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INCREASING UNIFORMITY IN CONSUMER BANKRUPTCY: MEANS TESTING AS A DISTRACTION AND THE NATIONAL BANKRUPTCY REVIEW COMMISSION'S PROPOSALS AS A STARTING POINT

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In its massive and impressive October 1997 report, the National Bankruptcy Review Commission recognized and attempted to address a major flaw in our consumer bankruptcy system: unjustified lack of uniformity in the treatment of similar cases. [1] Indeed, all nine commissioners agreed that this is a significant problem. [2] In addition, a majority of five commissioners supported a package of consumer bankruptcy recommendations that would make some improvements on this score. [3] By eschewing radical or architectural change in consumer bankruptcy law, [4] however, this Commission package would leave the law quite complex, and much local variation would likely persist.

Unfortunately, the Commission's worthwhile proposals and any possibility of improving upon them are getting less attention from Congress than the undeveloped, unrealistic suggestion from two dissenting commissioners [5] that means testing be imposed at the gates to the consumer bankruptcy system to sort "can pay" debtors into chapter 13 and bar them from chapter 7. [6] The intellectual leader of the means testing drive is a Commission member who is also a sitting federal judge, the Honorable Edith H. Jones of the U.S. Court of Appeals for the Fifth Circuit; she could find only one other commissioner among the nine to support her position on this issue. [7] The credit industry also focused its energy during the Commission process on pushing the means testing idea, although it never presented any specific proposal to the Commission. [8]

Although Judge Jones and the credit industry could not persuade the Commission, they have found allies in Congress, and three pending bills have picked up the idea of means testing. [9] While this approach might increase uniformity of treatment of those consumer debtors who could still afford bankruptcy, it would do so at the expense of raising the price of access to the bankruptcy system, disproportionately excluding the worst off, and it also would encourage more growth in the already saturated consumer credit market. [10] Before a discussion of realistic and reasonable ways to improve uniformity in consumer bankruptcy can continue, the means testing idea will have to be abandoned. Part I of this article presents a critique of means testing. Part II describes the forms and causes of non−uniformity in consumer bankruptcy. Part III analyzes the strengths and weaknesses of the Commission majority's attempts to address this problem.

I. THE PROBLEMS WITH MEANS TESTING

Means testing of chapter 7 is not a new idea. The Commission on the Bankruptcy Laws of the United States, established by Congress in 1970, considered it and then wrote: "[t]he Commission has concluded that forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system." [11]

Despite this conclusion, the substantial abuse section in chapter 7, [12] added by the 1984 Amendments, [13] has in practice implemented a form of means testing, in that U.S. trustees typically raise challenges to the use of chapter 7 where debtors' schedules indicate they could pay a significant portion of their debts in a chapter 13 plan. [14] These challenges are uncommon because few debtors attempt to abuse chapter 7. [15] The National

Bankruptcy Review Commission was presented with data from a study funded by the credit industry and conducted by Michael Staten at Purdue University's Credit Research Center. [16] This study purported to show that substantial numbers of debtors who file for bankruptcy could repay more of their debts. [17] However, its methods were criticized by a number of researchers. [18] In addition, the General Accounting Office has found fundamental flaws in the study. [19]

The current argument for tougher means testing focuses on one fact, the increase in the absolute number of filings, and one asserted explanation, a supposed loss of stigma associated with bankruptcy. [20] It is true that the number of consumer bankruptcy filings in 1997 exceeded 1.35 million, [21] a 700% increase since 1978, although the population increased only twenty−one percent in that period. [22]

The loss−of−stigma explanation is speculative and at best partial, but there is a political effort afoot to sell means testing on that basis. In a February 3, 1998, press release announcing introduction of a bill that includes means testing, U.S. Representative George W. Gekas began with this comment:

> The greatest, and perhaps most dangerous, irony I have come across in the past decade is that despite economic growth, low inflation, low unemployment, and increasing personal income, our nation had seen an alarming increase in the number of bankruptcy filings—1.3 million in 1997 to be exact. [23]

He added:

> The so−called bankruptcy of convenience is a new phenomenon, borne out of the loss of stigma the word bankruptcy once, but no longer, carried. [Sic] It used to be a sense of responsibility, or perhaps more appropriately, a sense of disgrace and embarrassment that discouraged Americans from declaring bankruptcy. [24]

Gekas, a Pennsylvania Republican, is chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, the House subcommittee charged with bankruptcy law−making responsibility. His assumption that the "bankruptcy of convenience" is now a phenomenon seems to be based on the discredited notion that many people who could pay their debts, not just occasional abusers, are filing in bankruptcy and getting a fresh start in chapter 7. [25] To address this asserted problem, he proposes a means test for chapter 7 and restricting debtors who do not pass it to chapter 13. [26]

The story told by Gekas, that there is a single cause for the increase in filings, is too simple. The more complex reality is that many reasons have combined to increase the number of personal bankruptcies. These include a 700% increase in consumer debt over the same period that filings increased by 700%, [27] lawyer advertising that has made debtors more aware of their legal rights, and the combined effect of various forms of social instability, including divorce, lack of medical insurance, and changes in employment practices (such as downsizing and increased use of contract and part−time workers). [28]

Is the higher filing rate really associated with a new bankruptcy of convenience? The Commission carefully reviewed the empirical evidence on this point, looking at debt−income ratios over the last two decades. This evidence shows that debt−income ratios have not changed and that the increase in filings cannot be attributed to a group of well−off debtors using bankruptcy as an easy solution. [29] In 1981, those who filed in bankruptcy had, on average, more than twice their annual income in short−term non−mortgage debt. [30] Several follow−up studies show that debtors who file in bankruptcy continue to be in as bad or worse financial condition. [31] What has changed then, is that there are more debtors with high debt−income ratios filing in bankruptcy, not that better off debtors are filing. Economist Lawrence M. Ausubel has explained that "[t]he social problem is not so much the rise in personal bankruptcies as the rise in overextended consumers." [32]

In his press release, Gekas completely absolved the credit card industry of responsibility for the increase in filings. He stated:

> Nor can we justifiably point an accusing finger at the credit card industry. The popular myth is that the credit card industry is flooding consumers with credit they can't afford thereby causing a surge in filings. However, those accusations are misdirected. Credit card debt accounts for only 16 percent of all bankruptcy debt. With some quick calculations you can see that leaves $33.6 billion of some $40 billion in debt still unaccounted—so it is not likely nor is it fair to blame the credit card industry for the rapid increase in bankruptcy filings. [33]

A revealing part of this argument is the idea that sixteen percent is a low amount of credit card debt as a percentage of total consumer indebtedness, including home mortgages. Gekas's comments raise the question whether sixteen percent would be a wise amount of total indebtedness for a consumer to have in credit card debt. Consider this hypothetical case: a family with total indebtedness of $100,000, with $16,000 of it in credit card debt, might have other debts about as follows, a $50,000 mortgage, $20,000 in car loans, a $5,000 small loan and another $9,000 in medical and other unpaid bills. Credit card spending is typically for current consumption, not long−term investment; for this hypothetical family, the bill for current consumption using credit cards is nearly a third of long−term mortgage indebtedness. In addition, a problem with the Gekas argument is that credit card debt need not be the sole type of over−indebtedness to be an important part of the overall picture.

The Commission's report details the nature of the changes in the credit industry as a whole. [34] Marketing now targets high−risk groups, including those with bad credit histories (so−called sub−prime lending to those with defaults on their credit records), college students and low−income persons. [35] High−risk lending results in more default and more bankruptcy. Total consumer credit volume is up, and economists point to the increase in volume as the major reason for increased bankruptcy filings. [36] One need not accuse the credit card industry of anything to observe that if any segment of the industry is unhappy with the default and bankruptcy rates, an obvious solution is for it to reduce the volume of credit extended to high−risk debtors. [37]

The stigma associated with bankruptcy is difficult to measure. Solid empirical, as opposed to anecdotal, evidence that it has decreased is hard to come by. [38] But even if stigma has declined, it is worth asking why that might be so. Gekas acknowledges that most people believe the credit card industry is flooding consumers with credit; there is ample evidence to support that belief. [39] Are people more tolerant about debt relief in bankruptcy as they see themselves, their children, neighbors and co−workers offered, and in many instances taking on, unmanageable debt? The credit industry may be fueling the loss of stigma of which it complains.

It would be hard for anyone to disagree with the proposition that Americans have too much debt [40] and not enough savings, [41] and that if we had less debt and more savings, there would be less bankruptcy. Savings provide a way to deal with a sudden loss of income or unanticipated expenses, without incurring debt. [42] People with any significant savings lose them in bankruptcy, or pay out the equivalent, [43] and thus they have a big incentive to avoid filing in any chapter.

What would be the likely impact of restricting access to bankruptcy? It is unlikely that it would prod the credit industry to reduce the volume of consumer debt. The huge growth in consumer credit has occurred under our supposedly lax current bankruptcy law, with creditors at risk for bankruptcy losses. [44] Restricting bankruptcy access would tend to encourage even greater growth in the credit industry. The Commission's report quotes economist Mark Zandi as stating, "'[t]ougher bankruptcy laws will simply induce lenders to ease their standards further.'" [45] The message to creditors would be to crank up the volume of consumer debt even more.

