JACKSON, *LOGIC AND LIMITS*, *supra* note 3 (formulating contractarian model that assumes self-interested creditors are risk averse when deciding whether to adopt bankruptcy legislation by consensus), with Korobkin, *Foundations of Bankruptcy Law*, *supra* note 15 (criticizing Jackson's contractarian model for assuming only a thin veil of ignorance).

89. See *infra* text accompanying notes 110–17 (discussing public choice theories on supply of legislation).

90. Some scholars distinguish between "organized interests" on one hand and "interest groups" or "pressure groups" on the other, using the latter to refer to membership organizations, and the former to include "not only associations such as trade associations, unions, professional associations, and environmental groups that have individuals or organizations as members, but also politically active organizations such as universities,

these theorists, imperfections in the market for legislation exist both because those who supply legislation are only indirectly affected by those who demand it and because legislation is a public good.

Public choice theorists note that, in our representative form of democracy, voters do not have a direct voice in the supply of legislation.⁹² Voters elect legislators; and legislators enact statutes. If voters are displeased with the statutes enacted by their representatives, they can, in the next election, vote for other candidates who they believe are likely to enact legislation more to their liking. Alternatively, voters can seek to influence legislation prospectively and more directly by making their opinions on proposed statutes known to their representatives.

Neither approach is likely to be effective when pursued by individual voters. Information about a legislator's voting record and pending legislation is time consuming to compile.⁹³ Moreover, it may be irrational for any single voter to accumulate this information since no individual voter is likely to make a difference in an election; nor is an individual voter likely to make a difference in a

hospitals, public interest law firms, and, especially, corporations that have no members in the ordinary sense." KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 10 (1986). These terms are also distinguished from the term "lobbyist," which is ascribed a narrow meaning; lobbying is defined as "direct contact between representatives of organized interests and policymakers." *Id.* at 10 n.14.

91. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 291-92 (1963) ("Almost any conceivable collective action will provide more benefits to some citizens than to others, and almost any conceivable distribution of a given cost sum will bear more heavily on some individuals and groups than on others.... [I]t is the opportunity to secure differential benefits from collective activity that attracts the political 'profit-seeking' group."); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 14-15 (1991) ("Public choice models often treat the legislative process as a microeconomic system in which 'actual political choices are determined by the efforts of individuals and groups to further their own interests,' efforts that have been labeled 'rent-seeking.'") (quoting Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983), and Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43 (1988)); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) ("In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation." (footnote omitted)).

92. See Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 280 (1990) ("Many economists and economically-minded lawyers in recent years have come to view much governmental regulation of business as the unfortunate result of a perverse quirk in our political system. In this view, representative democracy gives unwarranted weight to the interests of small and discrete pressure groups, whose interests may be directly opposed to the interests of the larger public." (footnote omitted)).

93. See, e.g., Macey, *supra* note 91, at 47 ("Individuals have very little incentive even to inform themselves about the relevant issues in a political campaign much less to inform themselves about the legislative process on an ongoing basis, or to spend resources to affect that process.").

legislature's consideration of a bill.⁹⁴ In addition, free-rider effects further discourage individuals from expending the time and effort necessary to become informed voters and lobbyists: once elected, legislators represent both informed and uninformed voters; once enacted, statutes govern both the informed and uninformed.⁹⁵ Many rational voters will, thus, sit back and remain ignorant, reasonably assuming that another voter will have sufficient incentives to acquire information about legislators and legislation.⁹⁶

Moreover, even if voters are perfectly informed and take the time to vote, issues get bundled in ways that make elections imperfect signals of voters' preferences on issues.⁹⁷ When they elect representatives, voters choose between candidates who offer a "package" of positions.⁹⁸ Because these packages cannot be disentangled by voters, even perfectly informed voters' election decisions focus on candidates' positions on issues that intensely interest the voter, and ignore candidates' positions on issues that benefit or harm the voter in more diffuse ways.⁹⁹ These issues of diffuse interest to voters can be systematically

94. See, e.g., BUCHANAN & TULLOCK, *supra* note 91, at 38 ("In collective choice...there can never be so precise a relationship between individual action and result.... The chooser-voter will, of course, recognize the existence of both the benefit and the cost side of any proposed public action, but neither his own share in the benefits nor his own share in the costs can be so readily estimated as in the comparable market choices."); Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 193 (1988) ("The probability that an individual's vote will be decisive in a typical election is effectively zero."). The obvious response to this argument criticizes the characterization of voters as motivated solely by self-interest. *Id.* ("People are motivated to go to the polls and vote for much the same reason they are motivated to go to the sports arena and cheer. It is the satisfaction that comes from participation and expression, not the expectation that they will determine the outcome, that draws people to the polls and to the sports arena.").

95. See, e.g., BUCHANAN & TULLOCK, *supra* note 91, at 38 ("Secure in the knowledge that, regardless of his own action, social or collective decisions affecting him will be made, the individual is offered a greater opportunity either to abstain altogether from making a positive choice or to choose without having considered the alternatives carefully."); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-76 (1957) (discussing legislation as public good).

96. See Macey, *supra* note 91, at 47 n.17 ("The term for the concept presented here is 'rational ignorance.'").

97. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 41 (1991) (discussing "problem of issue bundling").

98. See BUCHANAN & TULLOCK, *supra* note 91, at 218 ("The individual who sought to be elected to the representative assembly would find it necessary to offer a 'package' program sufficiently attractive to encourage the support of a majority of his constituents."); Elhauge, *supra* note 97, at 41 ("Voting normally requires a choice among a limited set of candidates, each of whom offers a package of positions.").

99. See Elhauge, *supra* note 97, at 41 ("Thus, even a perfectly informed voter can often do no better than to choose between candidates based on the issues that intensely interest the voter, even though a candidate's positions on other issues harm the voter in more diffuse ways." (footnote omitted)). Buchanan and Tullock refer to "issue bundling" as "implicit logrolling," and have the following to say about the phenomenon:

Logrolling may occur in a second way, which we shall call *implicit logrolling*. Large bodies of voters may be called on to decide on

underrepresented.¹⁰⁰

As a result, incentives exist for individuals to join together in interest groups. Groups of voters tend to have a greater influence upon the election of legislators and the enactment of legislation than do individual voters and individual lobbyists.¹⁰¹ The collectivization of voters does not resolve market imperfections in the demand for legislation, however, because free-rider problems also plague these collectives.¹⁰² Free-rider problems are said to exist because collectivization is costly to those who organize, although the benefits of organization, and the legislation that flows from it, accrue to everyone, whether or not they spent the time and effort to organize. Mancur Olson contends that collective action will occur when organization is advantageous to individual members of the affected group—when collective action is advantageous, the group is *privileged* and likely to organize; when collective action is not advantageous, the group is *latent* and unlikely to organize.¹⁰³

Olson argues that groups are more likely to be privileged when they are small to middle-sized and focused on relatively narrow issues.¹⁰⁴ Obversely, he

complex issues, such as which party will rule or which set of issues will be approved in a referendum vote. Here there is *no* formal trading of votes, but an analogous process takes place. The political “entrepreneurs” who offer candidates or programs to the voters make up a complex mixture of policies designed to attract support. In so doing, they keep firmly in mind the fact that the single voter may be so interested in the outcome of a particular issue that he will vote for the one party that supports this issue, although he may be opposed to the party stand on all other issues.

BUCHANAN & TULLOCK, *supra* note 91, at 134–35; *see also id.* at 217–20 (discussing effects of representative form of democracy on costs of collective decision making, including costs of implicit logrolling).

100. *See* Elhaage, *supra* note 97, at 41 (“To the extent this happens, the diffuse interests can be systematically underrepresented even if voters face no collective action problem in informing themselves and taking the time to vote.”).

101. *See, e.g.,* Macey, *supra* note 91, at 47 (“[I]ndividuals who want to affect the legislative process will find it advantageous to organize into political pressure groups in order to economize on the high costs of obtaining information about the welfare affects of impending legislation.”).

102. *See, e.g.,* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 21 (1974) (“Though all of the members of the group therefore have a common interest in obtaining this collective benefit, they have no common interest in paying the cost of providing that collective good. Each would prefer that the others pay the entire cost, and ordinarily would get any benefit provided whether he had borne part of the cost or not.”).

103. *Id.* at 22–23, 49–50. Olson argues that an individual will contribute to a collective action if there is a net benefit to that individual from his or her own contribution to the group’s collective good, a quantity he defines as $A(i)$. *Id.* Because $A(i)$ is defined as a net benefit, it is said to equal the difference between the gross benefits of the collective action to the individual, $V(i)$, and the costs of the collective action to the individual, $C(i)$. *Id.* Algebraically, $A(i) = V(i) - C(i)$. *Id.* Where $A(i) > 0$, Olson refers to the group as *privileged*; where $A(i) < 0$, Olson calls the group *latent*. *Id.*

104. *See, e.g., id.* at 33 (“[C]ertain small groups can provide themselves with collective goods without relying on coercion or any positive inducements apart from the

argues that large, diffuse groups are more likely to be latent because their free-rider problems are enhanced.¹⁰⁵ He contends that members of a large group are less likely than the members of a small group to assist in seeking or opposing legislation since the benefits of success will be more diffuse in a large group than in a small one.¹⁰⁶ Moreover, the argument continues, "large groups are not just less effective in their own right; they also generally face more effective opposition than small groups."¹⁰⁷ Similarly, small interest groups are more effective opponents because the members of a small interest group stand to suffer greater per capita losses or reap greater per capita gains than the members of a large interest group.¹⁰⁸ Finally, inaction is more likely to go unnoticed, or unremedied, in a large group than in a small one because larger groups face greater organizational costs.¹⁰⁹

collective good itself. This is because in some small groups each of the members, or at least one of them, will find that his personal gain from having the collective good exceeds the total cost of providing some amount of that collective good; there are members who would be better off if the collective good were provided, even if they had to pay the entire cost of providing it themselves, than they would be if it were not provided."). Not all theorists agree that group size is determinative of the provision of collective goods. For the argument that the relationship between group size and group organization is an indirect one, see, for example, NORMAN FROHLICH ET AL., *POLITICAL LEADERSHIP AND COLLECTIVE GOODS* 145-50 (1971) [hereinafter FROHLICH ET AL., *POLITICAL LEADERSHIP*]; HARDIN, *COLLECTIVE ACTION*, *supra* note 39, at 38-49; Norman Frohlich et al., *Individual Contributions for Collective Goods*, 19 J. CONFLICT RESOL. 310, 327 (1975).

105. See OLSON, *supra* note 102, at 48 ("First, the larger the group, the smaller the fraction of the total group benefit any person acting in the group interest receives, and the less adequate the reward for any group-oriented action, and the farther the group falls short of getting an optimal supply of the collective good, even if it should get some. Second, since the larger the group, the smaller the share of the total benefit going to any individual, or to any (absolutely) small subset of members of the group, the less the likelihood that any small subset of the group, much less any single individual, will gain enough from getting the collective good to bear the burden of providing even a small amount of it; in other words, the larger the group the smaller the likelihood of oligopolistic interaction that might help obtain the good. Third, the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained.").

106. *Id.*; MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 31-34 (1982). Not all economists agree with Olson on this point, however. See, e.g., FROHLICH ET AL., *POLITICAL LEADERSHIP*, *supra* note 104, at 146 ("[T]he conclusion that suboptimality will increase with group size only holds when arrangements for marginal costs sharing by the recipients of the collective good are ruled out.").

107. Elhauge, *supra* note 97, at 39 (citation omitted).

108. See *id.* ("[F]or any given level of per capita benefit to group members from a legal change, a larger group will likely face a smaller opposition that is more motivated because it suffers greater per capita costs.").

109. See *id.* at 38 ("Having a large number of members makes it more difficult and costly to identify members, reach collective cost-sharing agreements, and monitor and punish free riding." (citation omitted)). Frohlich, Oppenheimer, and Young question this premise, as well, however. FROHLICH ET AL., *POLITICAL LEADERSHIP*, *supra* note 104, at 148 ("In general, it does not automatically follow that the costs of the supply of a collective good will be a function of the number of recipients.").

The economic theory of legislation also focuses on imperfections in the supply of statutes. Utility-maximizing legislators are described by theorists of this school as motivated solely by a desire to be reelected.¹¹⁰ From this perspective, legislators will enact statutes that maximize retention of their incumbent status.¹¹¹ If voters were perfectly informed about pending legislation and their representatives perfectly informed about voters' legislative preferences, legislators' self-interest in maximizing their reelection bids would perfectly mirror voters' self-interests in maximizing the utility they derive from legislation. But, as noted above, free-rider problems discourage voters from acquiring this information.¹¹² Because small, issue-oriented interest groups are most likely to succeed in forming, legislators are more likely to learn of these lobbyists' preferences than of the preferences of the public at large, at least when the legislation involves narrow, specialized issues. Thus, the free-rider problems inherent in the demand for legislation also skew the supply of legislation.¹¹³ As a result, the argument runs, legislators supply statutes that benefit effective private interest groups to the detriment of the public interest.¹¹⁴

Supplementing this argument, David Mayhew contends that self-interested legislators maximize their chances of reelection in part by engaging in "credit claiming,"¹¹⁵ and that credit claiming is most common, and most believable, with "particularized benefits."¹¹⁶ He, thus, concludes that self-interested legislators are more likely to enact legislation that awards particularized rather than

110. See, e.g., DOWNS, *supra* note 95, at 27 ("Throughout our model, we assume that every agent acts in accordance with this view of human nature. Thus, whenever we speak of rational behavior, we always mean rational behavior directed primarily towards selfish ends."); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (1974) (arguing that congressmen are "single-minded seekers of reelection").

111. E.g., MAYHEW, *supra* note 110.

112. See *supra* text accompanying notes 93-96 (discussing "rational ignorance").

113. See Macey, *supra* note 91, at 52-56 (discussing factors that skew supply of legislation).

114. See *supra* text accompanying notes 90-91.

115. See MAYHEW, *supra* note 110. Mayhew actually describes three "electorally useful" activities: advertising, credit claiming, and position taking. *Id.* at 49. He defines "advertising" as "any effort to disseminate one's name among constituents in such a fashion as to create a favorable image but in messages having little or no issue content." *Id.* He defines "credit claiming" as "acting so as to generate a belief in a relevant political actor (or actors) that one is personally responsible for causing the government, or some unit thereof, to do something that the actor (or actors) considers desirable." *Id.* at 52-53. "Position taking" is defined as "the public enunciation of a judgmental statement on anything likely to be of interest to political actors." *Id.* at 61.

116. *Id.* at 53-54. Mayhew defines "particularized benefits" as having two properties: (1) they are small-scale enough to permit a single congressman to be responsible for obtaining the benefit; and (2) they are allocated on an ad hoc basis, "with a congressman apparently having a hand in the allocation." *Id.* at 54. He admits that "particularized benefits" closely resemble what Theodore Lowi calls "distributive" benefits. *Id.* at 53 & n.88. For a discussion of Lowi's distinction between "distributive" and other benefits, see *infra* note 173.

nonparticularized benefits.¹¹⁷

Public choice theorists argue that the nature of the issue can affect the likelihood that organized interests will disproportionately influence legislators.¹¹⁸ When legislation involves complicated and technical issues, especially those involving scientific or commercial subjects, organized interests are particularly likely to influence the content of the statute, if not its passage, because, other than industry groups and other affected interests, few will be motivated to inform themselves on the contents of this legislation.¹¹⁹ Individual lawmakers arguably are unlikely to inform themselves about the details of complex legislation, content to rely on committees and their staff for information.¹²⁰ Committees and their staff may, in turn, rely heavily on information provided to them by organized interests. There may be no countervailing position presented on some issues.¹²¹ Finally, Jonathan Macey argues that the influence of organized interests are enhanced with complex legislation because complex statutes provide cover for what he refers to as "hidden-implicit" deals with interest groups.¹²² He defines "hidden-implicit" statutes as those "couched in public interest terms"¹²³ to "avoid the political fallout associated with blatant special interest statutes."¹²⁴ Behind this public-interest rhetoric, Macey argues, lies the "hidden-implicit" benefit to the organized interest.¹²⁵

Public choice theorists also contend that legislative processes can enhance the influence of special interest groups in several ways. First, committee structure

117. MAYHEW, *supra* note 110, at 127–28 (Mayhew claims that one effect of "credit claiming" is "a strong tendency to wrap policies in packages that are salable as particularized benefits. Not only do congressmen aggressively seek out opportunities to supply such benefits (little or no "pressure" is needed), they tend in framing laws to give a particularistic cast to matters that do not obviously require it.").

118. See Jonathan R. Macey, *The Political Science of Regulating Bank Risk*, 49 OHIO ST. L.J. 1277, 1288 (1989) ("Extremely complex regulatory issues are especially likely to be resolved in ways that benefit special interest groups.").

119. See *id.* at 1289 ("[T]he cost of obtaining sufficient information to make an informed judgment about complex issues provides a decisive advantage for special interest groups.").

120. See *id.* ("Although the complexity of the issue already gives the legislative committee a virtual monopoly on the relevant information about the pros and cons of a proposed legislative package, the committee's power is further enhanced because it does not pay for other lawmakers to become informed about the intricacies of the policies under the command of the relevant committee."). For arguments that congressional committee structure enhances the influence of organized interests, see *infra* text accompanying notes 126–28, where public choice literature on committees is discussed.

121. See Macey, *supra* note 118, at 1290 ("The legislators will not receive any other viewpoint because only interest groups find it worthwhile to invest the resources to obtain, systematize, and convey arguments about such a complex issue to Congress.").

122. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (discussing complex statutes with "hidden-implicit deals" with special interests groups).

123. Macey, *supra* note 118, at 1289.

124. Macey, *supra* note 122, at 233.

125. *Id.*

can exacerbate interest group influence because committee members have greater influence over the content of legislation germane to their committee than other members of the legislature.¹²⁶ Interest groups' demand for enactment of a statute, thus, may be enhanced by committee structure because it allows organized interests to focus their lobbying efforts on the handful of legislators with committee membership.¹²⁷ Committee structure also impacts the supply of legislation because it facilitates credit claiming and position taking.¹²⁸ Second, logrolling¹²⁹ may also enhance the influence of interest groups because logrolling enhances the likelihood that legislation, of intense interest to some and diffuse interest to others, will be enacted.¹³⁰ With logrolling, competition among interest groups may be less likely and pork-barrel projects may be more likely.¹³¹ Finally, procedural rules permitting the bundling of issues in a single statute, and prohibiting the disentanglement of issues, are said to enhance the influence of interest groups.¹³² Omnibus bills that package several issues in the same bill may enhance the likelihood of the bill's

126. For discussions of the influence of organized interests on congressional committees and their members, see RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 15-45 (1973); JOHN F. MANLEY, *THE POLITICS OF FINANCE: THE HOUSE COMMITTEE ON WAYS AND MEANS* 223, 263 (1970). *But see* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 367-72 (1991) (questioning literature that emphasizes influence of interest groups on congressional committees as "subject to analytical and empirical doubt").

127. *See, e.g.*, Elhauge, *supra* note 97, at 42 ("[C]ommittee structure can exacerbate interest group influence." (footnote omitted)).

128. *See* MAYHEW, *supra* note 110, at 60-61 ("[M]any congressman can believably claim credit for blocking bills in subcommittee, adding on amendments in committee, and so on.").

