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Debt Collection as Rent Seeking

David Gray Carlson*

In this Paper, I wish to set forth an economic theory of debt collection, with the end of showing that the Article 9 filing system and the norm of bankruptcy equality share the same function—to break down local monopoly in favor of a national credit market, thereby transferring economic surplus from lenders to borrowers. In this account, debt collection will be portrayed as a kind of rent seeking. In law-and-economics discourse, rent-seeking opportunities are opposed because they induce fallow investments that create no value. If such rent-seeking opportunities were abolished, law-and-economics imagines that rent seekers would invest their time and resources in more economically productive projects.

This is pure malarkey, of course. No one knows for sure what the now-unemployed rent seeker’s next best opportunity would be. Perhaps it is robbing banks or kidnapping children or something socially worse than the petty corruption at hand. If so, then the rent-seeking opportunity in question is socially benevolent. The view that rent-seeking opportunities ought to be abolished is based on the premise that rent seekers have searched high and low for the absolutely worst activity available, from a social perspective, and that anything else they are led to do can only benefit society, or at least harm it less. Of course, there is no logical reason why this hierarchy of badness should exist. Accordingly, there is no logical reason for law-and-economics to rail against rent seeking in the abstract. Rather, whether rent seeking is good or bad is purely an empirical question.

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2. “Because wealth redistribution is a zero-sum game, the rent-seeking expenditures invested in property transfers are unlikely to be outweighed by any positive results of the expenditures.” Henry N. Butler & Larry E. Ribstein, The Contract Clause and the Corporation, 55 Brook. L. Rev. 767, 775 (1989).
Fortunately for *les rentiers*, there are many other reasons to oppose rent seeking than are dreamed of in utilitarian philosophy, as it is badly practiced in the law reviews. One may say, from an entirely non-economic perspective, that rent-seeking opportunities constitute the empowerment and privilege of the few against the many. Rent seekers have commandeered the tools of the state for private advantage instead of public good. They tax ordinary citizens against their will. They deprive citizens of the freedom to dispose of their own assets according to their choice, for no other reason than illegitimate political privilege. Rent seekers are freeloaders whose actions are opposed to the development of republican virtue.

Such reasons, trafficking in virtue and fairness, are nothing to the economist, save as empirical facts of existing preferences in society. To economists, only the consequences of policy are significant. As an arbitrary empirical matter, virtue and fairness may help constitute the demand curve for commodities, but, other than this, they can go hang themselves, so far as an economist is concerned. Quasi-religious propositions such as the notion that debts ought to be paid can have no deontological status in the scientific discourse of welfare economics, and so this Paper will scrupulously avoid them.

As this Paper is descriptive, not normative, it should be strictly understood that this Paper will never proclaim any given social policy as “good” or “wealth maximizing.” Though such conclusions are popular with the law review editors, they cannot be responsibly propounded unless a policy scientist knows all the facts. Of course, this is impossible for a great many reasons. In the absence of such Faustian perfect knowledge, the best that a policy scientist can do—and only with the greatest modesty—is to point out as many consequences of the law as possible, without any dream of sanctifying them with the name of public good. Policy is in the realm of prudence and politics, not science. However, as this is a scientific paper—not a prudential one—policy suggestions are strictly avoided, and the derivation of a moral is sternly forbidden.

This Essay proceeds as follows. First, debt collection will be described as an involuntary transfer from one party to another. The relevance of such transfers to welfare economics is problematic because mere transfer of wealth from debtors to creditors is

3. See *infra* notes 5-8 and accompanying text (arguing that no a priori theoretical determination of the social welfare effect of increasing or decreasing marginal cost is possible).
DEBT COLLECTION

not necessarily wealth maximizing. Therefore, to show that any given sort of wealth transfer is also wealth maximizing, one must establish—first, through theory, and, second, through empirical inquiry—that such transfers affect the creation of wealth in the future. The first part of the Essay fulfills this burden, discussing the conditions under which debt collection might constitute a fitting subject for welfare economics.

The second part of this Essay describes how debt collection might affect the price of credit. In particular, it distinguishes screening effects from monitoring effects. Local power in either of these effects allows creditors to extract rents from debtors. The third and fourth parts of this Essay show how Article 9 filing and bankruptcy redistributions work to destroy this local specialization, thereby lowering prices to consumers of credit, at the expense of potentially powerful local creditors.

The last part of this Essay reviews competing theories, which exalt and praise local creditor power. These theories will be shown to be based on false premises that increased local creditor power would lead to more competitive conditions in credit markets. The opposite turns out to be true. Of course, there is nothing wrong with the creation of anti-competitive conditions a priori from the perspective of welfare economics. But, as the progenitors of these theories are believers in the primacy of a priori welfare conclusions, the unintentional creation of market imperfections constitutes an embarrassment that should be acknowledged.

I. DEBT COLLECTION AS DISTRIBUTIVE POLITICS

Law-and-economics purports a disinterest in purely distributive or corrective justice, unless it can be shown that distribution or correction increases wealth. Therefore, to a utilitarian, the

4. Law-and-economics, when it thinks to set forth its normative goals, usually recommends the maximization of wealth—a term it scarcely bothers to define. Wealth can be defined as a numéraire for human pleasure or happiness. Mistakenly, it is traditional to refer to "dollars" as the numéraire, but "dollars" are merely one of the lesser, more degraded components of wealth. The other component is the net use value people enjoy in illiquid assets. In fact, the telos of the market is to insure that, like fools, rational consumers and their money are soon parted. That is to say, markets are in the business of moving goods to the highest valuing user. Thus, it is a mistake to maximize dollars instead of wealth generally. To do so is to maximize liquidity, not wealth. See generally Robin F. Grant, Note, Judge Richard Posner's Wealth Maximization Principle: Another Form of Utilitarianism?, 10 Cardozo L. Rev. 815, 820-21 (1989) (arguing that a numéraire of dollars equates with maximizing liquidity instead of wealth).
moral implications of theft, taxation, debt collection, or any other form of nonconsensual property transfer are potentially irrelevant. The utilitarian's only care is whether it can be shown that the particular transfer, or perhaps a class of transfers, will reduce or increase wealth in the future. Thus, for debt collection to matter to the welfare economist, it must have the potential to affect the aggregate quantity of wealth.

Law-and-economics argues that debt collection may affect wealth because it affects how creditors perceive risk, how creditors price credit in light of risk, and how price changes affect the aggregate quantity of wealth. Debt collection practices may affect how creditors perceive risk in at least two ways. First, the experience of loss in the past may portend a loss in the future—a creditor whose debtor defaults may fear nonrepayment from other debtors in the future. The creditor will therefore charge these later debtors a higher price, if she can. Alternatively, a change in the legal framework of debt collection may affect perceived risk. If legal reform makes it significantly easier for debtors to default, creditors may respond by raising the price of credit. In either case, the increased expectation of loss then becomes a marginal cost of producing future commodities. When commodities operate in an environment of downward-sloping demand curves, an increased marginal cost of production leads to a loss of utility to consumers in that market. That is, fewer goods are demanded because prices are higher.

Careless economists might call this price hike a deadweight social loss, although to call it so is bad theory. Such an increase in the marginal cost of production is a deadweight loss only in the context of a perfect market. But, because no market is perfect, nothing a priori can be said about the social worth of an increasing or decreasing marginal cost curve. The loss of consumer utility in the market under study may in fact actually increase social utility, if the loss cancels out another loss in

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Wealth maximization requires some means of assigning dollar values to report people's net use value in their assets. These would have to be phantom dollars not currently in the money supply. This is highly problematic—how can we trust people to report their unrealized gains from illiquid property? See generally Ian Ayers & Eric Talley, Solomonic Trading: Dividing a Legal Entitlement to Facilitate Coasean Trade, 104 YALE L.J. (forthcoming 1995) (discussing a model that assumes that all consumers lie about their utilities). These difficulties must be papered over if we are to do wealth maximization.

5. E.g., David Gray Carlson, Rationality, Accident, and Priority Under Article 9 of the Uniform Commercial Code, 71 MINN. L. REV. 207, 213 (1986) ("As the risk increases, demand falls, creating a deadweight loss to societal wealth.").
another market, thereby re-establishing the optimal allocation of resources.\textsuperscript{6}

Because this is so, the welfare economist faces enormous and probably insurmountable epistemological and empirical barriers.

\begin{quote}
[The task he undertakes
Is numbr'ing sands and drinking oceans dry;
Where one on his side fights, thousands will fly.\textsuperscript{7}
\end{quote}

But, aside from this "second best" consideration, it is not even clear that creditors will respond to past debtor theft by raising future prices. A creditor will do so only if the creditor extrapolates from the loss in question and attributes to the new borrower the attributes of the old defaulting borrower. In many cases, the creditor will not and should not make these extrapolations. If the creditor perceives that the new borrower does not present the same risk as the defaulting borrower, then the earlier loss was merely distributional and not relevant to the production of the future loan. To say otherwise is to succumb to the "sunk cost" fallacy—a fundamental error in price theory.\textsuperscript{8} Thus, the response of creditors to debtor default is a matter for empirical investigation, not \textit{a priori} theory.


\begin{quote}
It is well known that the attainment of a Pareitian optimum requires the simultaneous fulfillment of all the optimum conditions. The general theorem for the second best optimum states that if there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Pareitian conditions, the other Pareitian conditions, although still attainable, are, in general, no longer desirable. In other words, given that one of the Pareitian optimum conditions cannot be fulfilled, then an optimum situation can be achieved only by departing from all the other Pareitian conditions.

