

ACCESS TO JUSTICE: CONSUMER BANKRUPTCY

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I. ACCESS FOR WHOM?

Bankruptcy is a privilege for the honest but unfortunate debtor; not for the knave or churl.¹ All agree that bankruptcy should be available for those who are unable to pay their debts, but not for those who are just unwilling. The homilies are simple to state but not easy to apply. Why do consumers file bankruptcy? There are many explanations, all of them contentious and layered with disputed data. There simply is no definitive answer. Furthermore, as the following possible explanations demonstrate, Congress's choice to limit access to bankruptcy ignores the complexity of the question.

A. *Bankruptcy and Gambling Increases*

Over recent decades bankruptcy and gambling have been among the major growth industries in the United States. Bankruptcy has shown distressing increase over the past quarter century.² Although not a perfect parallel, analyzing the debtor's choice of which chapter and petition to utilize can give a rough estimate of the number of consumer bankruptcy filings. However, identifying the status of the debtor from the petition is not easy. There were only 6348 chapter 11 petitions in 2005,³ signaling that business filings were proportionately small. It is generally understood that over ninety-plus percent of the chapter 7 petitions involve individuals rather than business entities. Relying on the choice of chapter to

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¹ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (finding state wage assignment violates the purpose of bankruptcy law to give the "honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort"). This policy is iterated by the Supreme Court in applying the present law. *See, e.g., Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998) (noting a treble damage award against a landlord is not dischargeable); *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (applying a fair preponderance standard to determine that a debt is excepted from discharge); *Brown v. Felsen*, 442 U.S. 127, 138 (1979) (noting a bankruptcy court discharge determination is a different cause of action from a state debt determination).

² Annual filings are summarized in *The 2005 Bankruptcy Yearbook & Almanac*; in 1980, the 331,098 filings included 249,136 chapter 7 petitions and 75,584 chapter 13 petitions. *THE 2005 BANKRUPTCY YEARBOOK & ALMANAC* 5 (Christopher McHugh & Thomas A. Sawyer eds., 15th ed. 2005) [hereinafter *BANKRUPTCY YEARBOOK*].

³ *Id.*

identify the nature of the debtor is further confused because the different chapters may be used by different types of debtors. Consumer filings in chapter 11 are allowed.⁴ Chapter 13, which is designed for individuals to make payment plans with creditors and is pushed by Congress as the proper chapter for consumer debtors, is available for small business entrepreneurs who are not incorporated.⁵

If ninety-plus percent are consumer filings, the growth in bankruptcy is startling. By 1990, the total filings more than doubled to 782,960. By 2000, they had almost doubled again to 1,253,444.⁶ Prior to the 1978 Bankruptcy Reform Act, bankruptcy filings were substantially lower: in 1940, they totaled 52,320; in 1950, they totaled 33,392; in 1960, filings totaled 146,643, and in 1970, they totaled 194,399.⁷

Gambling has also seen an increase. From the colonial founding to the present, America has experienced surges of gambling. Lotteries were common and critical to funding bridges, colleges, and churches. Nevada legalized gambling in 1931.⁸ Atlantic City opened casino gambling in 1978 as an urban renewal project.⁹ In *California v. Cabazon Band of Mission Indians*, the Supreme Court opened the way to tribal gambling casinos.¹⁰ Gambling, particularly at tribal casinos, has

⁴ See, e.g., *Toibb v. Radloff*, 501 U.S. 157, 166 (1991) (allowing the former manager of a utility company to use chapter 11); *In re Moog*, 774 F.2d 1073, 1074–75 (11th Cir. 1985) (allowing a housewife to file in chapter 11).

⁵ An example is the over-the-road truck operator who sought to cram down the modification of the security interest in his semi-tractor upon the secured party in *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 957–60 (1997).

⁶ BANKRUPTCY YEARBOOK, *supra* note 2, at 5.

⁷ *Id.* at 10; see also ROBERT MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 127–28 (2000) (noting the growth in bankruptcy filings per capita). A breakdown of current filings by federal district are available from the Administrative Office of the United States Courts. See U.S. Courts, Bankruptcy Statistics, <http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm> (last visited Nov. 3, 2006). The American Bankruptcy Institute website provides bankruptcy filings, including a breakdown by state. See American Bankruptcy Institute, <http://www.abiworld.org> (go to the “Online Resources” tab and select “Bankruptcy Statistics” from the pull-down menu) (last visited Nov. 3, 2006).

⁸ JOHN LYMAN MASON & MICHAEL NELSON, GOVERNING GAMBLING 33 (2001).

⁹ Barbara Nash Westcott, *Dealing a Fair Hand to Atlantic City Property Owners*, 31 RUTGERS L.J. 913, 914 (2000).

