COLLECTIVE INACTION AND INVESTMENT:
THE POLITICAL ECONOMY OF DELAY
IN BANKRUPTCY REFORM

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Positive legal theory typically understands the production of legislation as the provision of a public good. Although the details can be complex, the treatment is basically simple. Legislative proposals are produced when interest groups act and are well organized, so that collective action problems already are overcome, or when organizing interest groups is (individually) cost-justified, so that collective action problems do not exist. When collective action problems prevent interest groups from organizing, legislative proposals are not forthcoming. Thus, the typical approach to legislative activity explains its presence or absence by the presence or absence of collective action problems. The approach, however, is seriously incomplete because it ignores the phenomenon of collective inaction. Sometimes organized interests groups do not act when acting would be in their apparent interest. Sometimes their failure to act cannot be explained by lapses in individual rationality, latent collective action problems or indifference, or simple ignorance. The data sometimes just do not support these explanations. When well-organized interest groups do not engage in legislative activity to further their apparent goals, inaction can be a deliberate decision. The presence or absence of collective action problems do not explain inaction. From the approach to legislation typical in the legal literature, collective inaction among well-organized groups with stakes in legislation is an anomaly.

Collective inaction was prominent in the passage of the 1998 Religious Liberty and Charitable Donation Protection Act ("the Act"). The Act amends the Bankruptcy Code to ensure that bankruptcy does not interfere with a good deal of charitable giving. Prebankruptcy contributions to qualifying charities under prescribed conditions are insulated from attack as constructively fraudu-

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lent transfers. Because such contributions come at the expense of creditors, creditors seemingly would care about such legislation. The conventional reasons why creditors might be indifferent to the Act are unsatisfactory. Various creditor groups existed and were already engaged in lobbying efforts in connection with the ongoing bankruptcy reforms. A striking datum, however, is the absence of legislative activity by these groups. The Act is the result of sustained legislative efforts by religious groups and inaction by well-organized creditors. The history of the Act shows no public statement of opposition by creditor groups: creditors did not propose alternative legislation, testify before congressional committees, or even apparently lobby against the Act. Creditor groups were completely silent. Although other explanations of their passivity are plausible, collective action problems cannot be among them.

This Article describes the phenomenon of collective inaction among well-organized groups as a way of understanding the passage of the Act. It argues that the Act resulted from an investment decision made by creditor groups that required passivity. Although the evidence is sparse, it is consistent with well-organized creditor groups choosing to postpone investing in a specific bankruptcy reform. The expected gains from making an investment in such reforms in the future exceeded the gains from an immediate investment in such reform. Delay maximized creditor groups’ expected return over time from the package of reforms urged by them. Inaction was not the result of an inability to make cost-justified organizational efforts to oppose the Act. Nor was it an implicit “bargain” between creditor groups and religious organizations, even in an extended sense of the term, in which creditor inaction was the price paid for the prospect of increased success in their ongoing efforts to have the Bankruptcy Code amended in their favor. Creditor inaction was unilateral, not a collusive outcome between creditors and religious groups, the main proponents of the Act. It was the same sort of investment decision as is made by any party who decides to delay incurring irretrievable costs.

The Article proceeds as follows. Part I describes the dominance of collective action models of legislative action. Part II briefly describes the Act’s provisions and its legislative history, and argues that the Act cannot plausibly be understood by collective action models. Drawing on supporting case studies of salient phenomena in the political economy of trade protection, it also argues

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3 See infra notes 34-35 and accompanying text.
4 See infra text accompanying notes 34-40.
that the failure of well-organized groups to act may not be an isolated occurrence. Part III considers and rejects some conventional explanations of creditor inaction consistent with the collective action models. Part IV analyzes creditor passivity as a deliberate postponement of an investment in bankruptcy reform and argues that the analysis is plausible. Part V concludes by briefly summarizing the Article's argument. An Appendix (Part VI) estimates the aggregate amount of prebankruptcy charitable contributions and describes bankruptcy law's effect on debtors' tax-driven incentives to make them.

I. LEGISLATION AND COLLECTIVE ACTION MODELS

A prominent collection of theories explain legislation as the result of two primarily economic factors: (1) the different stakes that competing sets of interests have in legislative outcomes, and (2) the different costs that these interests face in collectively organizing to effect a legislative outcome. The cost of effective organization implies that collective action problems prevent concerted opposition. If the organizing costs of each party exceed the party's benefits of successfully organizing, each will not organize, even when the aggregate benefits to affected interests of the organizational efforts exceed aggregate costs. These inequalities describe a collective action problem. Each affected party will not invest in political activity, free-riding instead off the organizational efforts of others. The differential costs of organization have a consequence for the registered demand for or against legislation; high organizational costs reduce the influence of a group of interests on the legislative outcome. From a purely demand-side perspective, legislation is unlikely to reflect the preferences of poorly organized interests.

Differential costs of organization also support some testable implications about the outcomes of legislative activity. Four of the implications concern the

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7 See Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q. J. ECON. 371 (1983); Peltzman, supra note 5.
distribution of expected benefits and costs of obtaining favorable legislation. First, when a legislative proposal yields large expected per capita benefits to a concentrated group of interests and imposes small per capita costs on a diffuse group of other interests, only the concentrated interests will organize. The proposal will not be opposed. Second, when the proposal yields small per capita benefits and imposes small costs on diffuse groups, organizational efforts in favor of or opposed to the legislation will not be forthcoming. The proposal will not have much support. Third, when legislation imposes large expected per capita benefits on a concentrated group and large per capita costs on another group, both groups will organize. The outcome of the intergroup competition is indeterminate. Fourth, when small per capita benefits are distributed to a dispersed group and large per capita costs imposed to a concentrated group, only the concentrated interests will organize. The proposal will be opposed. For ease of reference, I refer to all accounts that have these implications as collective action "models."

A broad range of legislative activity is consistent with the presence of collective action problems. For example, consumer interests are not represented before the International Trade Administration in the ongoing U.S.-Canadian lumber disputes, in which the individual stakes are small and the individual costs of representation are comparatively high. Mandated insurance of demand deposit accounts persists, even if inefficient, when the individual costs to depositors of organizing for more efficient banking regulations is less than associated benefits of doing so. Suboptimally lax environmental regulation arguably is the product of the diffuse state and local interests of the beneficiaries of stricter controls. These are examples of the second implication above.

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8 See Olson, supra note 6, at 48.
9 See id. at 32-33.
11 See Peltzman, supra note 5, at 23-24.
14 "Arguably" because it raises the fair question as to why, given the dispersion of affected interests, any environmental regulation is produced. See Richard L. Revesz, The Race to the Bottom and Federal Environmental Regulation: A Response to Critics, 82 MICH. L. REV. 535, 535-40 (1997).
The Bankruptcy Code contains prominent examples of the first implication: successful action by compact and well-organized interests receiving a compact stream of benefits. A 1988 amendment to § 365 protects the rights of licensees of intellectual property, so that rejection by the debtor’s trustee leaves the licensees’ rights under the license unaffected.\(^{15}\) Lessors and secured creditors with interests in aircraft equipment are given significant exemptions from the automatic stay.\(^{16}\) In general, a narrow exception to an otherwise broad bankruptcy rule is a reliable mark of successful political action, usually by compact groups which benefit from the exception.\(^{17}\)

Some legislation is produced, however, when well-organized groups fail to act. These are cases of legislation by default, as it were, in which members of affected groups decide not to participate in legislative activity. The failure of organized interests to act might be of three sorts. Although all can be described as “collective inaction,” only one sort embraces collective action models. First, failure to organize itself can occur when the per capita benefits of coordination are less than individual costs of doing so.\(^{18}\) Here, inaction is individually rational and consistent with the first implication of collective action approaches to legislative activity. It does not apply when groups already are organized. Second, groups already organized can fail to act when inaction maximizes net benefit to the group.\(^{19}\) Inaction here is a rational decision and again is consistent with the first implication. Third, a failure to organize might occur when per capita benefits of coordination are greater than associated individual costs or when already organized groups fail to take cost-justified measures to protect or further their interests.\(^{20}\) Inaction occurs when action is individually and collectively prescribed. Here, individuals or groups do not act even when there are no coordination problems among their members. This sort of collective inaction is inconsistent with implications of collective action


\(^{16}\) Id. § 1112.

\(^{17}\) See, e.g., id. §§ 365(a)(3) (leases of real property in a shopping center), 524(g) (enjoining pursuit of asbestos-related tort claims against reorganized entity), 550(c) (protecting noninsider transferee from preference recovery when transfer made between 90 days and one year prior to filing of petition), 1113 (rejection of collective bargaining agreements). The 1976 Copyright Act’s statutory delineation of fair use exemptions, 17 U.S.C. § 107 (1994), shows the same pattern of narrow exceptions enacted to protect specific industry groups active in the drafting of the Act. See Jessica D. Litman, Copyright, Compromise, and Legislative History, 72 CORNELL L. REV. 857, 883-88 (1987); Jessica D. Litman, Copyright Legislation and Technological Change, 68 OR. L. REV. 275, 340-42 (1989).

\(^{18}\) See supra text accompanying note 6.

\(^{19}\) See, e.g., infra text accompanying note 122.

\(^{20}\) The benefits can be in the form of avoiding rent-reducing political outcomes. See FRED S. MCCHESEY, MONEY FOR NOTHING 26-32 (1997).
models and is the focus of this Article. Part II argues that creditors' responses to the Act are of this sort. Part III argues that conventional supplements to collective action models cannot plausibly explain creditor inaction.

II. COLLECTIVE INACTION AND THE ACT

The statutory changes to the Bankruptcy Code made by the Act are easily described. The central changes occur in 11 U.S.C. §§ 548 and 544. Section 548 is amended to insulate specified sorts of transfers from attack as constructively fraudulent conveyances. Under the unamended version of § 548(a)(2), a transfer by the debtor constitutes constructive fraud when the debtor does not receive reasonably equivalent value in return and one of three further conditions are satisfied: (1) the debtor is insolvent at the time of the transfer, (2) the debtor will be left insufficiently capitalized, or (3) the debtor intended to incur debts she was unable to pay.\(^{21}\) The Act alters § 548(a)(2) to deem a debtor making a specified sort of transfer to have received reasonably equivalent value in exchange for it. As altered, § 548(a)(2) reads:

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.\(^{22}\)

Section 548(d)(3) defines a "charitable contribution" to be a transfer of cash or a financial instrument by a natural person to a "qualified religious or charitable entity or organization," as both terms are defined by § 170(c) of the Internal Revenue Code.\(^{23}\)

Although the statutory language is convoluted, the consequence of § 548(a)(2) and (d)(3) is clear: protected transfers to qualifying charities cannot be avoided as constructively fraudulent conveyances. Section 548(a)(1)(B) de-

\(^{22}\) Id. § 548(a)(2) (Supp. IV 1998).
\(^{23}\) Id. § 548(a)(3).
fines when a transfer is constructively fraudulent. It includes (a)(1)(B)(i), which requires that the debtor receive less than reasonably equivalent value for the transfer. According to § 548(a)(2), a debtor making a charitable contribution to a tax-exempt charity which satisfies either § 548(a)(2)(A) or (B) "shall not be considered" to have received less than reasonably equivalent value under § 548(a)(1)(B). This means that the debtor is considered to have received (at least) reasonably equivalent value for the transfer. Because reasonably equivalent value has been received, the transfer cannot be constructively fraudulent.

The amendment to § 544(b) assures the same result under state fraudulent conveyance law. Section 544(b)(1) subrogates the trustee to the rights of an unsecured creditor under state law to avoid a transfer of property by the debtor. This, of course, includes the right to avoid constructively fraudulent transfers under state fraudulent conveyance law. Section 544(b)(2) provides that § 544(b)(1) is inapplicable to transfers "not covered under section 548(a)(1)(B)."24 A debtor making a charitable contribution to qualifying charities or religious entities which satisfies either § 548(a)(2)(A) or (B) is deemed not to have received less than reasonably equivalent value under § 548(a)(1)(B). Thus, the transfer is "not covered" by the subsection, and § 544(b)(1) does not apply.25 The trustee therefore cannot use state fraudulent conveyance law to avoid such a transfer as constructively fraudulent. Section 544(b)(2) adds that in the circumstances neither can unsecured creditors do so in their own right. Although the drafting of amendments to §§ 548 and 544 can be criticized,26 their purpose is apparent: to insulate certain prepetition transfers from attack as constructive fraud. The political economy of the Act is harder to explain.

