A RESPONSE TO THE NEW ECONOMICS OF THE AMERICAN FAMILY

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Let me begin by attempting to establish the historical context for considering the data that Professor Warren has just presented on "The New Economics of the American Family." Congressional efforts to balance fairly creditors' rights and debtors' needs for financial relief have been highly controversial ever since they were first attempted.

A discharge under federal law first became available to non-merchants in this country in the Bankruptcy Act of 1841.[1] Since that time, creditors have repeatedly alleged that some individual debtors were unfairly obtaining a bankruptcy discharge when in fact they could pay some or all of their unsecured debts. Although the forms of the creditors' proposals have varied, the creditors' basic goal has remained the same: to require debtors who could pay at least some of their debts from future income to fulfill the obligations that they had undertaken.[2] The likelihood that this

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[1] *See* Carl Felsenfeld, *Denial of Discharge for Substantial Abuse: Refining - Not Changing - Bankruptcy Law*, 67 FORDHAM L. REV. 1369, 1377 (1999) (stating debtor-related benefits were expanded with 1841 Act to include voluntary proceedings for merchants and non-merchants); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 349–50 (1991) (calling Bankruptcy Act of 1841 watershed event, in part because of Act's availability to non-merchants).

[2] "Means-testing" as part of the chapter 7 bankruptcy process is the mechanism that creditors are currently supporting to identify such individuals. The rationale for "means-testing" can be found at Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means Testing*, 1999 B.Y.U. L. REV. 177, 181–83, 208–21 (1999) [hereinafter Jones & Zywicki] (stating means-testing is based upon principles of fairness and those who can pay their debts should be required to do so). An analysis of the results that such a process might produce can be found in Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a*

controversy would continue was readily foreseeable, no matter how an overall revision of the bankruptcy laws developed in the 1970's. The follow-up to the enactment of the 1978 Bankruptcy Code that we commemorate this weekend is the latest chapter in this ongoing struggle.

By the early 1960's, knowledgeable observers felt that the 1898 Bankruptcy Act might need overall revision because of two possibilities:

1. that its *substantive* provisions had become seriously out-of-date for both business and consumer debtors and their creditors;
2. that local legal developments might have produced a situation in which the federal bankruptcy courts were no longer functioning as a predictable *system*.

From the system-wide perspective, the issue was: could bankruptcy cases with similar financial profiles reliably be predicted to produce a consistent reaction no matter which bankruptcy court was handling the case? (Let me acknowledge parenthetically that it is a difficult assignment for me to ask you to turn your attention to these lower visibility systemic issues when the current legislative controversy is so heated and issues in spectacular business reorganizations clamor for our attention on a seemingly-daily basis.)

The strategic problem for those who believed that an overall revision of the 1898 Act might be necessary was that no factual basis was available to support "what everyone knew" about how the bankruptcy system was functioning. To attempt to document how the system was functioning, two major studies were subsequently undertaken. A team assembled by the Brookings Institution began the first study in 1965 and published its report in 1971.[3] A Congressionally-authorized Commission on the Bankruptcy Laws of the United States began its work in mid-1971 and filed its report in 1973.[4] Both studies confirmed the need to update the substantive provisions of the 1898 Act and to attempt to assure more systematic treatment for debtors and their creditors.[5]