¹⁰ 480 U.S. 202, 222 (1987). Many sources recite the history of gambling in America, including: HERBERT ASBURY, SUCKER'S PROGRESS: AN INFORMAL HISTORY OF GAMBLING IN AMERICA (1938); HENRY CHAVETZ, PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1950 (Bonanza Books 1960); CHARLES T. CLOTFELTER & PHILIP J. COOK, SELLING HOPE: STATE LOTTERIES IN AMERICA (1989); KIM ISSAC EISLER, REVENGE OF THE PEQUOTS: HOW A SMALL NATIVE AMERICAN TRIBE CREATED THE WORLD'S MOST PROFITABLE CASINO (2001); JOHN M. FINDLAY, PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS (1986); ROBERT GOODMAN, THE LUCK BUSINESS: THE DEVASTATING CONSEQUENCES AND BROKEN

shown explosive growth even beyond the boom and bust of the 1990s. To describe the growth of gambling in terms of growth in “drop” or “win” may be a startling way to describe many billions of dollars, but it is not insightful given the difference between the baccarat table at the Bellagio in Las Vegas and the blackjack table at the Ho Chunk near Baraboo, Wisconsin. The meaning of the rise in gambling opportunity is better understood from how it has transformed the daily lives of some tribes. It is summarized in the *National Gambling Impact Study Commission Report*, which states:

[W]ith revenues from gambling operations, many tribes have begun to take unprecedented steps to begin to address the economic as well as social problems on their own. For example, through gambling tribes have been able to provide employment to their members and other residents where the federal policies failed to create work. This has resulted in dramatic drops in the extraordinarily high unemployment rates in many, though not all, communities in Indian country and a reduction in welfare rolls and other governmental services for the unemployed. Tribes also use gambling revenues to support tribal governmental services including the tribal courts, law enforcement, fire protection, water, sewer, solid waste, roads, environmental health, land-use planning and building inspection services, and natural resource management. They also use gambling revenues to establish and enhance social welfare programs in the areas of education, housing, substance abuse, suicide prevention, child protection, burial expenses, youth recreation, and more. Tribes have allocated gambling funds to support the establishment of other economic ventures that will diversify and strengthen the reservation economies. Gambling revenues are also used

PROMISES OF AMERICA’S GAMBLING EXPLOSION (1995); WARREN NELSON ET AL., ALWAYS BET ON THE BUTCHER: WARREN NELSON AND CASINO GAMING, 1930S–1980S (Univ. of Nev. Oral History Program 1994); JEROME H. SKOLNICK, HOUSE OF CARDS: THE LEGALIZATION AND CONTROL OF CASINO GAMBLING (1978); G. Robert Blakey, *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211 (1985); G. Robert Blakey, *Legal Regulation of Gambling Since 1950*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1984, at 12; Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL’Y & L. 381 (1997) (stating gambling fractionates Indian cohesion and alters cultural identity as a scramble to participate in the wealth ensues); Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11 (1992) (focusing in particular upon the periodic waves of lotteries and their importance as revenue sources for infrastructure); Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming? “A Few Pages of History Are Worth a Volume of Logic,”* 1996 BYU L. REV. 407; T.J. Jackson Lears, *Playing with Money*, WILSON Q., Autumn 1995 (discussing the ambivalence of Americans toward gambling).

to support tribal language, history, and cultural programs. . . . There was no evidence presented to the Commission suggesting any viable approach to economic development across the broad spectrum of Indian country, in the absence of gambling.¹¹

The gambling boom is not confined to tribal reservations:

In 1982, the United States Department of Commerce identified Tunica County as the poorest county in the nation. The Reverend Jesse Jackson once proclaimed Tunica as ‘America’s Ethiopia’

In 1993, Tunica casinos attracted 1.7 million tourists who contributed in excess of \$140 million to the local economy By the end of 1994, Tunica County had twelve casinos and employed about 13,500 workers. Land values have increased from \$500 an acre to

¹¹ NAT’L GAMBLING IMPACT & POL’Y COMM’N, 104TH CONG., NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT 6-6 to 6-7 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> [hereinafter GAMBLING IMPACT REPORT]. As to the economic development of particular tribes, see also Jose J. Monsivais, *The Return of the White Buffalo: Taxation Issues Facing American Tribes Conducting Gambling Enterprises on Tribal Lands*, 20 AM. INDIAN L. REV. 399 (1996) (stating gambling revenue generates new taxation issues for tribal governments); Karen S. McFadden, Note, *The Stakes Are Too High to Gamble Away Tribal Self-Government, Self-Sufficiency, and Economic Development when Amending the Indian Gaming Regulatory Act*, 21 J. CORP. L. 807 (1996); Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44 (stating that the Kansas Potawatomie have new schools, health centers, a fire station, and \$2000 per year for each member, and each Rancheria resident pockets \$350,000 per year); Lynn Bixby, *Mohegan Sunrise*, HARTFORD COURANT, Oct. 11, 1997, at A1 (stating that, in its first year, the Mohegan Sun casino has transformed life for 1250 tribal members, including a \$20,000 yearly stipend for students); Marguerite D. Carroll, *Cashing in on Gaming Revenue*, AM. INDIAN REP., August 1997, at 16 (stating different tribes are using gaming income to invest in other businesses); Timothy Egan, *New Prosperity Brings New Conflict to Indian Country*, N.Y. TIMES, Mar. 8, 1998, at A1; Tim Giago & Deborah Locke, *The Case for Casinos*, MILWAUKEE J. SENTINEL, June 30, 1996, at J1 (stating jobs, health care, housing, and education are available for impoverished tribal members); Tom Gorman & Dan Morain, *California and the West: Gaming Profits Stir Fights over Tribal Membership*, L.A. TIMES, Feb. 28, 2000, at A3; Dirk Johnson, *Growth of Gambling on Tribal Land Starts Trek Back Home by Indians*, N.Y. TIMES, Jan. 17, 1999, at Y10 (discussing tribal members return to reservations now that jobs are available); Mike Johnson, *Heading Back Home: Casinos, Jobs Lure Indians Back to Better Lives on Reservations*, MILWAUKEE J. SENTINEL, Apr. 30, 2001, at 1; Dirk Johnson, *Manna in the Form of Jobs Comes to the Reservation*, N.Y. TIMES, Feb. 21, 1999, at A5.