The Act was introduced as one of a number of bills to make changes in the Bankruptcy Code. Most of the other proposed changes affected consumer debtors and were part of the Senate's 1997 Consumer Bankruptcy Reform Act.27 These included proposals for means-testing and credit counseling of debtors, requiring debtors to repay their prepetition debts if they have the ability to do so, and the required submission to United States trustees of debtors' recent income tax filings. Unlike the other proposals, Congress enacted the

24 Id. § 544(b)(2).
25 Id.
Act and did so quickly. Identical bills were introduced in the Senate and House in October 1997. (Another House bill which would have protected donations only to religious organizations was rejected in committee.) The companion bills were amended to insulate qualifying transfers from attack under state fraudulent conveyance law. The Act passed the Senate by a unanimous vote in May 1998 and the House by a unanimous vote in June 1998. It was signed into law in June 1998.

Two features of the process of the Act's passage are significant. First, public expression of opposition by creditor groups is absent. Religious figures, religious organizations, and several law professors testified on the Act's behalf before congressional committees. Only one representative of the National Bankruptcy Conference ("The Conference") testified against the Act. The Conference's members include bankruptcy judges, trustees, law professors, and some bankruptcy practitioners. Creditors are not among its members. Second, and more important, during the same period creditor groups were actively lobbying for the Reform Act's passage. Creditors' silence therefore contrasts with their sustained support of the failed 1997 Consumer Bankruptcy Reform Act. The American Bankers Association, a trade group of large and small commercial banks, spent about $1.7 million in the first half of 1997 lobbying for passage of the Consumer Bankruptcy Reform Act. The American Financial Services Association's members provide market-funded services

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29 144 CONG. REC. S10293 (1997); 143 CONG. REC. E2037 (1997).
35 See id. at 50-52.
38 See JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 72 (2d ed. 1997).
to consumers and small businesses, and include finance companies and credit cards issuers. In 1997, it spent about $700,000 on lobbying for the Reform Act. Both groups gave financial support to congressional candidates and political parties during the same period. The Bankruptcy Issues Council, a loose alignment of credit card issuers and finance companies, hired lobbyists, while bank credit card companies employed public relations firms, to urge passage of the Reform Act. The political activity and financial support of these creditor groups means that they are well organized; they have overcome collective action problems associated with legislative activity. Under a collective action model of legislation, creditor inaction in the case of the Act is an anomaly.

It is worth emphasizing both features of the Act’s passage: creditor inaction by otherwise well-organized and contemporaneously politically active groups. The datum contrasts sharply with the activity of creditor groups in prior bankruptcy legislation. Creditors and creditor groups participated in the drafting of a wide range of provisions in the 1978 Bankruptcy Code, from setoffs, exemptions, reorganizations, and adequate protection to bankruptcy procedure. Further, different creditor groups with different (and sometimes conflicting) interests directed their activities at discrete parts of the proposed bankruptcy reforms. The American Bankers Association, for instance, showed sustained interest in Chapter 11’s cramdown provisions. Banks demonstrated a predominant interest in the proposed provisions dealing with setoffs. In general, the level of creditor participation was high. Measured by the number of speakers before congressional committees, financial interests continued to be active throughout the process from proposal to adoption of the 1978 Code. Creditor groups were completely silent in the passage of the Act. Their representatives did not testify before either Senate or House Committees. Nor is there evidence that any of the lobbying activity associated with then-pending consumer bankruptcy legislation was directed at the Act. Lenders who participated in the National Bankruptcy Reform Commission’s deliberations on other bankruptcy

40 See Kepecki, supra note 39.
43 See Carruthers et al., supra note 42, at 187-88.
44 See id. at 172 (Fig. 4.1); for active participation among trade groups in the passage of the 1898 Bankruptcy Act, see Bradley Hansen, Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law, 72 BUS. HIST. REV. 86 (1998).
issues did not participate in the matter before Congress. In short, groups representing secured and unsecured creditors, such as the American Bankers Association, or lenders specializing in consumer loans, such as the National Association of Credit Management, did nothing. Testimony and public statements are excellent proxies for organized efforts, because they can distinguish between the existence of political efforts and the success of the efforts. Thus, the absence of political activity directed at the Act by well-organized creditor groups needs explanation.

Of course, there is no way to prove conclusively that creditor groups were completely inactive. Legislative activity can take a variety of forms, including lobbying, testimony before congressional committees, congressionally sponsored negotiations among industry groups, input into the drafting of proposed legislation, and providing information to members of Congress. The absence of indications of some forms of interest group activity obviously does not demonstrate that other forms of legislative activity were not being undertaken, particularly because some of them are difficult to observe. Undetected creditor action is possible. However, it is just as obvious that creditor groups might not have engaged in any form of legislative activity. The evidence, therefore, is important, and it simply does not show indications of creditor action in any of their familiar forms. The only supportable inference from the evidence is that creditor groups were collectively inactive in the face of the Act.

Testimony in opposition to the Act by the representative of the Conference is consistent with creditor inaction. The Conference’s membership does not consist of creditors. True, the membership includes part of the bankruptcy


46 Cf. Kevin M. Leyden, Interest Group Resources and Testimony at Congressional Hearings, 20 LEGIS. STUD. Q. 431 (1995) (number of lobbyists and size of research staff create statistically significant relationship to likelihood of invitation to testify). Proxies such as industry or geographic concentration are not as accurate at testing for political activity by interest groups. See Robert E. Baldwin, Trade Policies in Developed Countries, in 1 HANDBOOK OF INTERNATIONAL ECONOMICS 571, 581 (Robert W. Jones & Peter B. Kenen eds., 1984).


48 See supra note 36.
bar, which might reflect the interests of their client-creditors, but the bar membership does not predominate. Academics, bankruptcy judges, and trustees outnumber them, and they have divergent interests. In addition, the bar's interests are not systematically aligned with creditors' interests. Advantages of a rule flowing to attorneys representing creditors are cancelled by the disadvantages created by the rule for attorneys representing debtors. For these reasons, the testimony by the Conference's representative cannot be taken as an expression of creditors' opposition to the Act.

In fact, creditor inaction is doubly anomalous. It is inconsistent with the conventional understanding that lobbying costs are lower for organized groups. Lobbying is a joint product of organized groups. When the fixed costs of organizing are already incurred, they can be amortized over the range of lobbying efforts. Organized groups therefore face only the marginal costs of lobbying. Because creditor groups were organized prior to the Act, other things being equal, some public opposition to it, therefore, would be expected. Further, creditor inaction is inconsistent with the likely marginal lobbying costs facing creditor groups. Creditor groups already were lobbying Congress to enact consumer bankruptcy reform legislation. They were already incurring the presumably lower marginal costs of lobbying for legislation closely related to the Act. Other things being equal, the marginal costs of undertaking political efforts directed at the Act would be even lower. For this reason, creditor groups would be expected to lobby against the Act.

The passivity of creditor groups to the Act is not an isolated phenomenon. The politics of trade protection policy reveals instances in which well-organized groups fail to act to further their apparent interests. Trade policy

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49 For speculations about the role of the bankruptcy bar in bankruptcy legislation, see David A. Skeel, Jr., Bankruptcy Lawyers and the Shape of American Bankruptcy Law, 67 FORDHAM L. REV. 497 (1998).
50 Id.
51 For judges' incentives, see RICHARD A. POSNER, OVERCOMING LAW 109-144 (1995); for academics' incentives in law reform, see Robert E. Scott, The Politics of Article 9, 80 VA. L. REV. 1783 (1994); trustees' incentives to pursue fraudulent conveyances are briefly described in Walt, supra note 26.
52 Cf. Skeel, supra note 49, at 510 (bankruptcy lawyers or firms tend to represent particular set of interests).
54 See, e.g., Kozlowski, supra note 2; Bankruptcy Reform Decides to Take a Summer Vacation, CREDIT CARD NEWS, Aug. 1, 1998, at 3.
concerning sugar and coffee are prominent examples. Sugar production and importation is regulated by a complex combination of production controls, favorable loans, tariffs, and country-specific import quotas. Between 1948 and 1974, the Sugar Act was intermittently renewed and amended to alter the mix of regulation. Producers and consumer groups, such as the American Bakers Association and the Sugar Users' Group, attempted to effect the legislation. Industrial users account for about three quarters of domestic sugar consumption and comprise the membership of the Sugar Users' Group. Thus, the consumer groups affected by the Sugar Act are concentrated and organized. Because import regulation raises the price of domestic sugar above the world price, consumer groups presumably would oppose the Sugar Act. However, the history of the Act shows no consistent pattern of such opposition. Both the American Bakers Association and the Sugar Users' Group failed to oppose 1962 amendments to the Sugar Act, which continued the Act's quota and tariffs. In fact, both groups actively supported the 1948 Sugar Act. In 1955, a representative of the Sugar Users' Group testified in favor of extending the Sugar Act for another three years. The pattern is one of already organized consumer groups failing to act to protect their interests.

Trade policy concerning coffee shows a similar pattern. The United States was a signatory to the International Coffee Agreement ("ICA"), a multilateral agreement among participating exporting and importing countries in effect be-


_56 7 U.S.C. § 1100 (1937)._  
_58 See Anne O. Krueger, The Political Economy of Controls: American Sugar, in PUBLIC POLICY AND ECONOMIC DEVELOPMENT 170, 175 (M. Scott & D. Lal eds., 1990)._  
_59 See HESTON, supra note 57, at 353 (Sugar User's Group suggested changes to price formula; no attempt to eliminate formula)._  
_60 See Krueger, supra note 58, at 184. The Coalition for Sugar Reform, a recently formed group representing consumers and industrial users of sugar, has lobbied Congress to eliminate sugar programs. See Richard Lawrence, Record Crops Drop Sugar Price, J. COM., Feb. 25, 1999, at 6A. The puzzle is the pattern of lobbying behavior between 1948 and 1974._  
_61 Amendments to Sugar Act of 1948: Hearings Before the Comm. on Agric. on H.R. 5406, 84th Cong. 487-88 (1955) (statement of Wilbur H. Glenn, Nehi Corp.)._
between 1962 and 1989. The ICA established the means for setting schedules of target prices for coffee and export quotas to enable market prices to fall within the target range. It imposed on importing member countries obligations to enforce export quotas. The behavior of producer groups in producing countries prior to the ICA and consumer groups in importing countries under the ICA illustrates collective inaction or successful organization against apparent interests. Brazil, which at the turn of the century exported seventy percent of the world’s coffee, is the dominant producer. For a considerable period, it could act unilaterally to set coffee prices by controlling exports but did not do so. As a comparative matter, coffee production in Brazil was much more highly concentrated than in Colombia, the world’s second largest coffee producer. Because organizational costs among Brazil’s producers are presumptively lower than among Colombian producers, Brazilian producers would be expected to successfully take political action to control coffee exports. Colombia, however, delegated the control of coffee exports to its coffee industry. Brazil had no scheme for controlling the export of coffee until 1906. Thus, for a considerable period, Brazil’s coffee producers failed to undertake collective action even when organizational barriers were not present.

The ICA stabilized and probably raised coffee prices to importing countries. Political goals, such as regional security, explain the willingness of importing countries to join the ICA. The interests of domestic importing firms differed. Large roasting firms supported the ICA and lobbied Congress to adopt the treaty. They had reached agreements on price discounts from exporting countries and supported the United States’ joining the ICA. Price increases resulting from the ICA, therefore, disproportionately affected their small firm

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64 See Pieterse & Silvis, supra note 62, at 64-65.
67 See Bates, supra note 66, at 79; Pieterse & Silvis, supra note 62, at 9 (Table 2.1).
competitors. The ICA might have been a way of increasing the costs of raw materials facing small firm rivals. The interests of small roasting firms and domestic coffee traders, however, were harmed by the price increases. Because the domestic coffee industry was concentrated, the costs to firms of organizing to effect the adoption of the ICA was low. Further lowering organization costs was the existence of the National Coffee Association ("Association"), a trade organization that the State Department used to enlist crucial support for the ICA. Support or opposition to the ICA therefore would be expected to be registered in the Association. But the Association supported the ICA without opposition from small roasting firms and coffee traders. Although large roasting firms held a majority of the positions on the Association's Foreign Affairs Committee, small roasting firms and traders were represented. Small roasting firms and traders failed to object to the ICA. Their objections were registered only in the mid-1960s by regional trade associations, after the ICA had been implemented domestically. The puzzle is not that small firms and traders did not organize to oppose legislation that detrimentally affected them when organization costs were low; they eventually did. Rather, the puzzle is their delay in doing so. Collective action models do not account for the delay.