Test Drive: Means-Testing Real Chapter 7 Debtors, 7 AM. BANKR. INST. L. REV. 27 (1999) [hereinafter Culhane & White]. Both articles rely on the version of means-testing that was passed by the House of Representatives in the Bankruptcy Reform Act of 1998. *See* H.R. 3150, 105th Cong. (1998); *see also* Jones & Zywicki, *supra* note 2, at 180 (stating same). Both articles also compare the Culhane and White results with those of earlier studies that predicted a larger yield for creditors from a means-testing approach. *See* Culhane & White, *supra* note 2, at 34 (comparing their study to earlier study conducted by Ernst & Young in which Ernst & Young classified 7.4% more of sample filings as "can-pays"); Jones & Zywicki, *supra* note 2, at 186–92 (comparing two Ernst & Young studies, study by John M. Barron and Michael E. Staten of Credit Research Center at Georgetown School of Business, and study by WEFA Group to findings of Culhane and White); *see also* *In re* Summer, 255 B.R. 555, 562 (Bankr. S.D. Ohio 2000) (noting implementation of section 707(b) is difficult and judges are afforded too much latitude leading to arguments for means-testing). *But see* *In re* Walton, 866 F.2d 981, 986–87 (8th Cir. 1989) (McMillian, J., dissenting) (stating section 707(b) presumption of granting relief requested therefore did not establish future income test, a predecessor to means-testing).

[3] *See* DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (Brookings Institution ed., 1971) [hereinafter STANLEY & GIRTH].

[4] *See generally* REPORT OF THE COMM'N ON THE BANKR. LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pts. I, II (1973) (evaluating current bankruptcy administration and recommending changes).

[5] *See* STANLEY & GIRTH, *supra* note 3, at 1–6 (analyzing problems within 1898 Act and concluding "[t]he

Protracted legislative debates finally culminated in the 1978 Bankruptcy Code, which became effective on October 1, 1979.[6] As Professor Warren reports in her paper for this conference,[7] the long-standing debates about whether the new Code's provisions had been fairly balanced were renewed almost immediately. Creditors' advocates again have alleged that many "can pay" consumer debtors are illegitimately escaping their moral, as well as their legal, obligations by inappropriately seeking bankruptcy discharges under chapter 7.[8] Debtors' advocates have attempted to refute those allegations with empirical studies that describe the financial circumstances of consumer debtors who have used the procedures provided by the 1978 Bankruptcy Code.[9]

For some time, Professor Warren has been the leading academic spokesperson for the consumer debtors' advocates.[10] The data that she has presented this morning from her latest study[11] are, of course, not limited to those who have filed bankruptcy petitions. Instead she has described the financial circumstances of a large number of families, some of whom *may* decide that they need to use the provisions of the 1978 Bankruptcy Code.[12]

Professor Warren's data present a dramatic picture of "middle class" American families who continue to struggle financially despite the fact that two incomes are now available to meet their financial obligations.[13] Whether the overall impact of

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problems are so pervasive and so interlocked" that new bankruptcy act is essential); *id*. at ch. 10 (noting shortcomings of 1898 Act and proposing changes to heighten efficiency of process and service for debtors and creditors alike). *See generally* H.R. DOC. NO. 93-137, at pt. I (identifying inadequacy and discussing substantial need for revision, concluding "the focus should be on the relief granted to the debtors and the protection of the creditors' interests"). In addition, the Commission provided an invaluable service in Part II of its Report by proposing possible legislation to accomplish these goals as a starting point for the legislative debates. *See generally* H.R. DOC. NO. 93-137, at pt. II (proposing statutory changes to effectuate Commission recommendations through new bankruptcy structure titled Bankruptcy Act of 1973).

[6] Bankruptcy Act of 1978, Pub. L. No. 95-598, § 402, 92 Stat. 2549, 2682 (1979) (codified as amended at 11 U.S.C. § 402 (2002)) ("Except as otherwise provided . . . this Act shall take effect on October 1, 1979.").

[7] Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1 (2003).

[8] *See In re* Krohn, 886 F.2d 123, 126–27 (6th Cir. 1989) (stating bankruptcy amendments regarding substantial abuse were meant to deny relief to unneedy debtors); *In re* Walton, 866 F.2d 981, 983 (8th Cir. 1989) (noting substantial abuse amendments "were aimed primarily at stemming the use of Chapter 7 relief by unneedy debtors"); *see also* Jones & Zywicki, *supra* note 2, at 183 (noting recent inability of system to police itself allowing "well-off debtors" to get away with abuse).