129. Logrolling is defined as legislators' trades on votes. *See, e.g.*, BUCHANAN & TULLOCK, *supra* note 91, at 134 (defining logrolling as "exchanges of votes"). A legislator who is intensely interested in a piece of legislation can obtain the votes of legislators only diffusely interested in it by promising to vote favorably on another piece of legislation of diffuse interest to herself and of intense interest to the other. *Id.* at 132-40 (comparing model that excludes logrolling from one that includes it and noting that the latter accounts for differences in intensity of preference for collective action).

130. *See id.* at 133 ("Without some form of vote-trading, even those voters who are completely indifferent on a given issue will find their preferences given as much weight as those of the most concerned individuals.").

131. *See, e.g.*, BRIAN BARRY, *POLITICAL ARGUMENT* 318 (1965) ("[I]t is perhaps easiest to guess that logrolling under conditions of imperfect information will tend to produce over-investment in projects which yield specific benefits to determinate groups, because such benefits are highly divisible to the beneficiaries whereas costs are not so visible to the general taxpayer."); BUCHANAN & TULLOCK, *supra* note 91, at 131-69 (describing dynamic model of operational decision making and concluding that logrolling enhances the likelihood of governmental activity that benefits specific individuals or groups in discriminatory fashion and that is financed from generalized sources of revenue).

132. *See, e.g.*, R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 103 (1990) (noting that "closed rules" have waned in popularity, replaced with "restrictive rules" that limit "the number, type, and content of amendments"); MANLEY, *supra* note 126, at 223 (explaining that the "closed rule," which precludes floor amendments, channels interest groups toward committee members and away from nonmembers).

enactment since logrolling is simplified.¹³³

Because public choice theory focuses its criticism on lawmakers' incentives to supply legislation that maximizes their chances for reelection, it would be reasonable to assume that these theorists would be less critical (and perhaps even complimentary) of legislation drafted by individuals who do not seek reelection. Nonetheless, Robert Scott, alone and in conjunction with Allan Schwartz,¹³⁴ contends that the "private legislatures"¹³⁵ ("PL") responsible for drafting the Uniform Commercial Code—that is, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Law (NCCUSL)¹³⁶—are not free from interest group influence.¹³⁷ Schwartz and Scott compare the members of the ALI and NCCUSL to the members of a public legislature, and argue that private lawmakers are both similar and dissimilar to elected representatives. Based on this comparison, Schwartz and Scott suspect that private legislatures perform poorly relative to public ones.¹³⁸

The dissimilarities between private and public legislatures are fairly obvious. First, members of private legislatures are not elected to their positions in the ordinary sense and, thus, their motivations to vote for or against legislative proposals are not affected by their self-interest in retaining their incumbent status. Schwartz and Scott do not conclude that private lawmakers are motivated solely from public interest, however.¹³⁹ Instead, they describe a member of a private

133. See ARNOLD, *supra* note 132, at 102 (describing omnibus bills as "allow[ing] representatives to hide [controversial provisions] from their constituents").

134. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995); Scott, *supra* note 25; see also Robert E. Scott, *The Truth About Secured Financing*, CORNELL L. REV. (forthcoming 1997) (on file with the author).

135. The term "private legislature" belongs to Schwartz and Scott. Schwartz & Scott, *supra* note 134, at 607; Scott, *supra* note 25, at 1810. They use the abbreviation "PL" in referring to these private legislatures.

136. For more extensive descriptions of the American Law Institute and the National Conference of Commissioners of Uniform State Laws, see, for example, Schwartz & Scott, *supra* note 134, at 600-04; Scott, *supra* note 25, at 1803-04.

137. Schwartz and Scott are not the only scholars to have applied public choice theory to the Uniform Commercial Code. For additional such efforts, see Kathy Patchen, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 U. MINN. L. REV. 83 (1993); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEG. STUD. 131 (1996); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991). Schwartz and Scott's political theory of the Uniform Commercial Code is the most controversial of the lot, however. See Alces & Frisch, *supra* note 25.

138. Schwartz & Scott, *supra* note 134, at 651; Scott, *supra* note 134 (manuscript at 14). *But see* Alces & Frisch, *supra* note 25, at 1238 (contending that "[t]he legislative output of public legislatures shows signs of interest group influence no better, and perhaps far worse, than the indications of such pressure seen in the product of [private legislatures]").

139. See Schwartz & Scott, *supra* note 134, at 611 ("PL legislators are not elected and so may be thought to have an interest only in policy, but this assumption is too strong.").

legislature as seeking “to maximize the public good (as she conceives it),” but constrained by self-interest (as they conceive it). They define this self-interest as an interest in seeing “(1) that her private interest—for example, her law practice—is not directly impaired; (2) that her reputation for good judgment is not impaired; and (3) that she spends little time on PL business.”¹⁴⁰

Second, members of private legislatures do not belong to “UCC parties” and “do not owe allegiance to any constituency for their positions.”¹⁴¹ As a result, Schwartz and Scott conclude that they are ineffective in trading votes or log-rolling.¹⁴² Rather than suggesting that these dissimilarities minimize the influence of interest groups, Schwartz and Scott contend that organized interests are pivotal in their model of private legislatures.¹⁴³ They support this conclusion by noting a third dissimilarity: Unlike public legislators, private lawmakers do not themselves adopt legislation. Instead, private lawmakers may persuade public legislatures to enact the laws that they draft.¹⁴⁴ Consequently, Schwartz and Scott recognize that private lawmakers depend on the presence of interest group support (or at least the absence of interest group opposition) to ensure passage of their proposed legislation.¹⁴⁵

140. Scott, *supra* note 25, at 1814–15; see also Ribstein & Kobayashi, *supra* note 137, at 145 (similarly arguing that commissioners have “private interests that affect the content of uniform laws”—interests in preserving their reputation for good judgment, interests in “expense-paid trips to pleasant places for drafting meetings,” and interests in serving the business interests of their clients).

141. Scott, *supra* note 25, at 1813.

142. See Schwartz & Scott, *supra* note 134, at 613 (contending that “there is no cross-subject logrolling in the ALI and NCCUSL”). But see Alces & Frisch, *supra* note 25, at 1220–23 (refuting both the assertion that “logrolling is very difficult for members of private legislatures,” and its significance).

143. Schwartz and Scott do not describe precisely *how* organized interests influence NCCUSL and the ALI, but Ribstein and Kobayashi do. See Ribstein & Kobayashi, *supra* note 137, at 142–43 (arguing that organized interests influence the ALI and NCCUSL by inviting them to attend and participate in drafting and annual meetings, by requiring uniform law drafters to consult with the American Bar Association committee with jurisdiction over the subject matter, and by imposing supermajority voting rules).

144. See Schwartz & Scott, *supra* note 134, at 608 & n.33 (noting that restatements differ from uniform laws “because legislatures do not enact restatements”); see also Ribstein & Kobayashi, *supra* note 137, at 134 (“Because the NCCUSL must rely on the state legislatures to enact their proposals, agency costs can arise at two levels during the uniform law-making process—that is, agency costs could arise because of misincentives on the part of NCCUSL commissioners or the state legislatures or both.”).

145. Scott, *supra* note 25, at 1813–14. While Ribstein and Kobayashi generally agree with this insight, they view interest group support of the uniform lawmaking process as a more complicated question. Ribstein & Kobayashi, *supra* note 137, at 146–47 (“But it is not clear why such groups would bother with the intermediate stage of pressing their interests before a group of uniform lawmakers. Although influencing a single uniform lawmaking body may be less costly than lobbying 50 state legislatures, the advantages of lobbying the NCCUSL depend on whether the NCCUSL’s endorsement is likely to result in adoption of state laws.”). They conjecture that organized interests involve themselves in the uniform lawmaking process when to do so provides camouflage for their influence and

Schwartz and Scott also view private and public legislatures as similar in important ways, but do not view these similarities as likely to diminish the influence of organized interests on legislative proposals. Like the lawmakers in a public legislature, Schwartz and Scott note that the members of the ALI and NCCUSL act through committees,¹⁴⁶ and that members of committees are likely to be better informed on the legislative proposal than those not on the committee.¹⁴⁷ They also argue that rank-and-file members of the ALI and NCCUSL (who they refer to as the "median PL member") have even less incentive to educate themselves on the legislative proposal before voting than their counterparts in a public legislature.¹⁴⁸ They reach this conclusion because they understand membership in the ALI or NCCUSL to be an occasional responsibility, unlike the responsibilities of most legislators. Schwartz and Scott view these private legislators as motivated, in part, by an interest in minimizing their time spent on "PL business."¹⁴⁹

Based on these similarities and differences, Schwartz and Scott conclude that private legislatures similar to the ALI and NCCUSL "will have a strong status quo bias and sometimes will be captured by powerful interests."¹⁵⁰ Where only one interest group is active in the legislative process, Schwartz and Scott contend that

where involvement reduces the costs of interest group activity by serving as a focal point.
Id.

146. Scott, *supra* note 25, at 1803–10. They act through committees because the members of the ALI and NCCUSL are too numerous themselves to draft the Uniform Commercial Code. Scott describes the process as follows. First, the ALI (in consultation with NCCUSL) appoints a study group. The study group meets several times a year for several years, and reports (both to the ALI and NCCUSL) conceptually as to whether and what revisions should be made. Based on this report, the "NCCUSL (in consultation with the ALI) then appoints drafting committees, which reformulate the reports into statutory language." *Id.* at 1804–05. The drafting committees report to NCCUSL. "Thereafter, the NCCUSL tries to sell the new statutory provisions to the state legislatures." *Id.* at 1805; accord Schwartz & Scott, *supra* note 134, at 600–04.

147. Scott, *supra* note 25, at 1814–15. Members of a study group or drafting committee have more information than members of either the ALI or NCCUSL, according to Schwartz and Scott, both because some members are chosen to sit on a study group or drafting committee because they are experts on the subject matter and because other members of these committees develop an expertise by virtue of their membership on the study group or drafting committee. See Scott, *supra* note 25, at 1807–10 ("The principal currency in the Study Group, therefore, is technical expertise."). But see Alces & Frisch, *supra* note 25, at 1225 (questioning assertion that study group and drafting committee members are always experts and noting that some members are chosen to sit on these committees although they have "no particular expertise in the subject matter of the draft").

148. Scott, *supra* note 25, at 1814.

149. *Id.* at 1815. But see Alces & Frisch, *supra* note 25, at 1227 (questioning this conclusion as inconsistent with their own experience and noting that, on occasion, "median PL members" oppose positions taken in committee reports, "distribute position papers," and engage the private legislature in "real, substantial debate").

150. Schwartz & Scott, *supra* note 134, at 651. In addition, Schwartz and Scott conclude that "the products of these private legislative processes will sometimes be characterized by vague and imprecise rules and other times by crude but precise bright-line rules." *Id.*

the private legislature is likely to adopt moderate proposals favored by that organized interest.¹⁵¹ They also argue that where a single interest group dominates, incentives exist for the private legislature to propose “precise, clear, bright-line rules.”¹⁵² Where interest groups compete, however, Schwartz and Scott contend that the private legislature is likely either to adopt consensus proposals or to retain the status quo.¹⁵³ They contend that incentives exist for the private legislature either to do nothing or to “reach agreement on a vague and nondirective compromise that appears to accomplish something” where interest groups effectively compete against each other.¹⁵⁴

Schwartz and Scott concede that support for their model is largely impressionistic.¹⁵⁵ Based on their own contrary impressionistic evidence, Alces and Frisch question the accuracy of this theory as applied to the ALI and NCCUSL.¹⁵⁶ Others may question the accuracy of this model as applied to distinct private legislatures. The public choice theory of private legislatures is still relatively undeveloped.

As applied to conventional, public legislatures, however, criticism of public choice theory is fairly well developed. Political scientists and other theorists have criticized public choice theory as oversimplifying legislators’ interests in supplying and voters’ interests in demanding legislation. Critics of public choice theory offer a more complicated, and ultimately a richer, model of the political process. In the end, however, critics qualify rather than question the conclusions of public choice theory.

151. See Scott, *supra* note 25, at 1815 (“If only a single interest group is active, the proposal favored by the active group may influence the PL member’s vote. If the proposal favored by the interest group is sufficiently close to the preferences of the median PL members, the PL is likely to adopt it. This is because the uninformed participant wishes to do good and be seen as having good judgment, yet spends little time on PL business. It follows that the messages of a single expert will be taken as credible when they are not inconsistent with the uninformed preferences of the median PL members, because people of good judgment tend to heed such expert advice, especially when they are unable to inform themselves independently.”).

152. *Id.* at 1819 (“The incentives for an influential interest group to favor precise, bright-line rules should be obvious—precise rules reduce the industry’s costs of compliance with the rules, and, if they are rules that help the industry, give the interpreters of rules (i.e., judges) less ability to read the rule in a way contrary to the industry’s interest.”).

153. *Id.* at 1815 (“A person of good judgment does not favor one expert over another without becoming better informed. But if there are inadequate incentives to becoming informed, the member will prefer one of two alternatives: either to retain the status quo or to have the competing views accommodated in some fashion.”).

154. *Id.* at 1821–22 (“In sum, when interest groups compete, the barriers to logrolling mean that the messages they send will be too noisy to influence the PL outcomes. Because of the assumptions of preference and information disparities between members of the drafting process and the median participant, the general membership will hesitate to endorse either proposed alternative law.”).

155. Schwartz & Scott, *supra* note 134, at 651.

156. See Alces & Frisch, *supra* note 25, at 1218 (referring to their own involvement in the UCC drafting process).

Focusing on the supply side of this economic theory of legislation, critics argue that public choice theory oversimplifies legislators' motivations. They contend that public choice theorists have ignored legislators' public interest, altruism, and ideological commitment in voting for legislation.¹⁵⁷ They describe members of Congress as motivated, partly by an interest in reelection, but also in gaining political influence and making good public policy.¹⁵⁸ Although they argue that "constituent interest, special interest groups, and ideology all help determine legislative conduct,"¹⁵⁹ political scientists concede that legislators are predominantly interested in their own reelection.¹⁶⁰ Where legislation does not impact upon a legislator's primary interest in reelection, then secondary interests, such as gaining political influence and making good public policy, will influence political decision making.¹⁶¹ In contending that lawmakers are predominantly interested in reelection, these political analysts do not agree with public choice theorists who argue that legislators listen predominantly to organized collectives of voters. Instead, they view legislators as adept at reading, not only the preferences, but also the "potential preferences," of voters.¹⁶²

On the demand side of the analysis, critics of public choice theory question the claim that the preferences of special interest groups, representing a minority of the voters, dominate over majoritarian preferences.¹⁶³ Although recent political scholarship questions whether organized interests always dominate political decision making, it no longer¹⁶⁴ questions whether organized interests are

157. See, e.g., Daniel Farber & Phillip Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 890-900 (1987).

158. See, e.g., RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 137 (1978) (arguing that House members "try to achieve, in varying combinations, three basic personal goals: reelection, power inside Congress, and good public policy"); FENNO, *supra* note 126, at 1 (same, but adding that congressmen are also motivated by interests in setting up careers following their congressional terms and aggrandizing personal gain).

159. FARBER & FRICKEY, *supra* note 91, at 33.

160. See ARNOLD, *supra* note 132, at 5, 60-87 (formulating a theory of congressional policy making in which reelection is assumed to be the dominant goal for members of Congress).

161. Arnold explains that "[t]his means simply that legislators will do nothing to advance their other goals if such activities threaten their principal goal. If reelection is not at risk, they are free to pursue other goals, including enacting their own visions of good public policy or achieving influence within Congress." *Id.* at 5.

162. See *id.* at 10 ("Rather than assuming that policy preferences are fixed and asking what impact established preferences have on legislators' decisions, I introduce the notion of 'potential preferences' and ask how legislators adjust their decision in anticipation of them.").

163. See, e.g., FARBER & FRICKEY, *supra* note 91, at 17 ("Legislators are indeed influenced by special interests, but they need not be mere pawns.").

164. Early interest group theorists generally viewed organized interests as benign, describing interest groups as competitive forces at the center of our political system. See EARL L. LATHAM, THE GROUP BASIS OF POLITICS 35-37 (1952). They hypothesized that organized interests arise automatically to meet the need for competitive involvement in the political arena. See DAVID TRUMAN, THE GOVERNMENTAL PROCESS 43-44 (1951). These

influential political actors.¹⁶⁵ And in defining the circumstances in which these interests hold sway over legislation, political and economic theories of legislation are remarkably similar.¹⁶⁶

Recent political scholarship accepts the contention that collective action problems inhibit the formation of organized interests.¹⁶⁷ It adds to economic theories of legislation by constructing supplemental models of interest group formation.¹⁶⁸ One such theory contends that interest groups surmount their collective action problems and succeed in organizing because individuals derive benefit from the relationship or "exchange," and that in some instances a political

commentators, thus, characterized interest groups, and the competition between them, as a natural and beneficial attribute of our pluralistic political system. See LATHAM, *supra*; TRUMAN, *supra*. From this perspective, legislation is unlikely to be rent-seeking because competition among interest groups who would benefit from the legislation and interest groups who would be harmed by the legislation will cancel each other out. Moreover, legislation that is enacted after consideration of arguments raised by competing interest groups can be viewed as likely to mirror legislation that reflects voters' preferences. For critical descriptions of these theories, see FARBER & FRICKEY, *supra* note 91, at 17-21; SCHLOZMAN & TIERNEY, *supra* note 90, at 389; Jeffrey M. Berry, *On the Origins of Public Interest Groups: A Test of Two Theories*, 10 POLITY 379, 382 (1978); Robert H. Salisbury, *An Exchange Theory of Interest Groups*, 13 MIDWEST J. POL. SCI. 1 (1969). For contemporary case studies supporting this pluralistic model of interest groups, see, for example, RAYMOND A. BAUER ET AL., AMERICAN BUSINESS AND PUBLIC POLICY 324 (1972); LESTER W. MILBRATH, THE WASHINGTON LOBBYISTS 38-39, 331-45, 354 (1963). See also FARBER & FRICKEY, *supra* note 91, at 17-18 (discussing Milbrath, and Bauer, Pool, and Dexter); JAMES Q. WILSON, POLITICAL ORGANIZATIONS 308-15 (1973) (reviewing book by Bauer, Pool, and Dexter); Theodore J. Lowi, *American Business, Public Policy, Case-Studies and Political Theory*, 16 WORLD POL. 677, 696-715 (1964), reprinted in PUBLIC POLICIES AND THEIR POLITICS 27-40 (Randall B. Ripley ed., 1966) (reviewing book by Bauer, Pool, and Dexter and comparing it to Schattenschneider's study of tariffs). Early on, organized interests were characterized as politically influential and powerful on occasion. See E.E. SCHATTENSCHNEIDER, THE SEMISOVEREIGN PEOPLE (1960) [hereinafter SCHATTENSCHNEIDER, SEMISOVEREIGN PEOPLE] (reviewing organized interests more generally and reaching similar conclusions); E.E. SCHATTENSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF 108-09 (1935) [hereinafter SCHATTENSCHNEIDER, TARIFF] (studying Hawley-Smoot tariff legislation and finding interest group activity to be unbalanced: "[c]ontrary to assumptions often made, the distribution of activity among the classes of interests was not uniform and the antagonistic pressures evoked by the duties were not equal").

165. See, e.g., ARNOLD, *supra* note 132, at 3 ("Political scientists can explain with ease why concentrated interests so often triumph. These interests are often organized into groups and easily mobilized for action.").