\ldots From this theorem there follows the important negative corollary that there is no \textit{a priori} way to judge as between various situations in which some of the Pareitian optimum conditions are fulfilled while others are not. Specifically, it is \textit{not} true that a situation in which more, but not all, of the optimum conditions are fulfilled is necessarily, or is even likely to be, superior to a situation in which fewer are fulfilled. It follows, therefore, that in a situation in which there exist many constraints which prevent the fulfillment of the Pareitian \textit{sic} optimum conditions, the removal of any one constraint may affect welfare or efficiency either by raising it, by lowering it, or by leaving it unchanged.
\end{quote}

\textit{Id.} at 11-12.


\textsuperscript{8} According to price theory, production decisions depend on the marginal cost going forward, not the historical fact that investments were previously made. To say otherwise is the "sunk cost fallacy." \textit{But see ROBERT NOZICK, THE NATURE OF RATIONALITY} 22 (1993) (suggesting nevertheless that sunk costs powerfully motivate human beings).
Similarly, one cannot a priori state that creditors will respond to legal reform by changing credit prices. This argument presupposes that creditors care about or notice legal reform, which is often not the case. For instance, where minor legal reform is at stake—let us give as an example that current favorite of law professors: the abolition or reform of Chapter 11—creditors may well be rationally indifferent to the wealth redistribution it creates because the chances of any given borrower defaulting are very small, and the added cost of collection, once default occurs, is not worth the effort to think about at the time the price of the loan is set.

On the other hand, major legal reforms may well affect the perceived risk. For example, the abolition of secured credit may disrupt prices, at least on the short term, until alternative devices for debtor control are devised. Legal reform must be very major indeed before such disruption is likely to occur, and even then disruption is an empirical prediction. In any case, it is possible that loan prices are sensitive to major legal reform, and therefore law-and-economics in the debtor-creditor field cannot be entirely ruled out as a discipline—though, to be sure, it will be purely an empirical and never an a priori discipline.

Because nothing a priori can be said about the efficiency of legal reform in debtor-creditor relations, what follows is not so much a scientific program for reform as it is a study in class warfare between debtors and creditors—a war in which I will endeavor to be neutral. What I hope to do in the next few sections is to illustrate the functions that two social institutions have on the way creditors interact with debtors in the market. The institutions are the Article 9 filing system and the redistributive rules in bankruptcy. These will be shown to serve the same political function—the devastation of monopolistic local credit markets in favor of a competitive national market.

9. Numerous law review articles have purported to give advice on the question of Chapter 11 reform. See Charles J. Tabb, The Future of Chapter 11, 44 S.C. L. Rev. 791, 792-95 (1993) (listing a short summary of the seemingly endless literature on Chapter 11 reform). For the view that bankruptcy considerations are unimportant in economics, see Merton H. Miller, Debt and Taxes, 32 J. Fin. 261, 264 (1977) ("For big businesses, at least...the supposed trade-off between tax gains and bankruptcy costs looks suspiciously like the recipe for the fabled horse-and-rabbit stew—one horse and one rabbit.").

10. This is sometimes called "rational apathy" in law-and-economics literature. E.g., John C. Coffee, Jr., The SEC and the Institutional Investor: A Half-Time Report, 15 Cardozo L. Rev. 837, 843 (1994) ("The basic force that explains shareholder passivity may not be legal restrictions of political pressures, but rational apathy.").
Before this function is explicated, some preliminary analytic remarks will be useful in order to distinguish between "screening" and "monitoring" by creditors.

II. RISK AND POWER

Risk is metaphysically a difficult concept because its existence in the world cannot be verified or falsified. All outcomes are predicted in any probability statement. Therefore, no event can possibly prove or disprove an earlier assessment of probabilities. Yet people do behave as if risk exists. And, as price theory is distinctly a psychological theory, we might as well pretend that risk is a fact in the world. By "fact," I mean that risk can be known and therefore is susceptible of research. In Bayesian terms, new information changes the prior assessment of risk, when the new information is causally connected with other variables affecting outcome. Information, however, may be costly to obtain.

The greatest risk involved in lending is the moral hazard—the risk that the debtor will decline to pay interest on the principal lent. Risk of debtor misbehavior is undoubtedly a private cost to creditors, and private actors will strive to avoid or reduce it. Two different avoidance strategies may be identified in the market for credit. First, a creditor may screen debtors in advance of the loan to determine how much risk any given debtor poses to the creditor. Second, after the loan is made, a creditor may bully, cajole, and intimidate a debtor into unrisky behavior. This is often called monitoring, though the passive term is unhappily not very descriptive of the brutal strategy in question.

A. SCREENING

From the perspective of price theory, screening and monitoring strategies are quite different. Creditors incur screening costs before extending loans; screening costs are already sunk at the time a creditor sets the price of a loan. At that point, the screening cost is no longer a cost going forward and therefore is not a short-term marginal cost in the production of the loan. Ac-


12. Buckley, supra note 11, at 1440 n.89.
cordingly, a creditor will incur screening costs if the creditor believes that, across the class of screened debtors, the creditor will obtain debt contracts that reimburse not only the short-term marginal costs of lending but the costs of screening as well. This excess over short-term marginal cost may be called rents or quasi-rents; these quasi-rents are part of the long-term marginal cost of the entire enterprise of screening and lending.

Screening is founded on the perception that different debtors pose different risks to their creditors. The screening creditor hopes to weed out the thieves from the pool of debtors. Screening may not be entirely successful. If not, a creditor will require the honest debtors in the pool to cover the losses imposed by the thieves. Creditors, however, are subject to competition. The creditors who are better at screening can identify higher-quality pools. By so doing, they can expel thieves and make them join the inferior pools. The better a creditor screens, the lower the rate of interest she can charge the surviving, improved pool. Where a debtor is placed by competing creditors in different debtor pools, the debtor will give the debt contract to the creditor who has the best opinion of her character, because that creditor can offer the lowest interest rate. In other words, debtors in multiple pools defect to the pool where they can obtain the lowest interest rate.

Within the pool, it may be said that thieves—those who pose above-average risk to their creditors—are obtaining economic rents. These economic rents are simply the wealth obtained from creditors, the cost of which the creditors must pass back to debtors—at least when the credit market is competitive. When screening occurs, then, thieves lose their economic rents, and, so long as the lending market remains competitive after screening technology improves, the debtors are enriched at the expense of thieves. This, without more, is a matter of indifference to welfare.

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13. See George J. Stigler, The Theory of Price 263 (4th ed. 1987); Buckley, supra note 11, at 1442 (discussing the possible incentives for creditors to lower their secured debt ratios).

14. When the credit market is not competitive, it is possible that the creditor and not just other debtors will subsidize thefts. This phenomenon increases as demand grows more and more elastic, because, in a monopoly credit market, cost huffs and puffs up a steep marginal revenue curve, while price easily travels up a demand curve that is, by definition, twice as flat. Hence, cost travels more distance on the ordinate than does price, and the monopolist must make up the difference.

In comparison, when cost increases in a competitive market, the creditor is forced to pass the entire cost to the consumers in order to justify the continuance of production.
DEBT COLLECTION


economists, of course. Whether persons of good or bad character get wealth is neither here nor there; only the net aggregate increase of wealth across the board matters. Nevertheless, better screening lowers the marginal cost of lending and hence the interest rates offered to debtors. This lower interest rate in turn lowers the debtor's marginal cost of production. As always, whether this is a good thing is purely an empirical matter.

B. MONITORING

Of course, screening is only one of the creditors' alternatives to assuming the risk that debtors will steal. The other is monitoring. “Monitoring” is a term that economists have used without really defining what they mean. The term, however, clearly includes short-term marginal costs associated with creditor techniques to reduce the risk of future loss. On this basis, then, it can be said that monitoring includes intimidating or disabling the debtor from stealing.

Unlike screening costs, monitoring costs are not sunk at the time the actual price of a loan is set; monitoring costs are costs going forward because the creditor—at the time she makes the loan—anticipates that costly future monitoring will be necessary to reduce the debtor into a state of servility. Monitoring is, therefore, a short-term marginal cost of lending. If the price of the loan does not cover this cost, the creditor will perceive the loan as a losing proposition and will not go forward. The difference between monitoring costs and screening costs therefore can be summarized as follows: screening costs are part of the long-term marginal cost of lending, and monitoring costs are part of the short-term marginal cost of lending. In both cases, the creditor undertakes the activity with the expectation that the price actually paid will eventually cover the marginal cost in question.

A security interest is best viewed as a monitoring device—not a screening device—because it has the effect of reducing the risk of loss by disabling, at least to some degree, the debtor’s ability to transfer assets to the prejudice of the secured party and by giving the creditor more power to intimidate or otherwise control the debtor. Also, as with monitoring generally (and unlike screening), the cost of the device is forward-going at the time the price of the loan is set. To be sure, the security interest and other monitoring devices compete with screening as means to re-

15. See supra notes 4-8 and accompanying text (describing how welfare economists focus on wealth maximization and exclude questions of moral implications from their analysis).
duce risk. A creditor may well reduce the amount of screening when it is possible to take a security interest instead. As a result, some scholars have described security interests as a screening device,\textsuperscript{16} although it is more rigorously viewed as a monitoring device that competes with and substitutes for screening techniques.