[9] The preeminent examples are TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (Lightning Source, Inc. 1989) (discussing results of empirical data suggesting most chapter 13 debtors are in same dire financial situation as chapter 7 debtors, thereby refuting any claim that debtors are grouped into chapters based on ability to pay), and, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (Yale Univ. Press 2000) (asserting bankruptcy, largely a middle class phenomenon, is direct result of economic hardships suffered by debtors, including unemployment and illness, which leave these people with little choice but bankruptcy).

[10] *See generally* DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 2, 195 (Princeton Univ. Press 2001).

[11] *See generally* ELIZABETH WARREN & AMELIA WARREN TYALGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE (Basic Books 2003) (describing financial condition of and debts incurred by middle class families).

[12] *Id*. (advocating for changes more favorable to middle-class).

[13] *See* Warren, *supra* note 7, at 25 (concluding increased financial risks facing modern middle class two

these data will be considered conclusive enough to minimize arguments in a legislative context about their details or their relevance to the current legislative debate remains to be seen. Nonetheless, I urge us not to lose sight of the system-wide implications of Professor Warren's data as we consider developments that were both foreseen and not foreseen when the 1978 Code was being developed.

The accelerating shift from one-income to (at least) two-income families does represent a significant change in American family functioning since the 1970's when the present Bankruptcy Code was being developed. However, that development was already visible when the 1978 Code was being drafted. The fact that spouses could benefit from the opportunity to file jointly was foreseen and reflected in section 302[14] of the 1978 Code's permission for them to do so. That possibility had the potential for significant savings of administrative costs within the system and of lower filing and attorneys' fees for the individuals involved. (Let me say parenthetically that I do not believe that anyone foresaw accurately the extent of the technological revolution that has streamlined so many of our administrative procedures in more recent years.)

The permission for spouses to file jointly exists, no matter how high the spouses' combined incomes are. Their cases will be administered in a consolidated manner if the court determines[15] that the individuals' jointly-held property and debt overlap significantly, although the options available to them under the Bankruptcy Code may be limited if their aggregate debt exceeds permissible limits.[16]

While the need for spouses to file jointly was foreseen, we did not foresee how diverse the concept of "the American family" would become in the twenty-five years since the 1978 Code was enacted. For example, none of the "cohabiting men and women"[17] to whom Professor Warren refers could file jointly under section 302.[18] It would not matter that they were contributing two incomes to the household and that their jointly-held property and indebtedness were similar to those of eligible spouses. Neither could "all available adults,"[19] such as a grandparent and his or her adult grandchild who were similarly situated to eligible spouses in terms of their financial profile.

income families have eroded financial stability of millions).

[14] 11 U.S.C. § 302 (2002).

[15] *Id*. § 302(b) (authorizing court to determine extent of consolidation).

[16] *See id*. § 109(e). This section causes chapter 13 to become unavailable to eligible debtors unless their noncontingent, liquidated unsecured debt is less than $307,675 and their noncontingent, liquidated secured debt is less than $922,975. *Id.; see also id*. § 104(b). The current amounts were established pursuant to this section's requirement of triennial adjustments, beginning April 1, 1998. *Id*. § 104(b)(1).

[17] *See* Warren, *supra* note 7, at 25 (noting more than 6% of all American couples raising children in United States are unmarried and cohabiting).

[18] *See* 11 U.S.C. § 302(a) (stating joint case may be filed by debtor "and such individual's spouse"); *see also In re* Malone, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985) (ordering unmarried cohabiting debtors to file separate petitions); *In re* Coles, 14 B.R. 5, 6 (Bankr. E.D. Pa. 1981) (holding when parties are unmarried, although debts and assets are jointly incurred, parties may not file jointly or consolidate petitions, but petitions may be jointly administered).

[19] *See* Warren, *supra* note 7, at 40 (explaining today families are most likely to send anyone who could work out into workforce).