166. See, e.g., *id.* (Arnold contends that concentrated interests triumph in obtaining narrow, technical legislative benefits because "[l]obbyists and political action committees communicate precise policy messages to legislators, and they lavish special attention on the relevant committee and subcommittee members.").

167. See *supra* text accompanying notes 102-09 (discussing Olson's theory of collective action).

168. See HARDIN, COLLECTIVE ACTION, *supra* note 39, at 31-37 (discussing by-product theory and theory of political entrepreneur as defining the circumstances under which interest groups become privileged and surmount their collective action problems).

organizer or "entrepreneur" identifies these benefits for potential members.¹⁶⁹

Political and economic theories of legislation also agree that organized interests often affect legislative decision making, although political analysts more often emphasize that these interests do not control the legislative arena. The question then becomes, not whether interest groups influence legislation, but rather when organized interests are most likely to have such an impact. Political scientists' answers to these questions build on earlier economic analysis. Kay Lehman Schlozman and John Tierney argue that the likelihood that organized interests will influence legislative decision making depends upon numerous factors, including "the nature of the issue, the nature of the demand, the structure of political competition, and the distribution of resources."¹⁷⁰

Focusing on the nature of the issue, Schlozman and Tierney contend that "[o]rganizations whose political ends are narrow and technical are more likely to...[succeed] than those whose goals are more encompassing."¹⁷¹ Their conclusion is consistent with economic theorists who predict that free-rider effects preclude all but narrowly focused interest groups from achieving their collective interests.¹⁷² Other political theorists reach similar conclusions.¹⁷³ For example, focusing on the costs and benefits of a policy,¹⁷⁴ James Q. Wilson contends that interest groups are

169. See Salisbury, *supra* note 164. For discussions of, and elaborations on, Salisbury's "exchange" theory of interest group formation, see, for example, FROHLICH ET AL., POLITICAL LEADERSHIP, *supra* note 104, at 6-11, 18-25; WILSON, *supra* note 164, at 195-214. This "exchange" theory of interest groups also finds empirical support. See, e.g., BARRY, *supra* note 131 (concluding that Salisbury's "exchange" theory better explains origins of public interest groups in Washington, D.C. between 1972 and 1973 than Truman's "disturbance" theory).

170. SCHLOZMAN & TIERNEY, *supra* note 90, at 317.

171. *Id.* at 396.

172. See *supra* text accompanying notes 102-09 (discussing Olson's theory of collective action).

173. See, e.g., MILBRATH, *supra* note 164, at 343-45 (contending that organized interests have little influence on "broad political issues commanding considerable public attention," but that, when legislation is "specialized and affects only a small segment of the population" interest groups are more likely to influence the decisions of lawmakers); Lowi, *supra* note 164, at 27-40 (dividing regulation into three categories (distributive, regulatory, and redistributive) and concluding that: organized interests are most likely to influence distributive policies "so long as it does not appear that the benefits to one party are at the cost of another"; regulatory policies, because they affect broader segments of society, are more often characterized by a "high degree of organization and coalition formation"; and organized interests are rarely determinative in deciding redistributive policies, although they may interject themselves in the debate). For criticisms of Lowi's theory, see SCHLOZMAN & TIERNEY, *supra* note 90, at 282-83; WILSON, *supra* note 164, at 328-29; Michael T. Hayes, *The Semi-Sovereign Pressure Groups: A Critique of Current Theory and an Alternative Typology*, 40 J. POL. 138 (1978).

174. WILSON, *supra* note 164, at 328. Wilson describes political activity as falling into one of four categories: distributed benefits and distributed costs; concentrated benefits and concentrated costs; concentrated benefits and distributed costs; and distributed benefits and concentrated costs. *Id.* at 327-37; see also SCHLOZMAN & TIERNEY, *supra* note 90, at 83 & n.32; James Q. Wilson, *The Politics of Regulation*, in THE POLITICS OF REGULATION 357,

least likely to influence policies involving distributed benefits and distributed costs.¹⁷⁵ Where benefits and costs are instead both concentrated, he predicts that interest group activity will be intensely competitive.¹⁷⁶ Where benefits are concentrated and costs dispersed, he argues that an interest group is likely to influence policymaking—generally without opposition.¹⁷⁷ On the other hand, Wilson predicts that policies whose costs are concentrated and benefits dispersed “will rarely, if ever, be adopted” because the group that expects to bear the concentrated costs has every incentive to lobby against the proposal and the group that hopes to enjoy the dispersed benefit is unlikely to be effective in lobbying in favor of the proposal.¹⁷⁸

In addition, Schlozman and Tierney argue that the success of organized interests depends on the nature of the proposal. They contend that organizations are more likely to succeed in killing proposed legislation than in seeking a proposal’s enactment,¹⁷⁹ and their argument finds support in other commentators.¹⁸⁰ They also

366–72 (James Q. Wilson ed., 1980).

175. WILSON, *supra* note 164, at 332–33 (“Policies that both confer benefits on, and spread the costs over, large numbers of persons will tend to become easily institutionalized and to produce increases in benefit levels without significant organizational intervention.”); Wilson, *supra* note 174, at 367 (“Interest groups have little incentive to form around such issues because no small, definable segment of society...can expect to capture a disproportionate share of the benefits or avoid a disproportionate share of the burdens.”). Wilson describes these policies as involving *majoritarian politics*. *Id.*

176. WILSON, *supra* note 164, at 335 (“Programs that benefit a well-defined group but at a cost to another well-defined group generate continuing organized conflict.”). Wilson describes these policies as involving “interest-group politics.” Wilson, *supra* note 174, at 368.

177. WILSON, *supra* note 164, at 333 (“Programs that benefit a well-defined special interest but impose, or appear to impose, no visible costs on any other well-defined interest will attract the support of the organizations representing the benefited group and the opposition of none, or at best the hostility only of purposive associations having no stake in the matter.”); Wilson, *supra* note 174, at 369 (“Some small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition—if, indeed, they even hear of the policy.”). Wilson describes this category of political conflict as “client politics.” *Id.*

178. WILSON, *supra* note 164, at 335 (“Because of the organization and tactical advantages conferred by a concentrated cost and the corresponding disadvantages imposed by a distributed benefit, it is easy to suppose that policies with these characteristics will rarely, if ever, be adopted.”). He does not, however, argue that these sorts of proposals are never enacted and, indeed, notes that “[i]n fact they are, and perhaps with increasing frequency.” *Id.* Wilson identifies several factors that may explain the enactment of such proposals: the existence of a successful political entrepreneur, the occurrence of a “dramatic crisis that put the opponents at a hopeless disadvantage,” or the mobilization of a new, and probably temporary, political coalition. *Id.*; see also Wilson, *supra* note 174, at 370–72 (emphasizing influence of political entrepreneurs in obtaining this sort of regulation). Not surprisingly, Wilson refers to these sorts of programs as involving *entrepreneurial politics*. *Id.*

179. SCHLOZMAN & TIERNEY, *supra* note 90, at 395–96.

180. See, e.g., WILSON, *supra* note 164, at 331 (“Revisions to existing policies

agree with earlier authors¹⁸¹ who argued that interest groups are more likely to influence the details of implementing a policy than to determine whether the policy should be implemented.¹⁸²

Schlozman and Tierney argue that political influence also depends on the "structure of the political conflict"—that is, whether the organized interest has allies or competitors relating to the legislative proposal.¹⁸³ Skepticism that organized interests compete is based, in part, on empirical evidence. For example, in their study Schlozman and Tierney found that head-on competition between organized interests was atypical.¹⁸⁴ Whether organized interests present their position to lawmakers without opposition, Schlozman and Tierney surmise that access to legislators influenced their understanding and opinions of the proposal and, thus, their votes.¹⁸⁵ Other commentators have questioned the notion that interest groups can be expected to compete against each other on theoretical grounds. These theorists suggest that, at least some of the time, organized interests form cooperative coalitions.¹⁸⁶ "By reducing conflict in certain issue areas through

follow a different pattern that in turn depends on the extent to which the initial policy decision settled the ideological and normative issues and on the incidence of costs and benefits entailed by the program. Most of the new or enlarged powers acquired by government are soon taken for granted, and the debate over their propriety, if not their success, is stilled.... Other programs retain for longer periods a controversial status and remain or become the objects of organized struggles.... Other programs remain controversial until an accommodation is reached with the groups whose interests they threaten to harm.").

181. See BAUER ET AL., *supra* note 164, at 396–97 (describing minor lobbying victories); MILBRATH, *supra* note 164, at 343 ("Lobbyists can do very little to affect the outcome, though they may influence the details of the bill or the specific language of small sections.").

182. SCHLOZMAN & TIERNEY, *supra* note 90, at 394–95 (stating that although, in general, it is easier to affect the details of a policy than its broad outlines, this "is not a negligible form of influence").

183. *Id.* at 396 ("The greater the number of helpful allies, the more effective organized interests are likely to be; the more extensive the competing pressures, the more limited the impact of organized interests.").

184. See *id.* at 395 ("[O]rganized pressure on one side of an issue is not always met with organized pressure on the other. Of course, organized interests frequently confront opposition from other organized interests. Still,...while competition between organized interests sometimes vitiates organized interest influence, such rivalry is not inevitable.").

185. See *id.* at 165 ("Reasonable arguments can ordinarily be made on more than one side of a political issue. A policymaker who hears from only one side—or who hears much more from one side than the other—is likely to be persuaded by the arguments and information to which he or she is exposed. Hence, if access is unequal, it would not be surprising if it were to have consequences for influence.").

186. See, e.g., BUCHANAN & TULLOCK, *supra* note 91, at 119–262 (developing dynamic model of operational decision making by majority rule in a democratic society in which a constitution has been adopted and focusing on the importance of logrolling among coalitions of lawmakers); WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962) (developing dynamic model of coalition formation in political decision making).

The factors that inhibit the formation of coalitions of organized interests are identical to the factors that inhibit the formation of the organized interests themselves.

their aggregative activities, groups make it more likely that Congress will act favorably on such 'predigested' policies."¹⁸⁷

Finally, Schlozman and Tierney argue that organized interests are more likely to be influential if they have access to greater political resources, and that money is only one of many such resources.¹⁸⁸ For example, Schlozman and Tierney reported that, although they did not find organized interests to be underfinanced,¹⁸⁹ in general, they did find that some organizations were better financed than others.¹⁹⁰ Specifically, they found that organizations representing business interests were overwhelmingly better financed than representatives of the interests of consumers or labor.¹⁹¹ While indicating they found that organizations consistently ranked credibility, contacts, and numerous other nonmonetary factors as more important resources than a large budget,¹⁹² they also noted that labor and consumer groups were far more likely to express financial concerns than business organizations.¹⁹³ Moreover, without underemphasizing the "tilt" of these groups toward business interests, they also noted that, in some instances, the existence of a political entrepreneur was more important to the formation of an organization than funding.¹⁹⁴ In addition, Schlozman and Tierney conclude that organized interests also provide legislators detailed information on complex legislation, PAC contributions, and fact-finding junkets.¹⁹⁵ They describe numerous factors as

Economic theorists contend that these groups are more likely to form when membership in the group is limited and the issue that brings the group together is narrow. *See supra* text accompanying notes 102-09, 118-25. Political theorists generally agree with this analysis, although they elaborate on it. *See supra* text accompanying notes 172-78 and note 173.

187. W. Douglas Costain & Anne N. Costain, *Interest Groups as Policy Aggregators in the Legislative Process*, 14 *POLITY* 249, 271 (1981).

188. *See* SCHLOZMAN & TIERNEY, *supra* note 90, at 396 ("Other resources—a large and active membership, an appealing case, a dedicated staff, well-placed allies—can help compensate for an inadequate budget.").

189. Earlier empirical work questioned whether organized interests were financed well enough to influence political decision making on anything other than a sporadic basis. For a discussion of these early studies, see *supra* note 164.

190. *See* SCHLOZMAN & TIERNEY, *supra* note 90, at 395 ("Surely, the organizations we encountered vary substantially in the amount and adequacy of their resources; surely some of them are forced to get by on relatively slender budgets; and surely, the Washington representatives whom we interviewed seemed uniformly hardworking. Still, in general, their surroundings are hardly threadbare and their expense accounts hardly lean.").

191. *See id.* at 113-16.

192. *Id.* at 104-05 & tbls.5.4, 5.5.

193. *Id.* at 115 (describing respondents likelihood to feel underfinanced, Schlozman & Tierney noted that "a mere 9 percent of the corporations express a need for more money, [while] 58 percent of both the unions and the citizens' groups indicate a desire to increase their budgets").

194. *See id.* at 107-09 (discussing National Low Income Housing Coalition—"the organization of the 175 in [their] survey sample that manages on the lowest budget").

195. *Id.* at 395. For a detailed discussion of the multiple techniques that organized interests use to influence the federal government, see *id.* at 148-321, describing a plethora of political activity, ranging from lobbying to campaign contributions to grass root and media campaigns.

affecting an organization's choice of lobbying techniques, but conclude that funding, the nature of their cause, and past history best explain these choices.¹⁹⁶

Regardless of whether they focus on the supply or demand for legislation, critics of public choice, thus, suggest that the economic theory of legislation offers an incomplete, but not a wholly inaccurate, model of the political process.¹⁹⁷ Economic and political theorists agree that organized interests are most influential when they are small and the issue they promote is narrowly focused. When the interest group is small and narrowly focused, it is better able to overcome its collective action problems. When the issue provides narrow benefits to the group, but diffuse costs to society, not only is the group better able to organize, but opposition is less likely to exist. Moreover, legislators are more likely to enact legislation on narrow issues because "credit claiming" is all the more credible.

Critics of public choice theory are less sanguine about the normative implications of a purely economic analysis of political processes, however. These critics argue that, in some circumstances, legislation that benefits a minority at the expense of the majority may, in fact, be in the public interest.¹⁹⁸ They argue that legislation may seem to be "rent-seeking" when only monetary costs are compared to monetary benefits;¹⁹⁹ when nonmonetary costs and benefits are added to the equation, however, the legislation may rightly be viewed as being in the public interest.²⁰⁰ They also argue that transfers of wealth from one group to another should be rejected "[o]nly if we are willing to make cost-benefit analysis our sole norm,"²⁰¹ but that making it our sole norm also implies decisions about initial

196. *Id.* at 160-62.

197. Elhauge concludes that critics of public choice theory "do not disprove the point that the economic benefits and costs of political organization play a strong role and that special interest groups often take advantage of these economic factors to exercise disproportionate political influence." Elhauge, *supra* note 97, at 43. Nor do Farber and Frickey reject public choice theory in its entirety. Instead, they propose a "less grandiose version of the economic theory" of legislation which "could be used to identify tendencies within the political system, rather than claiming to explain all of politics." FARBER & FRICKEY, *supra* note 91, at 33. Their "less ambitious, weaker version of the theory" postulates "(1) that reelection is an important motive of legislators, (2) that constituent and contributor interests thereby influence legislators, and (3) that small, easily organized interest groups have an influence disproportionate to the size of their membership." *Id.*

198. FARBER & FRICKEY, *supra* note 91, at 33 ("Some wealth transfers may be morally desirable, even though the process involves some inevitable degree of waste, if only the cost of printing the checks.").

199. Legislation is characterized as "rent-seeking" when it "is not justified on a cost-benefit basis: it costs the public more than it benefits the special interest." *Id.* at 34; *see also, e.g.*, Macey, *supra* note 91, at 224 n.6 ("[r]ent-seeking" has been defined as an effort to obtain "economic rents," that is, "payments for the use of an economic asset in excess of the market price," through "government intervention in the market").

200. FARBER & FRICKEY, *supra* note 91, at 34.

201. *Id.*; *see also* Elhauge, *supra* note 97, at 53 ("But using a group's economic interest as the baseline measure of what degree of political influence it should have is appropriate only if one believes that economic efficiency should be our government normative standard.").

distributions of wealth and other social entitlements.²⁰² As a result, these critics conclude, interest group theory adds nothing to debate on the substantive desirability of a statute and may, indeed, be misleading.²⁰³

To argue that public choice theory adds nothing normative to a debate on the desirability of legislative action or inaction seems too broad a criticism to be accurate in all cases. When there *is* agreement on the normative goals of legislation, public choice theory *can* help explain how normatively unacceptable legislation gets enacted.

Bankruptcy theorists loudly debate the normative goals of bankruptcy legislation. Some argue that these laws resolve financial common pool problems, and that bankruptcy laws that seek to accomplish other redistributive goals are unnecessary and even unwise.²⁰⁴ Others argue that bankruptcy law should properly seek to redistribute the losses among creditors.²⁰⁵ This is a substantial disagreement on normative purposes. A slender thread of consensus does exist among these commentators, however.²⁰⁶ No one has asserted that bankruptcy law should redistribute wealth if the redistribution would enhance only the self-interest of the favored creditor. No commentator suggests that bankruptcy legislation should promote the self-interest of one party over all other affected interests. And yet Congress has enacted reallocative bankruptcy laws that promote a single organized interest over the interests of all others,²⁰⁷ and it will continue to do so absent process-oriented reform.

202. See FARBER & FRICKEY, *supra* note 91, at 34 ("For technical reasons, cost-benefit analysis—or more specifically, the underlying standard of economic efficiency—cannot be applied until a prior decision is made about how to distribute social entitlements."); see also Elhauge, *supra* note 97, at 54 ("Many instead believe that Pareto's test is the true measure of efficiency or that utility maximization is a more appropriate measure of social efficiency. Under both those measures of efficiency, the distribution of wealth can be as important as its maximization.").

203. See Elhauge, *supra* note 97, at 49 ("[C]ondemning the political process because of interest group influence is indistinguishable from condemning the political process for producing outcomes the condemner dislikes on independent normative groups.").

204. See *supra* text accompanying notes 3–14 (discussing argument made by Baird, Jackson, and Scott that bankruptcy law is generally in the public interest only when it seeks to maximize creditors' collective interests).

205. See *supra* notes 15–16 and accompanying text (discussing criticisms of creditors' bargain model on grounds that it too narrowly views normative goals of bankruptcy law). These critics would more broadly define bankruptcy law as being in the public interest when it protects the interests of the public at large, rather than merely the interests of creditors. See *supra* notes 15–16.

206. Cf. Posner, *supra* note 28 (manuscript at 3–4) (discussing "the features that are generally believed to characterize a socially desirable bankruptcy law" and concluding that "[a]lthough academic commentary on this subject is controversial, there is enough consensus at an abstract level to provide a useful baseline for identifying distortions caused by the influence of interest groups").

207. See, e.g., *infra* text accompanying notes 346–63 (discussing 1984 and 1994 omnibus amendments to Bankruptcy Code).

IV. AN ECONOMIC AND POLITICAL THEORY OF LEGISLATION RESOLVING COMMON POOL PROBLEMS

Critics of public choice theory are undoubtedly right that economic theory does not explain all legislation. Economic theories of legislation do, however, provide important insights into incentives to enact, revise and repeal statutory liability rules that resolve common pool problems, including financial common pool problems, although they are, standing alone, insufficient to explain these sorts of legislative resolutions.