Monitoring also differs from screening in that monitoring does not merely report but actually changes the attributes of the pool of debtors. Hence, whereas screening deprives thieves of their rents and (in a competitive market) awards these rents to honest debtors, monitoring transforms thieves and rehabilitates them, forcing them into at least the outward show of honesty and virtue.

If all creditors had the same ability to screen and monitor, then screening and monitoring would have the untrammeled effect of transferring wealth from thieves to honest debtors. But not all screening and monitoring technology is equally available to creditors. If only a few lenders have the requisite skill, a creditor monopoly or oligopoly may grow up, forcing debtors to pay supra-competitive rates of interest. In such a case, creditors capture most of the economic rents from thieves, which, from the perspective of debtors, makes the creditors little better than the thieves they displaced.

I will call creditors enjoying such a positional advantage “local” creditors. I will call their competitors “national creditors” in order to emphasize the local versus the national competition at work in the institutions I am covering here.\textsuperscript{17}

C. LOCAL CREDITORS

Local creditors with positional advantage, then, are in a position to collect economic rents from debtors. This power comes about because the local creditor is able to achieve a separating equilibrium by effective screening and monitoring. Screening creates this effect because it allows the local creditor to identify the higher quality debtors and offer them the competitive rate minus an increment. Because the local creditor beats out the


\textsuperscript{17} Obviously, informational and leverage differentials are not, strictly speaking, purely a function of locality. One local creditor may have informational and leverage advantages over other local creditors. In any case, the terminology is convenient and I trust no confusion will result.
DEBT COLLECTION

competition, the local creditor obtains all of the business from the identified pool. The national creditors are therefore left with an inferior pool and must charge this pool a higher price because fewer honest debtors are available to cover the thefts by the crooks.

Meanwhile, the local creditor with monopoly power takes over the role of stealing economic rents from the debtors in the higher-quality pool. To be sure, the local creditor has surrendered an increment by lowering the prices in order to beat the competition, but even this lower price can be raised again when the national creditors are forced to raise their own prices because the local creditor has skimmed off the good debtors. In short, the local creditor is in a position to drive out competitors by lowering prices and then recouping later under the pleasant shade of a more lucrative price umbrella.

The above account has described how the screening function enables local creditors to banish thieves and take over their share of the tax revenues extracted from debtors. But monitoring also plays a role in the story. The local creditor may be a powerful monitor of debtors. Professor Jim Bowers gives the example of the creditor who is the deacon of the local church. Such a creditor has the power to ruin a debtor's standing in the community, which makes the deacon an excellent monitor. All of the costs in becoming the deacon have long since been sunk, and so this power constitutes a competitive advantage of the creditor over other would-be monitors.

Monitoring can go beyond simply enforcing the terms of the debtor's bargain with the creditor. It can form the basis of a coalition between the local creditor and the debtor to loot the national credit markets. Bowers's deacon might be able to convince the local debtor that, because of loyalty or because of some threat of local or perhaps divine retribution, any debtor who has overborrowed from national and local markets and cannot repay all creditors should prefer the local creditor at the expense of the national creditor. When this occurs, the local creditor and the debtor have entered into a conspiracy to loot the national mar-

19. Id.
kets. Of course, the national credit market will resist this coalition with vigorous screening of its own, plus whatever monitoring it can muster. But, ex hypothesi, the power of the local creditor to monitor makes this a losing and hopeless enterprise. National credit starts to dry up, and this raises the price ceiling that otherwise curtails the local creditor's ability to extract rents from debtors.

Local monopoly in a credit market stems from screening and monitoring skill; commercial law tries to minimize the benefits derived from their skills and, thus, to reduce the rent seeking these skills allow. Article 9 and bankruptcy redistribution laws attempt to ensure that screening and monitoring skill remain as public a good as possible. When this socialization of screening and monitoring advantage occurs, creditors are unable to take over rents from the thieves and must return all savings to the debtors.

Without government intervention, the existence of local rents will, of course, draw further investments from national creditors. Through these investments, the weak creditors render themselves strong and therefore able to compete in the credit market with the local creditor. This entry into the market will bring credit prices down, and the economic rents of the first entrants in the market will erode.

If the market could be relied upon to produce investment in debt collection, it might well be self-regulating and therefore not require such government interventions as the Article 9 filing system or bankruptcy redistributions. But often the investment in public regulation gets the job done more efficiently than reliance on private investment. This, I believe, is the function of the Article 9 filing system and the redistributive rules in the Bankruptcy Code. Both institutions strengthen the hand of the national creditor at the expense of the local creditor, thereby preventing the local creditor from overcharging debtors for their loans.

III. ARTICLE 9 FILING

The history of Article 9 filing has been told many times. Quickly, secret liens were conceived as per se frauds by debtors and their allied creditors. Any creditor with an unsecured claim at the time of the hypothecation could therefore pursue the se-

cured party's collateral at her leisure and obtain a judicial lien upon it—even after the secured party purged the transaction of fraud by dispossessing the debtor. But, as the centuries waned, fraudulent conveyance law was thought to tip the balance too far against local creditors. By disallowing the hypothecation, fraudulent conveyance law prevented business from obtaining credit by hypothecating the means of production. The statutory predecessors of Article 9 therefore began to vindicate any hypothecation that was made a matter of public record. This allowed debtors both to convey assets to a lender and also to retain possession for productive activity. Meanwhile, national creditors were given information that, previously, only powerful local creditors could own. The filing system therefore served to reduce the information asymmetries between national creditors and local creditors, while allowing any given creditor to gain leverage over the debtor through security interests on personal property.

Article 9 is the latest incarnation of fraudulent conveyance reform. Notoriously, it vindicates all sorts of hypothecations and has made secured lending so easy that the no-asset bankruptcy predominates as the mode of failure in the United States. In these bankruptcies, only the secured parties recover; the general creditors do not. This has led to the deep suspicion that security interests are insidious attempts by debtors and their mobilized creditors to export risk to the unsuspecting class of unsecured creditors.\(^{22}\) These suspicions are important in their own right. They have led to the rapid development of lender liability and an attitude by the bankruptcy courts that secured creditors should be tripped up for minor inconsequential errors whenever possible. Whether Article 9 facilitates coalitions between debtors and secured creditors to pillage others is an important question, but is beyond the scope of this Paper.\(^{23}\) Here we examine the logic

\(^{22}\) For an interesting exchange on this suspicion, compare Lynn M. LoPucki, The Unsecured Creditor's Bargain, 80 VA. L. Rev. 1887 (1994) (arguing that security misallocates resources by imposing on unsecured creditors a bargain for which they did not contract) with Steven L. Harris & Charles W. Mooney, Jr., A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously, 80 VA. L. Rev. 2021 (1994) (arguing that secured credit does not necessarily harm a debtor's unsecured creditors or increase risk for unsecured creditors).

\(^{23}\) Ironically, the law-and-economics movement, which is usually in favor of freedom of contract in most fields of law, has been skittish when it comes to the moral status of secured lending. But this delicacy comes from mistaken application of the Modigliani-Miller irrelevance hypothesis. According to this hypothesis, security interests either must be irrational or must logically be founded upon immoral coalitions between secured lenders and debtors.
behind the reform—not the abuses to which the reform has been put by persons of bad character.

Article 9 filing socializes screening because it permits national creditors to discover debtor quality. It does so by advertising encumbrances that preexist the contemplated loan. Advertising, however, is costly and contrary to the self-interest of local creditors. Accordingly, the law must provide some incentive to make the requisite Article 9 filing. This is accomplished by empowering debtors to convey their assets free and clear of earlier unrecorded security interests. Thus, to prevent coalitions of crooked debtors and creditors from imposing frauds on subsequent lenders, Article 9 actually encourages even more crookedness. To prevent an unscrupulous debtor from selling collateral free and clear, the creditor must knuckle under and provide her competitors with the information that the filing system requires. The resulting advertisement warns off the subsequent creditors and helps them, through screening, to improve their pool of customers. In Article 9, as in economics, and in most of life, two wrongs indeed make a right.

Perfection, therefore, can be understood as some extra step a secured party must take to terminate the debtor's power to give better title to some subsequent transferee. Although various steps might be taken, Article 9 filing is the most famous step—the one most lawyers think about when they ponder the sublime ideal of perfection. This step is obviously connected with the goal of advertising debtor quality to future generations of creditors.

Notice that a creditor may have no security interest and yet obtain a screening boost from the Article 9 filing system. The security interest itself, however, is monitoring, not screening. Whether the debtor is honest or crooked, Article 9 reduces the secured creditor's risk of loss by assuring that her power over the debtor shall not be contradicted by some pre-existing power. But, by imposing a powerful incentive for the secured creditor to file, Article 9 also limits the ability of the creditor to conspire with the debtor to loot some later creditor further down the road.

Article 9 can therefore be viewed as discouraging two types of rent seeking by local creditors. First, Article 9 filing curtails

Elsewhere, I have shown that this pessimistic view is based on methodological blunders. Security interests are indeed logically capable of social good, though, as with all other contracts, whether any given security interest produces good in the world is strictly an empirical question. David Gray Carlson, On the Efficiency of Secured Lending, 80 Va. L. Rev. 2179 (1994).

the coalition of the local creditor and the dishonest debtor to raid the national credit market for rents. Second, it curtails the local creditor's incentive to invest in local power, by making the acquisition of information cheap. This program can therefore be viewed only as a socialistic intervention into free markets—a "second-best" reaction to market imperfection.