Other examples of unforeseen developments with system-wide potential for high variability in consumer cases exist. In her paper Professor Warren emphasized one with which "the American family" must struggle financially: the significantly expanded coverage of debt secured by "housing."[20] She advocates legislative amendments that would treat such claims as all other allegedly secured claims are treated in bankruptcy, bifurcating them into secured and unsecured portions, as of the date of the bankruptcy filing, under section 506(a).[21]

In the meantime, bankruptcy, district, and circuit courts have also noted the developments in lending against housing. Although the issue remains controversial, so far at least six Circuit Courts of Appeal have permitted the "stripping off" of completely unsecured junior liens from housing that serves as the debtor's "principal residence" in chapter 13 cases.[22]

By contrast, two Circuit Courts of Appeal have refused to permit "stripping off" of completely unsecured junior liens from such housing in chapter 7 cases.[23] From the bankruptcy system's point of view, uniform treatment of consumer cases with similar financial profiles would clearly be enhanced if legislation resolved those legal issues, as well as the one with broader implications that Professor Warren advocates.

Some variability would, of course, continue on the factual question of whether the alleged claim was completely unsecured. A valuation issue must initially be resolved in each of these cases, often involving contested testimony and an individual bankruptcy judge's reaction to that testimony's implications. But bankruptcy judges deal with valuation issues in many contexts, as they would have to do under section 506(a) if Professor Warren's bifurcation proposal were enacted.

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[20] *See id.* at 34–37 (detailing how American families are using mortgages to pay off credit card debt, take trips or just to have infusion of cash).

[21] *See id.* (explaining amendments would allow debtor to discharge unsecured portions of debt which they are unable to discharge now).

[22] For a thorough discussion of developments on this issue see *In re Samala*, 295 B.R. 380 (Bankr. D. N.M. 2003). If the alleged junior lien is merely undersecured, the United States Supreme Court held in *Nobleman v. Am. Sav. Bank*, that section 1322(b)(2) precludes "stripping down" such a claim to its secured amount. 508 U.S. 324, 326–27 (1993). *See generally* Lane v. Interstate Bancorp (*In re* Lane), 280 F.3d 663, 665 (6th Cir. 2002) (allowing modification of rights of totally unsecured homestead lender); Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1221 (9th Cir. 2002) (holding entirely unsecured lien on debtor's primary residence could be avoided); Pond v. Farm Specialist Realty (*In re* Pond), 252 F.3d 122, 123 (2d Cir. 2001) (permitting debtors to void wholly unsecured lien on their principal residential property); McDonald v. Master Fin., Inc. (*In re* McDonald), 205 F.3d 606, 608 (3d Cir. 2000) (stating rights of wholly unsecured mortgagee can be modified); Tanner v. FirstPlus Fin., Inc. (*In re* Tanner), 217 F.3d 1357, 1357 (11th Cir. 2000) (concluding rights of wholly unsecured homestead mortgagees are not protected by chapter 13 bankruptcy proceedings); Domestic Bank v. Mann (*In re* Mann), 249 B.R. 831, 832 (B.A.P. 1st Cir. 2000) (affirming voiding of unsecured junior mortgage lien on principal residence).

[23] When the conference occurred, the most recent circuit court decision was *Talbert v. City Mortg. Servs.* (*In re Talbert*), which acknowledges the continuing controversy on this issue in bankruptcy and district courts. 344 F.3d 555, 556 (6th Cir. 2003) (holding chapter 7 debtor may not "strip off" allowed junior lien when senior lien exceeds fair market value of real property). In chapter 7 cases, the Supreme Court had similarly precluded "stripping down" undersecured liens against such housing to the value of the collateral, based upon its interpretation of section 506(d). *See* Dewsnup v. Timm, 502 U.S. 410, 417 (1992) (finding debtor cannot "strip down" lien on real property).