A purely game theoretic explanation of legislative common pool resolutions demonstrates the incentives for enactment of these sorts of statutes. Reference to game theory predicts that lawmakers will enact statutes resolving common pool problems because a strategy of enactment weakly dominates in this model.²⁰⁸ In the background, however, lawmakers' Temptations to defect may still influence their decisions about enactment.²⁰⁹ Because enactment cannot eliminate the Temptation to defect, these resolute statutes provide only tenuous resolution to common pool problems—a resolution that is vulnerable to repeal or erosion through amendment.

Of course, legislatures *have* enacted statutes that resolve common pool problems. For example, all 50 states have adopted Article 9 of the Uniform Commercial Code; Congress, as well as every state legislature, has enacted environmental protection statutes; federal and state legislatures have enacted statutes governing the liquidation and rehabilitation of insolvent financial institutions. Economic and political theories of legislation supplement game theoretic explanations for these enactments. Political theory adds to the purely game theoretic model by making more complex assumptions about players in the game theoretic model. By distinguishing between lawmakers in direct and representative democracies, the model considers the effect interest groups can have on this process, and the likelihood that lawmakers will legislate in the public, rather than their own private, interest.

A. Enactment

Consider, first, a pure, rather than a representative, democratic government consisting of two citizens and deciding by consensus whether to enact

208. Credit is owed to Randy Picker for this point. A strategy is a "weakly dominated strategy" if "it is a player's best response to any strategies the other players might pick." RASMUSEN, *supra* note 40, at 31. By "best response," game theorists mean that it yields the greatest payoff. *Id.* at 28. It is only weakly best because, whatever strategies the other player picks, this player's payoff is no smaller with this choice than with any other strategy, and is greater in some strategy combinations. *Id.* at 31.

209. This is because T (the payoff representing the Temptation to defect) exceeds R (the payoff representing the Reward for cooperation) in the underlying Prisoner's Dilemma game. See *supra* note 45 (discussing mathematical relationship between payoffs defining Prisoner's Dilemma game). The same is true of a game of Hawk/Dove. See *supra* note 45 (discussing mathematical relationship between payoffs defining game of Hawk/Dove). It cannot be said of an Assurance game, however. See *supra* note 45.

rules of liability to resolve a Prisoner's Dilemma game. The choices in such a referendum are represented in Figure 2. Call it the Lawmaker's game.

Figure 2

	Vote For	Vote Against
Vote For	CPR ²¹⁰ enacted; cooperative result subsequently mandated (R= -1, R= -1) ²¹¹	CPR not enacted; Prisoner's Dilemma game played as in Figure 1 ²¹²
Vote Against	CPR not enacted; Prisoner's Dilemma game played as in Figure 1	CPR not enacted; Prisoner's Dilemma game played as in Figure 1

Voting For the legislative resolution is a weakly dominant strategy to the Lawmaker's game and we would, thus, expect it to be enacted.²¹³ Voting For the legislation dominates because Lawmaker 1 will Vote For it if she thinks Lawmaker 2 will Vote For, and does no worse Voting For if Lawmaker 2 instead Votes Against. Voting For the legislation only weakly dominates as a strategy response, however, because there are other strategies that are equally good—if Lawmaker 1 thinks that Lawmaker 2 will Vote Against the referendum, then Voting For the proposal is as good a response as Voting Against it. Moreover, repeating this two-person Lawmaker's game²¹⁴ over an indefinite period of time²¹⁵ will not improve

210. For lack of space, I abbreviate the phrase "common pool resolution" as "CPR," at the risk of confusing common pool resolutions with the life-saving technique of the same initials.

211. Legislative resolutions are, of course, not costless. But then again, neither are strategies of conditional cooperation. Because the costs of tacit resolution are not included in the payoff matrix representing the Prisoner's Dilemma game, they are also left off in the payoff matrix representing the Lawmaker's game.

212. See *supra* Figure 1.

213. For a definition of weak dominance, see *supra* note 208. The same conclusion follows if the Lawmaker's game is instead viewed to illustrate the choices these lawmakers face in deciding whether to adopt legislation to resolve an Assurance game or a game of Hawk/Dove (although there may be no need for legislation to resolve a two-person Assurance game because mutual cooperation is the pareto preferred Nash equilibrium). It remains true that if I think you will Vote For this legislation, I too will Vote For it, but that if I think you will Vote Against it, I am indifferent as between Voting For or Against the proposition since in either event the resolution fails. It also remains true that we are better off if we resolve these collective action problems, either by enacting legislation or by some other means.

214. Repetition can mean submitting the same ballot, over and over again, to the same lawmakers, or, in contrast to definitions of iteration in the context of Prisoner's Dilemma games, it can mean submitting different ballots to the same lawmakers each time the game is replayed. In either case, repetition does not affect the weakness of the dominant

it²¹⁶—even over multiple ballots, if I think you will Vote For the enactment, I will, too, and if I think you will Vote Against it, I know that my vote, whether for or against, won't lead to enactment.²¹⁷

Saying that a strategy of Voting For the legislative resolution weakly dominates in the Lawmaker's game does not alone determine whether the statute will be enacted. Enactment depends not only on whether I think you (or you think I) will Vote For the resolute statute, but also whether I think I (and you think you) will be better off if the legislative resolution is enacted.²¹⁸ To answer the latter question, we need to know more.

To keep things simple, first assume that this referendum occurs before the underlying Prisoner's Dilemma game is ever played.²¹⁹ In other words, the Lawmaker's game has multiple rounds. Here, assume that the players in this pure democracy decide whether or not to Vote For the resolute legislation in the first round. The second and all following rounds consist of conventional Prisoner's Dilemma games in which the same players choose between cooperation and defection.

In this game, the players decide how to cast their ballots solely by comparing the payoffs in the Lawmaker's game to those in the Prisoner's Dilemma

strategy where the players vote before having played the underlying Prisoner's Dilemma game.

215. In this pure democracy, lawmakers play an iterated game during the length of their lives. Since few of these lawmakers know with precision when their "term" will expire, none of them need fear a "Chain Store Paradox." See *supra* note 65 and accompanying text (discussing relevance of backward induction to iterated games). Given the lengthy life expectancies these lawmakers face, moreover, their discount rates are likely to be fairly low. See *supra* text accompanying notes 74–75 (discussing effect of players' discount rates on likelihood that repetition will lead to cooperative result in Prisoner's Dilemma game).

216. By contrast, when the Prisoner's Dilemma game is repeated indefinitely, mutual defection no longer strongly dominates as a strategy choice. See *supra* text accompanying notes 65–72 (discussing effect of repetition on Prisoner's Dilemma games).

217. Repetition may not be wholly irrelevant to the Lawmaker's game, however. One effect repetition might have is to teach me whether I am a good or a bad predictor of your voting habits. If you Vote Against legislative resolutions over and over again, I may tire of casting ballots in favor of a statute that probably will not be enacted.

218. This statement assumes that the lawmakers will cast ballots only in their narrow self-interest. Critics of public choice rightly point out that lawmakers are, at certain times and pertaining to certain issues, public minded, ideological, or altruistic. See *supra* text accompanying notes 157–62 (discussing importance of factors, other than self-interest in reelection, on legislative voting records). Whether lawmakers are likely to be motivated by ideological concerns when considering enactment of legislation will, of course, depend on the lawmaker and on the legislation. See *supra* text accompanying notes 157–62. These public-interested impulses can reinforce Vote For/Vote For as the dominant strategy and counter lawmakers' temptation to defect. See *supra* note 84 (discussing resolution of Prisoner's Dilemma game when players are assumed to act altruistically, rather than solely in their own self-interest).

219. This version of the Lawmaker's game resembles contractarian models. These lawmakers, because they are completely inexperienced in the ways of the underlying Prisoner's Dilemma game, are similar to actors assumed to vote behind a veil of ignorance.

game it seeks to resolve. In the Lawmaker's game, the payoffs from Vote For/Vote For are equal to the payoffs from mutual cooperation in the underlying Prisoner's Dilemma game, and the payoffs from any other strategy combination vary depending upon the what happens when the unresolved Prisoner's Dilemma game is later played.²²⁰ In the underlying Prisoner's Dilemma game, R, the payoff from mutual cooperation, exceeds P, the payoff from mutual defection, but mutual defection constitutes a strongly dominant strategy equilibrium.²²¹ Based on this comparison alone, both lawmakers would be better off if they Vote For enactment than if they Vote Against it—Voting For the statute leads to the payoff from mutual cooperation, whereas Voting Against the statute, in all likelihood, will later result in the payoff from mutual defection.²²² Thus, the lawmakers in this version of the Lawmaker's game should be fairly optimistic about enactment.

What if we change the timing of the referendum, however? This time, assume that these lawmakers have played the underlying Prisoner's Dilemma game for a while before the referendum comes to a ballot.²²³ That is, the first through the n th round of the game consist of conventional Prisoner's Dilemma games. In the next round [$n + 1$], the same players are asked to Vote For or Vote Against the resolute legislation with the knowledge that, in the rounds to follow this referendum (in [$n + 2$]...[$n + y$]), the players will resume their iterated play of the Prisoner's Dilemma game. Now, when voting in the referendum, the lawmakers are likely to be affected in their decision making, not only by the payoffs in the underlying Prisoner's Dilemma games, but also by their experiences in prior

220. See *supra* Figure 2 (defining Lawmaker's game). That is, the payoff for Vote For/Vote Against, Vote Against/Vote For, and Vote Against/Vote Against are not immediate. They depend upon the payoff in the underlying Prisoner's Dilemma game, in which the payoff from mutual cooperation exceeds the payoff from mutual defection.

221. See *supra* Figure 1 (defining Prisoner's Dilemma game). Mutual defection is the dominant strategy equilibrium if the Prisoner's Dilemma game is played only once, or a finite number of times, or, if repeated, never predictably repeated between the same two players. If the Prisoner's Dilemma game is instead repeated an indefinite number of times between the same two players, mutual defection is no longer the dominant strategy equilibrium. See *supra* text accompanying notes 65–72. Repetition can resolve a Prisoner's Dilemma game if players succeed in adopting strategies of conditional cooperation. For a discussion of the factors affecting the success of such strategies, see *supra* text accompanying notes 74–83.

222. The same conclusion follows, no matter the sort of collective action problem sought to be resolved behind this thick veil. Where the legislation is intended to resolve an Assurance game, lawmakers should still be fairly optimistic about enactment, although for different reasons. In the absence of legislation, I will cooperate if I think you will cooperate, and I will defect if I think you will defect; but if the legislation is enacted, we know that we will both cooperate. Where the legislation is instead intended to resolve a game of Hawk/Dove, lawmakers should again expect enactment. In the absence of legislation, I will defect if I think you will cooperate, but I will cooperate if I think you will defect; we may get it wrong and both defect. If the legislation is enacted, however, we know that we will both cooperate and, as a result, both be better off.

223. This version of the Lawmaker's game bears no resemblance to contractarian models of legislative resolutions to common pool (and other) problems. The lawmakers in this later referendum are not assumed to vote behind a veil of ignorance.

rounds of that game.

Several scenarios are possible: (i) By successfully adopting strategies of conditional cooperation, the lawmakers may have succeeded in achieving a mutually cooperative result in the underlying Prisoner's Dilemma game. Alternatively, they may have been unsuccessful in their attempts to cooperate,²²⁴ with (ii) both defecting in the underlying Prisoner's Dilemma game,²²⁵ or (iii) both roughly taking turns defecting,²²⁶ or (iv) one repeatedly reaping the Temptation to defect.²²⁷ In (i), lawmakers may Vote Against the statute as unneeded.²²⁸ In (ii) and (iii), the lawmakers would be likely to Vote For the legislative resolution because both are likely to predict that they will be better off if it is enacted. In (iv), the lawmaker who succeeded in reaping the Temptation to defect without suffering the Punishment of mutual defection in later rounds may Vote Against the statute because experience tells this lawmaker that he is better off without the legislation. In this way, the Temptation to defect from the Prisoner's Dilemma game the referendum seeks to resolve may, in turn, tempt a lawmaker to Vote Against enactment. It may tempt lawmakers because the underlying Prisoner's Dilemma game remains embedded within the Lawmaker's game.²²⁹

Repetition of the latter, more realistic, version of the Lawmaker's game may improve its results, depending on how the repetition works. If the Lawmaker's game is not only repeated, but if with each repetition the ballot involves a different legislative resolution to a different common pool problem, repetition may improve the results of the game. Now, voters can logroll.²³⁰ If you will be made worse off if

224. Strategies of conditional cooperation may not succeed in two-person games where players face significantly distinct discount rates, or where one or more players are systematically ineffective in monitoring or punishing the other's defection. For a discussion of the effect of these factors on the success of conditional strategies in iterated games—whether Prisoner's Dilemma, Assurance, or Hawk/Dove—see *supra* text accompanying notes 74–83.

225. Mutual defection might have resulted in these underlying iterated games if both players faced high discount rates.

226. Players might roughly take turns defecting if both were ineffective in monitoring and punishing the other's defection.

227. For example, one player could repeatedly reap the Temptation to defect if his opponent was incapable of punishing the defection.

228. The legislation would be unnecessary because the players have succeeded in resolving their Prisoner's Dilemma without it. Of course, where both these lawmakers believe that the costs of adopting and maintaining a strategy of conditional cooperation can be decreased by means of an external enforcement mechanism, they may Vote For the resolute statute anyway.

229. The Temptation to defect remains embedded even where the Lawmaker's game seeks to resolve a game of Hawk/Dove, but not when it seeks to resolve an Assurance game. See *supra* note 209. For a general discussion of the subject of embedded games, see BAIRD ET AL., *supra* note 40, at 191–95, 217, where it is stated that “[a] strategic interaction between individuals may have a different outcome and a different structure once it is put into its larger context.”

230. See BUCHANAN & TULLOCK, *supra* note 91, at 132–40, 152–58 (discussing effects of repetition and logrolling on public decision making). Although logrolling is undoubtedly easier to coordinate when the Lawmaker's game is played in the context of a

the first referendum passes but better off if the second one passes, and if I will be better off if the first one passes but worse off if the second one passes, we may agree to "trade votes," both Vote For both referenda, and both be better off.²³¹

What if there are more than two lawmakers asked to vote on the referendum? Does increasing the size of the group make it easier or harder to secure legislative resolutions to common pool problems? Game theorists generally conclude that it is more difficult to reach a cooperative result in an iterated n -person than two-person Prisoner's Dilemma game.²³² In an n -person version of the Prisoner's Dilemma game, all n players have to cooperate in order to maximize their joint welfare.²³³ Controversy exists as to whether the payoff from less-than-universal cooperation can ever exceed the payoff from universal defection.²³⁴ Even where it is assumed that a critical mass of players can do better by cooperating than by defecting along with the others, the number of cooperators needed to reach this level may be difficult to determine or obtain.²³⁵

Clearly, enactment will also be more difficult in an iterated n -person than two-person Lawmaker's game, with it made increasingly difficult as the size of the assembly increases. Nonetheless, it should be easier for n lawmakers to adopt a legislative resolution to a common pool problem than for n players to resolve the underlying Prisoner's Dilemma game by adopting a strategy of conditional cooperation, and for a simple reason.²³⁶ In an n -person Lawmaker's game, critical mass is a well-known number: the vote of the majority binds the dissenting minority.²³⁷ As a result, in this n -game, the payoff from less-than-universal cooperation exceeds the payoff from universal defection whenever $[(n/2) + 1]$ lawmakers Vote For the referendum.²³⁸ Thus, not only is it noncontroversial in the

representative democracy, vote trading can occur in any democratic setting. The possibility of logrolling, or "agreements to trade votes," does not make the Lawmaker's game a cooperative game, however. *See supra* note 85 (defining noncooperative Prisoner's Dilemma games). Agreements to trade votes are only imperfectly enforceable.

231. We would probably only agree to trade votes in this way if we both more intensely prefer enactment of the referendum that makes us better off than we prefer defeat of the referendum that makes us worse off.

232. *See supra* text accompanying notes 78–83 (discussing effect of group size on resolution of iterated n -person games).

233. *See supra* text accompanying notes 51–53 (discussing universal cooperation in n -person Prisoner's Dilemma game).

234. *See supra* text accompanying notes 54–60 (discussing theoretical controversy surrounding significance of "critical mass" of cooperators in n -person Prisoner's Dilemma games).

235. *See supra* text accompanying notes 61–63 (discussing limitations to cooperation by critical mass of players).

236. I say it "may" be easier because, under certain circumstances, it "may" be harder. Comparison depends, first, on the critical mass in the n -person game, and second, on whether the game is binary or generalized.

237. In a constitutional version of the Lawmaker's Dilemma game, however, a unanimous or super-majority vote may be required to bind lawmakers. For a comparison of majority rules and rules of unanimity, see BUCHANAN & TULLOCK, *supra* note 91, at 85–96, 131–45.

238. In addition, if a majority of lawmakers Vote For the resolute legislation,

Lawmaker's game to remark that payoffs from nonuniversal cooperation can exceed the payoff from universal defection in this game, it is also clear that exactly $[(n/2) + 1]$ cooperators are needed to achieve this preferred payoff. The only remaining uncertainty is whether a majority of cooperating players can be garnered.

Obtaining a majority of Votes For the legislative resolution is by no means a sure thing. For one thing, by increasing the size of the group voting in the referendum, the model introduces the possibility of free-rider effects. Legislation is a public good because it benefits, not only those who worked for its enactment, but also those who watched events develop and did nothing. Where it is not costless to cast a ballot in the referendum, there exist incentives for some lawmakers to free-ride on others' efforts and save the cost of voting. The time and expense to cast a ballot in this referendum are probably themselves negligible, but where logrolling is important to the model, voting may involve significant costs.

Consideration of a representative, rather than a pure, democracy further complicates the model. Although lawmakers in a representative democracy also play an iterated game, legislators in a representative democracy likely face a higher discount rate than lawmakers in pure democracy. Not even the most successful members of Congress are elected for life. Many do not return for a second term. On the other hand, legislatures are more likely than referenda to have procedural rules. These procedural rules tend to reduce the free-rider effects inherent in n-person decision making by providing procedures for monitoring and punishing defectors and shirkers.²³⁹

Moreover, interest groups may affect the likelihood that a representative assembly enacts legislation to resolve a common pool problem. Public choice theory predicts only that a legislature is likely to enact resolute legislation when interest groups favoring the proposal are better organized than those who oppose it, and that a legislature is unlikely to enact resolute legislation when organizations in opposition to the proposal are better organized than those in favor of it. Whether organizations representing the interests of defectors are more influential than those

the payoff from the nonuniversal cooperation of this majority not only exceeds the payoff from universal defection, but it also equals the payoff from universal cooperation where lawmakers face binary choices. This follows because all n lawmakers in the Lawmaker's game agree to be bound by the vote of the majority. "Up or down" votes to defect, thus, do not defeat the welfare maximizing result unless a majority of lawmakers vote to defect.

Where the n-person Lawmaker's game is, instead, a generalized game, nonuniversal cooperation may not be equated with universal cooperation. In a generalized game, choices can range from defection to cooperation, including a spectrum of choices between these two extremes. *See supra* note 47 (discussing generalized Prisoner's Dilemma games). Thus, in a generalized Lawmaker's game, a majority of lawmakers may enact a referendum that only partially resolves a common pool problem because, in this generalized Lawmaker's game, a coalition of cooperative lawmakers may be built by compromising the substance of the legislation. In this event, the majority rule could substantively differ from the universally cooperative result.