By providing information to the national credit market, Article 9 filing improves competition in the credit market generally. Thieves are deprived of their economic rents, and creditors are prevented from pocketing the savings. This is an ethically attractive program from many perspectives, but, once again, it is arbitrary and meaningless to a welfare economist. No a priori conclusions for welfare economics can be drawn from what has been said. All that can be said clearly is that Article 9 redistributes wealth from one class to another. These redistributions will probably affect prices—although this too is an empirical matter—but merely changing prices cannot be viewed as a priori good or bad.

Again, the rationale for public access to Article 9 filing information is that the system socializes a useful screening function, thus depriving local creditors of an advantage over national creditors. But this rationale presumes a context that may no longer be empirically correct. For example, where it is generally known that assets are always encumbered by security interests, a filing system may serve no useful screening function. Or, the filing system may simply cost too much, as many now allege. In these contexts, filing systems might violate the logic upon which they are founded, in which case reform is in order. These reforms—exercises in prudence and common sense—are beyond the scope of this Paper, which stops at conjuring forth the spiritual status of Article 9 filing.

IV. BANKRUPTCY REDISTRIBUTIONS

Like Article 9 filing, bankruptcy redistribution also serves to break down local power in aid of a national market. The chief tools for accomplishing this task are the distributional rule that says that all unsecured creditors divide the debtor's estate pro

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25. For example, security interests granted by financial intermediaries to their lenders will soon be immune from filing requirements under the soon-to-be-proposed Article 8, because it is understood that the broker-dealer business operates in a context of ostensible non-ownership. Jeanne L. Schroeder, Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street, 1994 COLUM. BUS. L. REV. 291, 351-56, 397-99.
rata\textsuperscript{26} and voidable preference law, which requires locally powerful creditors to honor the norm of equality with national creditors.

On the account given above,\textsuperscript{27} local creditors and dishonest debtors conspire to take rents from the national credit market. The key structural feature of this conspiracy is the local creditor's power to pull out principal from the failing debtor before the national creditors can get it. Therefore, when voidable preference law, in conjunction with bankruptcy redistribution rules, breaks up that power, the Bankruptcy Code effectively empowers national creditors against local creditors. So viewed, voidable preference law is at the center of bankruptcy policy, a fact noted by Professor James McLaughlin, who long ago wrote, "The law of preference is the main contribution of the Bankruptcy Act to the law of creditors' rights."\textsuperscript{28}

To be sure, it is possible to overstate the Bankruptcy Code's dedication to equality of creditors. For example, § 507(a) lists a whole series of senior priorities, including taxes.\textsuperscript{29} These exceptions to bankruptcy equality can be explained on various practical or political grounds. Suffice it to say that, if bankruptcy equality is a distributive norm whose medicinable eye cures the ill aspects of evil local law, so these priorities are compromises of the norm in aid of other policies, right or wrong.

As an even more dramatic inroad on the norm of equality between creditors, the Bankruptcy Code honors secured lending, more or less, and preserves for the secured creditor the actual collateral awarded prior to bankruptcy, or its equivalent.\textsuperscript{30} But this is so only when the creditor has conformed to the Article 9 rules by perfecting the security interest.\textsuperscript{31} This act of perfection provides evidence that the secured creditor is not participating in some scheme to loot the credit market, because the secured party has made public its monitoring strategy over the debtor.

\textsuperscript{27} See supra text accompanying notes 21-25 (discussing Article 9 filing).
\textsuperscript{28} James A. McLaughlin, Defining a Preference in Bankruptcy, 60 Harv. L. Rev. 233, 235 (1946).
\textsuperscript{31} As is well known, unperfected security interests are voidable preferences and also subordinate to the trustee's status as a hypothetical judicial lien creditor. For exhaustive treatment, see David Gray Carlson, Security Interests in the Crucible of Voidable Preference Law, 1995 Ill. L. Rev. (forthcoming); David Gray Carlson, The Trustee's Strong Arm Power Under the Bankruptcy Code, 43 S.C. L. Rev. 841 (1992).
If, at the time a debtor files for bankruptcy, the creditor has not filed a finance statement to confess her interest, or if the creditor files within the preference period, bankruptcy strikes down the security interest as an offense to the norm of creditor equality. So conceived, two disparate voidable preference policies—the punishment of transfers on antecedent debt and the striking down of secret liens (even when they are not transfers on antecedent debt)—can be shown to share a common purpose. Both policies attempt to defeat local advantage in favor of the national credit market. Thus, although voidable preference law has been criticized for pursuing disparate policies, these policies share the common goal of building national credit markets—a fundamental requisite of nation-building in general.

To be sure, the absence of an Article 9 filing for a security interest cannot properly be equated with the presence of a looting conspiracy between the debtor and the non-filing local creditor. A secret lien is, to borrow from the language of social science, often a “false positive.” Indeed, on these grounds, a respectable argument could be made that perfection errors that are not intended to harm the credit market might be excused. Courts show this instinct from time to time, as when they proclaim an unperfected security interest to be an “equitable lien”

32. C. Robert Morris, Bankruptcy Law Reform: Preferences, Secret Liens, and Floating Liens, 54 Minn. L. Rev. 737, 758 (1970) (opposing the punishment of secret liens under § 547(b) on the grounds that voidable preference law strikes only at unequal distributions on antecedent debt).

33. Thomas Jackson also claims that the two preference policies are the same, but the nature of the unity is far different from what I have suggested. According to Jackson, both branches of voidable preference law discourage creditors from wasting their money trying to collect debts. This maximizes the collections the aggregate of creditors can expect. Thomas H. Jackson, Avoiding Powers in Bankruptcy, 36 Stan. L. Rev. 725, 762-65 (1984).

The problem with this view is that local collection power just as plausibly reduces the total amount of creditor assets spent on collection. That is, if the national creditors know that the local creditor enjoys a crushing advantage, then they will not even try to collect. Yet voidable preference law equally defeats the local creditor whose power effectively discourages needless collection expense. If anything, voidable preference increases total collection expenses, by endowing a bankruptcy trustee with a new cause of action on behalf of the national creditors. Therefore, Jackson's explanation fails to be convincing. See David Gray Carlson, Philosophy in Bankruptcy, 85 Mich. L. Rev. 1341, 1382-84 (1987).

Professor Picker defends the rationality of security interests by pointing out that, when a creditor obtains a security interest, other creditors will not waste expense in trying to collect their debt. Randal C. Picker, Security Interests, Misbehavior, and Common Pools, 59 U. Chi. L. Rev. 645, 677 (1992). This is precisely to say that when one creditor is preferred over the others, the others will not bother to compete. But if voidable preference law undoes the initial transfer, other creditors will respond by investing in debt collection.
that is good against creditors.\textsuperscript{34} It cannot be denied, however, that debtor's counsel and bankruptcy judges exult in hanging a secured creditor out to dry for the most inconsequential mistakes. When this is done, the courts depart from the justification presented here—the punishment of local advantage over debtors. Such an instinct can best be understood as a second-best moral strategy, according to which courts make secured creditors take losses because, as a class, they have participated in an evil coalition to loot from subsequent creditors.

The view that bankruptcy equality—and particularly voidable preference law—is connected with nation-building and protection of the national market over local markets also draws support from the fact that this is how contemporaneous historical figures perceived bankruptcy legislation. That great nation-builder, Daniel Webster, said that power to prefer creditors led to unsound lending practices.\textsuperscript{35} And, in defending voidable preference law from its localist opponents in 1910, Congressman Joseph Swagar Sherley from Kentucky said:

Against the imperfections of this law I point to the imperfections of the insolvency laws of forty-odd states. When you have pointed out to you the hardships of this law, remember the times of the midnight attachments, remember the preferences to the brother, to the wife, to the father-in-law, to the mother-in-law, whereby the distant creditor was prevented from getting his just debt. Oh, but this is a collection law, we are told... the very purpose of government is to see that that which is owing to a man shall be given to him, and what we provide by a bankruptcy law is that all men shall have an equal chance in obtaining what is due him out of a failing debtor's estate. What you had under the old system was that the man near at hand or the man in the special favor of the debtor got the lion's share.

[Voidable preference] law... has done more to increase the credit of the poorer sections of this country than any law that was ever put upon the statute books... [b]ecause it gives assurance to the foreign creditor, if he lends to a merchant and misfortune overtakes that merchant, that he will have an equal chance with the home creditor...

\textsuperscript{34} Sanyo Elec., Inc. v. Howard's Appliance Corp. (\textit{In re Howard's Appliance Corp.}), 874 F.2d 88, 93 (2d Cir. 1989); see also Carlson, \textit{The Trustee's Strong Arm Power Under the Bankruptcy Code}, supra note 31, at 912-45 (citing cases).


\textsuperscript{36} 45 CONG. REC. 2273 (1910), \textit{quoted in McLaughlin, supra note 28, at 234 n.6. It may also be pointed out that legislators from rural areas did not hesitate to portray federal bankruptcy legislation as a plot by New York banks to deprive local creditors of their power. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 138-39, 145 (1935); Richard C. Sauer, \textit{Bankruptcy Law and the Maturing of American Capitalism}, 55 OHIO ST. L.J. 291, 313 (1994).
Of the debate surrounding the passage of the 1898 Bankruptcy Act, Richard C. Sauer, in a brilliant historical account of the conflicts between the local and national politics of the era, has written:

The passage of the Bankruptcy Act of 1898 brought to conclusion congressional deliberations of extraordinary intensity. . . . The tenor of discussion could hardly have been more impassioned or the scope more inclusive. The Act's opponents, most from regions that remained essentially agricultural, once again unfurled the banner of agrarian localism and carried it forward into battle against the forces of concentrated wealth and centralized government.