III. EXPLANATION: FAILED INSULATING STRATEGIES

Without more, collective action models of legislation are inadequate. They fail to account for the absence of political activity by well-organized creditor groups facing legislation adverse to their interests. They also cannot explain inaction by groups that could realize large benefits with low per capita organization costs. Accordingly, a set of standard explanations might be introduced to supplement collective action accounts. As supplemented, collective action models might be consistent with inaction by some well-organized groups. Whatever their worth in general, however, these standard explanations do not work in the case of creditor inaction to the Act. Although possible, the explanations are implausible. They do not fit the details of legislative activity sur-

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71 See BATES, supra note 66, at 151-52; Bates, The International Coffee Agreement: An International Institution, supra note 65, at 214; see infra text accompanying notes 95-102.
72 See Krasner, supra note 68.
73 See BATES, supra note 66, at 133 (Table 5.2).
74 See Krasner, supra note 69, at 510-11.
75 See McCHESNEY, supra note 20, at 137-41.
rounding the Act. The failure of these insulating explanations is catalogued below.

A. Opacity in Legal Rule

Complex or vague legislative proposals are sometimes difficult to understand. Complexity or vagueness also increases the amount of information needed to gauge the potential effect of a proposal on interests. Both are consequences of opacity in legal rule and require investments in information as a condition of acting. In some circumstances, ignorance can be the rational strategy. For example, banking regulations governing bank risk might be drafted in such a complex way that it is not cost-justified for noncommittee members of Congress and depositors to acquire information about their content.\(^{76}\) Trade policy also can involve protectionist legislation drafted in a form that makes it hard for voters to discern the effect of the measures. Import quotas or tariffs are preferred to subsidies, which require tax increases or borrowing, and voluntary export restraint agreements are favored over direct foreign aid payments, although in both cases the fiscal effect is the same.\(^{77}\) The Sugar Act might be another example of legal opacity in which sheer complexity obscures. In the floor debate to extend the 1948 Sugar Act, Representative Cooley, chair of the House Agriculture Committee, advised his colleagues that he “will admit this House will really be confused if they try to know all that is in this bill. It is something you almost are forced to accept upon faith.”\(^{78}\)

Legal opacity simply is not plausible in the case of the Act. For one thing, the Act is not complex in its terms or drafting, and its effect on creditors can be estimated roughly. The Act protects qualifying gratuitous transfers to noncreditors which would otherwise be avoidable as constructively fraudulent. As a result, less nonexempt property is available for distribution to creditors than prior to the Act. The Act therefore imposes a cost on creditors, which they may or may not be able to accurately fully shift back to debtors. Although there is some vagueness in the drafting of the Act’s amendment to § 548, its

\(^{76}\) See Jeffrey Worsham, Other People’s Money: Policy Change, Congress, and Bank Regulation 11 (1997); Macey, supra note 13, at 1288.


predominate effect on creditors is clear.\textsuperscript{79} Further, in general, many voluntary creditors are likely to be sophisticated enough to understand the Act's provisions and gauge its effect on the unit price of credit. Finally, the contemporaneous lobbying efforts for bankruptcy reform by creditor groups makes rational ignorance unlikely. Contemporaneous lobbying efforts reduce the marginal costs of acquiring information about the impact of legislation similar to legislation at which ongoing lobbying is directed. The information presumably is a low-cost by-product of ongoing lobbying. Thus, creditor groups have to invest little in understanding the terms and impact of a tolerably clear legislative proposal such as the Act. Inaction resulting from creditors' ignorance about Act's legal content or impact, therefore, is unlikely.

B. Creditors As Stakeholders

The Act might have no impact on organized groups of creditors. This is because debtors might ultimately bear the entire cost of the Act. By protecting qualifying transfers,\textsuperscript{80} the Act reduces the amount of nonexempt property which would otherwise be available for distribution to creditors. Creditors thereby face an increased risk of not being repaid and a correspondingly increased cost of extending credit. If creditors accurately estimate the increased cost and adjust, they could "price out" the effect of the Act by an upward adjustment in interest charges or other credit terms offered to debtors. Debtors therefore would bear the increased cost of credit; adjusting creditors are mere "stakeholders" of these costs. According to this explanation, organized creditor groups failed to lobby against the Act because their interests were unaffected by it. This is because they are adjusting creditors. Nonadjusting creditors, such as tort creditors, are sporadic claimants who at the margin could not alter their credit terms and therefore remain inactive in any case.\textsuperscript{81} The only puzzle, according to the stakeholder account, is why debtors would support the Act.

This stakeholder explanation of creditor inaction is unconvincing in its details. First, it depends on a questionable generalization about debtors' demand for credit. Debtors bear all of the increased cost of credit created by the Act only if their demand for credit is inelastic. In that case, debtors will not reduce

\textsuperscript{79} For a description of some of the statutory vagueness induced by the Act, see Walt, supra note 26, at 1032-41.
\textsuperscript{80} See supra text accompanying notes 21-26.
their demand for credit when creditors' supply curves for credit shift upward in response to the Act. With elasticities of less than -1, creditors and debtors share the credit cost increase and are not indifferent to the Act's effect on the price of credit. (The proportionate shares depend on the elasticities of supply and demand curves.) The demand for sugar and coffee, although historically fairly inelastic, has changed over time. By comparison, generalizing about the price elasticity of demand across the range of debtors and credit contracts is hazardous.

True, if the demand for credit is modestly price inelastic, creditors bear only a very small part of the increased cost in credit created by the Act. Given the slight costs imposed on them, lobbying might not be cost-justified even for well-organized creditor groups. Accordingly, creditor groups might act in the same way as creditors who make small unsecured loans. Unsecured creditors fail to adjust credit terms to reflect risks presented by individual debtors because the cost of acquiring information about debtors' risks exceeds the expected value of the loan to them. Their interest charges instead reflect the average nonpayment rate of their prospective debtors. Creditor groups correspondingly might not invest in organizational activity to determine or publicize the impact of the Act on the cost of credit. In describing the position of lenders, the director of the American Bankruptcy Institute remarked that "basically, it isn't costing them a lot of money." The Appendix estimates the potential size of prepetition charitable contributions made by debtors. However, even if the Act imposes few costs on creditors, creditor groups already were undertaking lobbying efforts on behalf of consumer bankruptcy legislation. Because lobbying for related legislation is a low-cost byproduct of ongoing lobbying efforts, it cannot be concluded that lobbying is not cost-justified even with the slight benefits from doing so. Even if the Act imposes few costs on creditors, lobbying against it surely is a lower (expected) cost alternative.

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82 See Johnson, supra note 57 (sugar); Pieters & Silvis, supra note 62, at 32 (coffee).
84 Lisa Fickenscher, Bankruptcy Reformers Debate Tithes That Bind, AM. BANKER, Nov. 20, 1997, at 13 (comment of Samuel Gerdano). Although no mechanism is described, the standard assumption is that creditors can adjust credit terms to reflect the risk of nonpayment; see, e.g., Skeel, supra note 49, at 508. For data showing the unpredictable impact of consumer loan losses on creditors' net earnings, see Charles A. Luckett et al., Personal Bankruptcies, 74 FED. RES. BULL. 591, 597-99 (1988).
85 See supra text accompanying note 54.
Second, the stakeholder explanation proves too much. According to this explanation, debtors bear the cost of any increase in the price of credit, and creditors adjust credit terms to reflect changes in costs created by legal rules. Creditors, therefore, are indifferent between the choice of legal rule. If so, the same is true for all proposed bankruptcy reforms: creditors are simply "stakeholders" who register prices created by the proposals. Thus, creditors should be indifferent to all bankruptcy reforms. Creditor groups would not invest in organizational activities or, if investment occurs, their efforts should remain constant in response to proposed bankruptcy legislation. But the data are inconsistent with this predictive consequence. The American Financial Services Association, the National Consumer Bankruptcy Coalition, and the like have invested in ongoing lobbying and research to alter consumer bankruptcy rules ranging from the bankruptcy discharge to exemptions. In fact, the proposals have originated with creditor groups. The prominence in legislative activity is at odds with creditor silence in the face of the Act. The stakeholder explanation wrongly predicts a constant response to bankruptcy reform.

C. Ideology

Ideology, understood broadly as views about the public interest unrelated to economic stakes, is another possibility. It may explain creditor inaction to the Act in a straightforward way. The Act's principal purpose is to protect transfers by debtors to religious organizations from fraudulent conveyance attack. The Act can be described as protecting a debtor's right to act religiously, by tithing. Protection of religious expression and private funding of religious organizations are politically salient issues, with significant popular support. The extent and intensity of support may be unrelated to the economic impact of the Act on the cost of credit. If so, the ideological nature of the issues may make defeat of the Act unlikely. As the executive director of the

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American Bankruptcy Institute delicately put it, attacking legislation that protects giving to charities is a "tough issue to take on."\(^8^9\) Given the salience of the issues raised, it is comparatively easy for voting constituents to monitor their elected representatives, making a divergence in manifested preference between principal and agent unlikely. In fact, the ideological preferences of representatives may coincide with those of their constituents. For both reasons, investment in organizational efforts to overcome ideologically based opposition may not be cost-justified.

Ideology does not explain creditor inaction here. It is not that voters may be concerned only with pecuniary returns, an empirical matter that analysis cannot settle. Nor is the methodological problem just that ideological preferences are difficult to interpret or measure, or that it is hard to describe mechanisms connecting these preferences and legislative outcomes.\(^9^0\) The trouble is that the explanation is ad hoc. The ongoing proposals to reform consumer bankruptcy law involve issues at least as ideological as the bankruptcy treatment of charitable donations. Limits on state exemptions, means testing of debtors, restrictions on the ability of debtors to file under particular chapters of the Code and on the fresh start pit individual debtors against creditors.\(^9^1\) The mix of empirical and normative issues provides at least as much a basis for ideology as charitable giving by debtors. Thus, if charitable donations present an ideological, tough issue for creditors, the ongoing consumer bankruptcy reforms do too. However, creditor groups have initiated the reforms and continued to lobby for adoption of the reforms. Their ideological nature has not induced creditors to remain inactive. Similarly, creditor groups, such as the California Bankers Association, were actively involved in the drafting of some controversial consumer finance provisions of the proposed revision of Article 9 of the Uniform Commercial Code.\(^9^2\) And in the spate of state regulation of

\(^8^9\) Fickenscher, supra note 81, at 13; see also id. (attorney for lenders describing the prevention of titthing as "a losing argument that makes the lenders look silly and greedy"); cf. Block-Lieb, supra note 5, at 846 (organized interests less likely to influence ideologically-framed issues).

\(^9^0\) For two invocations of ideology to explain legislative outcomes involving private law, without accompanying mechanisms, see MARK J. ROE, STRONG MANAGERS, WEAK OWNERS 27-33 (1994); David A. Skeel, Jr., An Evolutionary Theory of Corporate Law and Corporate Bankruptcy, 51 VAND. L. REV. 1323, 1368 (1998).


\(^9^2\) See, e.g., U.C.C. Revised Article 9 – Secured Transactions §§ 9-103(b), 9-109(d)(13), 9-620(g), 9-625(c)(2), 9-626(c) (1998). The politically controversial nature of the revised Article 9's effect on consumer financing is documented in Jean Braucher, Deadlock: Consumer Transactions Under Revised Article 9, 73
rent-to-own contracts, the rent-to-own industry has undertaken legislative activity and public relations campaigns. No less than bankruptcy, the combination of consumer contracts that include extremely high implicit interest rates and low income customers raises at least as controversial ideological issues. An explanation by ideology therefore mispredicts the fact and intensity of participation by creditors in the ongoing bankruptcy reforms. Without more, the explanation by ideology fails because it is ad hoc. Clearly, nonideological factors are at least as likely as ideological ones to reduce the expected value of opposing the Act.

D. Raising Rivals’ Costs

Collective inaction by creditor groups might be a predatory strategy to disadvantage competing creditors. By increasing the cost of credit, the Act eliminates the competitive advantage some lenders may have over others in offering credit. It removes from the market lower-cost credit and increases the equilibrium price of credit charged by lenders. Creditors therefore sell fewer units of credit. However, the higher price received for them may more than offset the loss in the volume of credit issued. If so, the Act yields net benefits for lenders whose costs made them previously competitively disadvantaged in offering credit. Thus, creditors who lacked a competitive advantage prior to the Act would support or at least not oppose its passage. In other words, creditor inaction could be an intracreditor strategy to raise other creditors’ costs.

Cost predation is a plausible explanation only if two generalizations are sound: (1) that the Act increases the credit costs of some creditors, and (2) that the legislative activity of creditor groups evidences an intracreditor rivalry over the costs of credit. Because available data do not support the second generalization, it fails. Take them both in turn. To be sure, the Act has the possible effect, familiar from antitrust literature, of raising competing creditors’ credit costs. The Act is a regulatory measure that raises the costs of credit to all

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94 See infra Part IV.