239. *See supra* text accompanying notes 126-33 (discussing public choice literature on committees and other procedural issues).

representing the interests of cooperators will differ from case to case, depending on the nature of the organized interest, the nature of the issue, the procedural setting, the nature of the proposal and the structure of the political debate. In general, public choice theory suggests that organizations representing diffuse interests are less successful than those representing more specific interests because of the collective action problems that large, diffuse groups face.²⁴⁰ The economic theory of legislation, thus, contends that common pool problems are more likely to be resolved by statute when resolution benefits a relatively narrow interest group, and less likely to be resolved by statute when the beneficiaries are more diffuse.²⁴¹ Political analysts add that financial and organizational resources are also instrumental in influencing legislation, and that organizations representing business interests generally have access to greater resources.²⁴²

Economic and political theories of legislation supplement this conclusion when they contend that the nature of the issue at stake also bears on the political influence of the organized interest. In general, they agree that organized interests are more influential when seeking to affect legislation involving narrow issues and less likely to influence broad or ideologically-framed issues.²⁴³ For example, Jonathan Macey contends that legislation involving complicated and technical issues can also exacerbate the influence of organized interests, in part, because complex statutes camouflage "hidden implicit deals" with interest groups.²⁴⁴ In a similar vein, David Mayhew argues that legislators are most likely to succeed in their "credit claiming" when the legislation involves narrowly framed, "particularized benefits."²⁴⁵ James Q. Wilson argues that organized interests are most influential in their demand for legislation when the legislation involves concentrated benefits and diffuse costs.²⁴⁶

Political analysts add that interest groups are most influential when not in competition with one another—either when they lobby for legislation without

240. See *supra* text accompanying notes 102–09 (discussing Olson's theories regarding circumstances under which organized interests resolve their collective action problems).

241. See *supra* text accompanying notes 102–09.

242. See *supra* text accompanying notes 188–94 (discussing Schlozman's and Tierney's empirical research on organized interests).

243. Complexity is not inversely related to ideology. With some complicated and technical issues, sides form on ideological grounds—health care reform is only one such example. With other complex issues, ideology has little to say—Jonathan Macey suggests banking regulation as an example of complex, nonideological legislation. See Macey, *supra* note 118, at 1288–90 (discussing the relationship of the complexity of issues involving regulation of bank risk to interest group influences on that regulation).

244. See *supra* text accompanying notes 118–25 (discussing Macey's theories regarding the effect of complexity on interest group influence).

245. See *supra* text accompanying notes 115–17 (discussing Mayhew's theory on the supply of legislation that permits "credit claiming" by providing "particularized benefits").

246. See *supra* text accompanying notes 171–78 (discussing Wilson's theories of interest group influence, as well as those of Milbrath and Lowi).

opposition, or form coalitions and lobby in tandem.²⁴⁷ Whether coalitions of interest groups will form and influence enactment of a resolute statute will depend upon numerous factors, but political analysts emphasize that success at coalition building often depends both on the nature of the interest groups in the coalition and the issues that bring them together. This is because the same collective action problems that impede the formation of interest groups also impede these groups from building coalitions.²⁴⁸

These theorists also emphasize the importance of legislative processes to interest group influence. The fate of many legislative proposals is decided, as a practical matter, not on the floor of the House or Senate, but in committee, after public debate and private negotiation.²⁴⁹ Complicating the model to include committees does not aid in predicting whether a resolute statute will be enacted, however. Delegation to committee reduces the size of the legislative body and thus, enhances the likelihood that lawmakers' adoption of reciprocal strategies, such as logrolling and issue bundling, will lead to a cooperative result.²⁵⁰ In addition, the procedures, customs, and practices followed by congressional committees often facilitate cooperation among committee members.²⁵¹ On the other hand, the delegation to a committee may also enhance the influence of organized interests,²⁵² especially when complex legislation is at issue.²⁵³ Where legislation is instead drafted by a committee of private individuals, commentators differ about whether the product is more or less likely to be influenced by organized interests.²⁵⁴

247. See *supra* text accompanying notes 183–87 (discussing political theories of coalition formation).

248. See *supra* note 186 (discussing overlaps in economic and political theories of coalition formation).

249. There is nothing inherently federal about statutes enacted to resolve common pool problems. I focus on Congress at this juncture both because public choice theorists have largely focused their attention on this institution, and also because the federal bankruptcy laws are the subject of this Article.

250. Delegation to committee reduces the number of lawmakers in the Lawmaker's game. Cooperation should get easier to coordinate as n gets smaller. See *supra* text accompanying notes 78–83 (discussing effect of size on resolution of Prisoner's Dilemma game).

251. See, e.g., FENNO, *supra* note 126, at 94–114, 171–91 (discussing norms of subcommittee autonomy, reciprocity, specialization, and apprenticeship that exist in House committees, and contrasting decision-making environment in Senate committees).

252. For a discussion of the public choice literature regarding the effect of committee structure on interest group influence, see *supra* text accompanying notes 126–28.

253. See, e.g., *supra* text accompanying notes 118–25 (discussing effect of issue complexity on interest group influence).

254. Compare, e.g., Schwartz & Scott, *supra* note 134 (contending that legislation drafted by private lawmakers fares poorly as compared to that adopted by conventional legislative processes), with Alces & Frisch, *supra* note 25 (criticizing Schwartz & Scott's theory and contending that commercial legislation drafted by private groups is far less likely to have been subjected to special interest amendment than comparable federal commercial laws).

B. Repeal or Revision

Legislatures' incentives to *enact* statutes to resolve common pool problems differ from their incentives to *revise* or *repeal* these statutes.²⁵⁵ A purely game theoretic analysis of the incentives to revise or repeal legislative resolutions to common pool problems suggests that, under defined circumstances, these statutes provide stable solutions. Recall the Lawmaker's game posited in Figure 2, and assume that, after enactment, the same two lawmakers are presented with a referendum to repeal the liability rules that had been enacted in an earlier referendum.²⁵⁶ These strategy choices are illustrated by Figure 3.

Figure 3

	Vote to Repeal	Vote to Retain
Vote to Repeal	CPR repealed; Prisoner's Dilemma game played as in Figure 1	CPR retained; cooperative result still mandated (R= -1; R= -1)
Vote to Retain	CPR retained; cooperative result still mandated (R= -1; R= -1)	CPR retained; cooperative result still mandated (R= -1; R= -1)

If enactment occurred before these lawmakers had played the underlying game, then, at the time of enactment, both lawmakers preferred the payoffs that followed from enactment to the payoffs likely to result in an unregulated play of the underlying game. Thus, when the referendum for repeal is considered, the

255. James Q. Wilson briefly distinguishes between the pressures for enactment and those for repeal or revision. He argues that:

[r]evisions to existing policies follow a different pattern that in turn depends on the extent to which the initial policy decision settled the ideological and normative issues and on the incidence of costs and benefits entailed by the program. Most of the new or enlarged powers acquired by government are soon taken for granted, and the debate over their propriety, if not their success, is stilled.... Other programs retain for longer periods a controversial status and remain or become the objects of organized struggles.... Other programs remain controversial until an accommodation is reached with the groups whose interests they threaten to harm.

WILSON, *supra* note 164, at 331.

256. Statutes can seek to resolve common pool problems by adopting liability rules or rules of contract, or by granting property rights. *See supra* note 1. Statutorily granted property rights are probably less vulnerable to repeal or revision than statutory rules of liability because the group on whom these property rights are conferred constitutes ready-made opposition to any effort to repeal or erode these rights. *See Scott, supra* note 25 (applying public choice theory of private legislatures to UCC Article 9 and concluding that this private legislature has been captured by lending institutions that benefit from secured transactions).

lawmakers should still prefer the payoffs they receive under the statutory scheme to those they could expect to receive if the statute were repealed.

If enactment occurred after these lawmakers had played the underlying Prisoner's Dilemma game, however, the result of this later referendum on repeal is less clear. We can expect those lawmakers who were Tempted to defect in the Prisoner's Dilemma game and who were Tempted to Vote Against the statute in the referendum on enactment to again be Tempted to Vote For repeal of the resolute legislation. In a two-person referendum these temptations are unlikely to lead to repeal, since, at most, only one of the two lawmakers would be Tempted to Vote For repeal. Where n lawmakers are instead involved, where repeal is instead proposed to a legislature of representatives, and where organized interests seek to influence the legislative proposal, a majority of Votes For repeal of the resolute legislation may develop over time.²⁵⁷ Although repeal is by no means certain, it occurs because legislative resolutions change the payoffs of the Prisoner's Dilemma game but they do not eliminate the Temptation to defect.²⁵⁸ When these resolving statutes are enacted by a slim majority, they may eventually be repealed with the change of just a couple of votes.

Game theory suggests that it may be easier to *amend* a resolute statute than *repeal* it.²⁵⁹ Recall the same 2-citizen pure democracy, but this time consider a referendum to amend the statutory common pool resolution to exempt²⁶⁰ one of the two lawmakers from the scope of the legislation. It does not take a matrix of strategy choices to illustrate that the amendment will fail in a two-person

257. William Landes and Richard Posner argue that repeal of legislation procured by organized interests bears hidden costs of which lawmakers are well aware. Landes & Posner, *supra* note 91, at 879. They argue that repeal would be viewed as an act of congressional bad faith that "would reduce the present value of legislative protection to interest groups in the future, and hence the enacting Congressmen's welfare." *Id.* As a result, repealing lawmakers would find that the "price" they could demand for enacting such legislation [in the future] will be lower." *Id.* at 879-80. Where repeal or revision of the resolute statute occurs significantly after its enactment, however, these reputational costs may diminish sufficiently, especially if enough of the legislators who passed the statute were defeated in their bids for reelection. Moreover, the institutional checks against repeal that Posner and Landes identify (majority rule, filibuster, bicameralism, the committee system, and the importance of seniority to committee chairmanships) are more likely to delay repeal than to quell it.

258. The matrix of payoffs that players would face after enactment of a resolute statute would, of course, differ depending upon the substantive terms of the statute. Where the underlying game is one of Hawk/Dove, the resolute statute can also be said to alter players' incentives to defect, but not entirely to erase the Temptation. *See supra* note 209. Where the collective action problem is better represented as an Assurance game, however, the resolute legislation may, in fact, remove the Temptation. *See supra* note 209.

259. Moreover, revision of a resolute statute is less likely to be viewed as a repudiation of the "bargain" struck among organized interests than its outright repeal. *Cf.* Landes & Posner, *supra* note 91, at 879-80 (discussing costliness to lawmaker of repeal of special interest legislation).

260. I am using the term "exempt" to refer to any method of singling out an entity (or class of entities) and providing that it is (or they are) no longer subject to the statute, although the statute remains in effect as applied to all other entities.

Lawmaker's game—the lawmaker that is not benefited by the amendment will Vote Against it. But if we instead assume that n lawmakers will vote on the referendum to revise, and that the referendum to this expanded assembly proposes amendments that exempt a majority of the lawmakers from the scope of the resolute statute (but leave the remaining lawmakers subject to the amended statute), Votes For the omnibus amendment bill may well succeed.²⁶¹

Repeal of a statute constitutes a public good—benefitting all those opposed to its enactment, not merely those who labored for its repeal. Thus, collective action problems hinder organized interests' efforts to repeal resolute statutes. These organizations are less likely to face collective action problems when seeking or opposing amendments to a statutory resolution to a common pool problem than when seeking or opposing its enactment or repeal, however. This is because amendments can be narrowly tailored to benefit the interests of a small group. If tailored narrowly enough, the revision is not a public good. On this issue, economic theory is bolstered by the empirical research of political scientists who have found that organized interests are more effective in influencing the revision than the enactment or repeal of legislation, that they are more likely to influence the details of legislation than the decision to adopt or reject an initiative.²⁶²

Resolution of collective action problems does not ensure the enactment of a defecting amendment, however. For one thing, by narrowly framing an issue, an organized interest may resolve its own collective action problems, but by the same token it may also resolve the collective action problems of its opposition, thus, enhancing the likelihood of competition between interest groups. For another, as an organization defines its interests more and more narrowly it both diminishes its collective action problems and simultaneously reduces the likelihood that a majority of lawmakers will support enactment of the revision.

Issue bundling can help in building majority support for these sorts of narrow amendments; it may also help reduce competition. As a result, omnibus revisions to legislative solutions to common pool problems may be more likely to succeed than piecemeal revisions.²⁶³ With piecemeal revisions, competitive

261. Moreover, lawmakers will prefer the payoffs from amendments that exempt them from the statutory resolution to the payoffs that follow from outright repeal of the statute. This follows because, in an n -person Prisoner's Dilemma game, the payoffs from nonuniversal defection increase with the number of cooperators. See *supra* text accompanying notes 46–50. Whether these defecting legislators can muster a majority will vary from bill to bill, however.

262. See *supra* text accompanying notes 179–82. (discussing significance of nature of proposal to interest group influence).

263. See ARNOLD, *supra* note 132, at 102 (“Legislators establish a series of nebulous positions on amorphous-sounding bills like the Clean Air Amendments of 1970, the Education Amendments of 1980, or the Omnibus Reconciliation Act of 1980, but they need never answer for the costs that specific provisions impose on particular groups or localities. Citizens affected by these provisions have a difficult time punishing their representatives, especially when legislators profess sympathy for their causes.”); SCHATTENSCHNEIDER, TARIFF, *supra* note 164, at 288–89 (“Pressures are formidable and overwhelming only when they have become unbalanced and one-sided. As long as opposed

lobbying can succeed: when A proposes that the legislature revise a statutory resolution to a common pool problem, B or C or D (or some combination of them) are likely to lobby in opposition to A's proposal, either because A's proposal is inconsistent with the interests of the group or because A's proposal is inconsistent with the interests of B or C or D (or some combination of them). By contrast, with omnibus revisions to such a statute, incentives exist to limit competitive lobbying. Rather than lobby to prevent enactment of another actor's proposed revision, A may instead agree to lobby in support of B's proposal in exchange for B's agreement to support A's legislative initiative. Thus, coalition formation is distinct when a resolute statute is revised rather than enacted or repealed because collective action problems are easier to resolve with proposals to amend than with proposals to enact or repeal.

In addition, coalition formation differs when a resolute statute is amended, rather than enacted or repealed, because the stakes are altogether different. The Lawmaker's game that pertains to enactment or repeal is a nonzero or positive-sum game because everyone does better if the resolute statute is enacted.²⁶⁴ Legislators asked to consider amendments to this resolute statute instead face a zero or negative sum game that is embedded in the larger Lawmaker's game.²⁶⁵ The slide down this slope is negative sum because defectors increase their payoffs at the expense of cooperators.²⁶⁶ Organized interests have every incentive to seek redistributive amendments along this slippery slope.

Coalition building in a zero-sum game differs substantially from cooperation in a nonzero-sum game. Game theory suggests that coalitions of

forces are equal or nearly equal, governments can play off one against the other. The strategy is, therefore, to preserve an equilibrium in many cases. The protective tariff was made strong by joining a multitude of interests in one piece of omnibus legislation.”)

264. See, e.g., RASMUSEN, *supra* note 40, at 32 (noting that the Prisoner's Dilemma game is not a zero-sum game, and defining nonzero-sum games as those where payoffs increase or shrink depending upon how they are divided).

265. For a definition of a zero-sum game, see RASMUSEN, *supra* note 40, at 32, defining it as “a game in which the sum of the payoffs of all the players is zero whatever strategies they choose.... In a zero-sum game, what one player gains, another player must lose.” The decision to amend legislation that resolves an underlying Prisoner's Dilemma or Hawk/Dove game is negative sum because T (the payoff from nonuniversal defection) exceeds R (the payoff from universal cooperation) in both these games. The decision to amend legislation resolving an Assurance game is less clearly negative sum since the Reward of universal cooperation exceeds the Temptation to defect in that game. See *supra* note 45 (discussing inequalities that define Prisoner's Dilemma, Hawk/Dove, and Assurance games). Theorists disagree as to whether an n-person Assurance game presents a collective action problem, however. Some contend that it does, notwithstanding the fact that $R > T$ in Assurance games, because they suspect that some players will free-ride anyway. See *supra* note 46 (discussing this debate). To the extent that an n-person Assurance game does present a collective action problem, then the decision to amend legislation resolving this game is a negative-sum decision.

266. See K.K. Fung, *On the Slippery Slope: Conformance v. Defection in a Multi-Party Prisoner's Dilemma*, 9 J. ECON. BEHAV. & ORG. 325, 326–29 (1988) (describing “slippery slope” between universal cooperation and universal defection in n-person Prisoner's Dilemma games).

cooperative players will form in a nonzero-sum Dilemma game when there are enough of them because a critical mass of cooperators ensures that the payoff from cooperation exceeds the payoff from defection.²⁶⁷ Coalition formation in a zero-sum game is inherently more strategic, however, because in this sort of game one player's gain necessarily comes at the expense of another player's loss.²⁶⁸

Consider, first, a pure democracy consisting of three citizens and deciding by referendum how best to divide \$1000.²⁶⁹ Game theory predicts that two of these three citizens will join together to enact a referendum that distributes \$500 each to the members of this two-person coalition, although it does not predict which two of these three citizens will coalesce.²⁷⁰ When the number of citizens expands, theorists generally predict that competitive players in this zero-sum game will form a minimum winning coalition—one that maximizes expropriations from the remaining minority.²⁷¹ Moreover, although iteration improved the results of a nonzero-sum Prisoner's Dilemma game,²⁷² theorists contend that iteration does not

267. See *supra* text accompanying notes 54–61 (discussing Schelling's theory of the critical mass).

268. For a discussion of coalition theory in a zero-sum context, see *infra* text accompanying notes 269–84.

269. A Divide-the-Dollar game differs importantly from the negative sum game of redistribution embedded within the Lawmaker's game in that, in this redistributive game, lawmakers will be uncertain of the precise dollar amount to be divided. In theory, lawmakers have every incentive to erode along this slippery slope until they reach the minimal number of cooperators needed to exceed the payoff from universal defection. See *supra* text accompanying notes 54–61 (discussing payoff from critical mass of cooperation).

270. See, e.g., BUCHANAN & TULLOCK, *supra* note 91, at 148–50; PETER C. ORDESHOOK, A POLITICAL THEORY PRIMER 286–98 (1992). It also predicts cycling among these coalitions. KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 96–100 (2d ed. 1963). This is because the loser will persuade one of the two players in the winning coalition to break ranks by offering her \$501, since the \$499 that the loser nets in this deal is better than nothing. But the loser in this (\$499/\$501) deal, will persuade the player netting \$499 in that deal to break ranks by offering her \$500. And so on.... Public choice theorists have identified various factors that solve Arrow's Impossibility Theorem, however, such as supermajority voting rules, and procedures that establish voting agendas and permit legislators to register the intensity of their preferences. See generally DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 441–76 (1992) (discussing Arrow's theorem and its resolutions).

271. See BUCHANAN & TULLOCK, *supra* note 91, at 150–52 (extrapolating from results of three and five person "divide-the-dollar" game to conclude that, with a group of any size, "imputations will always contain only those involving the symmetric sharing of all gains among the members of the smallest effective coalition"; noting that, in a simple majority rule game, "the smallest effective set will approach 50 per cent of the total number of voters as the group is increased in size"); RIKER, *supra* note 186, at 32 (applying game theory and concluding that "[i]n n-person, zero sum games, where side payments are permitted, where players are rational, and where they have perfect information, only minimum winning coalitions occur"). For discussions of Riker's minimum winning coalition theory, see ORDESHOOK, *supra* note 270, at 291–92; WILSON, *supra* note 164, at 269.