Another development that I believe was unforeseen and which causes "the American family" to struggle financially is reflected in the aggregate amounts that individual debtors are now accumulating as "educational loans." The Bankruptcy Code now provides that such claims are to be excepted from an individual's discharge under section 523(a)(8), unless the debtor can prove that requiring them to be paid would create an "undue hardship."[24] The same exception now exists in chapter 13, which imports section 523(a)(8) into section 1328(a)(2).[25]

"Undue hardship" is, of course, a standard that permits flexible interpretation.[26] However, variability in decision-making within the system has been increased by another development. A number of bankruptcy judges who were confronted with debtors seeking to discharge increasingly large amounts of "educational loans" reacted by creating the doctrine of "partial discharge" as an authorized possibility under section 523(a)(8).[27] In doing so they often relied upon equitable powers found in section 105(a) to create an amount that would not be an "undue hardship" for the debtor to pay.[28]

Once the concept of "partial discharge" became increasingly accepted, some bankruptcy judges began using it to reduce the overall amounts that would otherwise be excepted from a debtor's discharge pursuant to section 523(a)(15).[29] That exception, based upon the debtor's commitment to pay non-support obligations

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[24] 11 U.S.C. § 523(a)(8)(B) (2002).

[25] *Id.* § 1328(a)(2) (excepting section 523(a) from debts discharged under chapter 13).

[26] *See* Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (rejecting request for discharge on student loan debt on grounds that three part test for undue hardship not met). The court created a three prong standard for "undue hardship:"

> (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Id.; see also Hemar Ins. Co. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241–42 (11th Cir. 2003) (adopting *Brunner* test of undue hardship, but acknowledging other circuits use other tests); Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553 (8th Cir. 2003) (adopting "totality of the circumstances" test).

[27] *See* Tenn. Student Assistance Corp. v. Hornsby (*In re* Hornsby), 144 F.3d 433, 440 (6th Cir. 1998) (stating "partial discharge" of loans is permissible pursuant to powers codified in section 105(a)).

[28] *In re Hornsby* was the first circuit court of appeals opinion to approve the use of section 105(a) as the basis for creating a "partial discharge" of educational loans. *See id*. The opinion describes the early controversy concerning the use of the concept and also details the range of techniques that bankruptcy courts have used in implementing such an approach. *Id*. More recently, appellate litigation in this context has also focused on whether the debtor must satisfy all of the components of the circuit's controlling definition of "undue hardship" before a bankruptcy judge may consider granting a partial discharge. *See Brunner*, 831 F.2d at 396 (establishing three-part analysis to determine undue hardship). *See generally* Saxman v. Educ. Credit Mgmt. BJR Corp. (*In re* Saxman), 325 F.3d 1168 (9th Cir. 2003) (adopting *Brunner* test in Ninth Circuit); *Hemar*, 338 F.3d at 1238 (adopting *Brunner* test in Eleventh Circuit). *But see Long*, 322 F.3d at 550 (reaffirming broader "totality of the circumstances" approach to defining "undue hardship").

[29] The earliest decision to use this approach relied on the student loan decisions by analogy to reach this result. *See In re* Comisky, 183 B.R. 883, 884 (Bankr. N.D. Cal. 1995). Since that time, however, some courts have broadened the basis of their authority to grant a partial discharge under section 523(a)(15) by a more particularized focus on the language of the section itself or on their equitable powers derived from section 105. *See, e.g.*, Graves v. Myrvang (*In re* Myrvang), 232 F.3d 1116, 1122–24 (9th Cir. 2000).

incurred in the process of dissolving an earlier marriage, was not added to the 1978 Code until 1994.[30] The debtor's commitments in this context can also involve very substantial amounts.

It is easy to lose sight of the impact of developments such as the uneven availability of the "partial discharge" when there is such hotly-contested legislative pressure to change the basic concept of an individual's right to a bankruptcy discharge. But for those individuals affected by disparities in the use of such concepts within the overall bankruptcy system, the economic consequences can be severe indeed. Moreover, to the extent that bankruptcy judges are granting partial discharges, they are themselves identifying the extent to which some debtors "can pay."