The credit industry is trying to suggest that restricting access to bankruptcy will benefit consumers generally in the form of lower prices and interest rates. Congressman Gekas claimed that consumers will pay $400 per household this year for bankruptcy losses. [46] The source of this figure is another report paid for by the credit card industry. [47] Just as the GAO detailed the serious flaws in the Credit Research Center report, claiming to show substantial numbers of debtors in chapter 7 should be paying more in chapter 13, [48] the credit industry released two new reports. One of these was an attempt to rescue the Credit Research Center findings, [49] and the other concerns the financial costs of personal bankruptcy. [50] The Credit Research Center's claim, which is much weaker than Chairman Gekas' argument, states, "[i]f the losses due to bankruptcy, both secured and unsecured, were passed on to consumers in terms of higher prices, it would represent a loss equal to more than $400 per household in 1997." [51] This figure represents combined chapter 7 and chapter 13 bankruptcy losses. Alternatively, if such losses were passed on in terms of higher interest rates on secured and unsecured loans, the report states, "[t]his would result in additional interest payments on unsecured loans totaling almost $300 per household that revolves a balance." [52] Nevertheless, the report goes on to concede that creditors may instead have lower profits. [53] Of course, debtors excluded from bankruptcy do not necessarily repay their debts, so reductions in bankruptcy losses are not equivalent to reductions in default losses.

It is elementary economics that the predictable costs of consumer protection concerning credit, including bankruptcy relief, are shared by lenders and customers. [54] The credit industry is competitive, and all increased costs cannot be passed on. Consumers pay a little more and lenders make a little less because personal bankruptcy is permitted by law. Whatever small increases in prices consumers pay because of bankruptcy losses can be seen as insurance for consumers against financial reverses and inability to pay debts. In addition, it would be a big mistake to think that restricting access to bankruptcy would mean that all the debts now discharged would be paid; the credit industry report on the financial costs of bankruptcy makes no such claim. [55] The other recent industry report claims that on average 11.8% of chapter 7 filers, from the four cities studied, would be impacted by the Gekas bill and be able to pay on average 62% of their debts in a five−year chapter 13. [56] In other words, the industry report only claims a projected 7.3% impact on chapter 7 bankruptcy losses, assuming that chapter 7 debtors now repay nothing, when we know that many of them continue to pay secured and unsecured debts. [57] Among other problems, the industry report also does not discount repayment to present value to account for a five−year payout or account for any chapter 13 failure, when the current noncompletion rate exceeds 60 percent, [58] or deal with the likelihood of a reduction in the filing rate due to higher filing and attorneys' fees. Thus, the Gekas bill would likely save the average household a very small fraction of the $400 figure. [59]

In addition to the likelihood of stimulating additional risky consumer credit, another important problem with means testing is the expense of administering it. Who would pay for means testing? By complicating the bankruptcy process, means testing would likely increase filing fees and attorneys' fees, disproportionately affecting those who need bankruptcy most. Priced out of access to bankruptcy, these debtors would not necessarily pay their debts, but they would be denied relief from debt collectors and the opportunity for a fresh start. Some of the additional administration costs, for the time of judges, trustees, and support staff, would doubtless be passed on to taxpayers.

Pending bills contain two different proposals to means test bankruptcy. The Grassley bill would expand section 707(b) challenges from substantial abuse to abuse based on judicial consideration of the following three factors: 1) the ability to repay twenty percent of unsecured non−priority debts from disposable income in a three−year chapter 13; 2) bad faith of the debtor; and 3) whether the debtor attempted to negotiate an alternative repayment schedule or to use alternative methods of dispute resolution that were unreasonably refused by creditors. [60] The burdens and uncertainties of these factors are huge. It would be risky to file in chapter 7 without first attempting to negotiate a repayment plan—something lawyers probably would not do for the modest flat fees they now typically receive in bankruptcy. Unless all creditors agreed, a negotiated solution might be impossible. Also, two debatable standards would be in play: bad faith; and, what expenses are reasonably necessary, as part of the determination of disposable income. The McCollum and Gekas bills would make a debtor ineligible for chapter 7 and subject to challenges by a trustee or party in interest, unless the debtor's income was less than seventy−five percent of national median income or if the debtor could pay twenty percent of unsecured debt in a five−year chapter 13 plan, with ability to pay based upon expense allowances set by the Internal Revenue Service. [61] This approach might be somewhat less burdensome than the Grassley bill but would still involve the additional costs associated with eligibility challenges. The more fundamental problem is making a five−year chapter 13, and in many cases a low−repayment plan, the only bankruptcy option for more debtors. Despite large increases in administrative and human costs, it is far from clear that more debt would be repaid.

The proposals for means testing aim to push more debtors into chapter 13. Some lawyers would avoid the expense of dealing with abuse or eligibility challenges by putting nearly all clients in chapter 13. [62] The noncompletion rate in chapter 13 under our current system, where access to chapter 7 is denied only for substantial abuse, exceeds 60 percent. [63] The impact of stricter means testing would likely include a higher failure rate. More debtors would struggle to pay for some period of time but still end up subject to the claims of their creditors. Thus, the predictable costs of means testing are to exclude the worst off from bankruptcy altogether and to increase the already high failure rate in chapter 13.

II. THE FORMS AND CAUSES OF LACK OF UNIFORMITY IN THE CURRENT SYSTEM

Uniformity is central to the concept of just law—that the similarly situated be treated similarly. [64] The law might legitimately deviate from that goal to give people options beyond a minimum legal requirement, for example in bankruptcy by setting a baseline expectation and then permitting debtors to attempt more than is required. There are problems with understanding consumer bankruptcy in terms of options, with chapter 7 as the baseline requirement (giving up any nonexempt property in exchange for a discharge) and chapter 13 as the option to do more (paying dischargeable debt out of post−petition income). In addition to providing options, the Bankruptcy Code also provides incentives to choose chapter 13. [65] The current consumer bankruptcy system lacks coherence, and the combination of its complexity and incoherence lead to dramatic, unjustified inequities. The causes of lack of uniformity include: the great many options available to consumer debtors; [66] the differences in interpretation of federal bankruptcy law and variations in state law incorporated into bankruptcy law; [67] and, different pressures created by local legal culture because of the diversity of views among bankruptcy judges and trustees, particularly chapter 13 trustees, about the appropriate uses of bankruptcy by consumer debtors. [68]

Consumer bankruptcy law conventionally is viewed as providing two options—fresh start in chapter 7, [69] or chapter 13 pay−out plan from disposable income. [70] But on closer inspection, there are really many options. Chapter 7 can involve some debt repayment, whether by reaffirmation, [71] ride−through of secured debts, [72] creditor acquiescence in collateral retention if loan payments are kept up, [73] or voluntary debtor action. [74] Chapter 13 can involve a range of debt repayment, from very little (zero or two percent plans) to a great deal (so−called 100 percent plans, which are not really that because they usually involve no interest payment on unsecured debt). [75]

Why do we have all these options? Of course, many debtors have no income or not enough income to repay old debts and also to support themselves and their dependents. So we need to have an option for no repayment of past debt at least for them. Among those with enough income to pay some of their old debts, why have two chapter options? The premise that supports our current system is that the overwhelming majority of people who file in chapter 7 do not have enough to repay much of anything, [76] so that making chapter 13 the only option for many debtors would mean a lot more low percentage plans (assuming realistic payment expectations) and an even higher failure rate in chapter 13 than we already have (particularly with five−year plans required). [77] The costs of administering many more low percentage chapter 13 plans, many of which would fail, would probably exceed the gains to creditors, who instead can reduce default rates themselves by improving their screening and monitoring practices. [78]

Bankruptcy law gives debtors a chance to try to repay in chapter 13—and some really want that chance, even though most will not complete a plan. There are three main reasons a debtor may try. One is that the debtor feels an obligation to pay—call it an ethical, moral or social sense of obligation. [79] The more a debtor feels that his creditors acted responsibly and provided wanted, useful credit, the stronger that sense of obligation is likely to be.

Second, debtors repay secured creditors to hold onto collateral. [80] A complicated aspect of current consumer bankruptcy law is that chapter 13 is not just a voluntary repayment mechanism—it also creates incentives. One of these incentives is the ability to hold onto collateral even though one is in default. [81] As mentioned above, sometimes debtors manage to retain collateral in chapter 7, through reaffirmation, redemption, ride−through or creditor acquiescence. [82] When that is possible, the debtor has the best chance to succeed in retaining collateral, because the debtor need not also repay a part of unsecured debt. [83] When a debtor is in default on secured debt payments, secured creditors are less likely to cooperate and permit collateral retention in chapter 7. As a result, some of the worst−off debtors end up in chapter 13 as the only means to hold onto a home or car, and then, in addition, they usually have to pay some percentage of the unsecured debt, making it harder for them to propose a feasible plan. [84] If installment redemption were permitted in chapter 7, [85] it would be easier for debtors to succeed in retaining collateral. Also, that change would have the benefit of clarifying the purposes of the two chapters—chapter 7 for a fresh start, and chapter 13 for voluntary repayment. Under current law, chapter 13 has mixed purposes—primarily, holding onto collateral and voluntary repayment, [86] but sometimes both of these purposes can also be achieved in chapter 7. This overlap of the functions of the two chapters makes it very difficult for debtors to understand chapter choice.