. . . .

The Bill's supporters, for their part, insisted that it would "encourage trade, enlarge and extend credit, build up and promote business, put active, energetic, and brainy men at work, and add to the dignity and wealth of our common country." They equated it with the American spirit of enterprise and capacity for fair dealing. . . . Its significant place in the program of the Republican Party, "the party of hope—of humanity—of civilization," was often remarked. So apparent did it seem that this legislation represented the shining path of the future that its detractors could only be those "who always oppose what is good and wise in legislation as in all things, idiots and knaves."37

Thus, the theory that bankruptcy law favors national over local markets enjoys the advantage of having a close connection with American history. This fact distinguishes it from other theories of bankruptcy produced by the law-and-economics movement, which is self-avowedly ahistorical in its approach.38

The law-and-economics account of bankruptcy was, until recently, dominated by the so-called "creditors' bargain" theory introduced by Thomas Jackson.39 According to this theory, bankruptcy law should replicate the agreements to which creditors would unanimously consent, if transaction costs did not deter them from bargaining with each other in advance of default. Under this theory, bankruptcy redistribution is generally evil because creditors would not agree to surrender pre-existing power without compensation. Yet how can bankruptcy equality—a palpably redistributive program—be defended in light of the requirement of unanimous creditor consent? The response to this question was the most unsatisfactory empirical assertion that all creditors are already equal at state law, so that they would

37. Sauer, supra note 36, at 328-30 (citations omitted).
gladly consent to be equal under bankruptcy law. Empirical equality is a necessary condition to unanimous creditor agreement to a federal bankruptcy regime of bankruptcy equality, and, because empirical equality is the last thing one would expect to find in debtor-creditor relations, the creditors' bargain theory of bankruptcy must be considered a failure. Indeed, the theory has been withdrawn by its author.

More recent law-and-economics scholarship still opposes bankruptcy redistributions in general and favors freedom of contract, where local advantage might have maximum effect. This latter wave of literature is not often specific about the price theory on which it relies, but clearly it assumes a backdrop of competitive credit markets, in which local power does not exist. Only if credit markets are "perfect" can it be maintained that contracts are wealth maximizing. Contracts in imperfect markets are not necessarily so.

This post-Jacksonian literature implies that perfect markets already exist—a theoretical impossibility. But even if we clumsily equate highly competitive capital markets with perfect markets, it may be noted that, historically, it took a century of federal bankruptcy law to help establish these competitive capital markets. Indeed, it is fair to say that a major purpose of federal bankruptcy law is precisely to guarantee competitive

40. Id. at 15.
41. This statement of the empirical premise of the creditors' bargain theory is somewhat oversimplified. For a more detailed treatment see Carlson, supra note 38, at 463-71.
42. Thomas H. Jackson & Robert E. Scott, On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain, 75 VA. L. REV. 155 (1989). In this essay, the authors assert a "new creditors' bargain" theory, in which bankruptcy is openly redistributive. According to these authors, creditors are not rational market participants. Unsecured creditors are secretly risk-averse, and secured creditors are secretly risk-preferring. Id. at 164-78. Neither can instantiate their desires in an environment of free contract, and so they need federal intervention to adjust their contracts more toward their true preferences. Id. at 178-204. I venture a critique of this thesis in Carlson, supra note 38, at 482-503.
43. E.g., James W. Bowers, Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure, 88 Mich. L. Rev. 2097 (1990) (arguing that bankruptcy legislation is inherently flawed because debtors themselves are the most efficient liquidators of their assets); Robert K. Rasmussen, Debtor's Choice: A Menu Approach to Corporate Bankruptcy, 71 TEx. L. REV. 51 (1992) (arguing that parties should negotiate bankruptcy terms, and that Congress should provide a menu of choices rather than a mandatory default).
44. On the impossibility of a perfect capital market, see Carlson, supra note 23, at 2182-85 (describing time and capital formation as market imperfections).
conditions in a national credit market. This is not to preclude the possibility that bankruptcy law has outlived its purpose. Although I severely doubt this to be the case, it is an empirical question that cannot easily be answered without a great deal of experience in the bankruptcy system. Regardless, however, of whether federal bankruptcy law continues to be necessary to ensure the existence of a national credit market, one can at least firmly state that a major purpose of this law is to level local power in favor of a national credit market.

V. A CRITICAL RESPONSE TO DEFENSES OF LOCAL CREDITOR RENT SEEKING

A few scholars have made arguments explicitly or implicitly defending local creditor power and thus undermining the rationale for bankruptcy equality and Article 9 filing. Proponents argue that local creditor power encourages useful behavior. Professor Bowers, for instance, argues that a debtor who prefers a local creditor may be reacting to the creditor's investment in efficient payment technologies. He also urges that preferences to the local creditor increase efficiency because the debtor has the incentive to pay the highest valuing user of the dollars paid. In addition, Professors Baird and Jackson have suggested that favoring local creditors encourages creditors to search for information; as information is good, so is local creditor power. In this part, I demonstrate that each of these arguments is wrong.

A. THE DEBTOR'S LACK OF INCENTIVE TO PREFER CREDITORS WHO HAVE SUNK COSTS IN PAYMENT TECHNOLOGIES

The economics of debt collection remains almost entirely unexplored in the law reviews, but one salient exception is Professor James Bowers's *Georgia Law Review* article. In his witty allegorical essay, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution,* Bowers argues that local creditor power is a good thing, in utilitarian terms, because it rewards efficient creditor and debtor behavior. Therefore, as they reduce local creditor

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46. Bowers, supra note 18.
47. Id. at 27.
power, bankruptcy equality and, by implication, Article 9 filing are to be opposed. Yet it can be shown that this conclusion is simply the product of logical error, key strategic non sequiturs, and misinterpretation of his own examples. For that reason, his defense of local creditor power must be rejected on a priori grounds.

In his article, Bowers follows the traditional mode of starting from a “perfect” market for credit and relaxing assumptions, until the institution in question is explained. As Bowers commences his parable, all debtors live in the same place, and all creditors and debtors are indistinguishable from other members

48. Bowers does not mention Article 9 filing, but, as it erodes local positional advantage obtained by investing in information about debtors, Bowers would presumably oppose the socialization of knowledge that Article 9 filing portends. There is some hint of this in Professor Bowers's contribution to this Symposium. See James W. Bowers, Of Bureaucrats' Brothers-in-Law and Bankruptcy Taxes: Article 9 Filing Systems and the Market for Information, 79 Minn. L. Rev. 721 (1995). In his article, Bowers refers to subsequent creditors as "free riders" who do not pay the producer for the information received from the filing system. Id. at 734-35. But, in the end, he seems to favor the maintenance of the filing system, because of the external costs local creditor power would cause—though he would privatize it to lower its cost. Id. at 740-43.

49. I have already argued that perfect markets cannot contain any time. See Carlson, supra note 23, at 2182-85. Therefore, a market for credit is a contradiction in terms. Instead, credit markets only spring up because market imperfections—including time—have crept into the analysis.

In Professor Bowers's amusing rendition of the perfect market, space has been abolished, and infinite creditors dance on the head of a pin. Time still exists on the pinhead, however. It may be the case, though, that, philosophically, time and space are the exact same thing. If so, to abolish space is also to abolish time. See Bowers, supra note 18, at 35 n.30. According to Professor Terry Pinkard:

The categories of space and time turn out on the Hegelian conception to be forms of the more general category of quantity. Kant held that space and time were pure intuitions. That is, they were like the ordinary empirical intuitions, except that they lacked empirical content. In effect, for Kant, space and time were big (and pure) individuals at which we could only point; they were not primarily ordering relations (they were not concepts). Kant took this to be the conception of absolute space and time of which Newton spoke. Hegel argues that space and time are not primitives out of which quantitative relations are to be constructed, but are themselves to be constructed out of more primitive quantitative relations. He then constructed an account of how it is possible that we can have an independent understanding of these relations without first tying them into space and time. . . . This would have lent credence to Hegel's exclusion of the topics of space and time from his Science of Logic. One constructs adequate conceptions of space and time out of quantitative conceptions (i.e., mathematics), not the other way around.

DEBT COLLECTION

of their caste. In other words, there is what I have called a vigorous national market for credit with no local difference; no creditor enjoys more leverage over a debtor than any other. In this world, creditors can costlessly induce a sheriff to collect debts through the seizure of assets, if necessary. Furthermore, if more than one creditor seeks to levy the assets of an insolvent debtor, each obtains a pro rata share of the debtor's estate. There is no bankruptcy regime in which the debtor can fend off sheriffs.50

To create the conditions under which creditors may develop unequal leverage over the debtor, Bowers dispatches one debtor to a remote location. For this debtor, it is costly to make ordinary course payments. In Bowers's allegory, the transaction cost associated with payment is the cost of walking to the agreed point of payment, where the debtor will hand currency to the creditor.

At this point, the debtor, living abroad, still enjoys the largesse of a competitive credit market. No local advantage exists to give any creditor a monopoly over the debtor's borrowing. Because walking to the payment locus is a lump sum cost-per-payment, Bowers stipulates that the debtor will choose to deal with only one creditor, in order to minimize walking costs.51 Because the credit market is competitive, the debtor chooses one creditor at random.52

There is a rising disutility curve for either side in walking to a payment point. Therefore, the debtor would benefit if the debtor and the creditor met halfway, each side cutting off the steeper parts of the disutility curves of the other and thereby minimizing costs. Of course, the debtor, in a competitive market, must reimburse the walking creditor for her disutility in collecting the payment.