The websites of the National Indian Gaming Commission, www.nigc.gov, The Harvard Project on American Indian Economic Development, www.ksg.harvard.edu/hpaied, and National Indian Gaming Association, www.indiangaming.org, all provide substantial information and links to the data on how tribal gaming has grown and impacted the participating tribes.

\$50,000 an acre [Before the casinos opened,] thousands [had] moved away as the county population dropped from 28,000 to 8000 over the course of about thirty years. Many county residents had never held a full-time job.

Since casinos have come, unemployment has dropped to virtually zero. In fact, there are now more jobs than there are available workers in Tunica. The median family income of \$7600 has tripled. The number of food stamp recipients has dropped by more than 1000. At the Planters Bank in Tunica, deposits have increased twenty-five percent since gambling was introduced. Those who once struggled on minimum wage now have their choice of good jobs offering competitive salaries and full benefits. Additionally, jobs created by the casinos have helped other businesses increase sales, magnifying the impact of the casinos.

. . . The county budget has already quadrupled due to the increased tax revenue Twenty percent of the county's gambling revenue is earmarked for Tunica's education system, which had been placed on financial probation by the State due to its desperate need for funding.

. . . Before the first casino opened, Tunica had gone nine years without building a new home. Now there is a tremendous construction activity, with construction crews working long hours to complete an estimated \$3 billion in construction.¹²

Logically and intuitively, the two phenomena—gambling and bankruptcy increases—should be related, but there is no solid evidence to cement the connection.¹³

Judge Edith Jones and Todd Zywicki assail bankruptcy scholars for not including “legalized gambling” amongst the factors to consider in financial distress of consumers.¹⁴ Undoubtedly, there is correlation between gambling and some bankruptcy. The problem is there is an undoubted correlation between bankruptcy and divorce, bankruptcy and driving without insurance, bankruptcy and alcoholism, bankruptcy and layoffs, and bankruptcy and recession. Studies do allude to the disproportionate bankruptcy filings in those counties near casinos.¹⁵ One obvious example is where gambling by one employee brought

¹² Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 314–17 (1995) (footnotes omitted).

¹³ Richard I. Aaron, *How Much Does the Rise in Gambling Cause a Rise in Bankruptcy?*, 7 J. BANKR. L. & PRAC. 307, 307 (1998).

¹⁴ See Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 244.

¹⁵ See, e.g., RACHEL A. VOLBERG, GAMBLING AND PROBLEM GAMBLING IN NORTH DAKOTA: A REPLICATION STUDY, 1992 TO 2000: REPORT TO THE NORTH DAKOTA OFFICE OF THE GOVERNOR (2001), available at <http://www.nd.gov/humanservices/info/pubs/docs/study-gambling-in-north-dakota.pdf>; John M. Barron et al., *The Impact of Casino Gambling on Personal Bankruptcy Filing Rates 14* (Aug. 18, 2000) (unpublished study), available at

down Barings, a large British bank—the bank for the Queen—and resulted in a billion dollar loss, but it was gambling on currency, not table games.¹⁶

The National Gambling Impact Study Commission Final Report cites the Ladouceur study, stating that 28% of pathological gamblers filed bankruptcy, and another study that marked 19.2% as compared to 4.2% for non-gamblers, and 5.5% for low risk gamblers.¹⁷ The report also cites an Iowa study indicating that 19% of chapter 13 filings in Iowa involved gambling debt, a rate that is above the national average in the year after casinos began.¹⁸ Comments by judges in reported cases provide an anecdotal picture of gambling and bankruptcy.¹⁹

www.ncalg.org (follow “Bankruptcy” hyperlink; then follow “Collar Community Bankruptcy Study” hyperlink).

¹⁶ Laura Proctor, *The Barings Collapse: A Regulatory Failure or Failure of Supervision?*, 22 BROOKINGS J. INT’L L. 735, 738 (1997).

¹⁷ GAMBLING IMPACT REPORT, *supra* note 11, at 4–13.

¹⁸ *Id.* at 7–16.