A third reason debtors repay in chapter 13 is that they believe this will give them better credit access in the future. This is part of how chapter 13 is misleadingly sold, [87] but this reason is a phony one. Unfortunately, the Commission proposes to promote a lie—by requiring different credit reporting of chapter 13 cases. [88] If current credit granting practices are any guide to the future, this would not improve chapter 13 debtors' access to credit compared to that of chapter 7 debtors, but it would encourage the consumer fraud that filing in chapter 13 gets you more and better credit. [89] Chapter 7 debtors can often get credit immediately after discharge, or at least before a chapter 13 debtor could complete a three−year plan and get a discharge. [90] Furthermore, there are good reasons for creditors to prefer extending credit to chapter 7 debtors, [91] who have shed their debt and face a six−year bar on another chapter 7 discharge, [92] to chapter 13 debtors, who typically undertake a three−to−five year plan and are at high risk during that time to convert to chapter 7, discharging any new credit extended during the life of the plan. [93]

In addition to the fact that the Bankruptcy Code permits many options in the ways chapter 7 and chapter 13 can be used, there are several other significant causes of non−uniformity in consumer bankruptcy. There are two kinds of variations in the law on the books from district to district—differences in state law and different interpretations of federal bankruptcy law. [94] The incorporation of state law into federal bankruptcy law, most dramatically in the law of bankruptcy exemptions, [95] builds in non−uniformity. [96] So does the use of standards; such as good faith, [97] reasonably necessary expenses [98] in chapter 13, and substantial abuse [99] in chapter 7. These standards have received very different interpretations. [100]

Another kind of non−uniformity stems from the dynamics of law in action and occurs both from district to district and within districts from individual case to individual case. Judges, trustees and the bar in any area create a local legal culture about what uses of consumer bankruptcy are most appropriate. [101] Those with authority, judges and chapter 13 trustees in particular, can use rules of thumb [102] and practices concerning attorneys' fees [103] to create pressures and incentives for particular favored uses. Individual lawyers react differently to this sort of pressure. Some submit to it, particularly those who seek to handle a large volume of cases expeditiously, while others resist and find ways to serve their clients as they see fit, sometimes at the cost of having a less lucrative practice. [104] These different local cultures and different responses of individual lawyers to any given local culture mean, in sum, that there is a bankruptcy law of every law office. Lawyers present options to clients in very different ways and consciously and unconsciously steer their clients. [105] The resulting lack of uniformity from individual debtor to individual debtor is actually more dramatic than that based on differences in the law from district to district. [106] Similarly situated debtors, in terms of debt and income, end up with very different deals in bankruptcy, and the biggest reason is who their lawyers are, not debtors' own informed choices. [107] The complexity of the law gives lawyers much leeway to steer their clients. [108] Even those lawyers who want to use client−centered counseling have a hard time explaining the law so that debtors can make their own choices. [109] In short, greater simplicity is essential to make consumer bankruptcy law understandable to debtors. Only then could the rationale for remaining options be to give debtors a chance to do more than is required.

III. PRPSPECTS FOR GREATER UNIFORMITY UNDER THE NATIONAL

BANKRUPTCY REVIEW COMMISSION'S MAJORITY PACKAGE

The National Bankruptcy Review Commission has done an excellent job of addressing certain instances of non−uniformity. It has been less successful in coming up with proposals to reduce the complexity of the law, making non−uniformity inevitable. Regrettably, Congress does not appear to be interested in even piecemeal improvement.

The Commission majority has squarely attacked the most glaring form of *de jure* non−uniformity in bankruptcy—the incorporation of state exemption law and delegation to the states of the ability to opt−out of federal bankruptcy exemptions. [110] The Commission proposes to end opt−out, make bankruptcy exemptions a matter of federal law (except for the homestead exemption within the range of the federal floor of $20,000 and ceiling of $100,000), and set a lump sum amount for exempt property other than a homestead. [111] This set of proposals would increase fairness at the high and low end of the financial scale. No longer would debtors in Florida, Texas and Iowa be able to shelter unlimited amounts of money in an extravagant homestead. [112] While such cases are rare, they are an easy target, endlessly fascinating to newspaper reporters, and undermine the political acceptability of debt relief in bankruptcy. Doing away with exemptions that are unreasonably high is an important symbolic step. Of greater importance to a significant number of cases is ending unreasonably low exemptions and getting state and federal lawmakers out of the business of making lifestyle choices about what household items a chapter 7 debtor should be able to keep. With a lump sum federal exemption amount ($20,000, in addition to the homestead, or $35,000 if no homestead exemption is taken), the Commission would permit debtors to make idiosyncratic choices and end the unfairness in the current system, where a few debtors can shelter a lot of property, while others cannot keep certain items of particular importance to them (such as a boat). Federalizing exemption law is a good idea, but it will not affect most debtors because most do not have anything in excess of even the worst set of existing exemptions available. [113]

Despite the thorough review of exemption policy by the National Bankruptcy Review Commission and its presentation of a comprehensive package of exemption proposals, Congress does not appear to be prepared to do anything about this most obvious type of non−uniformity and unfairness. Representative McCollum of Florida, whose state is one of those with an unlimited homestead exemption, proposes another study. [114] Representative Gekas proposes only to lengthen the period of time a person must live in a state before using its bankruptcy exemptions, [115] hardly a comprehensive plan to deal with the problem of non−uniform exemptions. Representative Nadler has made the most ambitious proposals—to end opt−out and to limit pre−bankruptcy conversion of nonexempt property to exempt property, [116] but his bill would not otherwise disturb over−generous exemptions.

The Commission has also addressed a form of non−uniformity that results from the use of a standard, leading to very different interpretations. In the area of debt repayment required in chapter 13, the Commission's proposal is to no longer make that determination on the basis of disposable income after reasonably necessary expenses. [117] Instead, there would be guidelines for unsecured debt repayment, based on a graduated percentage of the debtor's income, from nominal repayment below $20,000 in income to five percent of adjusted gross income for debtors with income in excess of $75,000. [118] Debtors who meet the guideline amounts would not have to defend their budgets, but those with extraordinary and justifiable expenses would need to persuade the court that they should be permitted to pay less. [119]

Income−based repayment of unsecured debt in chapter 13 is a big improvement over the existing income−after−reasonable−expenses test. Not only would this approach get the bankruptcy courts out of much of the business of deciding what lifestyle choices are permissible, [120] it would also de−link unsecured debt repayment from the size of one's budget. Debtors generally would have to pay the same amount to unsecured creditors no matter how much collateral they decided to keep or how much they chose to spend on regular expenses. If a debtor could economize and live on a very tight budget, he would not have to pay more to creditors and could actually save while in chapter 13.

Probably the best aspect of income−based debt repayment is that it would be an important tool for changing local legal cultures that create pressure for unrealistically high unsecured debt repayment, an important cause of the high chapter 13 noncompletion rate. In some localities, bankruptcy judges and chapter 13 trustees have made it difficult to get chapter 13 plans confirmed without a certain percentage of debt repayment—for example, rules of thumb that 70% or 100% of unsecured debt must be repaid to avoid controversy. [121] There is empirical evidence that, as one might suspect, higher percentage plans correlate with a higher rate of noncompletion of chapter 13 plans. [122] While efforts to undo the unfairness of high repayment rules of thumb are to be applauded, one should not underestimate the ability of local officials to preserve local legal culture despite statutory change. The judges and trustees who push for high repayment usually rely on the good faith standard for chapter 13 confirmation, [123] so if Congress wants to change their practices, it had better—at a minimum—rewrite that subsection to make clear that good faith is not supposed to deal with how much has to be paid to unsecured creditors. Only then would income−based percentage guidelines have a chance at undoing local legal cultures that create huge disparities in how debtors fare in bankruptcy.

While the Commission has addressed one standard, reasonably necessary expenses, it did not touch two others—as already mentioned, good faith as a requirement for chapter 13 confirmation, and also dismissal of chapter 7 for substantial abuse. [124] If Congress enacted the Commission's proposals for income guidelines for chapter 13 unsecured debt repayment, it is predictable that some judges would start using ability to pay the guideline amount as the basis to determine substantial abuse in chapter 7, essentially making chapter 13 the only option for debtors who make more than $20,000 a year. The Commission's report recognizes this risk and discourages the idea that the recommended chapter 13 guidelines are relevant to substantial abuse analysis in chapter 7. [125] It is to be hoped that if Congress adopts income guidelines it can make clear that this is not what it wants.

Another important Commission proposal would make the difference between chapter 7 and chapter 13 fairer. The Commission recommends that upon a debtor's failure to make chapter 13 payments, the case automatically be converted to chapter 7, after notice and the opportunity for a hearing, but without another filing fee. [126] Thus, upon plan failure, conversion would replace dismissal as the default rule. A debtor would still retain the option for dismissal. Currently, many debtors who file in chapter 13 cease paying and their plans are dismissed. [127] Those who convert or refile after a dismissal have to pay a new filing fee and often a new attorney's fee. [128] These costs, which are not incurred by those debtors who use chapter 7 at the outset, penalize chapter 13 debtors who attempt to repay for some period of time but who are unable to complete their plans. The Commission's conversion proposal would reduce the hardship caused by the high noncompletion rate in chapter 13.