Professor Warren then proceeds to advocate the reform of other federal or state laws in order to reduce American families' need to use the bankruptcy system. Among those that she would target for reform are: alternative health care financing and extended disability insurance; re-regulation of interest rates; and predatory lending.[31]

Professor Skeel has already questioned the economic consequences of some of these proposals in his comments this morning.[32] I share the additional concerns reflected in Professor Warren's suggestion that the political hurdles to achieving such reforms could be very significant.[33]

Let me cite just one example from the Georgia legislature's recent effort to curb "predatory lending." In the 2002 legislative session, after earlier efforts had failed, Governor Roy Barnes was persuaded to sponsor legislation that targeted specific "predatory lending" abuses for elimination. The legislative proposal was specifically designed not to target the sub-prime lending market generally. Nonetheless, lobbying was intense on both sides of the issue, pitting much of the banking and mortgage lending industry against consumer advocates. Ultimately, however, an intensely-negotiated version of the legislation, known as the Georgia Fair Lending Act,[34] was enacted with an effective date of October 1, 2002. Some commentators characterized it as perhaps the strongest in the nation in its effort to

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[30] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 304(e), 108 Stat. 4106, 4133 (1994).

[31] *See* Warren, *supra* note 7, at 37–40 (detailing how these four topics are ripe for reform due to burdens placed on American families who either suffer debt from medical bill, disability that kept wage earner from working, or high cost of accrued debt based on interest rates which are often usurious).

[32] *See* David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 48–53 (2004).

[33] *See* Warren, *supra* note 7, at 38–40 (explaining consumer lenders and anti-regulators are against reform as well as idea of inefficient markets affecting how lenders act).

[34] *See* Georgia Fair Lending Act, 2002 Ga. Laws 455 (codified as amended at O.C.G.A. §§ 7-6A-1 to 11 (Supp. 2003)); *see also* Leetra Harris & Brian Nichols, *Credit or Loan Discrimination; Define and Prohibit Abusive Home Loan Practices; Provide for Prohibited Practices and Limitations for Covered Home Loans and High-Cost Home Loans Create Consumer Protections for Covered Home Loans and High-Cost Home Loans; Provide for Penalties and Enforcement; Provide Exceptions for Unintended Violations; Provide for Severability*, 19 GA. ST. U. L. REV. 14, 14–53 (2002) (detailing developments leading to enactment of this legislation).

stop the targeted abuses.[35]

Controversy concerning the likely effects that the Fair Lending Act would have on lending practices in Georgia continued throughout the summer and fall. In November, Governor Barnes was unexpectedly defeated in his bid for re-election to a second term. Soon after the legislature convened in January, 2003, three of the large credit-rating agencies—Standard & Poor's, Moody's Investor Service and Fitch Ratings—announced that they would no longer rate mortgage-backed securities that included Georgia loans. Their rationale was that the Fair Lending Act created an unlimited chain of potential liability for lenders and investors.[36]

The credit rating agencies' announcement created pressure to solve the problem as quickly as possible. The competing bills that were introduced in the House and the Senate produced another intense lobbying battle. The bill passed by the Senate was narrowly tailored to satisfy the credit rating agencies' concerns by capping liability for lenders and investors who had made a good faith effort to comply with the Fair Lending Act.[37] By comparison, the bill passed by the House included additional substantive revisions that consumer advocates believed seriously weakened the statute's protections against predatory lending abuses.[38]

Ultimately, it was the House version that prevailed, including a provision that the enacted law would become effective immediately.[39] It did so when Governor "Sonny" Perdue signed the extensive package of revisions to the Georgia Fair Lending Act on March 7, 2003.[40] Whether consumer advocates will attempt to revisit these issues in later legislative sessions in an effort to restore the protections that they felt were lost remains to be seen.

Finally, let me note a development that may have more positive potential for assisting individuals in making wise credit decisions: the increasing momentum

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[35] *See, e.g.*, Henry Unger, *Differing Predatory Lending Bills Clash: Senate's Version Limits Changes*, ATLANTA J. CONST., Feb. 13, 2003, at E1 (referring to Fair Lending Act as "nation's toughest law of its type").