¹⁹ See, e.g., *In re Cossu*, 410 F.3d 591, 597 (9th Cir. 2005) (finding a debtor’s sale of unregistered securities to earn commissions to support a gambling addiction supported the claim by a brokerage firm pursuant to its reimbursement agreement with the debtor); *In re Mercer*, 246 F.3d 391, 399 (5th Cir. 2001) (en banc) (noting that two years after introduction to casino gambling, the debtor had a gambling obsession financed through multiple credit cards); *In re Anastas*, 94 F.3d 1280, 1287 (9th Cir. 1996) (noting gambling addiction led the debtor to unexpected financial problems); *Rosen v. Bezner*, 996 F.2d 1527, 1533 (3d Cir. 1993) (remanding fact issue as to whether the debtor intended to conceal assets when he transferred his house to his wife on the advice of his Gamblers Anonymous counselor so he would not gamble the house away); *Chrysler Credit Corp. v. Perry Chrysler Plymouth, Inc.*, 783 F.2d 480, 482 (5th Cir. 1986) (noting the president of a dealership took proceeds from the floor-planned inventory to Las Vegas in hopes of scoring a big win to save the dealership); *Klein v. Morris Plan Indus. Bank of N.Y.*, 132 F.2d 809, 810 (2d Cir. 1942) (Hand, J., dissenting) (noting a window dresser for a retail store “with too much spare time on his hands” lost thousands); *In re Wilkins*, 329 B.R. 358 (B.A.P. 10th Cir. 2005) (unpublished table decision) (finding debtor lying about gambling post-petition supported the dismissal of her chapter 13 case); *In re Neal*, No. 05-1297-CV-W-SOW, 2006 WL 522439, at *1, *5 (W.D. Mo. 2006) (noting the debtor was a judge with a gambling addiction who borrowed money from local lawyers, and finding the bankruptcy court erred in sealing the list of creditors because it contained scandalous material); *In re Morris*, 155 B.R. 422, 423 (W.D. Tex. 1993) (finding a conversion from chapter 7 to chapter 11 was in bad faith where the purpose was to encompass post-petition gambling debts of over \$100,000); *In re Brown*, 86 B.R. 944, 946–47 (N.D. Ind. 1988) (finding a non-alienation provision of annuity issued to a lottery winner does not prevent the interest from passing to the bankruptcy estate); *In re Davis*, 208 F. Supp. 508, 509 (E.D.N.Y. 1962) (noting postal clerk lost his salary, his savings, and all that he could borrow from friends in six months at the track); *In re LaCounte*, 342 B.R. 809, 811 (Bankr. D. Mont. 2005) (noting the debtor’s overwhelming gambling debt led to bankruptcy filing); *In re Knowles*, 337 B.R. 680, 681–84 (Bankr. S.D. Iowa 2005) (finding whether loan proceeds were used to buy cattle or to gamble was a fact issue precluding summary judgment); *In re Lindell*, 334 B.R. 249, 252 (Bankr. D. Minn. 2005) (noting the debtor, a professional gambler, sold a

note with a face value of more than \$263,000 for \$50,000); *In re Bressler*, 321 B.R. 412, 418 (Bankr. E.D. Mich. 2005) (denying a discharge to a debtor for failure to keep records where the debtor claimed that he lost \$700,000 gambling); *In re Alnajjar*, 276 B.R. 844, 847 (Bankr. N.D. Ohio 2002) (noting an unsuccessful gambling run at a casino preceded the debtor's bankruptcy); *In re Pak*, 252 B.R. 215, 217 (Bankr. M.D. Fla. 2000) (noting the debtor claimed that large gambling losses forced the debt and bankruptcy); *In re Cacciatore*, 209 B.R. 609, 611–12 (Bankr. E.D.N.Y. 1997) (noting in two months, the debtor used up the credit line on a proffered credit card by placing bets with off-track betting parlors), *rev'd*, No. CV-97-4654 (ERK), 1998 WL 412644, *3 (E.D.N.Y. July 21, 1998) (reversing summary judgment to try the extent of the credit card issuer's knowledge); *In re Totina*, 198 B.R. 673, 674–76 (Bankr. E.D. La. 1996) (noting a well-educated debtor with a good income was heavily over-extended on his credit cards and sought help from Gamblers Anonymous); *In re Briese*, 196 B.R. 440, 443–44 (Bankr. W.D. Wis. 1996) (noting a housewife and part-time nurse's aid incurred \$30,000 in credit card debt in one year upon starting to gamble); *In re Alvi*, 191 B.R. 724, 728 (Bankr. N.D. Ill. 1996) (noting seventy-five percent of the credit card debt for casino gambling was a major factor, but not the only source of the debtor's economic problems); *In re Murphy*, 190 B.R. 327, 330 (Bankr. N.D. Ill. 1995) (noting the debtor had regularly repaid his credit card advances for gambling until he had a losing streak); *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995) (finding casino cannot seek nondischargeability of a wife's debts for her husband's gambling debt); *In re Video Depot, Ltd.*, 186 B.R. 126, 128–32 (Bankr. W.D. Wash. 1995) (noting, because the gambler paid his markers with checks drawn on the debtor, "his" corporation, the checks were a fraudulent transfer), *aff'd*, 127 F.3d 1195 (9th Cir. 1997); *In re Anderson*, 181 B.R. 943, 945 (Bankr. D. Minn. 1995) (noting a debtor bounced numerous checks during a blackjack spree to celebrate his eighteenth birthday); *In re Irvine*, 163 B.R. 983, 984 (Bankr. E.D. Pa. 1994) (noting the debtor embezzled money to pay off a bookie); *In re Hendrickson*, 156 B.R. 19, 20 (Bankr. W.D. Pa. 1993) (noting the debtor used a hidden bank account to make post-petition payments to gambling creditors from whom he feared reprisal); *In re Clagg*, 150 B.R. 697, 698 (Bankr. C.D. Ill. 1993) (noting the debtor's only hope of repaying his debt required that he win the Lotto); *In re Pressgrove*, 147 B.R. 244, 245–46 (Bankr. D. Kan. 1992) (noting the debtor had a long history of financial problems connected with gambling); *In re Poskanzer*, 143 B.R. 991, 993 (Bankr. D.N.J. 1992) (noting the debtor had created a personal fortune subsequently lost at casinos); *In re Hammer*, 124 B.R. 287, 288, 290 (Bankr. C.D. Ill. 1991) (finding it was not a substantial abuse of chapter 7 to allow debtor whose debts were three-fourths gambling to file bankruptcy); *In re Perry*, 119 B.R. 24, 27 (Bankr. S.D.N.Y. 1990) (finding it is an implausible, but not impossible, explanation that the debtor, an executive business assistant, would put her life savings at risk at a casino and, therefore, requiring testimony to test credibility and demeanor); *In re Gallini*, 96 B.R. 491, 492 (Bankr. M.D. Pa. 1989) (noting the debtor took approximately \$258,000 from the sale of her inn and lost it in two weeks in Las Vegas); *In re Pozucek*, 73 B.R. 110, 111–12 (Bankr. N.D. Ill. 1987) (finding a claim that the debtor did intend to pay his credit card purchases with money he had set aside but then lost through gambling was not credible); *In re Smith*, 66 B.R. 58, 60–61 (Bankr. D. Md. 1986) (allowing a casino's claim where applicable non-bankruptcy law made gambling debts legal); *In re Barnacle*, 44 B.R. 50, 51 (Bankr. D. Minn. 1984) (noting the debtor's extensive gambling was unknown to his wife and employer until just before bankruptcy); *In re Hirsch*, 36 B.R. 643, 644–45 (Bankr. S.D. Fla. 1984) (noting a real