Technology exists to lower the cost of transportation to the payment locus. Both the debtor and the randomly-chosen credi-

50. In this model, creditors are already equal—an assumption consistent with the fundamental empirical assumptions of the creditors' bargain model. Carlson, supra note 38, at 462-63. But, in Bowers's model, the assumption is not designed so much to justify a regime of bankruptcy as it is to set the stage wherein specific creditor differentiation is shown to be efficient. Although the demonstration is ultimately a failure, there is nothing inherently wrong with assuming creditor equality as a heuristic baseline, if the argument therefrom proceeds in a logical manner.

51. See Bowers, supra note 18, at 48-49. This is not precisely accurate in Bowers's example. Because all creditors live in the same place, the debtor can pay them all at the cost of a single walk. The debtor might therefore borrow from a consortium of creditors. Thus, one creditor might be the "lead bank" selling participations to the other banks.

52. Id. at 45-46.
tor invest in walking boots, thereby lowering the disutility curve each side faces. Thus, the debtor's optimal strategy is to invest in boots and meet a like-shod creditor halfway, even though this strategy requires the debtor to pay this creditor a higher interest rate than the barefoot creditors would charge FOB creditor's residence. Yet this extra expense is justified because the debtor relieves herself of more disutility than the cost of the creditor's investment in walking boots.

So far, in Bowers's model, we have a debtor choosing one creditor from the market at random for a deal that requires not only the advance of principal but the advance of the cost of the walking boots. At this point, Bowers is ready to theorize about the effect of creditor investment in the debtor-creditor relationship. Here is what he says about the debtor's decline into financial distress:

A fundamental problem for the prospective investor, in considering whether to make any specialized investment, is obtaining assurances the promised returns that justify making it will, in fact, be forthcoming. Should the debtor suffer financial reverses, the creditor knows that he is likely to be preferred... [because] the debtor is likely to want to pay off debt carrying the highest interest rate first, and the creditor's loan carries a higher rate than that of the clones who did not make any specialized contractual arrangements or investments.

In this passage, Bowers equates the creditor's investment in walking boots (paid for by the debtor) with what I have been calling a monitoring cost—the boots require a higher interest rate, which acts to reduce the creditor's future risk of loss. This conclusion cannot be sustained for reasons that I will set forth in due course.

Preliminarily, you may have noticed that, when last we left the debtor, she had chosen one creditor at random with whom to deal. Now, in the passage just quoted, multiple creditors have appeared, so that the debtor must consider which creditor to pay and which creditor to stiff. One is compelled to ask where these creditors came from. It is an easy matter to add extra creditors, but not so easy to explain why they are offering suboptimal services to the debtor. Let us say, for example, that the first loan, which garnered a price premium to cover the investment in payment technology, was obtained to finance some entrepreneurial idea of the debtor. Later, the debtor has further entrepreneurial ideas and so incurs more debt. At least some of the projects have

53. Id. at 47.
54. Id. at 49.
gone sour and the debtor is no longer able to afford to serve the debts of all the creditors together.

Unfortunately, such a simple addition of facts can explain neither the presence of extra creditors nor the differences in their deals with the debtor. With regard to the first loan, Bowers stipulates an optimal deal in which the locus of payment is the midpoint between the residences of the debtor and creditor. Why, then, would subsequent loans be obtained on any different terms? If the payment locus determined the structure of the first deal, it should likewise structure all further deals. Furthermore, because the first creditor already owns walking boots, the first creditor has a substantial competitive advantage over all other creditors. This should allow the first creditor to capture all the debtor's borrowing, and to charge economic rents as well.\textsuperscript{55}

Bowers cannot explain, within the confines of his allegory, why the debtor would deal with more than one creditor, but let us skip that step and assume that an insolvent debtor faces multiple liabilities. One of the creditors charges more interest than the others, because that creditor invested in walking boots and charged for it, whereas the other creditors made no walking concessions to the debtor at all. The debtor is in distress and cannot make all interest payments. Default looms, and the question is how the debtor will divide up her estate amongst the creditors.\textsuperscript{56} Bowers, in the above passage, maintains that, prior to liquidation, the debtor will wish to prefer the creditor who invested in walking boots. If such a creditor is paid, then the debtor is relieved in the future of high interest rates and faces only the lower interest rates of the remaining creditors. In other words, high price alone constitutes sufficient leverage to assure a preference over the other, lower-priced creditors.

This claim cannot be sustained due to the structure of negotiations over the remnants of an insolvent estate. At liquidation, the lower-priced creditors will take all the debtor's available assets in partial payment of their claims. The deficit claims cannot

\textsuperscript{55} In most economic models of secured lending, creditor multiplicity is a complete mystery. There is a powerful economic incentive for a debtor to use a single creditor. David Gray Carlson, Secured Lending as a Zero Sum Game: A Review of the Current Economic Theories (Mar. 1995) (unpublished manuscript, on file with author). Incidentally, if the debtor wished to borrow in the future, the debtor has erred in allowing the creditor to obtain a competitive advantage over the other creditors, because now the creditor has leverage to command economic rents from the debtor. The debtor should have obtained the creditor's commitment to lend at competitive rates in the future, in exchange for buying the creditor's superior payment technology.

\textsuperscript{56} Bowers, supra note 18, at 49.
be paid entirely, so they will grow as interest accrues. At this point, the debtor is judgment-proof and hence powerful.\textsuperscript{57} The debtor continues to own one asset that is always exempt from writs of execution—her “human capital.”\textsuperscript{58} This establishes a bilateral monopoly over a surplus owned jointly by the debtor and the creditors. Each side can deprive the other of the surplus; the debtor can deprive the creditors by refusing to work, and the creditors can deprive the debtor by taking any assets the debtor earns. Therefore, it is in the interest of both sides to compromise and split the surplus, according to principles that cannot be readily predicted on an economic basis.\textsuperscript{59} If the creditors are rational and self-interested, they will agree to a “reorganization” plan, in which they reserve to the debtor her “share” of the joint surplus. As no bankruptcy rule exists to bind the minority to the will of the majority, unanimous consent is required, and every creditor, plus the debtor, has holdout power against all the other bargainers.

This holdout power, however, destroys any incentive for the debtor to prefer a high-priced debtor. Under Bowers’s theory, the debtor prefers the high-priced creditor because she has a greater capacity to inflict pain on the debtor. But, if the creditor were forced to bargain with the others for the debtor’s human capital, high price alone would give the creditor in question no leverage whatsoever over the debtor. In the division of the surplus in human capital, pre-existing entitlements can have no effect on how the parties divide up the surplus, unless all other parties unanimously agree to honor those entitlements. Yet where creditors are self-interested, they have no reason to do so. Any one creditor can veto the high-priced creditor’s access to a share of this capital. For this reason, the debtor gains nothing by preferring the high-priced creditor over the low-priced creditor.

\textsuperscript{57} It is sometimes thought that debtors are weak and creditors powerful. This may be so at the time a loan agreement is negotiated, but quite the opposite is true when the debtor is broke and has nothing to gain from prudent management of assets. \textit{See generally} David Gray Carlson, \textit{Is Fraudulent Conveyance Law Efficient?}, 9 Cardozo L. Rev. 643, 644, 658-63 (1987) (characterizing fraudulent conveyance law as shifting power from strong debtors to weak creditors).

\textsuperscript{58} I infer that slavery is out, because the one and only involuntary debt-collection mode is the sheriff, who can grab only a person’s assets, not the person herself. \textit{See Bowers, supra note 18, at 38-39.}

\textsuperscript{59} \textit{See Robert Gibbons, Game Theory for Applied Economics} 20 (1992) (stating that in a Cournot duopoly model, “when there are more than two firms, iterated elimination of strictly dominated strategies yields only the imprecise prediction that each firm’s quantity will not exceed the monopoly quantity”).
Bowers presents a second source of leverage in his model, but once again he is demonstrably wrong in doing so. According to Bowers:

Second, should the creditor react by pulling out of the arrangement, the debtor’s investment in hiking boots is likely to be rendered less valuable, so the debtor’s losses in breaking his relationship with the creditor are likely to exceed his losses in deciding to breach his contracts with the remaining creditor clones.\(^6\)

Notice that, in this passage, Bowers has the debtor wishing to perpetuate the debtor-creditor relation with the high-priced creditor, in order to exploit the investment in walking boots by the creditor. Yet, previously, Bowers argued (also wrongly) that the high-priced creditor can expect to be paid. Here we have a contradiction. Creditors cannot simultaneously be paid and not paid.

For what it is worth, Bowers is also wrong that the debtor will wish to perpetuate the high-priced debtor-creditor relationship. All debtor-creditor relationships are about to be redrawn in the creditor composition that must follow the liquidation of the debtor’s existing assets. In this composition, the parties will split the economic rents from the debtor’s human capital in some way that economics cannot readily predict. The composition agreement will entirely remake all debtor-creditor relationships. These negotiations must cover the mode of future payments, but in the negotiations, the parties have the exact same incentive as before to choose the optimal mode of payment.

To be sure, the high-priced creditor has already invested in walking boots and the other creditors have not. If this model involved the extension of new value, this competitive advantage would mean that the creditor with the technological advantage would be able to outbid all other creditors for the debtor’s business and further would be able to extract rents from the debtor. Such a creditor has “local” power, as I defined it earlier.