The Commission's proposals concerning exemptions, chapter 13 repayment guidelines and automatic conversion upon chapter 13 plan default would reduce non−uniformity in the law on the books and increase fairness. The income guidelines could also be part of an attempt to change unrealistic high repayment expectations under some local legal cultures. But the Commission missed the opportunity to address local practices concerning attorneys' fees that encourage lawyers to put clients into chapter 13 and in particular into high percentage plans, even when not feasible over the long term.

For example, routine approval of attorneys' fees in chapter 13 that are much higher than in chapter 7 can be used by bankruptcy judges and chapter 13 trustees to promote chapter 13. While some premium for a chapter 13 case may be appropriate to reflect additional work by lawyers, in some districts the fees in the two chapters are much closer together than in others, suggesting that large differentials are used to create an incentive for lawyers to steer clients into chapter 13. [129] Two other examples of questionable fee practices also involve promoting high repayment plans. One of these is to award the entire first plan payment to the lawyer for his or her fee, creating an incentive to make plan payments as large as possible, even if not at a sustainable level. [130] The other is to front−load attorneys' fees in plans, so that lawyers are not at risk over the long term. [131] The Commission discussed variations in local fee practices briefly and noted the lack of justification for their diversity, but it did not make any recommendations. [132] It might, for example, have recommended that attorneys' fees in chapter 13 be paid in equal installments over the life of a plan. The gross disparities between chapter 7 and chapter 13 fees are more difficult to address, but the Commission could have recommended statutory language concerning reasonable fees that would encourage judges to refuse to award fees that give lawyers incentives to promote either chapter. [133]

The Commission also failed to do enough to clarify the purposes of the two chapters and to simplify the options. The Commission actually proposes to require different credit reporting for chapter 7 and chapter 13, even though most chapter 7 debtors can get credit well before a chapter 13 debtor can complete a three−to−five year plan, [134] and even though a debtor who filed in chapter 7 and saved the amount of unsecured debt repayment would be better off financially and therefore more credit worthy than the debtor who repaid unsecured debt in chapter 13. If enacted, this proposal would encourage lawyers to mislead their clients into thinking that chapter 13 is preferable as a means to get credit in the future. It also makes the mistake of emphasizing more credit, as opposed to more savings, as the essence of financial rehabilitation after bankruptcy. There is reason for similar concern about the Commission's recommendation for debtor education, not spelling out the content, evaluation, administration or funding of such programs. [135] Care needs to be taken, if this proposal is adopted, that government−sponsored or recommended debtor education not be a means to sell or promote credit. If the aim is to give debtors a knowledge of financial planning, education should emphasize the high costs of much consumer credit, demonstrate ways to budget and to save, and focus on the benefits of early planning for retirement. [136]

The largest missed opportunity of the Commission process was not proposing greater simplicity and coherence for consumer bankruptcy law. The major Commission attempt in this area was the recommendation that reaffirmation in chapter 7 not be permitted for unsecured debt. [137] This change would reduce overlap in the purposes of the two chapters by making chapter 13 the option to choose for those who wish to commit to repay unsecured debt. It would also enhance the essential character of chapter 7 as a fresh start. Further, Congress should take steps to regulate the growing practice of creditors getting debtors to repay discharged debt "voluntarily," without reaffirmation. [138]

Unfortunately, the coherence gained by prohibiting unsecured debt reaffirmation would be undercut by the Commission's recommendation to extend the prohibition to the undersecured portion of secured debts. [139] This would increase the need to use chapter 13 for collateral retention, augmenting chapter 13's incentive aspect. [140] Prevented from using a full debt reaffirmation for an undersecured loan, secured creditors would be less likely to agree to reaffirm, driving more debtors into chapter 13. Making chapter 13 the only way for many debtors to hold onto collateral deprives chapter 13 of its character as a voluntary repayment mechanism, a way for debtors to do more than is required. Also, by institutionalizing nominal percentage chapter 13 plans for those with income below $20,000, [141] the Commission package would be approving a collateral−retention−only type of chapter 13. Those who use chapter 13 exclusively or primarily for collateral retention are not responding to a social concern about wanting to repay debts and they are more likely to propose minimal unsecured debt repayment. It is incoherent for the Commission to be proposing different credit reporting for chapter 13, [142] while at the same time increasing its use as a collateral−retention mechanism.

It would have been better to expand, rather than contract, the ability of debtors to retain collateral in chapter 7. Instead, the Commission proposes to eliminate another method of doing so, ride−through. [143] Ride−through is the practice whereby some courts protect chapter 7 debtors against repossession when they continue to pay secured debts on which they are not in arrears. [144] An earlier draft of the Commission's report would have urged codification of this interpretation of current law, but the Commission changed its position on this point in the final version of its report. [145] Rather than cut back on collateral retention by means of reaffirmation or ride−through in chapter 7, bankruptcy law could make chapter 13 truly more concerned with voluntary debt repayment by permitting installment redemption of collateral in chapter 7, at least for homes and cars. [146] Chapter 7 would then be concerned with financial goals, a fresh start and holding onto important collateral, and chapter 13 would have a clearer character as an option for those who feel a social or moral need to attempt to do more by voluntarily committing post−petition income to repayment of dischargeable debt.

IV. CONCLUSION

The Commission has made a valuable contribution to the current public debate about consumer bankruptcy. All but two of its members resisted considerable industry pressure to back means testing of bankruptcy. [147] Means testing is a bad idea for many reasons. It would likely stimulate increased risky consumer credit, make it harder for the worst off to afford the benefits of a fresh start, produce minimal gains in repayment to creditors, and impose new costs in the administration of bankruptcy law.

The Commission majority has tackled two unjustified forms of non−uniformity of treatment for consumer debtors in bankruptcy: (1) the unfairness of using greatly varying state law exemptions in bankruptcy; and (2) allowing local legal cultures to push unrealistic high repayment plans in chapter 13, contributing to very high noncompletion rates in that chapter. Congress should give serious attention to the Commission's proposals to address these problems.

Despite its considerable wisdom, the Commission leaves us ultimately with mixed messages about the nature of the two chapters and with a very complex consumer bankruptcy system. Under the Commission's proposals, chapter 13 debtors are treated as "good guys" deserving different credit ratings, but chapter 13 debtors would be more likely than under current law to undertake plans primarily to hold onto collateral, rather than because they are driven by social and moral concerns to attempt repayment of unsecured debts. The elimination of ride−through of secured debts and prohibition on reaffirmation of the unsecured portion of undersecured debts would increase the need to use chapter 13 to retain collateral. Both chapters would continue to be used for debt repayment and collateral retention, leaving them without distinctive characters. Mixed messages and complexity of options make it hard to justify non−uniformity of results in terms of giving options because consumer debtors would continue not to understand their choices.

Congress should at least consider the Commission's piecemeal proposals. Beyond that, Congress should rethink and simplify the purposes of the two chapters to make them coherent to the public. It is time to give the two consumer chapters understandable and different purposes: chapter 7 for a fresh start, and chapter 13 for voluntary repayment. Unfortunately, Congress has been distracted by the credit industry's agenda, dimming immediate prospects for needed reforms.

FOOTNOTES:

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[1] *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 81, 125, 235 (1997) [hereinafter Commission Report]. The consumer chapter of the Commission Report is 225 pages long and provides a useful summary of the law and policy concerning most consumer bankruptcy issues. *See id*. at 77−301.Back To Text

[2] *See* Hon. Edith H. Jones and Comm'r James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, *in* Commission Report, *supra* note 1, ch. 5, at 69−72 [hereinafter Minority Package] (emphasizing that lack of uniformity is significant problem in consumer bankruptcy).Back To Text

[3] *See infra* Part III (discussing ways Commission's consumer recommendations would increase uniformity in consumer bankruptcy system).Back To Text

[4] *See* Commission Report, *supra* note 1, at iv (stating Commission did not adopt any proposals that radically or architecturally change business or consumer bankruptcy).Back To Text

[5] Four commissioners submitted an alternative to the majority package, but the minority package does not include means testing. *See* Minority Package, *supra* note 2. Means testing is only supported by two commissioners, Judge Edith H. Jones and Commissioner James I. Shepard. *See* Hon. Edith H. Jones & Comm'r James I. Shepard, *Additional Dissent to Recommendations For Reform of Consumer Bankruptcy Law*, *in* Commission Report, *supra* note 1, ch. 5, at 10−27 [hereinafter Jones−Shepard Dissent] (discussing means testing bankruptcy relief). *See also* Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors*, 5 Am. Bankr. Inst. L. Rev. 293, 296 n.7 (1997) (discussing timing of release of industry−backed bills in the fall of 1997 as an attempt to preempt discussion of the Commission's recommendations). Back To Text

[6] Chapter 13 provides for a payment plan, typically three to five years in duration, in which a debtor pays for collateral and also pays a percentage of unsecured debt out of disposable income after reasonable expenses. *See* 11 U.S.C. §§ 1322(d), 1325 (1994) (concerning length and confirmation of plan). Chapter 7 is called the Liquidation chapter and provides for liquidation of the estate and distribution of the proceeds to creditors. *See* 11 U.S.C. §§ 704(1)−(9), 727 (dealing with duties of trustee and debtor discharge). However, since more than 90% of chapter 7 debtors have no assets in excess of exemptions, it might be more accurately called the Fresh Start chapter. *See* Michael Brody, *Visa Fights Back, Launches an Overdue Attack on Credit Card "Bankrupts,"* Barron's, Oct. 23, 1989, at 11 (generalizing that over 95 percent of chapter 7 filings are "no−asset" filings); *see also* U.S. General Accounting Office, Comm. on the Judiciary, Bankruptcy Reform Act of 1978: A Before and After Look, at 56−57 (1983) (stating that chapter 7 usually involves little or no property loss because most debtors own few assets and reporting that 97 percent of chapter 7 debtors had no assets for distribution to creditors); Teresa A. Sullivan et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981−1991*, 68 Am. Bankr. L.J. 121, 127−34 (1994) (stating that in inflation−adjusted comparison debtors had fewer assets in 1991 than 1981). *See infra* Part II (describing myriad forms the consumer chapters can take).Back To Text