95 See infra text accompanying note 98.

96 See infra text accompanying note 98.

97 See Janusz A. Ordover & Garth Saloner, Predation, Monopolization, and Antitrust, in HANDBOOK OF INDUSTRIAL ORGANIZATION 537, 565-70 (Richard Schmalensee & Robert D. Willig eds., 1989); Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over
creditors (whether or not debtors ultimately bear the increased cost). Credit costs increase because the Act protects some prebankruptcy transfers from recovery as fraudulent conveyances. Fewer assets therefore are available in bankruptcy to satisfy all creditors' claims. However, the Act could raise some creditors' credit costs proportionately more than other creditors. For example, long-term debt might face a higher risk of the debtor's bankruptcy than short-term debt, or secured creditors might incur a lower risk of nonpayment in bankruptcy than unsecured lenders. In both cases, the Act increases the risk-adjusted cost of credit for long-term and unsecured lenders more than secured and short-term unsecured lenders. Higher credit costs mean that the price of credit for consumers increases and fewer units of credit will be offered and demanded at that price. However, the price increase affects creditors differently. For short-term unsecured and secured creditors, the price increase could exceed the increase in the unit cost of credit to them. At the same time, the reverse might be true for long-term creditors and unsecured creditors: the increase in their unit cost of credit might be greater than the increase in the price of credit.\textsuperscript{98} Short-term unsecured and secured creditors would prefer the Act or at least be indifferent to it.

The nature and extent of intracreditor rivalry of course is an empirical question.\textsuperscript{99} Clearly, the behavior of industry subgroups sometimes is consistent with raising rival creditors' costs. The apparent lobbying activity of banks and finance companies in the face of the Federal Trade Commission's Credit Practice Rule ("the Rule"), for example, fits the explanation.\textsuperscript{100} Banks and credit unions did not rely on coercive collection practices and security interests

\textsuperscript{98} Stated diagrammatically and simply, the credit industry's costs are described by an upward sloping industry supply curve. This reflects the different marginal costs different creditors incur in offering credit. The Act shifts the industry supply curve leftward. If the demand curve for credit is relatively inelastic, the equilibrium price of credit increases. Some producers' surplus therefore is lost because fewer credit contracts occur. However, the higher price of credit for the contracts that occur can exceed the increased cost for some creditors, so that the Act increases the net producers' surplus flowing to them. See Krattenmaker & Salop, supra note 97, at 234-38.

\textsuperscript{99} For evidence that finance companies occupy some different market niches than other financial institutions, see Eli M. Remolona & Kurt C. Wulfsbuhler, Finance Companies, Bank Competition, and Niche Markets, FED. RES. BANK N.Y. Q. REV., Summer 1992, at 25, 33; Michael D. Sherman, Survey of Asset-Based and Other Competitive Lending Activities, SECURED LENDER, Nov./Dec. 1993, at 18.

in household goods; finance companies did. 101 Because the Rule restricted collection practices and household goods as collateral, it affected the credit costs of financing companies more than the credit costs of banks and credit unions. Finance companies lobbied against the Rule. Banking groups such as the American Bankers Association and the Consumers Banking Association, both participants in the promulgation of the Rule, did not object to these provisions. 102 Significantly, banking groups did not join groups representing finance companies in challenging the Rule.

The behavior of coffee importers also suggests intragroup rivalry over costs. Export quotas under the ICA increased the price of coffee to importers. Large domestic coffee roasters obtained price discounts from coffee exporters. Because raw materials also constituted a smaller percentage of the total production costs of large domestic roasters than of small roasters, the price increase had a greater proportionate impact on the production costs of small roasters. 103 Price discounts obtained from coffee exporters further increased the cost advantage of large roasting firms. The large roasters supported the ICA, gave expert testimony in its favor, and helped enforce import quotas. Environmental legislation apparently shows a similar sort of intragroup rivalry among industry subgroups. 104

However, the behavior of creditor groups in response to the Act is inconsistent with raising rival creditors' costs. There is no evidence of intragroup rivalry among creditors. Legislative measures that increase the costs of competing creditors would elicit opposition by the already organized affected creditors. Presumably, rival creditor groups would invest in opposition an amount equal to expected rent lost by the Act. Correspondingly, creditor groups that would realize net gains in rents from the Act would invest in support of the Act an amount equal to the expected net gain. Thus, at least some legislative activity would be observed by organized representatives of both groups. None is evident in response to the Act. The American Financial Services Association represents both banks and finance companies, and it avoided lobbying for or against the Act. The American Bankers Association also failed

101 See Daniel J. Villegas, Regulation of Creditor Practice: An Evaluation of the FTC's Credit Practice Rule, 42 J. ECON. & BUS. 51, 64-66 (1990) (amount of credit obtained from finance companies was lower in states with restrictions on wage assignments; amounts obtained from credit unions significantly increased; banks not significantly affected).
102 See Letsou, supra note 100, at 635 nn.156-57.
103 See Bates, supra note 66, at 151-52.
to oppose or support the Act. No creditor group opposed the Act, unlike the
finance companies' response to the FTC Rule. Unlike the large roasters' re-
response to the ICA, no creditor group supported the Act either. None even tes-
tified in favor or against it. Intragroup rivalry to raise costs is an implausible
explanation where regulation induces no political activity by affected groups at
all.

E. Avoidance of Rent Extraction

Another candidate account explains creditor inaction as a strategy for
avoiding the extraction of rents by elected representatives. Creditors realize
economics rents: the amount above the cost of providing inframarginal units of
credit (understanding cost to include a competitive rate of return). By allowing
creditors to recover fraudulent conveyances, creditors are assured a larger por-
tion of rents than if recovery were not possible. Politicians can credibly de-
mand a share of rents in exchange for not enacting legislation that would re-
duce creditors' rents below their share net of the amount of extracted. Because
well-organized groups can offer more to politicians, and organization lowers
the costs of negotiations, being organized risks being the object of rent extrac-
tion by politicians. 105 Accordingly, creditor inaction might be a strategy for
avoiding attempts to extract economic rent.

This explanation clearly is inadequate in the case of the Act. Creditor
groups were already organized and therefore easy for politicians to identify and
negotiate with for a share of rents. Political transaction costs were low. Credi-
tor groups engaged in ongoing lobbying in connection with the proposed con-
sumer bankruptcy reforms. 106 They therefore were politically visible and their
interests the focus of attention. Inaction does not enable creditor groups to
avoid politicians' threats to reduce or eliminate their rents by passage of the
Act. Because creditor groups are already organized, politicians face low costs
in negotiating with them even if the groups do not oppose the Act. Thus, the
failure to oppose the Act simply is not a credible strategy for deflecting poten-
tial demands by politicians for a share of the rents from credit. Avoidance of
rent extraction can account for the failure to organize even when collective ac-
tion problems are not present. 107 It cannot satisfactorily explain why, once

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105 See McCchesney, supra note 20, at 145-47 (organized groups can make higher offers to politicians
with lower negotiation cost; organization exposes groups to rent extraction).
106 See supra notes 38-41.
107 Cf. id. at 146 (greater organization lowers cost of negotiation and increases risk of rent extraction).
groups are organized, they fail to engage in legislative activity under the same conditions.

IV. COLLECTIVE INACTION AND POSTPONED INVESTMENT

Two decisions have to be made by organized groups: whether to support or oppose proposed legislation and when to do so. These decisions are independent. Collective action models and the insulating strategies catalogued in Part III explain creditor inaction as a decision not to publicly oppose the Act. The explanations all assume that opposing the Act is not a net benefit for all or some creditors, or at least does not impose a net cost on them. Thus, all explain the failure to act as a decision about the effect of legislation on creditors' interests. None consider the separate decision concerning timing: when to support or oppose the Act. It is possible and plausible that creditor groups' failure to undertake legislative activity was a decision to delay expressing a view of the Act. In particular, creditor inaction could be a decision to postpone investing in support or opposition to the Act. Because the timing decision is independent of the decision to oppose or support, creditor groups could fail to undertake legislative activity even though they opposed the Act. Plausibly, it had nothing to do with the effect of the Act on creditors' interests. Inaction also was not the result of collective action problems faced by creditor groups, rational ignorance, ideology, and the like. More plausibly, creditor groups resolved the timing decision in favor of inaction.

A. Political Delay As Postponed Investment

Understood abstractly, the decision about timing involves choosing when to invest in the same project. A choice among projects can require selection among competing projects available at the same point in time. However, sometimes the same project competes with itself across time. In the latter case, the decision is not whether, but when, to undertake the project, and therefore delay is an option. To give a simple example, suppose that only two mutually exclusive and otherwise identical projects are available: project 1, which can be undertaken immediately, and project 2, which can be undertaken in the future. Project 1 has an immediate payoff of $100, and project 2 has a .5 chance of a $150 payoff and a .5 chance of a $50 payoff in the future.\footnote{See Stephen A. Ross et al., Corporate Finance 585-86 (5th ed. 1999); cf. Avinash K. Dixit & Robert S. Pindyck, Investment Under Uncertainty 27-29 (1994); Robert S. Pindyck, Irreversibility,}
rate is 0. Assume also that an $80 investment is required for both projects and that it cannot be recovered after it is made. The decisionmaker must decide whether to invest in project 1 or 2, or not invest at all. Project 1 has a net value of $20 ($100 - $80 = $20). Project 2, however, has a net positive value of $35 (.5 (- $80 + $150) = $35). This is because project 2 allows the decisionmaker to postpone the decision to invest and observe the actual value of the project. If the project has a value of $150, the decisionmaker will make the $80 investment. If the project turns out to have a value of $50, the $80 investment will not be made because its value is 0. (The project's net value is not negative because investment need not be undertaken.) Because there is .5 chance that project 2's value will be $150 and, therefore, that the $80 investment will be made, its net value is .5(-$80 + $150) = $35. Because project 2's net value is higher than project 1's net value, the decisionmaker should select project 2 and delay the decision to invest.

Considering only the net value of projects available at a given time ignores the value of delay. When a project can be delayed, the value of investing in it at a later date must be considered too. Delay is an opportunity cost incurred when a project is undertaken. Project 1 has a net positive value of $20 and a direct cost of $80. However, delaying investment and undertaking project 2 in the future has a net positive value of $35. This is the value of an investment opportunity. Because an immediate investment in project 1 means giving up delaying investment in project 2, project 1 creates an opportunity cost of $35. The sum of direct and opportunity costs of undertaking project 1 therefore exceeds its value ($80 + $35 > $100). Immediate investment is prescribed only if the project's value exceeds its direct costs by an amount equal to the cost of forgone investment opportunities.

Two conditions are necessary for an investment opportunity to create an opportunity cost. First, the investment must be not recoverable after it is made; it must be irreversible. If disinvestment is possible should a project's value fall below the cost of the investment, there is no opportunity cost associated with immediate investment. Second, the ability to delay investment must be feasible. Again, if waiting to invest is not an option, then immediate investment does not foreclose the possibility of investing in the future. Immedi-


109 See Pindyck, supra note 108, at 1110.
110 See id. at 1110-11.
111 See id. at 1111.
ate investment therefore does not create an opportunity cost. Irreversibility and the ability to wait are characteristic of salient sorts of choices. The decision to extract irreplaceable natural resources is irreversible: once development occurs, the resource cannot be recovered.\footnote{See Kenneth J. Arrow & Anthony C. Fisher, Environmental Preservation, Uncertainty, and Irreversibility, 88 Q.J. ECON. 312, 314-15 (1974).} (Irreversibility is an asymmetric relation, however. The decision to wait is reversible because extraction can occur at a later date.) A contracting party’s decision to repudiate the contract prior to performance is irreversible when the other party detrimentally relies on the repudiation. The repudiating party cannot unilaterally change her decision and perform.\footnote{See Alexander J. Triantis & George G. Triantis, Timing Problems in Contract Breach Decisions, 41 J.L. & ECON. 163, 164 (1998).} An ability to wait is characteristic of both the decision to extract natural resources and the decision to repudiate a contract.

Political decisions also often are characterized by irreversibility in investment and the possibility of delay. Although part of the value of investment in political activity can be salvaged, most political investment is specific to the activity. Once invested, resources usually cannot be retrieved if the political outcome proves disadvantageous. Their reallocation is not an option. Think of completed testimony before a congressional committee on a particular proposed bill. Delay often is feasible, too. Changed laws can operate to reduce the cost they impose on disadvantaged parties, so that the incentive to act sooner rather than later to oppose change is dampened. Laws having prospective effect only, or requiring compensation of those disadvantaged by the change in rule, are examples.\footnote{See Saul Levmore, Changes, Anticipations and Reparations, 99 COLUM. L. REV. 1657 (1999). For examples of comparative constitutional provisions that produce delay, see Jon Elster, Ulysses Unbound 103 (2000).} Another example is legislation which mandates a change by some specified future date, but leaves open the form by which it is to be implemented. Directives issued by the European Union, for instance, typically mandate a result by a stated date but leave to national legislation the particular way in which the result is to be implemented.\footnote{See Treaty Establishing the European Community, Feb. 7, 1992, O.J. (C24) 1 (1992), [1992] 1 C.M.L.R. 573 (1992), arts. 189, 191.1.} The gap in time between the date the directive enters into force and the date by which it must be implemented allows for delay. Proponents and opponents of the directive can choose to invest in legislative activity at the national level at any time within this period. The salience of delay in academic politics is famously described in Cornford’s satire on academic politics as the “Principle of Unripe Time”: “The Principle of Unripe Time is that people should not do at the pre-
sent moment what they think right at that moment, because the moment at which they think it right has not yet arrived.”