Now, however, the parties are bargaining over division of the surplus. In this negotiation, due to the jointly-held holdout power, the creditor with the walking boots has no leverage to demand compensation for investing in walking boots. Bowers was careful to stipulate that these walking boots have no cross-elasticity in them,\(^6\) and so the walking creditor cannot threaten to leave the consortium and use the boots elsewhere. Unless the consortium uses the boots, they are useless. Given the veto

\(^6\)Bowers, \textit{supra} note 18, at 49.

\(^6\)\textit{Id.} at 49.
power of every creditor (plus the debtor) over the use of these boots, it cannot even be said that the walking creditor owns the boots. Rather, the walking creditor has effectively dedicated this property to the partnership and has no unique claim to the economic rents they might generate.

The group, however, will surely benefit if the walking boots are used in conjunction with payments under the reorganization plan. To paraphrase Nancy Sinatra, these boots are made for walking, and that's just what they'll do. But by no means will the boots enable the creditor to capture economic rents. Whatever leverage the local creditor has from investing in payment technology will be expropriated by the newly reorganized firm. The walking creditor has no credible threat to stop this from happening.

The above comments are based on the premise that, if the debtor prefers the high-priced creditor who has invested in payment technology, it must come from some leverage the high-priced creditor has over the debtor. Yet, given the fate of the debtor—to negotiate a composition in which the high-priced creditor has no special advantage over the other creditors in bargaining for the debtor's going-concern surplus—there is no reason to conclude that such leverage exists.

B. The Debtor's Lack of Incentive to Pay the Higher Valuing Creditor

Separately from the above model involving a remote debtor and a walking creditor, Bowers also claims that debtors can be expected to make preferential payments to the "right" creditors, so as to maximize societal wealth. The gist of his argument is that creditors with high opportunity costs are the creditors who ought to be preferred, because they are the highest valuing users of the debtor's assets. This high opportunity cost makes these creditors comparatively more desperate and therefore more inclined to invest in the infliction of pain upon the debtor to induce faster payment. Because debtors will react to avoid pain, they therefore have a systematic incentive to move assets to the highest valuing users. As a necessary consequence of favoring higher valuing users, Bowers favors local creditor power.

This argument is of the utmost importance. If Bowers is right, then economic efficiency would demand that the debtor

63. Bowers, supra note 18, at 52-54.
have an untrammelled right to prefer one creditor over another. Bankruptcy redistribution would be inefficient, because it would keep dollars away from their desired destination. His claim, if correct, would constitute a powerful argument against bankruptcy intervention in debtor-creditor relations, because bankruptcy undoes the voluntary payments a debtor might make.

In fact, Bowers is demonstrably wrong, and just the opposite of what he asserts is true. Debtors have a perverse interest to move assets to lower valuing users, as the following sequential bargaining model shows. Suppose the debtor (D) has two creditors: C1 and C2. D owes A to each creditor, but has only A in assets. For time t, C1 is able to obtain a return on her money of \( r + n \), \( n > 0 \), while C2 is able to obtain only \( r \), \( r > 0 \). This makes C1 the higher valuing user of any payment D may choose to make—the one Bowers thinks D has an incentive to prefer. The discount factors are as follows, for C1 and C2 respectively:

\[
\delta_1 = \frac{1}{1 + r + n} \\
\delta_2 = \frac{1}{1 + r}
\]

so that \( \delta_2 > \delta_1 \). Thus, the higher valuing user (C1) has the lower discount factor (\( \delta_2 \)).

Suppose that the sheriff is the only debt-collecting agent that can force D to pay. The sheriff can collect A, but collection is time-consuming. It takes the sheriff t years to produce A for any creditor that hires her. The sheriff senses her monopoly power over collecting and wishes to maximize her own return by selling her services to their highest valuing user. This does not really describe sheriffs generally. Being common carriers, their services are subject to strict price controls. Nevertheless, an unregulated sheriff’s market will serve to test whether Bowers’s theory is correct. In essence, the greedy sheriff represents the transaction cost of collection, pushed to its limit, so that we can uncover what incentives are created with regard to D’s willingness to pay voluntarily.

In the auction between C1 and C2 for collection services, C1’s maximum bid—the indifference point between collecting and not collecting from D—is \( \delta_1 A \) (C1’s discount factor times the amount of assets), in which case C1’s payoff from collection is \( (1 - \delta_1)A \). C2’s maximum bid is \( \delta_2 A \) (C2’s discount factor times the amount of assets), in which case C2’s payoff from collection is \( (1 -
Because $\delta_2 > \delta_1$, $C2$ is in a position to outbid $C1$ for the sheriff's services.

$C2$'s maximum bid, however, is not what $C2$ must bid in order to obtain the sheriff's loyalty. Rather, $C2$ must bid only an increment more ($\epsilon$) than $C1$ has bid. Thus, in the auction just described, the sheriff's fee is $\delta_1A + \epsilon$, and $C2$'s payoff from involuntary collection ($\pi_{21}$) is:

$$\pi_{21} = A(1 - \delta_1) - \epsilon$$

To simplify, we will omit $\epsilon$, because it is only the inconsequential increment needed for $C2$ to outbid $C1$. Doing so will greatly simplify the notation to follow, without affecting the analysis. Hence, we rewrite:

$$\pi_{21} = A(1 - \delta_1)$$

$D$, however, is in a position to maximize her wealth by avoiding involuntary payment and bargaining with $C2$. The thrust of the bargain will be to cut out the sheriff and split the savings. We define $C2$'s share of the sheriff's fee as $\theta$, where $0 < \theta < 1$. In a consensual bargain, $C2$'s payoff in a voluntary settlement of the claim ($\pi_{2v}$) is:

$$\pi_{2v} = \pi_{21} + \theta \delta_1A$$

$$\pi_{2v} = A[1 + \theta \delta_1(\theta - 1)]$$

If $\pi_{2v}$ is $C2$'s share, $D$ takes the rest of $A$. This is $D$'s provisional payoff ($\pi_{DP}$), pending a future negotiation with $C1$. Hence,

$$\pi_{2v} = A(1 - \delta_{DP})$$

$$1 - \delta_1 \delta_{DP}$$


The Rubinstein model does assume that the parties have no preconception of who deserves what from a joint surplus. Hence, the use of $\theta$, besides being vastly simpler than what Rubinstein suggests, also can be justified as based upon psychological presuppositions of the parties on how surpluses ought to be divided. See Stigler, *supra* note 13, at 216 (describing the split of surpluses as "determined by factors outside the traditional theory: skill in negotiation, public opinion, coin flipping, a wise marriage").
In exchange for $\pi_{2V}$, we presume that $C2$ forgoes any further collection, and $D$ is discharged, so far as $C2$ is concerned, from $\delta_t A(1 - \theta)$ of debt.

$D$ still owes $C1$, however, and the sheriff is still willing to sell the services of the state in collecting $C1$'s debt. Because $C2$ has been paid off, $C1$ can no longer force the sheriff's poundage fee down through competition. The sheriff may exploit all of $C1$'s economic rents from debt collection. Because $D$'s estate has been reduced from $A$ to $\delta_t A(1 - \theta)$, the sheriff’s fee will be $\delta_t^2 A(1 - \theta) - \varepsilon$. The expression $\delta_t^2 A(1 - \theta)$ represents $C1$'s indifference point between collecting the debt, given the sheriff’s price, or investing in her next best opportunity. The symbol $\varepsilon$ represents the increment needed to induce $C1$ to collect. Once again, we omit $\varepsilon$ to simplify the calculations so that $C1$'s payoff from an involuntary collection is $D$'s remaining estate minus the sheriff’s fee, or:

$\pi_{II} = \pi_{DP} - \delta_t^2 A(1 - \theta) - \delta_t$

Again, $D$ can maximize wealth by joining with $C1$ to cut out the sheriff. Let us assume that $C1$ and $C2$ have equal bargaining skills vis-a-vis $D$. Each is able to obtain $\theta$ as its fractional share of the sheriff’s fee. This will allow us to measure collection prowess solely with respect to $r$, $C2$'s rate of return on assets it collects from $D$. With voluntary payment, $C1$ gets the amount of the involuntary collection, plus a split of the sheriff’s fee, or:

$\pi_{1V} = \pi_{II} + \theta \delta_t^2 A(1 - \theta)$

$\pi_{1V} = \delta_t A(1 - \theta) [1 + \delta_t (\theta - 1)]$

$D$ retains the balance of the estate. This is $D$'s final payoff ($\pi_{DP}$):

$\pi_{DP} = \pi_{DP} - \pi_{1V}$

$\pi_{DP} = \delta_t^2 A(1 - \theta)^2$

To summarize the results of this two-stage bargaining model, we have:

$\pi_{1V} = \delta_t A(1 - \theta)[1 + \delta_t (\theta - 1)]$

$\pi_{2V} = A[1 + \delta_t (\theta - 1)]$

$\pi_{DP} = \delta_t^2 A(1 - \theta)^2$

To verify that $C2$ always obtains more voluntary payment from $D$ than $C1$, it can be observed that:

$\pi_{2V} > \pi_{1V}$
because, if we divide both sides of this last inequality by \( A(1 + \delta_1(\theta - 1)) \), we get:

\[
1 > \delta_1(1 - \theta)
\]

Because both \( \delta_1 \) and \( \theta \) are positive and less than 1, \( \delta_1(1 - \theta) < 1 \). Therefore, \( C_1 \) can never do better than \( C_2 \), even though \( C_1 \) can earn a better return on any dollars collected than can \( C_2 \).65

This model disproves the theory that an insolvent debtor can be relied upon to transfer dollars to its highest valuing creditor. The opposite is true. Payment travels to the lower valuing user. Accordingly, voidable preference law enhances and does not harm the allocation of resources to their highest valuing user.