272. See *supra* text accompanying notes 65–83 (discussing iterated Prisoner's Dilemma games).

improve the results of a Divide-the-Dollar game.²⁷³ In fact, in *The Calculus of Consent*,²⁷⁴ James Buchanan and Gordon Tullock contend that iteration of a Divide-the-Dollar game in a political context generally worsens its results because minimum winning coalitions repeatedly expropriate from losers over time.²⁷⁵

Under limited circumstances, Buchanan and Tullock suggest that iteration helps to divide the dollar. Where players are assumed to possess equal political strength but disparate preferences for the dollar-to-be-divided,²⁷⁶ and if the dollar-to-be-divided is costless to the players (because it "is not raised from general taxes but is instead received in the form of an earmarked grant from some higher-level governmental unit"²⁷⁷), Buchanan and Tullock predict that iteration improves the game's result because it permits logrolling.²⁷⁸ Vote trading is said to improve the game because it roughly approximates a game in which open buying and selling of votes is permitted; Buchanan and Tullock contend that side payments improve a Divide-the-Dollar game because they provide a means for accounting for players' disparate preferences.²⁷⁹

Where the dollar to be divided is instead raised from general taxes, however, Buchanan and Tullock contend that logrolling substantially detracts from the game's result. Under these, more realistic, circumstances, they contend that minimum winning coalitions will, over time, trade votes to spend an excessive amount of tax dollars.²⁸⁰ The amount will be excessive, according to Buchanan and Tullock, because the minimum winning coalition can externalize a portion of the costs on the losers since both winners and losers will be taxed for the expense.²⁸¹ Where players are assumed to possess equal political strength, too much will be

273. See BUCHANAN & TULLOCK, *supra* note 91, at 131–45 (discussing dynamic version of operational decision making); RIKER, *supra* note 186, at 102–23 (discussing dynamic version of his coalition theory).

274. BUCHANAN & TULLOCK, *supra* note 91.

275. See *id.* at 152–58.

276. Because of the diminishing marginal utility of money, I suppose it is not completely nonsensical to assume that players hold disparate preferences for money. Buchanan and Tullock consider these distinctions between players' utility because their simplest model is slightly more complex than a Divide-the-Dollar game. In their simple model, farmers decide by referendum whether to spend these dollars on local road repair, a context in which their assumptions about disparate intensities of preference make much more sense. *Id.* at 125–26, 135–40.

277. *Id.* at 148.

278. *Id.* at 155–58.

279. *Id.* at 154–55.

280. *Id.* at 131–45, 155–68.

281. *Id.* at 139 ("In counting the costs to himself involved in the repair of other roads necessary to secure the repair of his own road, each farmer would consider only the repair of those roads which he agrees to support. In this way his expenditure pattern would include as a free gift the tax payments of 49 voters. The fiscal institutions postulated insure that all 100 voters share in the costs of each repair project approved, but a minimum participation of only 51 voters in the net benefits is required by simple majority voting. The natural result would be that each road in the township would be maintained at a level considerably higher and at a greater expense than is rational from the individual standpoint of the farmers living along it.").

spent, but these tax dollars will be evenly divided among lawmaker-citizens over time.²⁸² When Buchanan and Tullock instead assume that players possess unequal political strength,²⁸³ they conclude that the results deteriorate even further—too much will be spent and these tax dollars will be unequally divided to favor those players who hold greater political power.²⁸⁴

None of this shows that the unraveling of legislative solutions to common pool problems is inevitable. The process by which these statutes are revised can present significant obstacles to the dominance of special interest groups over the public interest. In addition, legislators' ideological commitment to the resolution of a common pool problem can also act as an important countervailing influence on interest groups. Constituent interest in resolution of the common pool problem can also act to inhibit the undoing of this legislation. In the absence of procedural and ideological impediments to interest groups' influences, however, incentives exist for legislative resolutions to common pool problems to be revised to the benefit of influential organized interests, possibly to the detriment of the public interest.

V. A POLITICAL AND ECONOMIC THEORY OF BANKRUPTCY LEGISLATION

What does this analysis suggest about the enactment, repeal and revision of bankruptcy legislation? In general, it predicts enactment of bankruptcy legislation, but finds that interests organized in opposition can upset things, either by blocking enactment or succeeding in efforts to repeal.²⁸⁵ To a limited extent, this

282. If every lawmaker faces an equal probability of inclusion in the minimum winning coalition, the expected gain from a competitive strategy equals the expected gain from cooperation. Peter Ordeshook mathematically establishes this principle, as follows:

For example, in the divide-the-thousand-dollars game, each person in a minimal winning coalition gains $1,000/[(n+1)/2]$ whereas excluded players gain nothing. The probability that person i is included in a minimal winning coalition equals the proportion of such coalitions that includes i , $(n+1)/2n$, so the expected gain in a noncooperative legislature is

$$[2,000/n+1] [n+1/2n] + 0 [1 - (n+1)/2n] = 1,000/n,$$

which is what one earns if everyone plays cooperatively and simply divides the thousand dollars among all players.

ORDESHOOK, *supra* note 270, at 291–92. If legislators are even a little bit risk averse, Ordeshook argues that they will adopt a cooperative strategy in this zero-sum game. *Id.* Moreover, Ordeshook contends that even risk neutral legislators will cooperate in this game if, on ideological or ethical grounds, an equal division of the spoils is preferred. *Id.*

283. For example, through membership in an organized interest, important congressional committee, or the political party in power, lawmakers may assure themselves of better-than-even chances of inclusion in the minimum winning coalition.

284. BUCHANAN & TULLOCK, *supra* note 91, at 283–95 (discussing effect of pressure groups and special interests on operational decision making); *see also* RIKER, *supra* note 186, at 102–23 (discussing dynamic model of minimum winning coalition theory where “weights (or influence or power or significance) of members” varies among n players).

285. Vote For/Vote For weakly dominates in the Lawmaker's game that was

prediction is supported by the history of the early Bankruptcy Acts. Congress enacted federal bankruptcy laws in 1800, 1841 and 1867.²⁸⁶ Each of these early Acts was enacted amid political controversy among organized interests²⁸⁷ and in reaction to national economic crises.²⁸⁸ Each was short-lived—repealed within a brief time after enactment.²⁸⁹

It also posits that organized interests may have an easier time in influencing amendment than repeal of bankruptcy laws—a hypothesis more strongly supported by recent legislative experience. In 1984 and 1994, Congress adopted statutory packages containing hundreds of revisions to the Bankruptcy Code.²⁹⁰ Many of these revisions permit a narrow class of creditors to opt out from participation in a liquidation or reorganization case; others entitle preferential treatment in such a case to a narrowly defined creditor group.²⁹¹

The relative strength of interest groups in the bankruptcy context is, thus, critically important to understanding the circumstances under which bankruptcy legislation will be enacted, repealed and revised. Their influence depends on the nature of the organized interests affected by bankruptcy legislation, as well as whether the bankruptcy proposal can be characterized as narrow and technical, or

discussed *supra* in the text accompanying Figure 2. See also *supra* note 208 (defining weakly dominated strategy).

286. An act to establish a uniform System of Bankruptcy throughout the United States, 2 Stat. 19 (1800); An act to establish a uniform System of Bankruptcy throughout the United States, 5 Stat. 440 (1841); An act to establish a uniform System of Bankruptcy throughout the United States, 14 Stat. 517 (1867).

287. See PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT AND BANKRUPTCY, 1607–1900*, at 18–19 (1974) (detailing congressional consideration of federal bankruptcy laws between 1789 and 1800); F. REGIS NOEL, *A HISTORY OF THE BANKRUPTCY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 124–30* (1918) (same); WARREN, *supra* note 20, 10–19 (same); see also *infra* text accompanying notes 309–17 (discussing influence of organized interests on early Bankruptcy Acts).

288. See *infra* note 321 and accompanying text (discussing economic circumstances surrounding enactment of various Bankruptcy Acts).

289. Although scheduled by its own terms to expire in five-years' time, the Bankruptcy Act of 1800 was repealed in 1803. An Act to repeal an act, instituted "An act to establish a uniform System of Bankruptcy throughout the United States," 2 Stat. 248 (1803). The Bankruptcy Act of 1841 lasted even less time than its predecessor. Efforts to repeal the Act, which was not to take effect until six months after its enactment, commenced even before it went into operation. NOEL, *supra* note 287, at 139; WARREN, *supra* note 20, at 79. And although this effort was unsuccessful, WARREN, *supra* note 20, at 80, the Act was repealed a year after its effective date. An Act to repeal the bankrupt act, 5 Stat. 614 (1843). Like its predecessors, the ink was barely dry on the Bankruptcy Act of 1867 before Congress sought to back away from its provisions. WARREN, *supra* note 20, at 109. Rather than simply repeal it, Congress amended the 1867 Act several times to expand its protections of debtors. *Id.* But in 1878, Congress repealed the 1867 Act. An act to repeal the bankrupt law, 20 Stat. 99 (1878).

290. See *supra* note 32 (referring to these omnibus amendment acts).

291. See *infra* notes 346–63 (detailing these special interest provisions).

whether it addresses broad issues of morality and ideology.²⁹² In addition, the influence of interested organizations depends on whether the proposal is to enact, repeal or amend the Bankruptcy Code, and whether the affected interest groups compete against or cooperate with each other.²⁹³ Their influence also depends on the process for consideration and enactment of bankruptcy laws,²⁹⁴ and whether a private legislature is involved in this process.²⁹⁵

A. *Organized Interests Effects on Bankruptcy Legislation*

Bankruptcy affects many groups: debtors, unsecured creditors, secured creditors, equity security holders, and others.²⁹⁶ How influential are these organized interests?

Unsecured creditors collectively benefit from the enactment of bankruptcy legislation.²⁹⁷ Public choice theory suggests that unsecured creditors may not succeed in influencing these laws, however, because they are a large and diffuse group.²⁹⁸ This diffuseness of interests means that collective action problems may impede the organization of this potential-interest group. In other contexts, we might expect groups of unsecured creditors to overcome their collective action problems. Statistics show that organizations representing business interests are better financed than those representing the interests of labor or consumers.²⁹⁹ Organizations representing creditors' interests are just as likely to oppose as favor enactment of bankruptcy legislation, however.³⁰⁰ Some creditor groups will oppose the legislation out of self-interest, preferring favorable state law remedies to those

292. See *supra* text accompanying notes 118–25, 171–78 (generally discussing public choice literature on the effect of the nature of an issue on interest group influence).

293. See *supra* text accompanying notes 179–87 (generally discussing public choice literature on the effect of the nature of the proposal and structure of conflict on interest group influence).

294. See *supra* text accompanying notes 126–33 (generally discussing public choice literature on the effect of procedural rules on interest group influence).

295. See *supra* text accompanying notes 134–56 (generally discussing public choice literature on the effect of a private legislature on interest group influence).

296. See Posner, *supra* note 28 (manuscript at 11–16) (detailing a list of organized interests, or “cast of characters,” who influenced the contours of the 1978 Bankruptcy Code, and including in this list debtors, creditors, elected federal officials, unelected federal officials, lawyers, state and local authorities, and academics).

297. *Id.* (manuscript at 13). In theory, this point can be extended to any legislative resolution to a common pool problem that pits the interests of individual creditors against creditors' collective interests. Article 9 of the Uniform Commercial Code is another statute that fits this description. For discussions of the public choice implications of this and related commercial legislation, see *supra* note 137.

298. See Posner, *supra* note 28 (manuscript at 12–13) (describing trade creditors as unrepresented in debate on 1978 Code “except in a diluted fashion by general institutions like the Commercial Law League”).

299. See *supra* text accompanying notes 188–94 (discussing empirical study conducted by Schlozman and Tierney regarding the importance of financial strength of organized interest).

300. See Posner, *supra* note 28 (manuscript at 12–13).

under the federal bankruptcy laws.³⁰¹

Debtors' interests in bankruptcy legislation approximate the collective interests of unsecured creditors as a group, but debtor organizations serve as a poor proxy for creditor organizations. First, the interests of debtors and unsecured creditors in bankruptcy legislation often diverge, particularly where issues of discharge or reorganization are involved. Second, like unsecured creditors, debtors' interests are also diffuse and poorly organized.³⁰² There are literally millions of debtors; they come in all shapes and sizes. Collective action problems inhere in organizing such a group. Although these problems may not be insurmountable, if debtors' interests are put forward in Congress, they are more likely to be put forward by narrowly defined organizations of debtors.³⁰³ And the interests of these narrowly defined debtor organizations are unlikely to mirror unsecured creditors' interests in bankruptcy legislation. Finally, debtors' interests in bankruptcy legislation are unlikely to be represented effectively before Congress, not only because they are a diffuse group, but also because they are, at times, a stigmatized group.³⁰⁴ Except during periods of economic malaise, few are likely to lobby on behalf of debtors' interests. Debtors can be perceived as pariahs—either immoral deadbeats or unlucky schmoes. Those currently facing financial distress may immediately understand the need for strong bankruptcy legislation, but insolvent entities are, almost by definition, unlikely to be able to afford to fund an effective lobbying campaign.³⁰⁵ Of course, nearly every commercial entity is both a debtor and a creditor. Any expectation that business organizations can be expected invariably to represent debtors' interests before Congress seems misguided, however. Entities that do not currently face financial distress are more likely to empathize with creditors' views than debtors' views on

301. See *supra* text accompanying notes 223–29 (discussing results of Lawmakers' game when lawmakers are assumed to have played underlying Prisoner's Dilemma game prior to their vote).

302. See, e.g., Peter V. Letsou, *The Political Economy of Consumer Credit Regulation*, 44 EMORY L.J. 587, 628 (1995) (contending that debtors are an ineffective lobbying force, and considering consumers who are likely to default, those who are unlikely to default, and those who are likely to be priced out of credit due to consumer credit regulations); Patchen, *supra* note 137, at 126–36 (arguing that consumer-debtors' interests in commercial law are too diffuse to stimulate effective representation in the UCC lawmaking process); Posner, *supra* note 28 (manuscript at 11–12) (contending that debtors are an ineffective lobbying force, and distinguishing between “continuing” and “overburdened” debtors).

303. Consumer groups may represent the interests of consumer debtors before Congress. The interests of small business debtors may be represented by trade associations. The interests of large corporate debtors may be well-heeled enough to represent their own interests before Congress.

304. Congress sought to diminish the stigma of bankruptcy with its enactment of the 1978 Bankruptcy Code. It did this indirectly, for example, by using the term “debtor” and not “bankrupt.” See 11 U.S.C. § 101(13) (1994) (defining “debtor”).

305. See, e.g., *In re Dow Corning Corp.*, 194 B.R. 121 (Bankr. E.D. Mich. 1996) (denying request made by official tort claimants committee to hire attorney to lobby against proposed federal legislation that would reduce value of claimants' silicone implant claims).

bankruptcy legislation.³⁰⁶

On the other side of the coin, secured creditors, lessors, consignors, financially-confident debtors, the equity security holders of well-off corporate debtors and others may not oppose the enactment of bankruptcy legislation if they perceive it with indifference as a statute that neither benefits nor harms them. If these entities perceive proposed bankruptcy legislation as harmful to them, however, they may actively oppose it. Whether this opposition is effective will vary, depending on the entity.³⁰⁷ Because their interests are narrowly focused, financial entities, especially banks and other commercial institutions, are more likely to overcome their collective action problems and represent their interests effectively before Congress than more diffuse groups.³⁰⁸ Groups already organized to represent the interests of financial institutions in nonbankruptcy contexts can easily redefine themselves to represent their interests in bankruptcy legislation.

Controversy among organized interests partially explains Congress' difficulty in enacting bankruptcy legislation during the early nineteenth century. Charles Warren describes the controversy that surrounded the 1800 Bankruptcy Act largely as a conflict among competing economic interests.³⁰⁹ He explains that commercial interests supported the Bankruptcy Act of 1800 because it was a "creditor's bill"³¹⁰—modeled after the contemporaneous English Bankrupt Act, it permitted creditors of "traders, merchants and brokers" to petition against debtors³¹¹ who committed "acts of bankruptcy."³¹² Opposition was leveled against

306. See Posner, *supra* note 28 (manuscript at 11) ("Overburdened debtors may have a strong incentive to organize, particularly during economic downturns when their financial difficulties are most acute; continuing debtors have little incentive to organize."). Adler makes a similar point as applied to the political ineffectiveness of equity holders and tort victims. In emphasizing the diffuseness of these investors and victims, he argues that their expected benefit from amendment to the Bankruptcy Code must be multiplied by the probability that insolvency will occur. Adler, *Financial and Political Theories*, *supra* note 19, at 342-43.

307. Both Adler and Rasmussen believe that equity holders are too diffuse to organize and effectively influence bankruptcy legislation. See *supra* note 23. Skeel disagrees, arguing that at least large institutional equity holders should be able to overcome their collective action problems. Skeel, *Brave New World*, *supra* note 18, at 496-97.

308. See Skeel, *Brave New World*, *supra* note 18, at 497 ("Banks are notoriously well organized and effective as lobbyists.").

309. See WARREN, *supra* note 20, at 13 ("[T]he lines of division were largely geographical and sectional—the North against the South, and the commercial cities against the agricultural regions."); see also COLEMAN, *supra* note 287, at 19 ("In general, the North and the commercial towns supported the bankruptcy bill [proposed before 1800], while the South and the farming areas opposed it.").

310. Warren notes, however, that "representatives of the debtor class were influential enough to secure an amendment in their favor, through a motion to strike out a clause which provided that there should be no discharge of debts contracted prior to the Act." WARREN, *supra* note 20, at 14; see also Edward H. Levi & James W. Moore, *Bankruptcy and Reorganization: A Survey of Changes*, 5 U. CHI. L. REV. 1, 33 (1937) (noting additional provisions of 1800 Act that benefited debtors).

311. The Bankruptcy Act of 1800 contained no voluntary provisions. Levi & Moore, *supra* note 310, at 33.

the bill by representatives of agricultural interests on two grounds: First, following English law, several states exempted real property from the reach of creditors,³¹³ but real property was not exempt under the Bankruptcy Act of 1800.³¹⁴ Second, it was argued that the commercial economy of the Northern cities and the agricultural economy in the Southern states would clash as a result of the new federal law. It was argued that city merchants, unfamiliar with the cyclical nature of an agricultural economy, could proceed against country traders under the Bankruptcy Act, who would in turn press farmers for payment.³¹⁵

Moreover, although other political and constitutional issues also got mixed into the controversy, Warren explains that this conflict between the economic interests of the Northern commercial traders and the Southern (and eventually Western) farmers continued during consideration and enactment of the Bankruptcy Acts of 1841 and of 1867.³¹⁶ Others see this same economic contest as explanatory of the Bankruptcy Act of 1898, as well.³¹⁷

B. The Nature of the Issue

Bankruptcy issues can be complex and technical. Like tax laws, banking laws, and the laws of secured transactions, bankruptcy laws involve numerous detailed provisions that arguably are only fully understood by a the handful of lawyers that specialize in the area. Bankruptcy practice is so distinct from other areas of expertise that many State Bar Associations require lawyers to receive special certification of their expertise.³¹⁸ Congress also has distinguished bankruptcy adjudication and bankruptcy procedure from that in other federal courts by creating special bankruptcy courts to hear and determine most of the litigation

312. Levi and Moore note that "[t]he acts of bankruptcy were those by which a debtor attempted to put himself or his property beyond the reach of his creditors." *Id.*

313. See WARREN, *supra* note 20, at 16 (discussing this as basis for Thomas Jefferson's opposition to the Bankruptcy Act of 1800).