Creditor groups also faced a timing decision as to when to oppose the Act. Opposing or supporting legislative proposals are “projects” for creditors when the proposals affect the demand for credit or its price. (The value of the “project” to creditors can change stochastically, depending on responses of affected debtors to legislation.) A straightforward reading of pre-Act § 548 of the Bankruptcy Code, supported by case law, finds charitable contributions to be actually or constructively fraudulent. By insulating qualifying prepetition charitable donations from fraudulent conveyance attack, the Act reduces the assets available to unsecured creditors. Because the Act increases the price of credit or reduces demand for it, preserving pre-Act law is the relevant “project” for creditor groups. Its value to creditors varies according to changes in partly exogenous variables, such as the rate of charitable giving by debtors and their income. Over a range of expenditures, investments by creditor groups plausibly can increase or decrease the likelihood that legislative proposals will be enacted. Because preserving their position under the Bankruptcy Code required opposing the Act, creditor groups therefore had to decide when, if ever, to invest in opposition to it. The environmental counterpart is the decision as to the timing of an investment to protect an unextracted natural resource.

The investment decision of creditor groups is characterized realistically by irreversibility and an ability to wait. In general, the investments made by organized political groups sometimes satisfy these conditions. Political activity can take a variety of forms, ranging from lobbying to campaign contributions to testifying before congressional committees, to commissioning studies, each of which straightforwardly involves an investment. Because many of these uses of resources are transaction-specific, such as lobbying for or against a particular bill, disinvestment often is limited or impossible. Thus, political in-

118 See infra text accompanying note 115 (political options “shared” with competing groups).
Investments frequently cannot be recovered. This is true in the case of the Act. Testifying and lobbying against the Act, for example, are sunk costs for creditors. The specificity of the Act's provisions assures that, once performed, such activities have no alternative use. Thus, political activities with respect to the Act are reliably irreversible investments for creditor groups. The decision to take measures to oppose the Act also could be delayed, at least over a period of time. When to lobby and how much, for instance, are choices that could be made at any number of points. True, there is a threat that competing groups will induce Congress to act adversely to creditor groups, thus foreclosing legislation favorable to them, as in fact occurred with the Act. Creditors have no proprietary right to the option available to them to receive favorable legislation (or prevent unfavorable legislation); the option instead is "shared" with competing groups. Competing groups can eliminate the option by obtaining legislation adverse to the interests of creditor groups. However, over a period of time, creditor groups reliably can obtain favorable legislation or prevent unfavorable legislation. Within that period, creditors have the opportunity to expend resources now or later. Thus, opposing the Act over the course of the impending legislation is describable as an investment opportunity for creditor groups.

B. The Value of Political Delay: Political Investment Opportunities

The next question is whether the above description is useful in understanding creditor inaction. In general, a description is worthwhile when it unifies diverse phenomena by casting them in the same terms. Expenditures in a variety of settings can be described as investments in projects; decisions about the timing of expenditures must be made. Timing decisions must be made in non-contractual contexts as well as when collective action problems are absent. Describing creditor groups as facing an investment opportunity fits with other choices describable as timing decisions. Further, descriptions are useful when they simply identify what needs explanation. The voter's paradox shows that voting rather than not voting requires explanation. Similarly, because the

120 Both are typically important expenditures for interest groups. See Kay L. Schlozman & John Tierney, supra note 47, at 289-97; John R. Wright, Interest Groups and Congress 38-43 (1996).
122 See infra text accompanying notes 130-31.
123 See John Ferejohn & Debra Satz, Unification, Universalism, and Rational Choice Theory, in The Rational Choice Controversy 71, 75 (Jeffrey Friedman ed., 1996); cf. Michael Friedman, Explanation and
timing of political activity presents an investment decision, inaction by creditor groups over a specified period needs to be explained, particularly when collective action problems are absent. Political action is not the self-evident norm. Judged by both standards, talk of creditor groups’ choice as a timing decision about investment is helpful.

More important, the above description is useful because it is potentially explanatory. Informal and plausible estimates of some important parameters give good reason for thinking that the value of delay might have induced creditors not to invest in opposing the Act. Investment should be delayed when the cost of waiting (lost immediate payoffs) is less than the benefit of waiting (the value of the opportunity to delay and take advantage of changes in subsequent payoffs). If waiting to invest always had no cost and the investment opportunity always had value, indefinite delay would be prescribed. Conversely, if the opportunity to wait always had no value and the cost of waiting was positive, immediate investment would be prescribed. In the case of legislative activity, the realistic assumption is that neither possibility obtains, and that the costs and benefits of delay change as a function of the size of investment and time. Plausible estimates suggest that creditor groups could realize large benefits from delaying investment in opposing the Act. The estimates are supported by treating the opportunity to oppose it as a real option.

To see this, first note that an investment opportunity can parallel an American call option. The opportunity gives the holder the right to make an expenditure (the exercise price) and receive a project (the underlying asset) up to a maturity date, when the value of the project fluctuates during the period. Once an option is exercised, it cannot be retrieved; it is irreversible. Similarly, once an investment is made, the opportunity to invest or not invest disappears and is irreversible, at least with respect to the particular expenditure. Some investment opportunities lack important features of typical financial or real options, such as a directly observable maturity date or a well-defined underlying asset. However, their absence makes measurement of the value of an investment opportunity difficult. It does not undermine conceiving of the opportunity to expend resources during a period as a call option. In the case of the Act, the underlying asset is the preservation of pre-Act fraudulent conveyance

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124 See Pindyck, *supra* note 108, at 1112.

law and the exercise price for creditors' groups are expenditures made opposing the Act. The maturity date of the call option is not directly observable.

The value of an American call option depends on the current value of the underlying asset, its variance, the exercise price, the risk-free interest rate, the time to maturity of the option, and the net payoff from the underlying asset.\textsuperscript{126} Among these parameters, the duration of the option and the variance in value of the underlying asset are important.\textsuperscript{127} Longer durations increase the prospect that returns on the underlying asset will exceed the exercise price before the maturity date. Greater variance increases the return above the exercise price. (Returns below the exercise price have no effect on the value of the option because the option will not be exercised in the circumstance.) Thus, other parameters aside, longer maturity dates and greater volatility in the underlying assets increase the value of a call option. Similarly, the greater length of time an investment can be delayed and higher variance of returns increase the value of an investment opportunity. Accordingly, these parameters can be estimated to assess the value of delay to creditor groups in opposing the Act. A realistic qualitative estimate suggests that delay in opposing the Act was valuable to creditor groups.

Creditor groups prospectively faced an extended period during which they could oppose the Act. Fraudulent conveyance law prior to the Act favored them: charitable contributions by debtors usually were deemed actually or constructively fraudulent transfers. Existing law cannot be altered unilaterally by competing groups, unlike contractual repudiation, in which the decision to put an end to the contract by breaching prior to performance can be made unilaterally by the counterparty. Altering statutory law also typically takes time. Internal congressional changes toward larger committees and increased reliance on congressional staffs make quick legislation the exception. Amending the Bankruptcy Code is a protracted affair and requires coordinated congressional action or sustained and uniform judicial reinterpretation of the existing Code. Because these institutional or precedential requirements are significant, the period during which creditor groups could oppose a change in fraudulent conveyance law was significant. The delay in congressional consideration of current proposals for consumer bankruptcy legislation indirectly confirms as much.

The length of time pre-Act fraudulent conveyance law will remain in effect of course is not a directly verifiable variable. Thus, the opportunity to invest in

\textsuperscript{126} See ROSS ET AL., supra note 108, at 556-57.

\textsuperscript{127} See Aswath Damodaran, The Promise of Real Options, J. APP. CORP. FIN., Summer 2000, at 29, 32-33.
preserving pre-Act law does not have a directly verifiable maturity date.\footnote{Cf. \textit{id.} at 34 (noting difficulty of verifying maturity of some real options). The alacrity with which the Act was enacted does not show that creditor groups did not initially expect an extended period during which opposition would be possible.} And, the maturity date is itself affected by the legislative or judicial activity of competing groups, such as religious organizations, to change fraudulent conveyance law. Still, given the procedural or precedential requirements for a change in federal law, the opportunity to oppose change had an extended maturity date. As a possible example, consider newsworthy cases in which religious debtors tithe to their churches proceeds gained from criminal activities.\footnote{See, e.g., Steven Oberbeck, \textit{Mormon Church Will Return Tainted Tithing}, \textit{SALT LAKE TRIB.}, June 11, 1997, at B1.} Existing fraudulent conveyance law already favors creditors, treating the transfer as, at least, constructive fraud, and the salience of the facts of this unrepresentative case makes a change in law more difficult. Creditors could expect that prominent unsavory facts increase the likely longevity of existing law. This parameter increases the value of waiting to oppose the Act.

Two factors are present here affecting the maturity date for successful legislative activity by creditor groups: organized opposing groups and existing fraudulent conveyance law favorable to creditors. In general, these factors work in opposite directions. The presence of organized opposing groups increases the probability that legislation will be enacted to change existing law.\footnote{See Saul Levmore, \textit{Voting Paradoxes and Interest Groups}, 28 \textit{J. LEGAL STUD.} 259, 273 (1999).} Legislative activity by these groups therefore truncates the period during which opposition to proposed legislation must be undertaken. At the same time, existing law and the presence of institutional and procedural requirements extend the period between the initiation of legislative activity and a change in law. In the case of the Act, the latter factor dominates the former factor. This is because the precedential force of existing law and congressional committee structures create barriers which delay legal change. Precedent created by case law can continue to operate, even after a change in law. For instance, case law construing prior law can be treated as "supplementing" or "interpreting" provisions in new law. The inertia of existing law favors creditor groups.\footnote{Cf. \textit{Wright}, \textit{supra} note 120, at 46-48 (legislative process with multiple decision points favors status quo).}

More generally applicable is delay caused by institutional barriers. Even when organized groups propose amending existing law, congressional committees operate sequentially. Paired alternatives are not simply voted on by a sin-
gle set of voters. Committee structure requires that the Act's proponents expend the cost of legislative activity over time, directing their efforts at different committees and houses of Congress. 132 During that time, intervening events can occur that further delay the adoption of proposed legislation. Both institutional barriers to change and the possibility of intervening events suggest an extended period of time during which pre-Act fraudulent conveyance law would remain in effect.

Variance in the returns from continuation of pre-Act fraudulent conveyance law was high. A large part of its value to creditors is the value of the assets that can be recovered from transferees and used to satisfy claims held against debtors. The number of prepetition transfers subject to fraudulent transfer attack is subject to change. In the case of charitable contributions, significant annual changes in the aggregate amounts of giving can occur. 133 As with other donors, debtors presumably alter their patterns of giving in response to changes in their disposable income and sentiments for charity. Both changes are to some extent independent of bankruptcy law. Also needed are estimates of the timing of the prepetition contributions by debtors. Finally, the quantity of assets available to creditors depends on whether recovery of avoidable charitable contributions is cost-justified for the trustee. 134 Changes in these factors make reliable estimates of the amount of assets available for distribution to creditors uncertain. The uncertainty is shown by the difficulty of estimating the rate and contribution levels among income groups, described in the Appendix. Thus, although variance is not a directly observable variable, the value to creditors of a continuation of pre-Act fraudulent conveyance law to creditor groups of opposition seems similarly volatile.

Equally important, contemporaneous proposals to reform consumer bankruptcy law plausibly increased the volatility of returns from pre-Act fraudulent conveyance law. The proposals interacted to increase the unpredictability of creditors' returns. To see this, note that proposals to limit the bankruptcy discharge raise the cost of bankruptcy for debtors who would receive a discharge prior to amendment of the Bankruptcy Code, but not for debtors who would not otherwise receive a discharge. There are three cases to consider. For debtors who would not otherwise receive a discharge, proposed limitations on dis-

132 For the role of bicameralism in delaying political decisions, see ELSTER, supra note 114, at 133-36.
134 See Walt, supra note 26.
charge do not alter the cost of bankruptcy. Their incentives to file a bankruptcy petition are unaffected and therefore the value of pre-Act fraudulent conveyance law for their creditors remains the same.