The intuitive nexus between gambling and bankruptcy remains indeterminate since the court is not required to determine why the debtor filed. Now consider the fact that Utah is at or near the top in per capita filings of consumer bankruptcy.²⁰ Utah is also one of two states where there is no legalized gambling. So at least as to Utah, the gambling and bankruptcy thesis fails.

B. Children

Another proposition to explain bankruptcy is fecundity. A child is the best indicator of financial doom and bankruptcy.

Where does parents' money go? It goes to basics. The real increases in family spending are for the items that make a family middle-class and keep them safe (housing and health insurance), that educate their children (preschool and college), and that let them earn a living (transportation, childcare, and taxes).

In other words, today's family has no margin for error. There is no leeway to cut back if one earner's hours are cut or if the other gets sick. There is no room in the budget if someone needs to take off work to care for a sick child or an elderly parent. Their basic situation is far riskier than that of their parents a generation earlier. The modern American family is walking a high wire without a net.²¹

Targeted marketing also plays a role: "Time-starved households have become easy prey for marketers, whose research shows that parents who spend less time with their children will spend more money on them."²²

This theory would explain Utah's high standing in bankruptcy since Utah is a leader in population increase.²³ The best available study concurs that the

estate broker who was addicted to trading options and Jai-Alai used a client's rent collections and sold his wife's jewelry); *In re Alessi*, 12 B.R. 96, 97-99 (Bankr. N.D. Ill. 1981) (finding the refusal to grant a license to race horses by the debtor in chapter 7 was not a violation of the automatic stay).

²⁰ Dave Anderton, *Utah Falls to No. 3 in U.S.—for Bankruptcy Filings*, DESERET MORNING NEWS, Apr. 18, 2006, at D10 (stating Utah dropped from its number one ranking in 2002 through 2004 to its current third place).

²¹ Elizabeth Warren, *The Middle Class on the Precipice*, HARV. MAG., January-February 2006, at 28, 31, available at <http://s162044184.onlinehome.us/lib/06jf/pdf/0106-28.pdf>; see also ELIZABETH WARREN & AMELIA TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 6, 13, 173-79 (Basic Books 2003).

²² JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* 25 (2004) (reporting a study of advertising agencies and family data demonstrating how marketing toward children increases family spending).

distinctive Utah family dynamic is a factor, but only in conjunction with low wages, particularly a gender gap for women, and a higher divorce rate.²⁴

C. Credit Card Abuse

A more common explanation for the increase in consumer bankruptcy filings is credit card abuse.²⁵ Diane Ellis looked to Canadian bankruptcy rates to support her conclusion that the decision in *Marquette National Bank of Minneapolis v. First Omaha Service Corp.*²⁶ paved the way for expanded credit card access and increased borrowing, which led to a rise in consumer bankruptcy filings.²⁷ The Supreme Court deferred to the state law of the lender rather than the state law of the card customer in setting interest rates.²⁸ The result was a race to states with no interest rate limits—the deregulation—particularly South Dakota and then Delaware.²⁹

Americans are immersed in debt because of excessive consumption. They choose bankruptcy as a way out from the crushing debt which they have heaped on themselves. One commentator has labeled this phenomenon “affluenza,” calling it “a painful, contagious, socially transmitted condition of overload, debt, anxiety,

²³ HAROLD A. HOVEY & KENDRA A. HOVEY, CQ'S STATE FACT FINDER 2006: RANKINGS ACROSS AMERICA 424 (2006) (showing Utah's birth rate is first amongst the states); JOYCE A. MARTIN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L VITAL STATISTICS REPORTS, BIRTH: FINAL DATA FOR 2004, at 9, 52 (2006), available at http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_01.pdf (reporting Utah's birth rate of 21.2 and fertility rate of 92.3, showing Utah's birthrate is among the highest in the United States); STATE PROFILES: THE POPULATION AND ECONOMY OF EACH U.S. STATE 383–84 (Courtney M. Slater & Martha W. Davis eds., 1999) (stating Utah's high population growth ranking is attributed to its birth rate and not the in-migration of other high growth ranking states).

²⁴ Jean M. Lown & Barbara R. Rowe, *A Profile of Utah Consumer Bankruptcy Petitioners*, 5 J.L. & FAM. STUD. 113, 116 (2003).

²⁵ See, e.g., MANNING, *supra* note 7, at 5, 122–23, 261 (arguing the dramatic rise in consumer debt is the planned strategy of credit card issuers, particularly CitiBank, which especially impacts the working class, students, and elderly people).

²⁶ 439 U.S. 299 (1978).