314. An act to establish a uniform System of Bankruptcy throughout the United States, 2 Stat. 19, 23, at § 5 (1800) (exempting necessary wearing apparel of debtor and family); *id.* at 26-27, at § 18 (same).

315. See WARREN, *supra* note 20, at 15 (discussing position of William Gordon of New Hampshire).

316. See *id.* at 27 (describing controversy surrounding proposals preceding 1841 Act and concluding that the proposal was rejected because "Northern Senators (who believed that a bankruptcy law was unconstitutional unless confined to merchants and traders) [joined] with Southerners (who were opposed to any bankruptcy law at all)"; *id.* at 103 (noting that proposed bankruptcy legislation was not adopted in 1864 due to lobbying by the "Boston Board of Trade and other Northern commercial bodies" who argued that this legislation should wait until "the ending of the war and the reconstruction of the Southern states").

317. See, e.g., David Gray Carlson, *Debt Collection as Rent Seeking*, 79 MINN. L. REV. 817, 831-37 (1995) (describing enactment of 1898 Bankruptcy Act as involving conflict between commercial nationalism and agrarian localism); Richard C. Sauer, *Bankruptcy Law and the Maturing of American Capitalism*, 55 OHIO ST. L.J. 291, 328-30 (1994) (same).

318. See Richard Lieb & Sara Krauss, *Certification of Bankruptcy Attorneys* (July 6, 1994) (unpublished manuscript, on file with the author).

in bankruptcy cases,³¹⁹ and by empowering the Supreme Court of the United States to promulgate separate Federal Rules of Bankruptcy Procedure.³²⁰ While it is easy to think of bankruptcy law as narrow, at times bankruptcy involves issues that are broad based and that strike to the center of existing ideological debates.

It should come as no surprise that most federal bankruptcy legislation has been enacted in reaction to economic crises of national proportion.³²¹ When large segments of the American population suffer as a result of the nation's economic difficulties, public opinion may favor the provision of financial relief on humanitarian grounds. At times, the relationship between economic hardship and bankruptcy legislation has been explicitly framed in moral terms. Warren contends that, in the late eighteenth century, public opinion favored enactment of the Bankruptcy Act of 1800 due, in part, to publicity of the imprisonment of several

319. See 28 U.S.C. § 151 (1994) (designating bankruptcy courts as units of federal district courts).

320. See *id.* § 2075 (enabling Federal Rules of Bankruptcy Procedure).

321. Warren explains that pressure for the 1800 Bankruptcy Act increased following financial crises that occurred in the 1790s. See WARREN, *supra* note 20, at 10–12 (discussing “paper bubble” that burst in 1792, involving “a wild wave of speculation in Government scrip and in the shares of every kind of corporation,” and land bubble that burst in 1796, involving “wild over-speculation” in “real estate all over the country”); *id.* at 18 (discussing impact of commercial losses due to capture of vessels by France in “what our Supreme Court termed our ‘limited, imperfect war with France in 1799’”).

The Bankruptcy Act of 1841 was enacted after a lengthy period of national economic difficulty that began with the War of 1812. See NOEL, *supra* note 287, at 134 (discussing commercial losses due to trade embargoes imposed by England and France prior to the War of 1812); WARREN, *supra* note 20, at 22–23 (discussing commercial losses due to the War itself). In the aftermath of the War of 1812, the country suffered from “the severest depression it had ever undergone.” *Id.* at 25. Economic decline continued during the 1830s. NOEL, *supra* note 287, at 135. During that period, President Andrew Jackson vetoed a bill to recharter the Second Bank of the United States. *Id.* Discontinuance of the National Bank caused it to call all of its loans and accommodations, resulting in widespread commercial havoc. *Id.* States stepped in to fill this void, chartering their own banks, a power that many states were said to have abused. *Id.* Numerous state-chartered banks failed, as well. These federal and state bank failures precipitated not only the failure of merchants, traders, and other commercial entities, but also settlers and prospectors who had received financial encouragement from the government to develop the territories acquired in the War of 1812. *Id.* at 135–36.

The Bankruptcy Act of 1841 was repealed in 1843, but Congress resumed its debate on the need for bankruptcy legislation following the Panic of 1857. WARREN, *supra* note 20, at 87, 95. Of course, the outbreak of the Civil War in 1861 worsened economic conditions, as Southern plantation owners and traders defaulted on more than \$200 million of indebtedness owed to Northern merchants. NOEL, *supra* note 287, at 146; WARREN, *supra* note 20, at 97.

Similarly, the Bankruptcy Act of 1898 was enacted following the Panics of 1884 and 1893. Tabb, *supra* note 20, at 23. The 1898 Act was also amended radically during the Great Depression. See *id.* at 28–30 (discussing Depression era bankruptcy legislation, including Frazier–Lemke Act and Chandler Act, and noting that these provisions were adopted as part of New Deal legislation intended to reverse the Great Depression).

Revolutionary War heroes for nonpayment of obligation.³²² Peter Coleman similarly contends that, in the early portion of the nineteenth century, public opinion favored enactment of voluntary bankruptcy legislation as a means of overriding harsh—and some said immoral—state laws providing for the imprisonment of debtors for the failure to pay even petty sums.³²³

Even when enacted during times of prosperity, the subject of bankruptcy has been a morally charged one from time to time in American history. On one end, bankruptcy presents moral questions regarding the sanctity of contractual and other legal obligations. When bankruptcy law provides for the discharge of unpaid obligations, it butts directly against this ethical issue; even when it does not, bankruptcy law necessarily skirts the subject as it involves debtors who have broken promises and are unable to repay their obligations. At the other end of the spectrum, bankruptcy involves moral questions regarding mercy and rehabilitation.³²⁴ Bankruptcy laws, particularly those providing for the discharge of debt, exist to protect debtors from the reach of their creditors, relieve them from past financial hardship and forgive prior commercial indiscretions; reorganization laws further seeks to rehabilitate debtors, providing them with a second chance at financial stability and commercial success.

In addition, jurists have struggled with the scope of Congress' constitutional authority to enact bankruptcy legislation throughout American history. Although the United States Constitution permits Congress to enact "uniform Laws on the subject of bankruptcies,"³²⁵ lawmakers in the early nineteenth century questioned whether this power enabled them to adopt a bankruptcy law that permitted debtors voluntarily to commence a proceeding although contemporaneous English law provided only for involuntary commencement.³²⁶ There was also considerable debate as to whether state-chartered corporations constitutionally could commence a federal bankruptcy case—if state law governed the creation of the corporation, how could federal law govern its liquidation?³²⁷ At the same time, lawmakers were uncertain as to whether

322. See WARREN, *supra* note 20, at 13–20 (discussing petition to Congress on behalf of Robert Morris, Revolutionary War hero and bankrupt).

323. See COLEMAN, *supra* note 287, at 254–55 (discussing efforts to repeal state laws permitting imprisonment of insolvent debtors, and the relationship of this reform effort to proposals permitting voluntary bankruptcy filings).

324. See GROSS, FAILURE AND FORGIVENESS, *supra* note 15, at 91–103 (discussing bankruptcy goals of forgiveness and rehabilitation).

325. U.S. CONST. art. I, § 8, cl. 4 (Bankruptcy Clause).

326. See WARREN, *supra* note 20, at 30–31 (explaining that opponents to voluntary bankruptcy proposals argued that such a voluntary law might be unconstitutional, and certainly would be immoral).

327. See, e.g., COLEMAN, *supra* note 287, at 22 ("Some opponents of a national bankruptcy system, most notably Thomas Hart Benton of Missouri, considered corporate enterprises so inextricably entwined with economic life that no relief law was worth enacting that did not apply to them. Others were so hostile to corporations and banks that they opposed any proposal to include them. Some even saw such bills as devices by which northern banking interests would crush the weaker southern and western institutions. These opponents commonly appealed to sectional interests and to states' rights. The national

states were constitutionally permitted to enact their own insolvency legislation.³²⁸ These questions under the Bankruptcy Clause were not considered resolved until enactment of the Bankruptcy Acts of 1867 and 1898.³²⁹

Questions as to the constitutionality of bankruptcy legislation were not limited to those under the Bankruptcy Clause. For example, the Supreme Court initially struck down provisions in the Depression era Frazier-Lemke Act which protected farmers in bankruptcy from state foreclosure actions as violative of the Fifth Amendment.³³⁰ More recently, the Supreme Court ruled that the bankruptcy jurisdictional provision enacted with the 1978 bankruptcy legislation violated Article III of the Constitution because it delegated the "essential attributes of judicial authority" to bankruptcy judges who were neither granted life tenure nor salary protection.³³¹

Bankruptcy law has also involved heated political debates throughout American history. In the Eighteenth and early Nineteenth Centuries, bankruptcy legislation was at the fore of important debates between Federalists and anti-Federalists.³³² The Bankruptcy Act of 1841 was enacted by only the narrowest of

government, they argued, should have no power to break up corporations created by the states."); Skeel, *Corporate Law and Corporate Bankruptcy*, *supra* note 18 (discussing historical debate regarding eligibility of corporate debtors for bankruptcy relief).

328. In *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), the Supreme Court struck down a New York State insolvency law that discharged certain debtors from preexisting contractual obligations. *See also* *McMillan v. McNeil*, 17 U.S. (4 Wheat.) 209 (1819) (*per curiam*) (invalidating similar Louisiana law). Due to ambiguities in these decisions, contemporary jurists questioned whether *Sturges* also should have been read to cast doubt on state laws discharging debtors from obligations arising after enactment. *See* WARREN, *supra* note 20, at 24 (noting that many read *Sturges* to have invalidated all state insolvency laws, whether applicable to prior or future contracts). The Supreme Court did not resolve this question until its decision in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). In *Ogden*, the Court held that states could not discharge debts due to the citizen of a foreign state, but that they could discharge future debts owed to citizens of the same state. *See, e.g.*, Tabb, *supra* note 20, at 15 (discussing *Ogden*).

329. *See* WARREN, *supra* note 20, at 109 (distinguishing Bankruptcy Act of 1867 from its predecessors in that, "all the old questions as to the constitutionality of voluntary bankruptcy, of extension of bankruptcy to any class of persons other than traders, and of its application to corporation—questions which, in the 1820s, 1830s, and 1840s, had caused such heated contests—now aroused practically no debate"); *id.* at 144 (reaching similar conclusion with regard to the Bankruptcy Act of 1898).

330. The Frazier-Lemke Act was initially enacted in 1934 to enable farmers to protect their land and homes from foreclosure actions. Pub. L. No. 486, 48 Stat. 1289 (1934); *see* Tabb, *supra* note 20, at 28. The Supreme Court struck this statute down in *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555, 589-602 (1935). Congress revised and reenacted the Frazier-Lemke Act, Pub. L. No. 384, 49 Stat. 942 (1935), and the Court upheld the constitutionality of the revised Act in *Wright v. Vinton Branch*, 300 U.S. 440, 470 (1937).

331. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

332. Warren argues that Federalists' support for the Bankruptcy Act of 1800 was also straightforward to comprehend—it federalized an area of the law that, before then, had been left to the states. WARREN, *supra* note 20, at 17-18 (quoting James A. Bayard of

majorities in, what Warren describes as, "one of the clearest cases of logrolling."³³³ Bankruptcy legislation was among the package of statutes enacted during the Reconstruction Period following our Civil War.³³⁴ It was an integral part of the New Deal legislation enacted during the Great Depression.³³⁵ Much of the Chandler Act was enacted in reaction to populist concerns that "public investors needed protection from insiders in reorganization cases."³³⁶ From the Reagan era to date, bankruptcy reform also has been an important part of Republican efforts to "deregulate" federal law (especially federal law governing corporations) and reinstate "basic" values in our legal system (particularly values regarding the sanctity of contract and property).³³⁷

Casting the bankruptcy debate in moral, constitutional or political terms may counteract the collective action problems faced by diffuse interest groups.³³⁸ Emphasis on the moral need to protect unlucky debtors from destitution can help enact (or prevent repeal) of voluntary bankruptcy legislation. Reference to constitutional doctrine also can frame the debate in principled ways. Describing bankruptcy laws as public investor or consumer protection legislation can have a similar effect. Alternatively, emphasis on the moral turpitude of broken promises

Delaware as arguing that the 1800 Bankruptcy Act would "effect to unite and nationalize the United States and its permanent operation will cement together the different parts of the Union and connect more closely the Nation with the Federal government"); *see also, e.g.,* Carlson, *supra* note 317, at 834 (describing bankruptcy law as "connected with nation-building and protection of the national market over local markets"); Judith Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Unity*, 58 N.Y.U. L. REV. 22, 36 (1983) (discussing Federalist support for early national bankruptcy legislation). Anti-Federalists also argued that the law was unnecessary to a commercial economy, and unwanted by states that had not themselves enacted such laws. *See* WARREN, *supra* note 20, at 15 (discussing grounds for opposition by William Gordon of New Hampshire and Albert Gallatin of Pennsylvania). Even today, states' rights issues arise with frequency in the area of bankruptcy. *See* Block-Lieb, *supra* note 20, (discussing congressional debate on bankruptcy jurisdiction and state rights during consideration of 1984 amendments to Bankruptcy Code); Posner, *supra* note 28 (manuscript at 66-83) (discussing pertinence of state's rights and federalism issues to debate over exemptions in 1978 Bankruptcy Code).

333. WARREN, *supra* note 20, at 77; *accord* COLEMAN, *supra* note 287, at 23 ("In effect, western interests abandoned their opposition to the relief measure in return for northern support for the distribution bill.").

334. *See* WARREN, *supra* note 20, at 95-128 (describing forces behind enactment, amendment, and repeal of Bankruptcy Act of 1867).

335. *See* Tabb, *supra* note 20, at 28-30 (discussing Depression era bankruptcy legislation).

336. *See id.* at 29-30 (discussing influence of SEC Chairman, William O. Douglas, on Chandler Act).

337. *See* Block-Lieb, *supra* note 20 (discussing 1984 Amendments obtained by consumer finance industry); Countryman, *supra* note 20, at 821-27 (same).

338. *See, e.g.,* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 31 (1991) ("The implicit public choice assumption that ideology doesn't count, or doesn't count much, is usually correct. But when the broad mass of average people have even a weak preference and that preference is the same for most people, then ideology does matter.").

can help repeal or oppose enactment of bankruptcy laws.

Playing the ideology card is unlikely to trump in the amendment game, however. Revisions to exempt a narrow interest group from the bankruptcy laws contradict the fundamental purpose of bankruptcy law by providing unequal distributions to similarly situated creditors, but the immorality of this inequity is abstract. It is easily countered by the argument that certain creditors should receive favored treatment in the bankruptcy context because absent favored treatment they will suffer harm.

C. The Nature of the Proposal

As noted above, diffusely interested groups may be ineffective when seeking either enactment or repeal of bankruptcy legislation. Diffuse groups interested in enactment or repeal of the bankruptcy laws face collective action problems. Organization of their interests is, thus, difficult.

Once enacted, bankruptcy law may be easier to amend than repeal. Enactment and repeal are both public goods; narrowly framed amendments are not. Thus, bankruptcy legislation can be eroded by amendments that favor the self-interest of narrowly framed interest groups.³³⁹

Creditor groups may join together and lobby in favor of omnibus legislation that promotes the narrow interests of the members of the coalition.³⁴⁰ Similarly, debtor organizations can be convinced to support the omnibus bankruptcy bill by including in it several narrow provisions that favor some debtors' interests. Keeping the omnibus bill together depends on including provisions with concentrated benefits and diffuse costs.³⁴¹ If a particular proposal is controversial, lobbyists may persuade legislators against inclusion of the controversial proposal in the omnibus bill rather than against the package as a whole. Opposition to the omnibus bill faces collective action problems, whether that opposition comes from debtors, creditors, or other interests, since opposition is a public good—if successful, opposition benefits all those opposed to the bill, not only those who worked against its passage. Moreover, coalitions of defectors can present a tempting package of bankruptcy revisions to legislators seeking reelection—votes in favor of the legislation provide the approval of more than one interest group at a time, and votes against the legislation are discouraged by characterizations of the bill as a “well balanced product of compromise.”³⁴² Other

339. There are many ways in which a revision to the Bankruptcy Code can favor the self-interest of narrowly framed interest groups. For example, the revision may grant the entity a priority in distribution, exempt the entity from the scope of the automatic stay, exempt a transaction from avoidance, or except an obligation from discharge.

340. See Douglas G. Boshkoff, *Debtor Protection at the Close of the Twentieth Century*, 23 CAP. U. L. REV. 379, 382 (1994) (similarly noting that collective action problems impede making changes in eligibility restrictions in the Bankruptcy Code, and contrasting exceptions to discharge since “benefits of any new exception to discharge are more narrowly focused on the protected class”).

341. See *supra* text accompanying notes 174–78 (discussing Wilson’s theories of interest group influence).

342. See *supra* text accompanying notes 118–25 (discussing Macey’s theory that

legislators may not object to these "hidden implicit deals" because bankruptcy legislation is easily viewed by legislators as too complex to merit detailed study by anyone other than the "experts."³⁴³ Like the free-rider problems that public choice scholars have identified in the demand for legislation, individual legislators may rationally conclude that their time is not well spent reviewing complex bankruptcy bills. Omnibus bankruptcy bills also provide multiple legislators with the opportunity for "credit claiming" because they are comprised of numerous narrowly framed provisions containing "particularized benefits."³⁴⁴ Logrolling on bankruptcy legislation is made easier by means of these omnibus bankruptcy bills, since the payback occurs with a single vote in favor of the bill.³⁴⁵

Experience surrounding the 1984 and 1994 Amendments supports the notion that organized interests may have greater success in influencing the amendment of the Bankruptcy Code than its enactment or repeal. Organized interests succeeded in obtaining a number of special benefits in the Bankruptcy Amendments and Federal Judgeships Act of 1984—provisions intended to benefit the consumer credit finance industry,³⁴⁶ farmers entrusting crops to grain storage facilities,³⁴⁷ lessors of nonresidential commercial premises,³⁴⁸ the Mothers Against Drunk Driving,³⁴⁹ purchasers of time-share interests,³⁵⁰ parties to repurchase agreements,³⁵¹ and organized labor.³⁵² Organized interests also succeeded in

technical and complex legislation provides a mechanism for "hidden-implicit" deals with special interest groups).

343. See *supra* text accompanying notes 118–25.

344. See *supra* text accompanying notes 115–17 (discussing Mayhew's theory that supply of "particularized" legislation is enhanced by legislators' interest in "credit claiming").

345. See *supra* text accompanying notes 129–33 (discussing effect of logrolling and issue bundling on interest group influence).

346. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, §§ 301–324, 98 Stat. 333, 352–58 (1984). For a description of the lobbying campaign mounted by the National Coalition for Bankruptcy Reform for amendment to the Bankruptcy Code to limit the bankruptcy discharge available to consumer debtors with regular income, see Countryman, *supra* note 20, at 821–27. See also Boshkoff, *supra* note 340 (criticizing 1984 Amendments to Code obtained by consumer finance industry).