[7] *See* Jones−Shepard Dissent, *supra* note 5, at 1 (noting that Judge Jones and Commissioner Shepard supported this position). *See also* Klein, *supra* note 5, at 294 & n.4 (describing Judge Jones as "the Commissioner who most closely identified with creditor interests" and stating that she left the room during consumer advocates' main opportunity to present their views to the Commission). Back To Text

[8] *See* Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483, 503 (1997) (discussing consumer credit industry's general support for means testing but failure to submit a proposal).Back To Text

[9] The three bills were introduced by Rep. McCollum, H.R. 2500, 105th Cong. (1997), Sen. Grassley, S. 1301, 105th Cong. (1997), and Rep. Gekas, H.R. 3150, 105th Cong. (1998). All three bills have provisions against use of chapter 7 by a debtor who could, on the basis of schedules of debts and income, pay 20% of unsecured debts in chapter 13. The Grassley bill would amend § 707(b) to make it an abuse of chapter 7, giving a basis for challenge by parties in interest as well as judges and trustees, to file in that chapter when the debtor could pay 20% of nonpriority unsecured claims in a three−year chapter 13. *See* S. 1301, at § 102. The McCollum and Gekas bills have nearly identical means testing provisions. *See* H.R. 2500, § 101; H.R. 3150, § 101. Both bills require that to be eligible for chapter 7, either the debtor's income must be less than 75% of the national median income or the debtor must not have enough monthly net income to pay all secured debts and 20% of unsecured debts in a five−year plan. Monthly net income would be based on expenses permitted by national or local standards set by the Internal Revenue Service. The bankruptcy courts would be charged with hearing objections based on ineligibility for chapter 7. Debtors ineligible for chapter 7 would only be eligible for chapter 13 or 11). Back To Text

[10] *See infra* Part I (discussing problems with means testing).Back To Text

[11] Report of the Commission on the Bankruptcy Laws of the United States, Part I at 159 (1973).Back To Text

[12] *See* 11 U.S.C. § 707(b) (1994) (providing for dismissal of debtor's petition where granting relief would be substantial abuse of Bankruptcy Code).Back To Text

[13] *See* Bankruptcy Reform Act of 1984, Pub. L. No. 98−353, Title III, §§ 312, 475, 98 Stat. 355, 381 (1984).Back To Text

[14] *See* Wayne R. Wells et al., *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 Clev. St. L. Rev. 15, 19, 23−24, 33−35 (1991) (noting that although both bankruptcy judges and U.S. trustees have power to raise substantial abuse challenges, in practice U.S. trustees do this job, either directly or using panel chapter 7 trustees, and that there is great variation in how U.S. trustees screen for substantial abuse); *see also* Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional*

Conditions, 65 Notre Dame L. Rev. 165, 174 n.54 (1990) (discussing varying interpretations of "substantial abuse," including that it refers to ability to pay debts). Back To Text

[15] *See* Warren, *supra* note 8, at 493 (stating "there are no data showing that the consumer bankruptcy system is shot through with abuse"); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501, 536−37 (1993) [hereinafter Braucher, *Lawyers and Consumer Bankruptcy*] (noting that lawyers and chapter 7 trustees surveyed rarely saw substantial abuse challenges and attributed this to lack of abuse in that most debtors in chapter 7 have no excess income to fund chapter 13 plans if they state their expenses realistically rather than understating them, as many debtors do); Teresa A. Sullivan, As We Forgive Our Debtors 33 (1989) [hereinafter AWFOD] (noting most debtors in bankruptcy have very low incomes and thus they need not be concerned about substantial abuse challenges). *But see* Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 Am. Bankr. L.J. 461, 461 (1997) (stating, on the basis of LoPucki's own practice experience in the 1970's, that there are many spendthrifts in system who incur debt without ability to repay, knowingly or with reason to know). Also, LoPucki argues empirical studies have not been designed to uncover this pre−bankruptcy abusive behavior. *See id.* at 461 n.3. LoPucki's solution is terribly labor−intensive and thus expensive and of doubtful feasibility: he would give trustees authority to investigate thoroughly the pre−bankruptcy behavior of all debtors and to determine when a debtor should have realized that his situation was hopeless. Debtors who incurred debt after that point could be required to make payments under a plan. To encourage thorough investigation, trustees would be paid substantial fees in all cases, with these fees to be paid from a fund created by assessments against all debtors required to repay. *See id.* at 480−81. Assuming LoPucki is right, that many debtors realize or should realize that they are incurring debt they will not be able to repay, it does not follow that only allowing these improvident debtors to file in chapter 13 will curb their borrowing. In addition, knowingly or negligently improvident debtors are unlikely to be good candidates to complete chapter 13 plans. A chapter 13 debtor ordinarily gets a discharge only upon completing a plan, which usually lasts three years. *See* 11 U.S.C. §§ 1328(a), 1325(b) (addressing debtor discharge and plan confirmation); William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 Ind. L.J. 85, 92−93 (1989) (discussing high failure rate of chapter 13 petitions and consequences of plan failure). Back To Text

[16] *See* Commission Report, *supra* note 1, at 90. Back To Text

[17] *See id*. (stating study was used to support credit industry's position favoring means test in consumer bankruptcy).Back To Text

[18] *See id.* (noting letters to and statements before Commission criticized study).Back To Text

[19] *See GAO Review Criticizes Creditors' Research Study*, Consumer Bankruptcy News, Feb. 12, 1998 (noting that statistical basis for findings is flawed); U.S. General Accounting Office, Report to Congressional Requesters, Personal Bankruptcy, The Credit Research Center Report on Debtors Ability to Pay, (Feb. 1998) (visited Apr. 7, 1998) <http://www.gao.gov> [hereinafter GAO Study]. The GAO Study notes five areas of concern, probably the two most significant of which are that the Credit Research Center report assumed that debtors, information on their schedules concerning expenses is realistic and that the report did not include reaffirmed non−housing debts. *See id.* at 2−3. The percentage of debtors in the study who indicated an intent to reaffirm such debts varied from 23% in one city to 73% in another. *See id*. at 11. In addition, the Credit Research Center report did not use scientific random sampling methodology. *See id*. at 3; *see also* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 536−37 (suggesting debtor understatement of expenses is more likely than overstatement). Back To Text

[20] *See infra* note 23 and accompanying text (discussing press release announcing Gekas bill); Jones−Shepard Dissent, *supra* note 5, at 10−13.Back To Text

[21] *See* Consumer Bankruptcy Filings Up 20 Percent in 1997, 7 No. 13 Cons. Bankr. News 1, March 26, 1998 (more than 1.35 million consumer bankruptcy filings in 1997, according to Administrative Office of the U.S. Courts).Back To Text

[22] *See* Commission Report, *supra* note 1, at ii, 84 & n.127 (noting increase in bankruptcy filings).Back To Text

[23] Statement of Chairman George W. Gekas (press release of Feb. 3, 1998) (on file with the author) [hereinafter Statement of Chairman George W. Gekas].Back To Text

[24] *Id.Back To Text*

[25] *See supra* notes 14−19 and accompanying text.Back To Text

[26] *See supra* note 9 (discussing Gekas bill).Back To Text

[27] *See* Commission Report, *supra* note 1, at ii, 84 & n.127.Back To Text

[28] *See id*. at iii, 84−85 (listing these and other explanations such as growth in organized gambling and changes in garnishment and collection practices).Back To Text

[29] *See id.* at 83 (observing "that the picture has not changed appreciably since the early 1980's").Back To Text

[30] *See id.* (citing Teresa A. Sullivan et al., As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 75 (1989)).Back To Text

[31] *See* Commission Report, *supra* note 1, at 83 & n.124 (discussing and citing four studies on debt−income ratios).Back To Text

[32] Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 Am. Bankr. L.J. 249, 270 (1997).Back To Text

[33] Statement of Chairman George W. Gekas, *supra* note 23.Back To Text

[34] *See* Commission Report, *supra* note 1, at 82−95 (discussing rise in bankruptcy filings along with expanded and higher risk consumer credit).Back To Text

[35] *See id*. at 92−93 (stating that fastest growing credit issuers are those that give credit to people with "tarnished credit histories," "young people," and "the poorest Americans").Back To Text

[36] *See id*. at 85 (quoting Jagdeep S. Bhandari & Lawrence A. Weiss, *The Increasing Bankruptcy Filing Rate: A Historical Analysis*, Nat'l Conf. of Bankr. Judges (Winter 1993) and Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 Am. Bankr. L.J. 249, 250 (1997)). Ausubel notes that the rise in tandem of credit card defaults and bankruptcy filings has led some to mistakenly attribute the increasing credit card default rate to bankruptcy leniency. *See* Ausubel, *supra* note 32, at 270.Back To Text