²⁷ See Diane Ellis, Fed. Deposit Ins. Corp., *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate*, BANK TRENDS, March 1998, at 1, available at http://www.fdic.gov/bank/analytical/bank/bt_9805.pdf.

²⁸ *Marquette*, 439 U.S. at 308.

²⁹ *But see* Jones & Zywicki, *supra* note 14, at 227–42 (stating credit card access is competitive and not aggressively marketed and users are undisciplined); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1492–96 (2005) (stating the increase in credit card debt is simply a substitution for former consumer credit debt).

and waste resulting from the dogged pursuit of more.”³⁰ Another commentator noted that “[d]espite working all these hours, somewhere between a quarter and 30 percent of households live paycheck to paycheck. With the margin of error so thin, it is not surprising that personal bankruptcies are at historic levels.”³¹ If so, consumers are unwitting victims because they do not understand the exponential growth of credit card debt through uncontrolled interest rate charges.³² For some, the bankruptcy growth is moral decay.³³

That bankruptcy is the chosen³⁴ palliative for a raging infection of crushing debt³⁵ is undoubted, but the question of the etiology is unresolved: Is it weak

³⁰ John de Graaf et al., *Affluenza: The All-Consuming Epidemic 2* (2d ed. 2005) (providing a follow-up to a 1997 television documentary outlining the binge of spending with inevitable bankruptcy consequences for some).

³¹ JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* 72 (1998) (stating the desire fueled by television provokes spending, paid with credit cards). The same argument from the perspective of the political role of consumerism is found in LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* (2003).

³² American consumers are unaware of the terms of the credit card transactions, especially the “universal default” rule and its effect upon the initial come-on terms. *Frontline: The Secret History of the Credit Card* (PBS television broadcast Nov. 23, 2004), available at, <http://www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.html>. The argument is more engagingly told in the fictional story line of a legal secretary in a large Boston law firm whose credit card debt lands her in jail. *Boston Legal: Legal Deficits* (ABC television broadcast Dec. 13, 2005). Jerry Espenson, as banking transactions expert of the law firm, declares to the attorney for the credit card issuer: “I have a Harvard M.B.A. and I cannot understand what [the credit card contract] says.” *Id.*

³³ See MANNING, *supra* note 7, at 343 n.9 (“Rising personal bankruptcy reflects the diminished influence of the Calvinist ethos of thrift and savings in maintaining social control, that is, constraining individual consumption behavior.”); Jones & Zywicki, *supra* note 14, at 208 (“[W]e contend in this Part that increased bankruptcy filings have been fueled by an increase in the net economic benefits of filing and by a decline in the level of personal shame and societal stigma that previously deterred individuals from filing bankruptcy. Bankruptcy is now too frequently a choice fostered by irresponsible spending habits and an unwillingness to live up to commitments.”); *The NewsHour with Jim Lehrer: Bankruptcy Law?* (PBS television broadcast June 8, 1998) (statement of Sen. Charles Grassley, (R) Iowa), available at, http://www.pbs.org/newshour/bb/law/jan-june98/bankrupt_6-8.html (“There is no shame anymore with bankruptcy. Some people use bankruptcy for financial planning, and that’s wrong.”) [hereinafter *Jim Lehrer*].

³⁴ The discussion is about choosing bankruptcy as a voluntary way out of debt. The Bankruptcy Code does authorize an involuntary petition against any individual except a farmer. 11 U.S.C. § 303 (2006). However, its use against individuals or entities has been negligible. It hardly seems to be to the advantage of consumer, creditors and the consumer credit industry has been the largest lobby for closing access to bankruptcy.

³⁵ The degree to which overwhelming medical debt provokes bankruptcy is another commonly assumed but very much disputed cause. See, e.g., David U. Himmelstein et al., *Illness and Injury as Contribution to Bankruptcy*, HEALTH AFF., 2 February 2005, at W5-

impulse control or rapacious external forces? Congress is certain; it has no doubt of the cure: Close the doors to the bankruptcy courts. This is not a new idea. Behavioral epidemics have brought analogous responses: AIDS is rising—close the clinics; sexually transmitted disease is worrisome—bar the distribution of condoms; adolescent drug use is frightening—tell them to just say “no.”

II. HOW THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005³⁶ DENIES ACCESS

Clearly Congress intended to put the lid on bankruptcy filings when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and removed the discretion of the bankruptcy courts.³⁷ Previously, courts could dismiss consumer chapter 7 petitions upon finding the chapter 7 petition would

63, available at <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1.pdf> (finding about one-half of surveyed bankruptcies reported medical causes); APARNA MATHUR, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, MEDICAL BILLS AND BANKRUPTCY FILINGS 1 (2006), http://www.aei.org/publications/pubID.24680,filter.all/pub_detail.asp (select the “Click here” link to view the pdf version) (stating that, as a primary cause, medical expenses can account for twenty-seven percent of bankruptcies, but up to thirty-six percent when co-factored with credit card debt). *But see* Jones & Zywicki, *supra* note 14, at 244 n.274 (noting the cost of insurance relative to inflation has not changed, and therefore medical burden cannot explain the steep rise in bankruptcy); Zywicki, *supra* note 29, at 1518 (arguing that studies showing a high correlation between medical expense and bankruptcy are flawed by over-inclusion of what is a medical expense); David Dranove & Michael L. Millenson, *Medical Bankruptcy: Myth Versus Fact*, HEALTH AFF., 28 February 2006, at W74–75, available at <http://content.healthaffairs.org/cgi/reprint/25/2/w74.pdf> (reporting medical bills account for only seventeen percent of bankruptcies). Much of the debate about statistics centers on the question of whether credit card debt should or should not be counted in measuring medical bills. *See, e.g.*, Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 558 (2006) (reporting twenty-nine percent of interviewees used general credit cards for medical expenses and some medical care providers offered specific credit cards); Jim Lehrer, *supra* note 33 (interviewing Shirley Nichols, a debtor who quit her job because of illness and had charged medical bills to credit cards).