Among debtors who would receive a discharge prior to the proposed amendments, two cases in turn need to be considered. Because the cost of bankruptcy increases for these debtors, their incentive to file a bankruptcy petition is reduced. Their aggregate demand for bankruptcy also is reduced. Some of them will not file while others still will find filing worthwhile. Federal fraudulent conveyance law is inapplicable when a bankruptcy petition is not filed. Debtors who do not file a bankruptcy petition might recover and repay their creditors, but federal fraudulent conveyance law does not contribute to their repayment. Thus, when a debtor is one who would receive a discharge prior to the proposed amendments, the returns to creditors from pre-Act federal fraudulent conveyance law are reduced.

Under the proposed amendments, when debtors file for bankruptcy, they will make more nonexempt assets available to their creditors in order to reduce their continuing liability. Thus, the limitations on discharge do not diminish and can increase the expected distribution that creditors otherwise would receive through the use of fraudulent conveyance law. However, the set of competing proposals creates uncertainty in future law and increases the unpredictability of distributions in this third sort of case. Proposed restrictions on discharge settle on different limitations and give greater or lesser discretion to the bankruptcy court to grant a discharge in every case. A discharge means that the debtor's future income and wealth will not be available to satisfy her creditors' claims. Because the proposals only create presumptions and allow for the exercise of discretion according to unspecified standards, discharges

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135 When there are transaction costs in avoiding a transfer as a fraudulent conveyance, property not transferred by the debtor produces a larger distribution to creditors. Limitations on discharge give the debtor an incentive to minimize the transaction costs of transfers, because these costs do not reduce the debtor's continuing liability to creditors. Thus, given transaction costs associated with avoiding transfers, limitations on discharge increase creditors' dividends.

136 See Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong § 101 (1998) (20%; median income test); Responsible Borrower Protection Act of 1997, H.R. 2500, 105th Cong. § 101 (1997); Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 102 (1997) (20%; means-testing required in every case). All proposals call for means-testing to prevent certain debtors from filing a Chapter 7 petition, which results in their debts being discharged, and forcing them instead to file a Chapter 13 petition, which results in some repayment of their debts from postpetition assets. By limiting the debtor's right to elect between bankruptcy chapters, the proposals in effect limit the right to a discharge.
can vary among bankruptcy courts and across bankruptcy districts.137 This increases the unpredictability of expected distributions to creditors. Unpredictability is further increased by the uncertainty as to which proposal, if any, will be adopted. Thus, the proposed limitations on discharge have three different effects on creditors’ returns from pre-Act fraudulent conveyance law. They decrease their returns in some cases and leave them unaffected or increase them in other cases. In this way, ongoing bankruptcy reform enhances the volatility of returns from pre-Act fraudulent conveyance law.

Estimation of the two variables above suggests that the opportunity to delay opposing the Act was valuable to creditor groups. It does not make the full case for delay, however. A complete case would require showing two things. One is the cost of immediate investment. Delay is prescribed only if the net returns from immediate investment are less than expected returns from postponing investment. If immediate investment produces payoffs, some levels of investment could yield higher returns than those produced by delaying. That is, at some exercise price, exercising the option by investing now can be more valuable than preserving the option to invest later. The striking datum about the Act, described in Part I, is the entire absence of legislative activity by creditor groups. Inaction can be fully explained as postponed investment by them only if it can be shown that the cost of feasible activity made delay more valuable than immediate activity. Although I have not demonstrated this, the absence of opposition to the Act is consistent with the possibility.

The second thing that needs to be shown is that there are not factors that accelerate investment in legislative activity. A realistic possibility is that investment can be made in increments and that the total cost of defeating proposed legislation is not known to creditor groups. Some investment in legislative activity therefore could disclose information about these costs. It need not affect the likelihood of successfully opposing the Act.138 This would accelerate investment. To give a simple numerical example, suppose that investment can be made in two stages. The cost of the first stage is $60 and it will reveal whether a further investment of $200 is needed to complete a project. Initially


there is a probability of .5 that the further investment will be needed. Assume also that the project’s payoff is $150. Investment in the first stage is cost-justified. This is because the decisionmaker can decide at the second stage whether to undertake further investment depending on what investment at the first stage revealed about the total costs of completing the project. Because there is a probability of .5 that no further investment will be needed, the payoff from making an initial investment of $60 is positive (-$60 + (.5 x $150) = $15). In the case of the Act, the complete absence of legislative activity by creditor groups suggests that the possibility did not obtain. Although the total cost of successful political opposition is unknown to creditors ex ante, their inaction is consistent with the absence of cost-justified incremental investments to discover it.

V. CONCLUSION

An investment opportunity requires both a decision whether and when to invest. The timing decision is present whether the decisionmaker is an individual, firm, or organized group and whenever the expenditure can be made at any point within a period of time. Within bankruptcy, in a Chapter 11 proceeding, the exclusivity period for filing a reorganization plan allows the debtor control over the timing of reorganization.\footnote{See 11 U.S.C. § 1121(b) 1994. Courts frequently extend the exclusivity period under § 1121(d), increasing the debtor’s control over timing. See, e.g., In re Public Service Co., 88 B.R. 521 (Bankr. D.N.H. 1988); In re Perkins, 71 B.R. 294 (W.D. Tenn. 1987).} Because asset values are volatile and can exceed the amount of outstanding debt, delay of a reorganization plan within the exclusivity period has “option value” for the debtor.\footnote{See Lucian A. Bebchuk & Howard F. Chang, Bargaining and the Division of Value in Corporate Reorganization, 8 J.L. ECON. & ORG. 253, 263-65 (1992).} The debtor’s decision when to submit a plan within that period therefore describes a decision of timing. Even the decision when to contract presents a timing issue. Although noted in the legal literature on contractual performance,\footnote{See Richard Craswell, Insecurity, Repudiation, and Cure, 19 J LEGAL STUD. 399 (1990); Thomas H. Jackson, Anticipatory Repudiation and the Temporal Element of Contract Law: An Economic Inquiry Into Contract Damages in Cases of Prospective Nonperformance, 31 STAN. L. REV. 69 (1978); Triantis & Triantis, supra note 113.} the timing decision is important in noncontractual political settings too. This is particularly true when a decisionmaker is making similar investments, as in the case of the Act, when creditor groups were lobbying on behalf of ongoing consumer bankruptcy reforms. Saul Levmore conjectures that organized groups will invest more to influence voting procedures when there is
no winner among all pairwise alternatives and no expectation of competing organized opposition.\textsuperscript{142} He concedes, however, that the expectation of opposition might induce more or less investment.\textsuperscript{143} Once timing is considered, Levmore's conjecture and concession are consistent. The value of immediate political investment and delay varies depending on the presence of opposition by competing organized groups. The probability of influencing voting procedures is high when competing groups do not exist or do not oppose a proposal. At the other extreme, investment promises no return if organized opposition is overwhelming; delay at least conserves the group's resources. Because the value of immediate investment or delay can change, the prospect of organized opposition can justify more or less investment over time.

Timing decisions require determining and comparing the value of immediate investment with the value of preserving the opportunity to invest by delay. Delaying investment risks expiration of the opportunity to invest, so that the expenditure is never made. By focusing exclusively on externalities associated with the provision of public goods, collective action models center only on the decision whether to invest. They therefore cannot account for the failure of well-organized groups to act in their apparent interest. Even when successful, collective action models describe only a sufficient condition for inaction. Inaction still can result from factors concerning the timing of expenditures. This Article argues that, when groups are already well organized, the decision to delay investment is a more satisfactory explanation of collective inaction.

Understanding political activity as an investment opportunity has different predictive implications from collective actions models. Because the models focus on the differential costs of organization facing competing groups, they imply that inaction is the result of free riding by affected interests. Thus, where per capita organizational costs are low and free riding therefore unlikely, the models predict the presence of legislative activity. The investment-like nature of political activity makes a different prediction. By focusing on variables that affect the value of political outcomes in the future, the account considers the value of immediate activity versus delay. The account therefore predicts the presence of legislative activity in part by estimates of the value of delay to organized or unorganized affected interests. Accordingly, even when per capita organizational costs are low, it predicts inaction if incurring immediate costs is less valuable than postponing the investment. Creditor passivity in the face of the Act is consistent with the implications of under-

\textsuperscript{142} See Levmore, supra note 130, at 272-73.
\textsuperscript{143} See id.
standing political activity as an investment opportunity but embraces collective action models.

To be sure, explaining inaction as a decision to preserve an investment opportunity risks being ad hoc. Because any choice is describable as including as an alternative an opportunity to make an investment at a later date, the failure to act always can be explained as the result of a decision to delay. (Correspondingly, because the public good features of outcomes always can be postulated, some collective action models of inaction risk being ad hoc.) To avoid being ad hoc, there must be an independent basis for thinking that the investment opportunity is causally relevant to the choice to postpone investment. The argument in this Article provides a basis. Volatility of asset value and the duration of possibility of acquiring the asset are variables that partly determine the value of an investment opportunity—the option to make an expenditure. Thus, they are a measure of the value to creditor groups of postponing legislative activities to oppose the Act. Qualitative evidence going to the variance in the value of fraudulent conveyance law to creditors and the high cost of legal change, therefore, supports finding that delay was valuable to creditor groups. It is reasonable to conclude that, for creditor groups already engaged in closely related legislative activity, the value of postponing opposition to the Act is causally relevant to their choice not to act. The inference is based on more than mere consistency with creditor passivity in the face of the Act.

The option-nature of political delay also has directly testable implications. One implication concerns the effect of changes in expectations about the prospect of likely legislation on legislative activity. The value of an option depends on the volatility of the underlying asset and the number of periods until maturity; acceleration of the maturity date law reduces the option’s value. Correspondingly, other things being equal, acceleration of the date at which new legislation is likely to succeed reduces the value of a political option. The opportunity cost of acting immediately therefore is reduced. Thus, the explanation predicts that information suggesting that impending legislation is likely to succeed induces legislative activity by creditor groups. Information suggesting that it is unlikely to succeed, on the other hand, induces delay. Accordingly, bouts of activity and inaction by creditor groups should correlate with changes in the prospects of the likelihood of an imminent change in law.
VI. APPENDIX: TAX-DRIVEN INCENTIVES FOR CHARITABLE CONTRIBUTIONS IN BANKRUPTCY

This Appendix argues for four claims: (1) the aggregate amount of prepetition contributions made to charities by debtors in bankruptcy probably is significant; (2) bankruptcy and tax law can interact to produce an “oversupply” of prepetition charitable contributions, judged by a non-normatively specified baseline; (3) the possibility of an “oversupply” is real; and (4) the Act increases the incentives bankruptcy and tax law give to debtors to make prepetition charitable contributions. The argument is non-evaluative and only describes the Act’s likely effect on prepetition giving by debtors in bankruptcy. It therefore does not make a normative case for or against the Act.

A. Claim (1): Significant Prepetition Contributions

No data exist concerning the amounts or sorts of prepetition charitable contributions currently made by individual debtors or households. The Administrative Office of the United States Courts does not code bankruptcy filings to detect charitable contributions by debtors. Current expenditure schedules filed by debtors also are unreliable guides because contribution might appear there as a “gift,” “expense,” “liability,” or “other.” 144 Postpetition contributions listed as part of a filed repayment plan are more reliable because typically they are more detailed, and they were allowed by some courts prior to the Act. 145 However, these proposed contributions might not reflect prepetition giving by the debtor, and only occur in Chapter 13 cases. In addition, most consumer bankruptcy cases are liquidations, not Chapter 13 cases. 146 For both reasons, repayment plans are likely to underestimate seriously the rate and amount of prepetition giving by debtors. While some consumer bankruptcy attorneys judge that prepetition giving by their clients is not unusual, their evidence is impressionistic, unsystematic, and possibly unrepresentative. 147 Estimates of

144 See, e.g., Official Bankruptcy Form 7 (Statement of Financial Affairs) (Question 7, “gifts”); Official Form 6 (Schedule J – Current Expenditures of Individual Debtors) (“other” expenses).
145 For impressionistic evidence that charitable contributions are frequently part of Chapter 13 repayment plans, see Consumer Bankruptcy Reform Roundtable, supra note 47, at 5 (comment of Judge Wedoff).
147 Based on informal discussions with several consumer bankruptcy attorneys; cf. Arthur S. Hayes, Bankruptcy Judges Ponder Whether Heaven Can Wait, WALL ST. J., Nov. 27, 1991, at B1 (bankruptcy judges increasingly confronted with debtors seeking to continue donations to religious organizations).
the frequency and amount of prepetition charitable contributions by debtors therefore involve speculation.