The above exercise reveals a subtle point in the economic theory of debt collection. If \( C_1 \) is a higher valuing user of funds, this is by virtue of being a local creditor with a competitive advantage over the national creditors. Yet the above two-stage bargaining game shows that \( D \) will prefer the national creditor, because the comparatively worse opportunity costs of national creditors make debt collection a comparatively more attractive investment. This disincentive on the local creditor to invest in collecting constitutes a Pigouvian counterweight to the sunk costs in monitoring that establish local advantage in the first place. Hence, local advantage must exceed \( D \)'s incentive to prefer the national creditors in order for credit markets to reflect a local creditor's monopoly power.

To summarize, despite the wit with which he unfolds his allegory about debtors and creditors on pinheads, Bowers fails to show that bankruptcy redistributions have a bad effect on credit

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65. To further verify, if \( r = .08 \), \( n = .04 \), \( A = $100 \), and \( \theta = .44 \), then we obtain:

\[
\pi_{TV} = 25 \\
\pi_{DV} = 50 \\
\pi_{DF} = 25
\]

Interestingly, \( C_1 \)'s share of a voluntary payment hits its maximum at \( \theta = .44 \), when \( r, n, \) and \( A \) are at these values. Differentiating for \( \theta \),

\[
\pi_{TV}' = \delta_1 A [2\delta_1(1-\theta) - 1] \\
\pi_{DV}' = \delta_1 A \\
\pi_{DF}' = 2\delta_1 A (\theta - 1)
\]

When \( \pi_{TV}' = 0 \), \( \theta = 1 - 0.5\delta_1 \). This formulation represents \( C_1 \)'s maximum position.

Earlier, reference was made to the use of \( \theta \) in lieu of the Rubinstein model for splitting surpluses. See supra note 64. The Rubinstein model, if substituted for \( \theta \), would tend to place \( \theta \) near 0.5, because the discount factors of debtors and creditors will not differ from each other by very much. As a result, \( \pi_{TV} \) would tend to increase nearer to 55, and \( \pi_{TV} \) would decrease to the neighborhood of 24.
markets. The debtor will not reward investments in payment technology with preferential treatment, because such investments do not result in any leverage. Likewise, the debtor has no incentive to prefer the highest valuing creditor. Rather, the opposite is true. The debtor will tend to prefer the lowest valuing user, *ceteris paribus*.

C. LOCAL CREDITOR POWER AND INCENTIVES TO PRODUCE INFORMATION

Bowers is the only author to discuss explicitly the economics of debt collection. But glimpses of the view that local creditor power is good can occasionally be found elsewhere. In particular, Douglas Baird and Thomas Jackson have suggested that socialization of knowledge about debtor quality is counter-productive. Generally applied, this remark becomes a theory that favors local advantage over national markets.

Baird and Jackson write in defense of a “race priority” between secured creditors. According to a race priority, if a debtor has issued a security interest to $C_1$, and if $C_1$ has failed to file a financing statement, the debtor can issue a senior security interest to $C_2$, even though $C_2$ fully knows of $C_1$’s lien, provided $C_2$ is the first to perfect. Hence, priority is said to depend on a “race” between $C_1$ and $C_2$ to perfect. A “race-notice” priority would subordinate $C_2$, unless $C_2$ is a bona fide purchaser who is the first to perfect. Baird and Jackson, following the folklore, assume Article 9 is a “race priority,” although certain sections of the UCC indicate otherwise.

In defending Article 9’s supposed race priority system, Baird and Jackson point out that, under a race-notice system, $C_2$ may be punished for information that $C_2$ might gather. In short, they fear that a race-notice priority discourages screening activity by $C_2$. Instead, they think that “we want to encourage people to gather information,” and that “having knowledge is generally good.” They go on to say:

> Implementing a notice recording system, at best, penalizes only a party who actually *makes* a loan or other purchase. The rule may be more likely to drive away any party with knowledge [of prior un-
perfected liens] than it is to result in having that knowledge incorporated into the transfer system. At the margin, such a rule may discourage people from gathering information about property in the first instance. Nothing under the present "notice" systems encourages anyone except a subsequent purchaser from imparting the knowledge he has to the filing system. Where there is a well-organized market for the particular type of property in question, this result may tend to drive away the person with information.\textsuperscript{69}

Earlier, it was suggested that local creditor knowledge (in the context of national market ignorance) is a bad thing. This differential knowledge constitutes a market defect, permitting local creditors to extract rents from debtors. The above remarks from Baird and Jackson, then, reduce to the view that localism deserves privilege over nationalism in credit markets.

Their argument, however, stems from their metaphorical confusion. It is true that knowledge of the arts or the sciences is good, but it does not follow that knowledge of commodities in the market is likewise an untrammeled good. Such knowledge has merely instrumental worth and has little or no inherent cultural worth. Knowledge of title to property is good only if it furthers the cause of efficient allocations of resources. Knowledge is bad when it hampers efficient allocations. In short, knowledge is a transaction cost, and its requirement simply serves to make credit transactions more expensive for creditors who do not already have it.\textsuperscript{70}

Even so, no inefficiency would result from encouraging creditor ignorance so long as all creditors were equally ignorant and acquisition of knowledge were equally expensive for each creditor. If a market were perfect, except for one island of ignorance amidst the buyers and sellers, the elimination of ignorance would re-establish the requisite equality between creditors. The resulting elimination would then create economic efficiency. But where everyone in the market is ignorant, the introduction of knowledge into one of the producers is actually inefficient. It is possible that the perpetuation of ignorance better serves efficiency (though, as always, this is an empirical question). Or, alternatively, it is possible that the socialization of knowledge is preferable to the strategic acquisition of knowledge by local creditors. This is precisely what both Article 9 and bankruptcy redistributions try to achieve. The one socializes knowledge by

\textsuperscript{69} Id. at 315-16.

inducing secured parties to publicize their rights. The other makes knowledge useless by treating all unsecured creditors equally in bankruptcy.

Although Baird and Jackson discuss only race priorities, their defense of local knowledge is contrary to the spirit of both the Bankruptcy Code and Article 9's filing system—two institutions they contradictorily support.⁷¹

CONCLUSION

This Article has described the logic followed by the Article 9 filing system and bankruptcy redistributions. According to that logic, private information and private power in creditors are a bad thing, because they lead to noncompetitive localist credit markets. Instead, Article 9 filing and federal bankruptcy legislation overtly try to create national credit markets. The beneficiaries of this policy are debtors, who are relieved of the obligation to pay economic rents to creditors with monopoly power.⁷²

This account differs from the pre-existing accounts in several ways. First, the enrichment of debtors at the expense of local creditors is not defended as a wealth-maximizing phenomenon. Rather, Article 9 and bankruptcy redistribution aim to create national credit markets—an important goal in nation-building. Second, the account emphasizes the redistributive aspects of

⁷¹ Baird and Jackson elsewhere defend Article 9 filing in general and even propose its radical expansion to leases, bailments, and the like. Douglas G. Baird & Thomas H. Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 STAN. L. REV. 175, 184-201 (1983). Their defense of private knowledge discussed in the text therefore contradicts their general support of Article 9, which exists precisely to socialize private knowledge.

In addition, as exponents of the creditors' bargain theory, which defends bankruptcy equality among creditors, Baird and Jackson would appear to oppose local investment in knowledge and power, although the creditors' bargain also insists that local knowledge and power do not exist, because, empirically, creditors are already equal and therefore part of a national market structure. See supra part III (describing Article 9 filing favoring a national market); part IV (describing bankruptcy redistribution rules favoring a national market).

⁷² Although this logic can be ascribed to the Article 9 filing system, other parts of Article 9 violate this logic. Most notoriously, Article 9's "first to file" rule allows debtors to put themselves under the power of a secured creditor who is the first to file, even if the secured creditor never advances funds. This power over the debtor discourages the debtor from shopping around for credit and very much empowers one creditor over others in the ensuing competition for the debtor's business. The creation of this power can be defended if the market for credit is competitive. According to this defense, the secured party will have lowered the introductory interest rate in exchange for obtaining the power over the debtor that filing a financing statement portends.
these programs, rather than trying to obscure them. Third, the account emphasizes that debtor-creditor relations are profoundly about power, dominance, and subordination. To be sure, this is not to celebrate legislative pursuit of self- or class-interest in devising the rules of commercial exchange. Naked appeal to one's own self-interest has no normative bite. Public institutions must pursue the public good; this is a necessary condition of their legitimacy. For this reason, identifying the spirituality behind an institution is of the utmost importance. In a sense, spirituality is the only important datum of a social institution. Unless a social institution can appeal to the reigning normative beliefs of the public, the institution cannot endure. In this respect, national markets for credit—while controversial in the nineteenth century—have become uncontroversial. Indeed, the very role of nation-building as the origin of uniform commercial legislation and bankruptcy redistribution has been forgotten in an age that now takes for granted that this is, after all, one nation. Those who would abolish Article 9 filing and repeal the Bankruptcy Code would do well to remember the structural role these institutions played in creating our current national market for credit.