[37] *See* Commission Report, *supra* note 1, at 88 (noting that consulting firm of August, Fair, Isaac & Co. stated that 54% of bankruptcies could be eliminated "by eliminating potential nonpayers from the bottom 10% of credit card holders").Back To Text

[38] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 540. Although many lawyers in consumer bankruptcy practice believe that social stigma has been waning in recent years, they also think their clients are still influenced by moral values and religious beliefs and feel dejected, ashamed and humiliated when they contemplate filing in bankruptcy. *See id*. Back To Text

[39] *See* Timothy L. O'Brien, *Giving Credit Where Debt Is Due*, N.Y. Times, Dec. 14, 1997, § 4, at 14 (noting installment credit is up 50% in last four years, average credit card holder has four cards and about $4,000 in high−interest debt, and lenders are targeting consumers who are least creditworthy in their marketing). The

Commission notes a revolution in the use of credit, giving Americans unprecedented access to credit—$1.7 trillion in non−mortgage consumer credit in 1997. *See* Commission Report, *supra* note 1, at ii. Back To Text

[40] *See Consumers Rack Up Big Debt*, Press J., Mar. 5, 1998, at A19 (quoting economist Hugh Mackenzie as stating, "[l]evels of consumer debt that people would have thought were completely catastrophic in the 1970's are matters of routine now"); O'Brien, *supra* note 39, at 14 (stating that "consumers are firmly into debt overdrive"); *The Week Ahead*, Bus. Wk., Mar. 9, 1998, at 113 (estimating consumers added $5 billion in new debt in January, 1998, to $3.9 billion borrowed in December, 1997).Back To Text

[41] In February 1998, "[t]he Commerce Department [announced] that the rate of saving [by Americans in 1997] fell to 3.8 percent of disposable income, the lowest level in 58 years and less than half of its postwar peak of 9.5 percent, set in 1974." Edward Wyatt, *Share of Wealth in Stock Holdings Hits 50−Year High*, N.Y. Times, Feb. 11, 1998, at A6. Back To Text

[42] *See*, *e.g.*, Vincent D. Rougeau, *Rediscovering Usury: An Argument for Legal Controls on Credit Card Interest Rates*, 67 U. Colo. L. Rev. 1, 34 (1996) (noting real income has declined over 25 years but spending has increased because of consumer debt).Back To Text

[43] In chapter 7, assets in excess of exemptions are liquidated. *See* 11 U.S.C. §§ 522, 726 (1994). Meanwhile, a chapter 13 debtor must pay unsecured creditors at least what they would be paid in chapter 7, so that the value of nonexempt savings must be paid in the plan. *See* 11 U.S.C. § 1325(a)(4). Most debtors in both chapters have no assets in excess of exemptions. *See supra* note 6 and accompanying text. A few states have over−generous exemptions, permitting exemption planning to shelter assets. This is a practice the National Bankruptcy Review Commission recommends addressing by capping the homestead exemption and federalizing all other exemptions in bankruptcy. *See infra* notes 110−13 and accompanying text.Back To Text

[44] *See*, *e.g.*, William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 Geo. L.J. 1129, 1129 (1983) (stating bankruptcies increased after Act took effect in October 1979).Back To Text

[45] Commission Report, *supra* note 1, at 88 & n.142 (quoting Mark M. Zandi, *Easy, Credit, Profligate Borrowing, Tough Lessons*, Regional Fin. Rev. 16, 17 (1997)). Back To Text

[46] *See* Statement of Chairman George W. Gekas, *supra* note 23, at 3.Back To Text

[47] *See The Financial Costs of Personal Bankruptcy* (prepared by WEFA Group, Resource Planning Group) (Feb. 1998) at 3 n.2 (on file with author) [hereinafter *The Financial Costs of Personal Bankruptcy*] ("This study was funded by Visa and MasterCard"); *see also* Ausubel, *supra* note 32, at 270 ("the likely effect of further limiting the dischargeability of credit card debt is an increase in the outstanding balances of marginal consumers").Back To Text

[48] *See* GAO Study, *supra* note 19.Back To Text

[49] *See Chapter 7 Bankruptcy Petitioners Ability to Repay: Additional Evidence from Bankruptcy Petition Files* (prepared by Policy Economics and Quantitative Analysis Group, Ernst & Young LLP) (Feb. 1998) at iii n.1 (on file with author) [hereinafter *Chapter 7 Bankruptcy Petitioners Ability to Repay*] (stating that study was funded by Visa U.S.A. and MasterCard International). This study replicates some elements of the Credit Research Center's bad methodology. For example, calculation of the ability to repay non−housing, non−priority debt apparently still does not include reaffirmed debt in debtor's expenses. *See id.* at 3. This was one of the problems mentioned in the GAO Study. *See* GAO Study, *supra* note 19.Back To Text

[50] *See Financial Costs of Personal Bankruptcy*, *supra* note 47.Back To Text

[51] *Id.* at 17.Back To Text

[52] *Id.* Back To Text

[53] *See id.*Back To Text

[54] *See* David Warner, *Bills Seek To Slow Bankruptcy Filings*, Nation's Bus., Mar. 1998, at 6 (noting burdens of chapter 7 get shifted on to consumers "in the form of higher prices and higher interest costs," according to Bruce Josten, Executive Vice President of Government Affairs of Chamber of Commerce); *see, e.g.*, Ausubel, *supra* note 32, at 254 (presenting available data on historical increase of delinquencies and chargeoffs in credit card payments).Back To Text

[55] *See The Financial Cost of Personal Bankruptcy*, *supra* note 47, at 17. By coming up with per household cost of bankruptcy losses this report cannot be taken to say that any pending proposal or even abolition of bankruptcy entirely would eliminate all of that cost.Back To Text

[56] *See Chapter 7 Bankruptcy Petitioners Ability to Repay*, *supra* note 49, at 4−5.Back To Text

[57] *See* GAO Study, *supra* note 19 (concerning percentages of debtors who state an intent to reaffirm) and *infra* notes 71−75 and accompanying text.Back To Text

[58] *See* Commission Report, *supra* note 1, at 90 (noting 32% completion rate in chapter 13); *see also* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 Am. Bankr. L.J. 397, 410 (1994) [hereinafter Whitford, *The Ideal of Individualized Justice*] (displaying table of chapter 13 data).Back To Text

[59] *See The Financial Costs of Personal Bankruptcy*, *supra* note 47, at 16−17. Chapter 7 losses are put at $37.8 million of $44.3 million total personal bankruptcy losses, which are estimated to be $400 per household. To determine how much the Gekas bill would save the average household, one would need to reduce the $400 figure to the amount for chapter 7 losses, then apply the 7.3% repayment figure from *Chapter 7 Bankruptcy Petitioners Ability to Repay*, *supra* note 49 (using figure too large in view of flaws in study). Next, one would need to discount to present value, determine an appropriate noncompletion rate (probably higher than the current rate, due to forcing more debtors into chapter 13), and subtract the amount of bankruptcy loss that would be converted to nonbankruptcy default losses because debtors would not file but still would not pay. One would have to deduct chapter 13 trustees' fees. Finally, one would have to know how much of bankruptcy losses would come out of industry profits, rather than be passed on to consumers. Back To Text

[60] *See* S. 1301, 105th Cong., at § 101 (1997), *supra* note 9 and accompanying text. The bill proposed by Senator Grassley implicitly acknowledges some of the costs this provision would put on debtors by providing for debtors' attorneys fees in the event the court does not grant a motion to dismiss or convert and the motion was either coercive or not substantially justified. *See also* Commission Report, *supra* note 1, at 89−91 (discussing means testing to prevent abuse). Back To Text

[61] *See* H.R. 2500, 105th Cong., § 101 (1997); H.R. 3150, 105th Cong., § 101 (1998) (providing that McCollum and Gekas bills would also allow debtors to file in chapter 7 if they could not pay at least $50 per month to unsecured creditors after expenses); *see also supra* note 9 and accompanying text.Back To Text

[62] A persistent problem in consumer bankruptcy is that lawyers who do fixed−fee cases have incentives to avoid controversy. *See* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 Am. Bankr. Inst. L. Rev. 165, 177−79 (1997) [hereinafter Braucher, *Counseling Consumer Debtors*]. This phenomenon explains, for example, the high incidence of reaffirmations when creditors threaten to raise discharge challenges and the willingness of lawyers to go along with rules of thumb setting high repayment expectations in chapter 13.Back To Text

[63] *See supra* note 58 (concerning low completion rate in chapter 13).Back To Text

[64] *See* Aristotle, The Nicomachean Ethics 313−17 (H. Rackham trans., Everymans Library ed., 1947) (discussing equity and justice of law); *see also* Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 Am. Bankr. L.J. 221, 225 (1997) (calling for greater uniformity in bankruptcy).Back To Text

[65] *See* 11 U.S.C. § 1322(b)(3) (1994) (permitting cure of defaults); 11 U.S.C. § 1325(a)(5) (permitting debtor to pay secured creditor collateral value if less than debt outstanding, popularly known as cram down); 11 U.S.C. § 1328(a) (giving broader discharge in chapter 13 than in chapter 7); 11 U.S.C. § 1301 (providing co−debtor stay); 11 U.S.C. § 727(a)(8) (providing six−year bar on a second discharge in chapter 7, not applicable in chapter 13); and 11 U.S.C. §§ 522, 726, 1325(a)(4) (requiring that non−exempt property be liquidated in chapter 7, but not in chapter 13 so long as its value is paid to creditors).Back To Text