[36] *See* Henry Unger & Robert Luke, *House Bill on Lending Draws Flak; S & P Objection: Senate Version that Caps Liability More Acceptable, Agency Says*, ATLANTA J. CONST., Feb. 8, 2003, at F1 (describing rating agencies' reason for not rating securities with Georgia mortgages).

[37] *See id*. at F1.

[38] *See* Henry Unger, *House Passes Lending Bill: Disappointed Consumer Advocates Switch Focus to the Senate*, ATLANTA J. CONST., Mar. 5, 2003, at D1 (discussing how change was intended to limit liability of lenders and investors to regain confidence in Georgia's housing industry).

[39] *See* Michelle Golden, *Georgia Senate Passes Lending Revision*, MACON TELEGRAPH, Mar. 7, 2003, at A1.

[40] *See* An Act to Amend Title 7 of the Official Code of Georgia Annotated, 2003 Ga. Laws 1 (codified as amended at GA. CODE ANN. §§ 7-6A-1–6A-13 (Supp. 2003)) (amending Georgia Fair Lending Act). A detailed analysis of these developments, comparable to those cited *supra*, note 31, for the 2002 legislation can be found in the fall 2003 issue of the Georgia State University Law Review. Tucker Barr, *Banking and Finance: Georgia Fair Lending Act: Amend the Georgia Fair Lending Act; Provide for Changes in Limitations on Late Payment Charges; Clarify that Certain Home Loan Refinancing Shall Not Be Presumed to Be a Flipping; Specify When and Against Whom a Borrower May Assert Claims and Defenses for Violations of the Act; Provide for Limits on Liability for Violations of the Act Under Certain Circumstances; Provide the Department of Banking and Finance with Express Authority to Promulgate Rules and Regulations; Provide for Good Faith Reliance on Guidance from the Department of Banking and Finance*, 20 GA. ST. U. L. REV. 1 (2003).

behind the "financial literacy" movement.[41] These programs are now proliferating at many levels in an effort to prevent debtors from making unwise or unmanageable commitments based upon ignorance of their financial consequences.

For this conference's purposes, let me emphasize experiments that attempt to educate debtors who have filed bankruptcy proceedings. Studies of these efforts to enhance the debtors' ability to make wise future choices are becoming available,[42] so that those who wish to initiate or continue such efforts can benefit from prior experience.

It may be that such financial educational efforts will become more widespread and incorporated in our nation's educational programming for children and adults. If they are, they obviously have the potential for impact on financial decision-making by the families in Professor Warren's latest study as well as for those who have already decided that they need to file bankruptcy petitions. Because they have such positive potential, these educational efforts deserve our attention and support as we continue to work on the fascinating issues presented by consumer debtors' bankruptcies.

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[41] One indication of the attention now being given to this movement is the fact that legislation encouraging financial literacy efforts is now being introduced in Congress. For examples, see the effort by Senator Paul S. Sarbanes (D-Md.) to create a Financial Literacy and Education Coordinating Committee within the U.S. Treasury Department, S. 1470, 108th Cong. § 3 (2003) (attempting to improve financial awareness among consumers), and by Senator Deborah Stabenow (D-Mich.) to create a federal Financial Literacy Commission, S. 1532, 108th Cong. § 101 (2003) (same).

[42] *See generally* Richard L. Weiner, Corinne Baron-Donovan, Karen Gross & Susan Block-Lieb, Debtor Education, Financial Literacy and Pending Bankruptcy Legislation (November 1, 2003) (unpublished manuscript, on file with the author). An earlier report on efforts to deliver financial education to chapter 13 debtors can be found at Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 591–92 (2001) (finding insufficient evidence of positive impact of financial education programs and calling for more experimentation and evaluation before requiring debtors to take financial management courses as condition of discharge).