However, a rough estimate of the aggregate amount of prepetition contributions by debtors suggests that it is likely to be significant. The estimate of aggregate contributions cannot be direct because data on giving by debtors or debtor households do not exist. Thus, an estimate must be based on inferences from data about the pattern of giving by households generally and members of religious denominations. Although the rate and levels of contributions vary significantly by income, and debtors' patterns of charitable giving themselves might not be representative of the general population, the data provide a basis for inferences about their behavior. While a sample of bankruptcy filings shows that Catholics have lower filing rates than the percentage of Catholics in the filing state, the finding is consistent with debtors' patterns of charitable giving being typical.\textsuperscript{148} A lower filing rate says nothing about the amounts gifted by the relatively fewer religious debtors who do file bankruptcy petitions. Equally important, gifting patterns (and filing rates) by non-Catholic religious debtors might be typical of the general population. If so, giving among religious debtors on average still might be representative. Accordingly, an assumption of representativeness seems reasonable. At the very least, for reasons stated below, the assumption probably does not overstate estimated aggregate contributions by debtors.\textsuperscript{149}

Over two-thirds of American households make annual monetary contributions to charities.\textsuperscript{150} The average 1995 household contributed approximately $1000, representing an average of about two percent of household income.\textsuperscript{151} Individual contributions as a percentage of income are greater than average at low and high levels of income.\textsuperscript{152} Slightly over forty percent of contributions


\textsuperscript{149} See infra text accompanying notes 154-55.


\textsuperscript{151} See id.

are made to religious organizations. Three-fourths of the contributions made by taxpayers with incomes below $40,000 are made to them. The percentage and rates of household contributions have not declined between 1995 and 1998.

If the pattern of giving by debtors in bankruptcy reflects that of the population at large, the following rough estimate can be made. Approximately 1.4 million bankruptcy petitions were filed in 1997, of which about ninety-seven percent were nonbusiness filings (approximately 1.35 million). If two-thirds of nonbusiness debtors made prepetition contributions to charities, approximately 890,000 debtors will have done so. If the annual contribution made by debtors averages $1000, the annual aggregate amount contributed by debtors to charities is about $890 million. The amount almost certainly overstates the size of the contributions because nonbusiness debtors’ incomes tend to be below national averages. Estimates of the average pretax incomes of Chapter 7 debtors vary, ranging between about $18,000 and $22,000. If the average debtor income is $18,000 and debtor households contribute an average of two percent of it to charities, the average annual household contributes $360. The estimated annual aggregate amount of charitable contributions by debtor households therefore is $320 million. Although it ignores the administrative and collection costs of recovery, the estimated amount is significant.

While obviously rough, the estimate is conservative for at least four reasons. First, average debtor income is higher than $18,000 because almost one-third of bankruptcy petitions are filed as Chapter 13 cases, and Chapter 13

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153 See AMERICAN ASSOCIATION OF FUND-RAISING COUNCIL, GIVING USA 1999 (1999) (43.6% in 1998); CHARLES T. CLOTFLTER, FEDERAL TAX POLICY AND CHARITABLE GIVING 22 (Table 2.5) (1985) (summarizing studies based on tax returns and household surveys between 1962 and 1978; between 60 and 66.8%).

154 See Clotfelter & Schmalbeck, supra note 152, at 215.


157 See TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 64 (Table 4) (1989) (average income $23,642; 1981 dollars); Teresa A. Sullivan et al., Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991, 68 AM. BANKR. L.J. 121, 128 (Table 1) (1994) (average income $20,535; 1991 dollars); Elizabeth Warren, The Bankruptcy Crisis, 73 IND. L.J. 1079, 1103 (Table 1) (1998) (reporting study finding that average income of $17,765; 1997 dollars). Philip Shuchman’s comparison of earlier studies of bankruptcy petition data shows estimates of the average pretax income of Chapter 7 individual debtors between about $13,000 and $17,000. See Philip Shuchman, Social Science Research on Bankruptcy, As We Forgive our Debtors: Bankruptcy and Consumer Credit in America, 43 RUTGERS L. REV. 185, 195 (Table 1) (1990) (not stated in constant dollars; includes some business-related filings).
debtor's income tends to have higher incomes than Chapter 7 debtors. Second, because individuals with low (and high) pretax incomes give a greater than average higher percentage of their earnings to charity, debtors whose incomes are $18,000 might well tend to give more than two percent of their income to charity. Third, there are marked differences in the amounts given to charities by members of different religious denominations. Charitable contributions by members of Christian denominations range from about eleven percent of annual income for members of the Church of the Latter-Day Saints to under one percent for Unitarian-Universalists. A higher percentage of income given by debtor-members of denominations whose members tend to have higher than average incomes could increase the aggregate amount of prepetition contributions. The possibility is real because of the predominance of charitable giving to religious organizations, presumably mostly by their members. Fourth, state fraudulent conveyance laws typically allow recovery of qualifying prepetition transfers made more than a year prior to the bankruptcy filing. This means that in principle charitable contributions made within these periods also must be counted. Thus, an accurate estimate must add contributions made in prior years to the aggregate contributions made in the year in which a bankruptcy petition is filed. For all four reasons, the amount of prepetition contributions in principle available to creditors could exceed $320 million.

B. Claim (2): The Possibility of "Oversupply"

Bankruptcy and tax law can interact to produce an "oversupply" of prepetition charitable contributions. They do so when a charitable donation is costless to the debtor. A tax deduction for a charitable contribution reduces the taxpayer's tax bill by the amount of the taxpayer's marginal tax rate. The deduction thereby reduces the cost of the contribution to the taxpayer by the same

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159 Cf. Clogg et al., supra note 153, at 19 (Table 2.2) (taxpayers whose income averaged between under $4000 and $20,000 averaged contributions between 2.1 and 3.9% of their income; 1974 tax returns); Christopher Jencks, The Nonprofit Sector: A Research Handbook 321, 323 (Walter W. Powell ed., 1987). The net effect of increased giving is unclear. Some survey data show that almost half of households surveyed with incomes less than $20,000 made no annual charitable contributions at all. See Hodgkinson & Weitzman, supra note 150. Increased percentages of incomes given by debtors therefore may or may not compensate for possibly lower frequency of contribution within the average income levels of debtors.

amount. (And the government thereby subsidizes the contribution by the amount of the forgone tax revenue.) A bankruptcy discharge limits the debtor’s liability for dischargeable claims against it to the amount of its nonexempt assets. The discharge, therefore, further reduces the cost to the debtor of making a prepetition charitable contribution. And the debtor’s insolvency means that nonexempt assets remaining at the time of a bankruptcy filing will be distributed to satisfy creditors’ claims. The combination of insolvency and a discharge means that the debtor incurs no cost in making a prepetition charitable contribution of nonexempt assets rather than delaying consumption. Because a charitable deduction reduces the taxpayer’s nondischargeable tax bill, in some cases the taxpayer has an incentive to make prepetition contributions. Thus, the debtor’s insolvency can work with a discharge and charitable deduction to produce an “oversupply” of charitable contributions.

By an “oversupply” (or “overcontribution”), I simply mean a greater amount of contributions than is produced when debtors are not insolvent and bankruptcy law does not apply. That is, the baseline from which supply is measured is one in which tax law alone operates. It is not a baseline determined by the normative desirability of a particular quantity of charitable contributions. Rather, the baseline measures the distortion in tax-driven incentives to contribute produced by bankruptcy law. Relative to this baseline, insolvency and bankruptcy law can combine with tax law to produce an “oversupply” (“overcontribution”) of charitable contributions.

To see this, consider first the basic treatment of an individual debtor’s taxable income under the Bankruptcy Code. In general, the income tax liability of an individual debtor is not dischargeable. Unlike other prepetition claims, taxes are not dischargeable obligations under Chapters 7 or 11. The debtor remains personally liable for unpaid taxes. There are three limited exceptions

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161 Immediate consumption of nonexempt assets often is not an option. Often it is infeasible when assets are illiquid. Even when feasible, prepetition consumption in principle can be grounds for dismissal of a bankruptcy case under the “substantial abuse” standard of 11 U.S.C. § 707(b) or denial of a discharge under the “actual fraud” standard of 11 U.S.C. § 727(a). See, e.g., In re Smith, 229 B.R. 895 (Bankr. S.D. Ga. 1997); In re MD Taj Uddin, 196 B.R. 19 (S.D.N.Y. 1996); In re Ragan, 171 B.R. 592 (Bankr. N.D. Ohio 1994). Immediate consumption therefore can result in the denial of a bankruptcy discharge.


163 See id. § 523(a). The “superdischarge” available in Chapter 13 via § 1328(a) extends to all prepetition tax claims. This is because § 523(a)’s list of nondischargeable claims does not apply to a discharge granted under § 1328(a). However, a discharge under the subsection requires that the debtor make all payments under the payment plan. Because § 1322(a)(2) requires that a payment plan pay all § 507 priority unsecured claims in full, and tax claims are included among them, completion of a payment plan requires paying tax claims in full. Thus, tax claims effectively are nondischargeable under Chapter 13.
to nondischargeability. Taxes due for a year in which a tax return must be filed more than three years before the filing of the bankruptcy petition, taxes assessed more than 240 days before the filing of the petition, and taxes not assessable after the commencement of the case are dischargeable claims. The exceptions do not apply when the debtor files a fraudulent return or willfully attempts to evade the tax. Tax claims are given eighth priority among unsecured priority claims. Tax liens sometimes are subordinated to unsecured priority claims, as under § 724(b)(2), which allows payment to select unsecured priority claims ahead of a tax lien. However, the tax claim secured by the lien still remains a nondischargeable claim against the debtor.

The nondischargeability of tax claims, their priority, and the tax treatment of charitable contributions each can affect a debtor’s incentives to make petition charitable contributions. Charitable contributions are deductible to reduce the debtor’s taxable income whether or not a debtor files a bankruptcy petition. Their tax treatment remains the same. Because tax claims have lower priority than other unsecured claims, nondischargeability can operate independently of priority. Accordingly, three cases need to be considered: Case I: **No tax liability; unsecured nontax debt owed;** Case II: **Outstanding tax liability; unsecured nontax debt with priority over income tax debt;** and Case III: **Outstanding tax liability; income tax debt with priority over nontax unsecured debt.** Assume in each case that the unsecured nontax debt is dischargeable. Assume also that the property transferred is cash and that it is insufficient to satisfy all outstanding tax and nontax debt.

Case I: **No tax liability; unsecured nontax debt owed.** When the debtor is solvent, the “price” of a charitable contribution is the amount of forgone consumption of property contributed less the charitable deduction to which she is entitled. Insolvency makes the contribution of nonexempt property effectively costless to the debtor. This is because if the debtor does not contribute, nonexempt property is distributed to her creditors. Thus, she forgoes nothing by contributing the property. Her creditors instead pay the entire cost of the debtor’s contribution. Thus, charitable deduction combined with insolvency

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164 See id., §§ 507(a)(8)(A)(i)-(iii), 523(a).
165 See 26 U.S.C. § 170(a), (c) (1994).
166 The assumption is descriptively accurate. Most charitable contributions by individuals in the United States are in cash. See, e.g., Statistics of Income: Individual Income Tax 1995 Table 2.1 (1995) (79.5% of total contributions by individual itemizing taxpayers in cash; 1995 figures). Section 548(a)(2)'s protection is limited to charitable contributions of cash or cash substitutes. 11 U.S.C. § 548(d)(3)(B) (Supp. IV 1998). The property considered in the text therefore is restricted appropriately to such items.
167 See supra note 152.
and a discharge reduces the price of a contribution to the debtor to zero. A charitable contribution becomes a free good for the debtor. When no taxes are owed, all of the debtor's prepetition unsecured debt, by assumption, is dischargeable. Accordingly, the debtor has no incentive to retain nonexempt assets to reduce her liability on prepetition claims. Insolvency therefore gives a predisposed debtor an incentive to make prepetition charitable contributions. Section 548(a)(2) and the tax treatment of charitable contributions do not reduce the debtor's incentive to do so.\textsuperscript{168}

Case II: \textit{Outstanding tax liability; unsecured nontax debt with priority over income tax debt}. Because prepetition tax liability is nondischargeable, the debtor has an incentive to reduce her tax bill. A charitable deduction reduces the debtor's taxable income by the amount of her marginal tax rate, limited by the maximum amount of the charitable deductions allowable in a taxable year. If a prepetition charitable contribution of nonexempt property is not made, it will be distributed to satisfy unsecured claims in order of their priority. As in Case I, the debtor therefore does not forgo consumption if she makes a contribution. However, because nontax debt is assumed to have priority over (eighth priority) tax debt, the retained nonexempt property will go to nontax creditors. The debtor does not have the option of having it be used to satisfy tax debt first. Not making the contribution, therefore, has the effect of satisfying dischargeable ahead of nondischargeable debt. On the other hand, making a prepetition contribution reduces the debtor's nondischargeable tax liability. Thus, unlike in Case I, the debtor has a tax-driven incentive to make a prepetition charitable contribution. By protecting the transfer from attack, § 548(a)(2) assures that it will reduce the taxpayer's nondischargeable tax bill. The debtor's unsecured creditors and the government pay the entire cost of the contribution.