[66] *See infra* notes 69−93 and accompanying text.Back To Text

[67] *See infra* notes 94−100 and accompanying textBack To Text

[68] *See infra* notes 101−109 and accompanying text.Back To Text

[69] *See* 11 U.S.C. § 727(b) (providing for discharge of prepetition debts).Back To Text

[70] *See* 11 U.S.C. § 1325(b).Back To Text

[71] The recent GAO analysis of the Credit Research Center data itself produced fascinating new data concerning local variations in reaffirmation practices in 12 locations, with more than 50% of debtors in 8 of the districts stating an intention to reaffirm and with percentages of debtors reaffirming in the 12 locations ranging from 22.6 in Los Angeles to 70.2% in Atlanta, and with the average amount of nonmortgage debt reaffirmed ranging from $1,362 in Los Angeles to $6,706 in Memphis. *See* GAO Study, *supra* note 19, at 12 (Table 1). A mostly theoretical possibility is redemption under 11 U.S.C. § 722, but that section requires lump sum payment. *See also* Julio M. Zapata, *Taming the Bankruptcy Code's Toothless Tiger, 11 U.S.C. § 521(2)*, 72 Wash. L. Rev. 1195, 1199 (1997) (observing that chapter 7 debtor may redeem certain secured property by paying creditor lesser of approximate fair market value of property or lien).Back To Text

[72] *See* Commission Report, *supra* note 1, at 166 (noting split of authority on whether Bankruptcy Code permits debtors not in default on secured loan payments to simply continue paying without reaffirmation). The most recent U.S. Court of Appeals decision acknowledges ride−through as an option. *See* McClellan Federal Credit Union v. Parker (*In re* Parker), No. 96−15784, 1998 WL 113872, at *5−6 (9th Cir. Mar. 17, 1998).Back To Text

[73] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 528−29 (describing practice of secured creditors foregoing repossession so long as payments are kept up).Back To Text

[74] *See* 11 U.S.C. § 524(f) (stating that nothing in reaffirmation provisions of Bankruptcy Code prevents debtor from voluntarily repaying any debt).Back To Text

[75] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 531−534 (describing great variety in rules of thumb about how much debt must be repaid in chapter 13); Commission Report, *supra* note 1, at 262−273 (discussing diversity of approaches to application of chapter 13 confirmation tests and unfortunate involvement of judges and trustees in lifestyle choices).Back To Text

[76] *See* Commission Report, *supra* note 1, at 83 (reviewing empirical evidence on this point).Back To Text

[77] *See supra* notes 15, 58 and accompanying text.Back To Text

[78] *See* Ausubel, *supra* note 32, at 250 (discussing connection between relaxed credit standards and credit card defaults).Back To Text

[79] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 540−43 (describing social concerns of consumer debtors).Back To Text

[80] *See id.* at 526−30.Back To Text

[81] *See supra* note 65 and accompanying text (listing statutory incentives to use chapter 13); *see also* AWFOD, *supra* note 15, at 230−46 (discussing failure of incentive model of bankruptcy to sort debtors into chapter 7 and chapter 13 based on ability to pay); *id.* at 239 (noting that debt−income ratios for debtors in two chapters are similar).Back To Text

[82] *See supra* notes 71−74.Back To Text

[83] Even though one may be able to pay less to secured creditors in chapter 13, using cramdown under 11 U.S.C. § 1325(a)(5), the price to the debtor is also committing disposal income to repay unsecured claims for at least three years. *See* 11 U.S.C. § 1325(b).Back To Text

[84] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 529−30; *see also* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 403−04 (detailing tradeoffs between chapter 13 and chapter 7).Back To Text

[85] *See* Whitford, *supra* note 15, at 100−01 (discussing disadvantages of only permitting installment redemption in chapter 13); *see also* Ned W. Waxman, *Redemption or Reaffirmation: The Debtor's Exclusive Means of Retaining Possession of Collateral in Chapter 7*, 56 U. Pitt. L. Rev. 187, 196 (1994) (discussing need for installment redemption in chapter 7); *cf.* Aaron C. von Staats, *Ipso Facto Clauses and Chapter 7 Bankruptcies: Superfluous Contract Provisions, Enforceable Prenuptials, or Contrary to the Fresh Start?*, 32 B.C. L. Rev. 703, 710 (1991) (noting decisions holding that section 722 lump sum redemption requirement precludes installment payments under chapter 7).Back To Text

[86] Less frequently employed reasons to choose chapter 13 include the broader discharge, the co−debtor stay, relief from the six−year bar on a second discharge in chapter 7, and preserving non−exempt property. *See* 11 U.S.C. §§ 1328, 1301, 727(a)(8), 727, 522, 726; *see also* Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence From the Federal Bankruptcy Courts*, 17 Harv. J.L. & Pub. Pol'y 801, 814 (1994) [hereinafter Sullivan, *Persistence*] (enumerating purposes of chapter 13 protection); *cf*. Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 403−04 (detailing choices available under chapter 13 as well as some results of opting for protection under chapter 13).Back To Text

[87] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 538−39, and Braucher, *Counseling Consumer Debtors*, *supra* note 62, at 187−90.Back To Text

[88] *See* Commission Report, *supra* note 1, at 291−93. The report acknowledges the point that credit access is probably better after chapter 7. *See id*. at 291 & n.402; *see also* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 537−38 (observing that chapter 7 debtors may have an edge over chapter 13 filers in reestablishing credit post−petition).Back To Text

[89] *See* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 403, 406 (identifying consumer bankruptcy as new consumer protection problem because lawyers too often serve their own interests rather than those of their clients).Back To Text

[90] *See* Stephen E. Frank, *Over Your Head in Debt? Bankruptcy Offers New Start*, Wall St. J., Aug. 23, 1996, at C1, (quoting Professor Elizabeth Warren, Reporter for National Bankruptcy Review Commission, saying it is "a myth" that consumer debtors will not be able to get credit following bankruptcy); *see also* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 537 (discussing unequal treatment of chapter 7 and 13 debtors in reestablishing credit following bankruptcy).Back To Text

[91] *See* Braucher, *Counseling Consumer Debtors*, *supra* note 62, at 187−88; *see also* Stuart P. Gelberg, *Amending Fair Debt Collection Act*, 4 Am. Bankr. Inst. L. Rev. 518, 518 (1996) (concluding reporting practices of credit agencies make it easier for chapter 7 debtors to reestablish credit even though chapter 13 debtor may have paid far greater amounts against claims of creditors).Back To Text

[92] *See* 11 U.S.C. § 727(a)(8) (1994).Back To Text

[93] *See supra* note 58 and accompanying text (concerning high failure rate in chapter 13). The Commission proposes to make conversion to chapter 7, rather than dismissal, the default rule when a debtor fails to make plan payments. *See* Commission Report, *supra* note 1, at 273−75. This is a good idea for reasons discussed *infra*, at notes 124−26, but it would make discharge of post−petition credit extended to chapter 13 debtors more likely than under current law.Back To Text

[94] *See* John T. Cross, *State Choice of Law Rules in Bankruptcy*, 42 Okla. L. Rev. 531, 580 (1989) (remarking section 522(b)(2)(A) explicitly directs bankruptcy courts to use specific forum's substantive law).Back To Text

[95] *See* 11 U.S.C. § 522(b) (incorporating state exemptions from process into bankruptcy law and permitting states to decide whether to opt−out of federal bankruptcy exemptions).Back To Text

[96] *See* Commission Report, *supra* note 1, at 117−38 (discussing exemptions). Use of state law is sometimes good policy for other reasons. *See* Kathryn R. Heidt, *Interest Under Section 506(b) of the Bankruptcy Code: The Right, the Rate and the Relationship to Bankruptcy Policy*, 1991 Utah L. Rev. 361, 380−81 (stating that three reasons for respecting state law in bankruptcy are: to reduce uncertainty; to reduce forum shopping; to prevent party from receiving windfall).Back To Text

[97] *See* 11 U.S.C. § 1325(a)(c).Back To Text

[98] *See id.* § 1325(b); *see also* James Rodenberg, *Reasonably Necessary Expenses or Life of Riley?: The Disposable Income Test and a Chapter 13 Debtor's Lifestyle*, 56 Mo. L. Rev. 617, 664 (1991) (discussing lack of uniformity in determining reasonably necessary expenses).Back To Text

[99] *See* 11 U.S.C. § 707(b); *see* Wells, *supra* note 14, at 31−41 (describing great differences in interpretation of substantial abuse test). *See also* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 403 (recounting differing interpretations of substantial abuse around country); *cf.* Michael D. Bruckman, *The Thickening Fog of "Substantial Abuse": Can 707(a) Help Clear the Air?*, 2 Am. Bankr. Inst. L. Rev. 193, 195 (1994) (observing there are several different approaches to determining substantial abuse).Back To Text

[100] *See*, *e.g.*, Bruckman, *supra* note 99, at 195.Back To Text

[101] *See* Sullivan, *Persistence*, *supra* note 86, at 803−04 (discussing how judges, lawyers, other repeat actors such as trustees introduce important variations into implementation of formal rules through shared local perceptions and expectations); *see also* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 415 (stating local legal culture of Madison, Wisconsin, does not particularly encourage steering debtors into particular form of bankruptcy).Back To Text