³⁶ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (amending 11 U.S.C. and scattered sections of 28 U.S.C.) [hereinafter BAPCPA]. The event has provoked ample literature. *See, e.g.*, RICHARD I. AARON, BANKRUPTCY LAW FUNDAMENTALS, especially ch. 1 (2006); Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169 (2005); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005); Symposium, *The Changing Landscape of Bankruptcy in America*, 15 WIDENER L. SYMP. J. 575 (2006); Symposium, *Beneath the Surface of BAPCPA*, 13 AM. BANKR. INST. L. REV. 417 (2005).

³⁷ *See* 11 U.S.C. § 707(b) (2006).

“substantially abuse” bankruptcy.³⁸ Courts rested heavily on the income of the debtor that could be used to pay creditors.³⁹ Congress replaced the deleted term “substantially” with five pages of detailed criteria commonly known as “the means test,” which incorporates tables and data from the United States Census and the Internal Revenue Code.⁴⁰

Congress has denied free access to chapter 7 for consumer debtors and limited the use of chapter 13. It is also clear Congress overshot the mark.

A. Drafting Errors

The Consumer Protection Act increases costs and frustrates participants by seemingly pointless burdens, quixotic choices, and confusion. The draftsmanship is shameful.⁴¹ The legislation is filled with grammatical errors, nonsensical mandates, and internal conflict. The following illustrations demonstrate the point. They are illustrations; not an exhaustive list.⁴² No substantive analysis is attempted, as that very lengthy undertaking is best left to other sources that are ample.

³⁸ *Id.*

³⁹ See, e.g., *In re Taylor*, 212 F.3d 395, 397 (8th Cir. 2000), *cert. denied*, 531 U.S. 1010 (2000) (holding a pension, which is excluded as property of the estate, should still be used to determine the income available to pay creditors); *In re Stewart*, 175 F.3d 796, 809–10 (10th Cir. 1999) (holding the totality of the debtor-physician’s circumstances should measure his ability to pay creditors, including his choice to lower his income through a fellowship); *In re Kornfield*, 164 F.3d 778, 784 (2d Cir. 1999) (holding an exempt pension should be factored into the hypothetical plan to repay creditors); *In re Lamanna*, 153 F.3d 1, 2 (1st Cir. 1998) (noting the debtor’s monthly expendable income while living at home with parents means income is \$770 above expenses); *In re Koch*, 109 F.3d 1285, 1290 (8th Cir. 1997) (holding the debtor’s exempt workers’ compensation should be factored into the hypothetical plan to repay creditors).

⁴⁰ BAPCPA, *supra* note 36, § 102.

⁴¹ See *In re Sosa*, 336 B.R. 113, 114–15 (Bankr. W.D. Tex. 2005) (making such comments as: “to call the Act a ‘consumer protection’ Act is the grossest of misnomers”; “[o]ne of the more absurd provisions”; “this requirement is inane”; and “it is not the individual consumers of this country that make the donations to the members of Congress”).

⁴² For starters, as indicated by the Act’s title, the purported subject of the Act is denial of access to *consumer* debtors seeking bankruptcy relief. However, the 2005 Act also made many business bankruptcy changes that limit the availability of bankruptcy. Examples include time limitations and mandates that increase the cost for the small business debtor, effectively limiting its availability. As with consumer bankruptcy, the drafting errors portend conflict and litigation and have a chilling effect on the negotiation process, which is the heart of successful chapter 11 bankruptcy.

The major barrier is cost.⁴³ The filing fees have increased three times in six months to the current fees of \$299 for chapter 7 and \$274 for chapter 13.⁴⁴ While the filing fee is proportionately trivial in comparison to the stakes in bankruptcy, it does demonstrate a mindset. The greatest contributor to high costs is shoddy draftsmanship because uncertainty is expensive and contradiction costs even more. A simple example is the “automatic dismissal” that the Bankruptcy Code imposes on the debtor who fails to provide mandated documents by the forty-sixth day after the filing of the petition.⁴⁵ “Automatic” is a new term of art that suggests a mechanical event belied by the language of the Bankruptcy Code inviting a request for dismissal⁴⁶ and empowering the court to decline the request.⁴⁷ Another simple example is the pre-bankruptcy credit counseling mandated by the Bankruptcy Code,⁴⁸ but referring to “waiver” and “exemption” from the requirement when only a deferral from the requirement is expected.⁴⁹ Ambiguous new terms of art play into the divergent incentives amongst debtor and creditors. Ambiguity becomes an invitation to litigate or, alternatively, becomes a bargaining chip in negotiation. Negotiation is frequent over issues such as family support, opposition to a repayment plan, or a hassle over the discharge of particular debts.