Case III: \textit{Outstanding tax liability; unsecured income tax debt with priority over nontax debt}. Because tax debt is both nondischargeable and has priority over nontax debt, the deductibility of charitable contributions does not differentially affect the debtor's disposal of property. If the debtor does not make a charitable contribution, the nonexempt property not contributed will be distributed first to satisfy tax debt. In this case, the debtor's nondischargeable tax bill is reduced by the value of the property distributed. If the debtor makes a charitable contribution, taxable income is reduced by the amount of her charitable contributions cannot be carried forward to reduce taxable income in subsequent years. See 26 U.S.C. § 108(b) (1994). Thus, when the debtor has no tax liability, the deductibility of charitable contributions only allows the contributions; the favorable tax treatment does not induce them.
The value of the deduction to the debtor is the amount of the contribution times the debtor’s marginal tax rate. Not making a contribution therefore reduces the debtor’s taxable income more than would a charitable deduction. Whether the debtor prefers making a contribution depends on whether she values the deduction more than the reduction in nondischargeable income tax debt owed. The tax treatment of charitable contributions here does not induce the debtor to make a contribution.

The different allocation of the costs of contribution in the three cases affects the propensity to make contributions. In Case I, the debtor pays none of her costs; her unsecured nontax creditors bear the entire cost. Thus, the debtor has an undiminished incentive to “overcontribute.” In Case II, the costs of the debtor’s contribution are shared between her unsecured nontax creditors, with priority, and the government. For the same reason as in Case I, the incentive to “overcontribute” is present and undiminished here, too. In Case III, the debtor and the government share the cost of the contribution. The contribution is a cost to the debtor: the amount above her charitable deduction by which her tax bill would have been reduced had the property not been contributed. It is a cost to the government too because the government subsidizes the contribution by forgoing tax revenue in an amount equal to the value of the property contributed times the debtor’s marginal tax rate. Because the debtor bears part of the cost of her contribution, her incentive to “overcontribute” in Case III exists but is diminished, unlike in Cases I and II.

Bankruptcy law works with the favorable tax treatment of charitable contributions differently in each case. In Case I, bankruptcy alone gives a debtor an incentive to contribute. This is because insolvency combined with the dischargeability of all outstanding debts makes the debtor indifferent between making and not making a charitable contribution. The availability of a charitable deduction from taxable income does not affect the debtor’s willingness to contribute. By protecting prepetition charitable transfers, § 548(a)(2) allows a predisposed debtor to make charitable contributions. Case II, in which favorable tax treatment combines with the priority of nontax debt, actually biases a debtor in favor of making charitable contributions. Section 548(a)(2) allows this bias to operate. In Case III, the nondischargeability of tax debt decreases a tax-driven incentive to make charitable contributions. It counters the bias in favor of giving created by insolvency, the dischargeability of nontax debt, and a charitable deduction.
C. Claim (3): A Likelihood of "Oversupply"

Whether "overcontribution" is a serious prospect depends on the relative frequency of the three cases within bankruptcy. This is an empirical question about which no studies exist. Nor could there be. The Act's amendment of § 548 changed the existing law of fraudulent conveyances, and debtors have not had time to adjust their pretirement charitable giving to the change. Still, existing data are suggestive. They do not exclude the possibility of a significant potential for tax-driven incentives in bankruptcy to make charitable contributions. Americans at all income levels make charitable contributions and itemize the contributions on their tax returns.\(^{169}\) Across income levels their willingness to do so also is responsive to tax incentives such as the size of a charitable deduction from income tax.\(^{170}\) Unless individual debtors in bankruptcy are atypical, they too respond to the favorable tax treatment of charitable contributions.\(^{171}\) Most bankruptcy petitions are filed under Chapter 7, and almost all of these are no-asset cases: there are no assets to distribute to creditors.\(^{172}\) In the vast range of cases, priority among unsecured creditors, therefore, is unimportant. The dischargeability of debt alone dominates. The predominance of no-asset cases and the prevalence of charitable giving is consistent with individual debtors making pretirement charitable contributions. A fair inference is that protecting charitable contributions from fraudulent conveyance attack enhances tax-driven incentives to make them.

Studies of samples of consumer bankruptcy filings consistently find that no more than twenty percent of individual debtors list federal or state taxes among their debts.\(^{173}\) The frequency of outstanding tax liabilities among self-employed debtors is likely to be higher because taxes are not withheld from

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\(^{169}\) See CLOTFELTER, supra note 153, at 28 (Table 2.8).


\(^{171}\) Clotfelter estimates that 88.1% of contributors with average incomes in 1980 of $12,663, and 89.6% of contributors with average incomes of $17,636, itemized their charitable contributions. See CLOTFELTER, supra note 153, at 28 (Table 2.8).

\(^{172}\) See Herbert & Pacitti, supra note 146.

their earnings.\textsuperscript{174} Even including wage earners in the filings sampled, tax claims are not involved in a significant number of consumer bankruptcy cases. Cases in which taxes are not owed describe Case I above. In these cases, in which unsecured nontax debt is dischargeable, it costs the debtor nothing to make prepetition charitable contributions. If debtors in bankruptcy respond to a reduction in the cost of giving as they do to a change in the size of the charitable deduction, "overcontribution" is predictable in a significant number of cases.

Case II is unlikely to be common. This is because tax debt is a frequent part of priority unsecured debt. Very little priority unsecured debt listed apparently is senior to tax debt.\textsuperscript{175} Thus, most cases in which unsecured tax debt is listed are instances of Case III. In these cases a charitable contribution is not costless to the debtor. The debtor has a choice: she can make a charitable contribution and reduce taxable income by the amount of its charitable deduction (contribution times its marginal tax rate) or not do so. If a contribution is not made, priority tax debt is reduced by the amount of the property retained. Forgoing a larger reduction in nondischargeable tax debt is a cost to the debtor.

"Impure" versions of Case II, however, might be common. These are instances in which the debtor owes small amounts of priority tax debt and large amounts of junior priority nontax debt. The "impure" case may be common because the estimated mean tax liability of individual debtors apparently is low (under $1800, according to most studies).\textsuperscript{176} As long as a debtor has enough nonexempt assets left to satisfy a priority tax claim, excess amounts retained go to satisfy nontax priority debt. This debt is dischargeable. Making charitable contributions of amounts in excess of the debtor’s tax bill, therefore, is costless to her. The dischargeability of nontax unsecured debt increases the discount in the price of making a charitable contribution already given by a charitable deduction. For amounts above the debtor’s tax bill, the price of the

\textsuperscript{174} Sullivan et al. report that the self-employed owed almost 75% of the total tax liabilities owed by individual debtors in their sample; wage earners owed about 25% of total tax liabilities. See Sullivan et al., supra note 157, at 288 (Table 15.2). They also report that the mean amounts of tax debt owed by self-employed and wage earner debtors in their sample were $7,192 and $1,407, respectively. See id., at 284-85 (Table 15.1). Both differences suggest higher tax liabilities among self-employed debtors in bankruptcy. Comparatively higher tax liabilities are unsurprising given the absence of withheld taxes from income of the self-employed, reliably their principal source of revenue.

\textsuperscript{175} See Shuchman, New Jersey Debtors, supra note 173, at 575 (Table 38) (tax debt is 60% of total priority unsecured debt).

\textsuperscript{176} See Sullivan et al., supra note 157, at 285 (Table 15.1) ($1,407 for wage earners); Shuchman, New Jersey Debtors, supra note 173, at 575 (Table 38) ($1,195); Shuchman, The Average Bankrupt, supra note 173, at 301 ($1,294).
charitable contribution to the debtor is zero. The modest mean tax liability of individual debtors suggests that an "impure" version of Case II might not be unusual.\footnote{Modest" is judged by the aggregate dollar amount of available exemptions or future wages. Studies range in their estimates of the percentage of homeowners among Chapter 7 debtors from 16 to 52\%. See Shuchman, supra note 157, at 195 (Table 1). Although homestead exemptions vary considerably among states, equity in a home is an asset that potentially can be used to satisfy nondischargeable tax liability.}

For example, assume that Debtor has a marginal tax rate of fifteen percent. Assume also that she has nonexempt assets of $200 in cash and owes nondischargeable senior tax debt of $100 and $500 in junior priority unsecured nontax debt. If Debtor makes a charitable contribution of $200, she reduces her taxable income by that amount. The value of a charitable deduction to her is $30 (.15 \times $200 = $30). Her $100 nondischargeable tax debt, however, remains unpaid. Debtor, therefore, incurs a net cost of $70 if she makes a $200 contribution. If Debtor makes a $100 contribution, however, and retains the other $100, she gets a $15 charitable deduction and eliminates her $100 tax debt. Because the $500 priority nontax debt is dischargeable, it costs Debtor nothing to make the $100 contribution. Thus, for amounts above $100, her decision to contribute is made as if she owes no tax debt.

\section{D. Claim (4): Increased Incentives to Give}

The Act increases the incentives bankruptcy or tax law already gives debtors to make prepetition contributions in Case I and the "impure" version of Case II. It does so in an obvious way, by increasing the value of the contribution to the debtor. By insulating gratuitous transfers to qualifying entities from fraudulent conveyance attack, § 548(a)(2) guarantees that the debtor's donative preference will be respected. The Act also reduces the cost of making the contribution by protecting the giving debtor's right to a bankruptcy discharge. Section 707(b) now prohibits a court from taking into account, in determining whether to dismiss a bankruptcy case, pre- and postpetition qualifying charitable contributions.\footnote{See 11 U.S.C. § 707(b) (Supp. IV 1998) (third sentence). Although homestead exemptions vary considerably among states, equity in a home is an asset that potentially can be used to satisfy nondischargeable tax liability.} This prevents the making of such contributions to be used as a grounds for denying a discharge. Thus, when the debtor has no tax liability and owes unsecured debt (Case I), the Act assures that insolvency and a discharge make a charitable contribution effectively costless to the debtor. When the debtor owes taxes and unsecured debt with priority over tax debt,
and has assets in excess of the amounts owed the unsecured debt (the "impure" version of Case II), it does the same when the debtor contributes the excess.

The Act also affects the debtor's incentives to make postpetition contributions in Chapter 13 cases. It does so by making postpetition contributions as part of a repayment plan costless to the debtor in Cases I and the "impure" version of Case II. Section 1325(b)(1)(B) allows the court to approve a plan if it allows for application of all of the debtor's disposable income within a three-year period to payment of outstanding claims. The Act amends the definition of "disposable income" to exclude expenses incurred in making charitable contributions. Because the debtor's repayment plan can provide for charitable contributions, the plan controls how much disposable income is available for distribution to creditors. More contributions mean greater expenses and therefore less disposable income. And because all disposable income goes to satisfy creditors' claims, the debtor's only options are to have the plan provide for contributions or make more income available to creditors. Keeping disposable income is not an option. Thus, given no tax liability and unsecured claims (Case I) or dischargeable unsecured claims with priority over tax debt (the "impure" version of Case II), insolvency and discharge again make a contribution costless to the debtor. The Act, by allowing a debtor to control the amounts available to creditors, gives an already inclined debtor an incentive to make postpetition contributions.

As a normative matter, increasing the incentive to make prepetition contributions may or may not be a good thing. It depends on whether the "overcontribution" that occurs in Case I or the "impure" version of Case II itself is objectionable—another normative matter. As I am using the term, to describe the transfers as "overcontribution" only identifies contributions that would not have occurred without a bankruptcy or tax rule. It does not condemn them. To do that, a moral assessment of the transfers is needed, and this Appendix offers none. However, two points about the interaction of tax considerations and the Act are relevant to a normative assessment. First, in drafting the Act, Congress did not carefully consider the behavioral effects induced by tax considerations working together with the Act. Congress's only concern with the tax code was to protect transferees that qualified as charitable organizations under the tax code. Second, the additional incentive to make charitable contributions added by insolvency and a discharge raises the question as to how much charitable giving should be encouraged. Because tax deductions subsidize such giving,

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179 Id. § 1325(b)(1)(B) (1994).
180 See id. § 1325(b)(2)(A) (Supp. IV 1998).
there may be moral reasons for limiting the encouragement at some point. It
certainly does not follow that because federal tax policy encourages charitable
contributions by reducing their cost to the taxpayer, bankruptcy law should
support the activity too.\footnote{For a contrary argument, cast in terms of the “consistency” with federal policy, see Todd J. Zwickl, \textit{Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor’s Right to Tithe}, 1998 \textit{Wis. L. Rev.} 1223, 1266-67.} Thus, there may be an objection to bankruptcy law
giving debtors a further incentive to make charitable contributions.