347. §§ 350–354, 98 Stat. at 358–61. Following the failures of several grain storage facilities in the Midwest, legislation was introduced to expedite the treatment of farmers' ownership claims against grain storage facility debtors. For a discussion of this legislation, see Block-Lieb, *supra* note 20, at 2–13.

348. §§ 361–362, 98 Stat. at 361–64. Although shopping center lessors had received favorable treatment under the 1978 version of the Bankruptcy Code, this industry group subsequently sought legislation strengthening and expanding these protections. For a discussion of this legislation, see Block-Lieb, *supra* note 20, at 2–14.

349. § 371, 98 Stat. at 364. Due to efforts by Mothers Against Drunk Driving, bills were introduced to make nondischargeable certain debts incurred by persons convicted of driving while intoxicated. For a discussion of this legislation, see Block-Lieb, *supra* note 20, at 2–14.

350. §§ 401–404, 98 Stat. at 366–67. For a discussion of these time-share amendments, see Block-Lieb, *supra* note 20, at 2–15.

351. §§ 391–396, 98 Stat. at 364–66. For a discussion of the "repo agreement" amendments, see Block-Lieb, *supra* note 20, at 2–20.

obtaining numerous provisions in the Bankruptcy Reform Act of 1994. For example, included among the "Commercial Bankruptcy Issues" covered in the 1994 Amendments, are provisions expanding the exemptions provided to financiers of aircraft equipment, vessels and rolling stock;³⁵³ overriding judicial decisions extending the one-year preference period to include certain noninsider transferees;³⁵⁴ providing a federal rule for the perfection of an encumbrance in rent accruing on mortgaged property;³⁵⁵ extending the protections provided to timeshare interest purchasers in the event the debtor-timeshare interest seller rejects the timeshare interest;³⁵⁶ increasing the wage priority distribution relating to sales commissions earned by independent sales representatives;³⁵⁷ excluding from the definition of property of the estate any interest in liquid and gaseous hydrocarbons transferred by the debtor pursuant to a production payment agreement;³⁵⁸ extending protection of mortgages and security interests in rents and lodging payments that accrue post-petition;³⁵⁹ expanding upon definition of, and thus existing exemptions pertaining to, swap agreements;³⁶⁰ limiting the circumstances under which a debtor

352. § 541, 98 Stat. at 390-91. Within hours after the Supreme Court's decision in *NLRB v. Bildisco & Bildisco, Co.*, 465 U.S. 513 (1984) (holding that debtor-in-possession could reject its collective bargaining agreement upon showing that compliance with the agreement would be more burdensome to the estate than rejection would be to covered employees), the Chairman of the House Judiciary Committee introduced legislation to reverse the decision. For a discussion of this prolabor amendment, see Block-Lieb, *supra* note 20, at 2-23 to 2-25.

353. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 201, 108 Stat. 4106, 4119-21 (1994). For a discussion of these amendments to 11 U.S.C. §§ 1110 and 1168, see David G. Hicks, *The October Surprise: The Bankruptcy Reform Act of 1994—An Analysis of Title II—the Commercial Issues*, 29 CREIGHTON L. REV. 499, 503 (1996), noting that the amendment expands prior protection that had applied only to "purchase money equipment," but noting that the provision applies only to equipment placed in service after the statutory effective date.

354. § 202, 108 Stat. at 4121. With this amendment, Congress intended to override cases like *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989). For a discussion of the effectiveness of this amendment, see David Gray Carlson, *Tripartite Voidable Preferences*, 11 BANKR. DEV. J. 219 (1995); Hicks, *supra* note 353, at 503-06.

355. § 204, 108 Stat. at 4122.

356. § 205, 108 Stat. at 4122-23. For a discussion of this amendment to 11 U.S.C. § 365(h), see Hicks, *supra* note 353, at 507-08.

357. § 207, 108 Stat. at 4123-24. For a discussion of this amendment to 11 U.S.C. § 507(a)(3), see Hicks, *supra* note 353, at 509, where he describes it as being "the result of lobbying."

358. § 208, 108 Stat. at 4124-25. For a discussion of this amendment to 11 U.S.C. §§ 101 and 541(b)(4), see Hicks, *supra* note 353, at 510, where he indicates that the amendment seeks uniformity across varying state laws on the topic of "production payments."

359. § 214, 108 Stat. at 4126. For a discussion of this amendment to 11 U.S.C. §§ 363(a) and 552(b), see Hicks, *supra* note 353, at 514-17, where he indicates that the amendment seeks to characterize "hotel rents" as cash collateral.

360. § 215, 108 Stat. at 4126. For a discussion of this amendment to 11 U.S.C. § 101, see David Gray Carlson, *Rents in Bankruptcy*, 46 S.C. L. REV. 1075, 1085 (1995), in which he refers to the 1994 amendment to 11 U.S.C. § 552 as "bizarre" because it leaves bankruptcy courts with the unsavory choice between the plain language of the statute and

in a single-asset real estate case can defeat a request for relief from the automatic stay made by a creditor whose claim is secured by an interest in such real estate;³⁶¹ requiring trustees and debtors-in-possession to timely perform obligations under an unexpired lease of commercial personal property pending approval of a motion to assume or reject such a lease;³⁶² and excepting the proceeds of money order agreements from property of the estate.³⁶³

Just because organized interests influenced enactment of the 1984 and 1994 Amendments may not, on its own, indicate that each of the amendments made by these omnibus bills conflicts with the public interest in sound bankruptcy policy. But commentators have criticized enough of these amendments as unnecessary, ineffective, or counterproductive to create substantial questions as to whether any of them serve a broad public purpose.³⁶⁴

stray remarks to the contrary, found in obscure places within the legislative history.

361. § 218, 108 Stat. at 4128. Commentators conflict on the effectiveness of this amendment to 11 U.S.C. §§ 101 and 362(d). *See Hicks, supra* note 353, at 521 (noting that this amendment was “[p]ropelled by substantial support from commercial mortgage bankers, life insurers and related industries that hold long term paper on these projects”). *Compare* Edward S. Adams & James L. Baillie, *A Privatization Solution to the Legitimacy of Prepetition Waivers of the Automatic Stay*, 38 ARIZ. L. REV. 1, 32 (1996) (referring to the 1994 amendment permitting secured creditors of a “single asset real estate” case to obtain relief from automatic stay more readily than other secured creditors and finding the amendment to “forge a fair compromise”), *with* Don Willenburg & Baxter Dunaway, *Single Asset Real Estate Cases After the Bankruptcy Reform Act of 1994*, 5 J. BANKR. L. & PRAC. 107, 128 (1996) (“Decisions interpreting and applying these provisions [regarding ‘single asset real estate’] may show that even when a lobby is successful in persuading Congress to change the law, the result may not always be what was intended.”), *and* David Gray Carlson, *Artificial Impairment and the Single Asset Real Estate Case*, 23 CAP. U. L. REV. 339, 341 (1994) (noting that creditors in “single asset real estate” cases may no longer be able to oppose confirmation on grounds that the class of claims is impermissibly impaired only artificially since that argument “may have been killed off by accident in the otherwise pro-creditor Bankruptcy Reform Act of 1994”).

362. § 219, 108 Stat. at 4128–29. For a discussion of this amendment to 11 U.S.C. §§ 363 and 365, *see Hicks, supra* note 353, at 522, where he views this amendment as “[i]ntended to balance competing concerns that have arisen under existing law.”

363. § 223, 108 Stat. at 4129–30. For a discussion of this amendment to 11 U.S.C. § 541(b), *see Hicks, supra* note 353, at 525, where he indicates that this provision “resulted largely from an organized lobbying campaign by representatives of the money order industry.”

364. *See supra* notes 20, 346–63 and accompanying text (detailing some of these special interest amendments and, in the footnotes, their criticism); *see also* Cynthia A. Baker, *Other People's Money: The Problem of Professional Fees in Bankruptcy*, 38 ARIZ. L. REV. 35, 36–37 (1996) (“Will the tighter fee standards under the 1994 amendments permit courts to effectively control [professionals’] fees [in bankruptcy], rein in costs, and resolve these problems? The answer, resoundingly, is no. The recent amendments are an attempt to cure a broken leg with a Band-Aid.”); David Gray Carlson, *Security Interests in Exempt Property After the 1994 Amendments of the Bankruptcy Code*, 4 AM. BANKR. INST. L. REV. 57, 83 (1996) (“The 1994 Amendments to section 522(f) are only half successful.”).

D. The Nature of the Process

Bankruptcy law is federal law. As such, bankruptcy policy is set by Congress, and by the Senate and House Judiciary Committees—the congressional committees with jurisdiction over bankruptcy legislation. From time to time, Congress also establishes a commission for the review of bankruptcy legislation in order to assist it in formulating policy and drafting proposed legislation.³⁶⁵ Congress received informal assistance of this sort with the Bankruptcy Acts of 1841³⁶⁶ and 1898,³⁶⁷ and the Chandler Act.³⁶⁸ It more formally created a Commission on the Bankruptcy Laws of the United States in 1970; their report culminated in the Bankruptcy Code of 1978.³⁶⁹ More recently, Congress again created a National Bankruptcy Review Commission.³⁷⁰

Public choice theorists are frequently critical of the legislation enacted by Congress.³⁷¹ Bankruptcy legislation is not immune from this sort of criticism.³⁷² It remains to be seen whether legislative proposals offered by the Bankruptcy Review Commission are to be preferred over those adopted by Congress in recent history.³⁷³ Commentators disagree on whether statutes promulgated by private legislatures like the ALI and NCCUSL are preferable to those enacted by more conventional legislatures.³⁷⁴

365. Since enactment of the Federal Advisory Committee Act ("FACA"), Pub. L. No. 92-463, 86 Stat. 770 (1972), these commissions probably constitute "advisory committees" within the meaning of the FACA. For a discussion of the breadth of the FACA, see Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L.J. AM. U. 111 (1996). For a discussion of the breadth of the remedies potentially available for violations of the FACA, see Douglas D. Morriss, Note, *Alabama-Tombigbee Rivers Coalition v. Department of Interior: Giving Sabers to a "Toothless Tiger," the Federal Advisory Committee Act*, 26 ENVTL. L. 393 (1996).

366. See Tabb, *supra* note 20, at 16 (noting that Joseph Story wrote several versions of the 1841 Act).

367. See *id.* at 23-24 (contrasting Lowell and Torrey bills).

368. See Mitchell S. Dvoret, *Bankruptcy Under the Chandler Act: Background*, 27 GEO. L.J. 194 (1938) (discussing involvement of American Bar Association, the National Bankruptcy Conference, and other trade associations in the Chandler Act); Tabb, *supra* note 20, at 29 (same).

369. See Bankruptcy Study Commission, Pub. L. No. 91-354, 84 Stat. 468 (1970) (establishing Commission on the Bankruptcy Laws of the United States); see also H.R. DOC. NO. 93-137, pt. I, at v-xix (1973), reprinted in LAWRENCE P. KING ET AL., 2 COLLIER ON BANKRUPTCY app. (15th ed. 1979). For a discussion of the Commission's involvement in the enactment of the 1978 Code, see Posner, *supra* note 28.

370. See *supra* note 33 and accompanying text (noting creation of National Bankruptcy Review Commission with enactment of the 1994 amendments to the Bankruptcy Code).

371. See *supra* text accompanying notes 90-133 (discussing public choice and interest group theories).

372. See *supra* note 20 (citing various commentators criticizing recent bankruptcy amendments as "special interest legislation"); see also Alces & Frisch, *supra* note 25.

373. Cf. Jay S. Bybee, *Advising the President*, 104 YALE L.J. 51 (1994) (generally analyzing historical sources for, and constitutionality of, advisory committees).

374. Compare Schwartz & Scott, *supra* note 134, at 651 (formulating a model of

There are several reasons to think that the involvement of the Bankruptcy Review Commission will improve things.³⁷⁵ Like members of the ALI and NCCUSL, members of the Bankruptcy Review Commission are not motivated by a desire for reelection. Although appointed by political actors,³⁷⁶ there would seem to be little means by which a commissioner could be punished for taking positions contrary to the expectations of the person or entity making the appointment. As a result, it would be reasonable to expect commissioners to vote on legislative proposals based on their concerns for the public interest and their perceptions of the policy purposes of the bankruptcy laws.

Schwartz and Scott argue that private lawmakers, such as members of the ALI and NCCUSL, do not vote on legislative proposals based solely on their conception of the public's interest in the proposal.³⁷⁷ They suggest that incentives also exist for private lawmakers to act in their self-interest—to decline to support legislation inconsistent with their private practice or personal affairs, as well as legislation that would harm their reputation for good judgment. They also contend that private lawmakers have every incentive to minimize their time spent on “PL business.” Should Schwartz and Scott’s analysis be extended to apply to members of the Bankruptcy Review Commission? While it is probably prudent to assume, as Schwartz and Scott contend, that commissioners will be reluctant to approve legislative proposals that contravene their private interests,³⁷⁸ including reputational interests,³⁷⁹ I am reluctant to assume that commissioners seek to

private lawmaking and concluding that “private legislatures with a membership similar to that of the ALI and NCCUSL and procedures similar to theirs will have a strong status quo bias and sometimes will be captured by powerful interests”), and Scott, *supra* note 25 (concluding that the private lawmaking process by which Article 9 of the UCC is promulgated leads to bright-line rules favoring the financial organizations that benefit from these statutes, and remaining agnostic as to whether the law of secured transactions enhances public welfare), with Alces & Frisch, *supra* note 25 (responding to Scott, and contending that the public lawmaking process for enactment of bankruptcy law is no better, and possibly far worse, than the private legislative process by which Article 9 has been adopted; opining that bankruptcy law may improve due to involvement of the Bankruptcy Review Commission).

375. See Bybee, *supra* note 373, at 58–60 (describing numerous informational and political purposes for advisory committees).

376. Bankruptcy Review Commission, Pub. L. No. 103–394, § 604, 108 Stat. 4147, 4147–48 (1994) (indicating that the Commission is to be composed of nine members: three to be appointed by the President, one by the President pro tempore of the Senate, one by the Minority Leader of the Senate, one by the Speaker of the House of Representatives, one by the Minority Leader of the House of Representatives, and two by the Chief Justice of the United States).

377. See *supra* text accompanying notes 134–56 (discussing Schwartz’s and Scott’s political economy of private legislatures).

378. As a result, organized interests may influence a commission indirectly by appealing to the personal predilections of the commissioners.

379. Thus, commissioners may have little interest in suggesting legislation with no chance of enactment. To avoid making quixotic proposals, commissioners may second-guess Congress’ political concerns and frame their recommendations accordingly. By staking out clear lines of opposition, interest groups may indirectly influence commission

minimize their time spent on "commission" business. My reluctance stems, in part, from the notion that commissioners more closely resemble members of the ALI or NCCUSL who sit on a study group or drafting committee than those members who do not serve on these sorts of committees. Schwartz and Scott argue only that members of the ALI and NCCUSL who do not serve on committees seek to minimize their time spent on "PL business," and with good reason.

My optimism about the Bankruptcy Review Commission also stems from its comparative expertise. Commissioners are likely to be better informed on the subject of bankruptcy than the average member of Congress—and better informed on substantive legal issues than the "median PL member" of the ALI and NCCUSL. Some commissioners may be appointed because of their preexisting expertise in the area. Others may begin their appointment as neophytes to the area, but by virtue of their concentrated study can be expected to develop a better-than-average understanding of the subject matter. In addition, a commission may divide its burden of study, at least initially, among small working groups or committees of commissioners. This delegation is likely to enhance the ability of the commission to gather information necessary to consider complex and specialized issues.

But, of course, a commission's proposals are not automatically enacted into legislation.³⁸⁰ Organized interests may still impact bankruptcy legislation by influencing Congress' determination to adopt a commission's proposal. Nonetheless, a commission may assist in deflecting the influence of interest groups at this later stage, as well. A commission may help Congress to rebuff the pressure of interest groups. Legislation proposed by the commission may take on a momentum of its own. Commissioners may act as "political entrepreneurs"—selling the proposed legislation to Congress. Where one of the commissioners is a member of Congress, it seems particularly likely that the commissioner-congressman will push for enactment of the proposal. Moreover, Congress may be reluctant to tamper with a commission's package of legislative proposals. If it is a congressional commission, Congress may be reluctant to ignore the advice it has solicited. Even if the commission was created by some other branch of government, almost by definition members in the commission will have been chosen for their expertise in the subject matter or stature in the legal community. Congress may find it difficult to refute the advice of these experts. In addition, "blue-ribbon" consideration of the issue may rally public opinion in favor of a legislative proposal; and public favor for the proposal may counteract opposition from organized interests.

CONCLUSION

By establishing liability rules that sanction misbehavior, bankruptcy law can resolve the common pool problems that trouble creditors of a financially

proposals.

380. The Bankruptcy Review Commission will only advise Congress on the subject of bankruptcy. Its recommendations may be more influential than others, but they are not binding. The Commission has no power to enact statutes; it merely recommends a package of legislation to those who do have such power.

distressed debtor. But the more exceptions there are to these rules of liability, the less likely it is that the Bankruptcy Code will deter value-diminishing behavior. And organized groups have every incentive to seek exemptions from this seemingly complex and technical law. When coalitions of influential organizations join together in these efforts, legislators may view enactment of the omnibus bankruptcy amendment act as beneficial (or, at worst, irrelevant) to their reelection efforts. Opposition to omnibus bills can be satisfied by including in the bill provisions that benefit the interests of this opposition. As a result, bankruptcy laws may be unstable resolutions to financial common pool problems.

Recently, several bankruptcy scholars have argued that bankruptcy law is unnecessary because financial common pool problems are just as effectively resolved with rules of contract or property.³⁸¹ This Article does not purport to resolve the "theoretical divide" between commentators who would reform bankruptcy law and those who would repeal it.³⁸² My position in this dialogue should not be misunderstood, however. I should not be read to support the clamor for repeal of the corporate reorganization provisions, although this Article paints an unflattering picture of the legislative process responsible for these laws. Rather than repeal bankruptcy laws as unsuccessful, the process by which Congress enacts, repeals, and amends that legislation should be reformed so that it is more likely to provide a stable resolution of this common pool problem.³⁸³

What reform do I propose? Congress should establish a permanent bankruptcy review commission for consideration of all amendments to the Bankruptcy Code, similar to the Permanent Editorial Board that exists to consider proposals for amendments to the Uniform Commercial Code. Like any proposed reform, mine is imperfect. Of course, Congress could repeal legislation establishing a permanent bankruptcy review commission, or it could simply decline to fund the commission once established. Because either of these legislative events would be public, however, it is possible that the creation of a permanent commission would affect the conscience of Congress on the topic of bankruptcy. It just might deflect Congress' Temptation to defect.

381. See *supra* note 19 and accompanying text (reviewing this literature).

382. The reference to a "theoretical divide" belongs to Adler, *Role of Insolvency Rules*, *supra* note 19, at 1111, where he states that "[t]he notion that contract can better provide any incentive forms the theoretical divide...between critics of and defenders of bankruptcy law."

383. First, the process through which Congress *enacts* (chapter 11 and other chapters of) the Bankruptcy Code is not as problematic as the process through which Congress *amends* the Code to benefit individual creditors at the expense of all. Moreover, repeal of imperfect legislation seems, to me, to be an overreaction to the problem of instability. Finally, I have my doubts that legislative repeal would cure the Temptation to defect even from common law resolution of financial common pool problems.