[102] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 532−33 (describing huge variations in local expectations for repayment in chapter 13 in four cities, from 10% in Dayton, Ohio, to 100% in San Antonio, Texas as floor for hassle−free confirmation); *see also* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 415 (discussing effects attributed to local culture in other research); *cf.* Sullivan, *Persistence*, *supra* note 86, at 814−15 (suggesting local legal culture greatly influences which form of protection debtor will choose).Back To Text

[103] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 546−51 (describing large differences in gap between attorneys' fees routinely approved in chapter 7 and chapter 13, with smallest gap in Cincinnati, where median chapter 7 fee was 70% of standard chapter 13 fee and largest gap in Austin, Texas, and Dayton, Ohio, where chapter 7 fees were about half chapter 13 fees); *id.* at 557−58 (describing how San Antonio, Texas, chapter 13 trustee encouraged chapter 13 by paying full first plan payment to lawyer and speeding up payment of rest in response to pressure from local lawyers).Back To Text

[104] *See id*. at 520−21 (charts showing how different lawyers within each of four cities responded very differently to local legal culture as far as percentage of cases they filed in chapter 13).Back To Text

[105] *See* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 415 (noting that attorneys steer debtors into chapter 13 in some districts but not others); *see also* Sullivan, *Persistence*, *supra* note 86, at 841−46 (describing how judges influence attorneys to steer clients into particular chapters of bankruptcy by making one chapter or another more attractive to attorneys practicing before them).Back To Text

[106] *See supra* note 104 and accompanying text (concerning different lawyer reactions to local culture and different rates of use of chapter 7 and chapter 13 by attorneys within each of four cities).Back To Text

[107] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 557−58 (quoting Marion "Al" Olson, chapter 13 trustee in San Antonio, Texas, as saying biggest factor in chapter choice is who your lawyer is).Back To Text

[108] *See* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 415 (saying that too many debtors are being steered into chapter 13 cases and especially high payment chapter 13 plans).Back To Text

[109] *See* Braucher, *Counseling Consumer Debtors*, *supra* note 62, 166−68 (discussing complexity of factors that clients need to consider and describing client autonomy as ideal that can only be imperfectly achieved under current law). *See also* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 405 (observing debtors must make several choices in bankruptcy case which critically affects relief received, and typically they lack much information about these choices); *cf.* Sullivan, *Persistence*, *supra* note 86, at 851 (noting that most practitioners in study assumed consumer debtors were not likely to be well−informed decision makers with respect to chapters 13 and 7).Back To Text

[110] *See* 11 U.S.C. § 522(b) (1994) (dealing with property exemptions and application of state law and permitting opt−out).Back To Text

[111] *See* Commission Report, *supra* note 1, at 117−138.Back To Text

[112] *See* Fla. Const. art. X, § 4 ; Tex. Const. art. XVI, §§ 50, 51; Fla. Stat. ch. 222.01−222.30 (1997); Iowa Code § 561.16 (1992); Tex. Prop. Code Ann. § 41.001 (West 1983 & Supp. 1998) (setting forth respective states' homestead exemptions).Back To Text

[113] *See supra* note 6 and accompanying text (concerning high percentage of no asset cases). The proposed exemption changes would be unlikely to affect chapter choice, because most debtors in bankruptcy now—in chapter 13 as well as chapter 7—have no assets in excess of exemptions. *See* Warren, *supra* note 8, at 491 n.13 ("[a]ny argument that assumes that shifts in exemption levels will affect the chapter 7/chapter 13 mix flies in the face of the available empirical evidence.")Back To Text

[114] *See* H.R. 2500, 105th Cong., § 113 (1997) (establishing Bankruptcy Exemption Study Commission in Sen. McCollum's bill); *see also supra* note 9 and accompanying text.Back To Text

[115] *See* H.R. 3150, 105th Cong., § 181 (1998) (lengthening residency period from 180 days to 365 days in Sen. Gekas' bill); *see also supra* note 9 and accompanying text.Back To Text

[116] *See* H.R. 3146, 105th Cong. § 7 (1997) (ending opt−out and providing that debtor who converts property, in year before filing, to form of property exempt in unlimited amount can only exempt $100,000 worth of that property).Back To Text

[117] *See* 11 U.S.C. § 1325(b) (1994) (setting forth commitment of disposable income to debt repayment as test for confirmation of chapter 13 plan).Back To Text

[118] *See* Commission Report, *supra* note 1, at 262−273.Back To Text

[119] *See id*. at 268 (giving examples of when deviation might be permitted—to support chronically−ill dependent or because of very high local cost of living).Back To Text

[120] *See id*. at 264 (listing such contentious budget items as orthodontia, piano lessons, college tuition, tithing, dry cleaning, and utility and food expenses).Back To Text

[121] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 532−34 (describing practices in Cincinnati, Ohio, where at least 70% of plans were required for routine confirmation, and San Antonio, Texas, where anything less than 100% would bring confirmation challenge from chapter 13 trustee).Back To Text

[122] *See* Whitford, *The Ideal of Individualized Justice*, *supra* note 58, at 412 (explaining such data).Back To Text

[123] *See* 11 U.S.C. § 1325(a)(3) (1994) (requiring plan to be proposed in good faith). Back To Text

[124] *See* 11 U.S.C. § 707(b) (providing for dismissal of chapter 7 cases for substantial abuse); Commission Report, *supra* note 1, at 270−71 (noting that although Commission was aware of uncertainty created by substantial abuse standard, it did not make recommendation on appropriate interpretation).Back To Text

[125] *See* Commission Report, *supra* note 1, at 271−72.Back To Text

[126] *See id.* at 273−76.Back To Text

[127] *See id*. at 275 (noting data showing that dismissal is the most common disposition of chapter 13 cases).Back To Text

[128] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 15, at 547 (noting fees charged for conversion from chapter 13 to 7 in Texas and Ohio).Back To Text

[129] *See id*. at 547 (the most obvious explanation for differences in fees is to give an incentive to lawyers to use chapter 13); *see also id*. at 550−52 (comparing fees in the two chapters).Back To Text

[130] *See id*. at 558 (describing this practice in San Antonio, Texas).Back To Text

[131] *See* Commission Report, *supra* note 1, at 272 & nn.343, 344 (concerning differing local practices as to whether attorney's fees are paid over life of plan).Back To Text

[132] *See id.* at 272.Back To Text

[133] For example, in 11 U.S.C. § 330(a)(3) (1994), another consideration might be added, as proposed subpart (F): whether the compensation creates an incentive for lawyers to promote one chapter rather than another. Alternatively, a bright line rule could be developed, but with the need for administrative input, for example, by the U.S. trustees. If the U.S. trustees were directed to do annual surveys to determine the median local chapter 7 fee, then a statutory provision could state that chapter 13 fees should not exceed 135% of the median chapter 7 fee unless upon motion and a showing of special circumstances, to justify a higher fee in chapter

13.Back To Text

[134] *See supra* notes 87−93 and accompanying text.Back To Text

[135] *See* Commission Report, *supra* note 1, at 114−16 (recommending all chapter 7 and chapter 13 debtors have opportunity to participate in financial education program).Back To Text

[136] *See* Fred Waddell, *Easy Credit: A Wall Around The Poor*, N.Y. Times, Feb. 15, 1998, § 3, at 2 ("The rich are aware that those who understand credit collect it; those who don't understand credit pay it.") Back To Text

[137] *See* Commission Report, *supra* note 1, at 145−58.Back To Text

[138] *See id*. at 161−65 (discussing creditor practice of obtaining unenforceable reaffirmation agreements, not filed with court, and recommending that debtors have cause of action for treble damages, costs and attorneys' fees against creditors who seek to collect discharged debts not reaffirmed in compliance with requirements under 11 U.S.C. § 524(c) and (d) (1994)); *see also* Karen Gross, *As We Fleece Our Debtors*, 102 Dick. L. Rev. (forthcoming 1998) (discussing possible loophole of using voluntary repayment under 11 U.S.C. § 524(f) (1994) to have discharged debtors sign form letters requesting "reminders" to make payments). Back To Text

[139] *See* Commission Report, *supra* note 1, at 145, 159−60 (limiting secured debt reaffirmation to value of collateral).Back To Text

[140] *See id*. at 159−60 (referring to this effect).Back To Text

[141] *See id*. at 268.Back To Text

[142] *See id*. at 291−93 (suggesting debtors who utilize chapter 13 repayment plans should have different credit reports from those who do not use chapter 13).Back To Text

[143] *See id*. at 165−69 (discussing Commission's eventual disapproval of ride−through after its earlier approval).Back To Text

[144] *See* Commission Report, *supra* note 1, at 165−69.Back To Text

[145] *See id*. at 166−67; *see also* McClellan Federal Credit Union v. Parker (*In re* Parker), No. 96−15784, 1998 WL 113872, at *5−6 (9th Cir. Mar. 17, 1998) (recognizing ride−through as option under current law).Back To Text

[146] *See* Whitford, *supra* note 15, at 100−01 (suggesting installment redemption should be available in chapter 7 and chapter 13).Back To Text

[147] *See supra* note 5 and accompanying text.Back To Text