Some of the problems may be remedied in various ways. First, some may be resolved by subsequent amendment. The filing fee progression is an example.⁵⁰

Some provisions may be interpreted so as to reach a practical solution. For example, in order to avoid an absurd result, the court in *In re Wilbur*, held that “unsecured creditors” in the Bankruptcy Code means non-priority creditors.⁵¹ Another example is the \$125,000 cap imposed by the Bankruptcy Code on a homestead acquired within 1215 days preceding the petition.⁵² *In re McNabb*

⁴³ See, e.g., *In re Curlington*, No. 05-38188, 2005 WL 3752229, at *5 (Bankr. E.D. Tenn. Dec. 7, 2005) (noting the debtors’ inability to pay the \$50 fee for counseling is not an exigent circumstance).

⁴⁴ Filing fees are set in 28 U.S.C. § 1930 (2006). The 2005 Act originally set the fee at \$200 for chapter 7 and \$150 for chapter 13. BAPCPA, *supra* note 36, § 325. A fourth increase to \$300 for chapter 7 filing fees is pending before Congress in H.R. 5585, 109th Cong. 1st Sess. (2006).

⁴⁵ 11 U.S.C. § 521(i)(1).

⁴⁶ See *id.* § 521(i)(2).

⁴⁷ See *id.* § 521(i)(4).

⁴⁸ See *id.* § 109(h).

⁴⁹ See *id.* § 109(h)(3).

⁵⁰ See *supra* note 44. Congress made incongruent changes to 28 U.S.C. § 1930(a)(1) (2000)—which was effective immediately by the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 6058(a), 119 Stat 231 (2005) (codified at 28 U.S.C. § 1930)—changing the filing fee to \$220, *id.* A technical correction in percentages of 28 U.S.C. § 589a(b) was also enacted in Pub. L. 109-13, § 6058(a), 119 Stat 231 (2005).

⁵¹ See, e.g., *In re Wilbur*, 344 B.R. 650, 654–55 (Bankr. D. Utah 2006) (citing 11 U.S.C. § 1325(b)(1)(B)).

⁵² See 11 U.S.C. § 522(p)(1).

found the statute could only apply to two states literally.⁵³ The predicate of § 522(p)(1), “as a result of electing under subsection (b)(3)(A),” limits the application to those states that have not opted out of § 522(d) and have homesteads above \$125,000.⁵⁴ Other courts reject a plain meaning approach. *In re Kane* found that the undoubted intent of Congress to close the “mansion loophole” renders the “election” ambiguity a scrivener’s error, which the court should correct.⁵⁵ *In re Blair* held the cap did not apply to the increased equity during the 1215 days preceding bankruptcy on a home, which the debtor acquired prior to of the 1215 day limit because such was not an interest that the debtor acquired.⁵⁶ *In re Virissimo* found that the “election” referred to in section 522(p)(1) is the election to declare a homestead exempt.⁵⁷ Alternately, the statute is ambiguous and the intent of Congress was for it to apply to all homestead claims.⁵⁸ The *Virissimo* court certified this issue to the Ninth Circuit Court of Appeals. *In re Kaplan* held that the \$125,000 cap applies to states that have opted out of section 522(d) in light of congressional intent.⁵⁹ *In re Landahl* agreed and held that the \$125,000 cap applies to Florida homesteads.⁶⁰

Other provisions will be found unconstitutional. See, for example, section 526(a)(4), which bars an attorney from counseling a debtor “to incur more debt in contemplation of . . . filing a case.”⁶¹ *Hersh v. United States* held this over-inclusive provision offends the First Amendment as an unconstitutional intrusion upon attorney-client relations.⁶²

Finally, some provisions will simply have to be ignored. One example is the requirement that every “debtor” file copies of its tax returns.⁶³ By the Bankruptcy Code’s definition of “debtor”⁶⁴ and “person,”⁶⁵ corporations such as Enron and United Airlines would be included. Part of the absurdity is no trustee normally exists in a chapter 11 case. To whom is the required tax return submitted: to itself as debtor in possession, or will “trustee” be expanded to include the United States trustee? Another example is the command to the clerk to give written notice within ten days of the filing of a petition that a presumption of abuse arises,⁶⁶ a conclusion requiring judicial construction upon a number of computational

⁵³ 326 B.R. 785, 788–89 (Bankr. D. Ariz. 2005).

⁵⁴ *Id.* at 791.

⁵⁵ 336 B.R. 477, 488–89 (Bankr. D. Nev. 2006).

⁵⁶ 334 B.R. 374, 376–77 (Bankr. N.D. Tex. 2005).

⁵⁷ 332 B.R. 201, 205 (Bankr. D. Nev. 2005).

⁵⁸ *Id.* at 207.

⁵⁹ 331 B.R. 483, 485–88 (Bankr. S.D. Fla. 2005).

⁶⁰ 338 B.R. 920, 923 (Bankr. M.D. Fla. 2006).

⁶¹ 11 U.S.C. § 526(a)(4) (2006).

⁶² 347 B.R. 19, 24–25 (N.D. Tex. 2006).

⁶³ See 11 U.S.C. § 521(e)(2)(A)(i).

⁶⁴ *Id.* § 101(3).

⁶⁵ *Id.* § 101(41).

⁶⁶ See *id.* § 342(d).

elements.⁶⁷ Another example is the Bankruptcy Code imposes the duty upon each “debtor” to report income changes and forecast twelve month’s of projected income.⁶⁸ Yet another example is the designation of “debt relief agency” to be disclosed by every lawyer who gives bankruptcy advice to a consumer client whose income is below \$150,000.⁶⁹ The entire firm of an attorney giving advice to a client about the threat to his or her pension rights provoked by an airline bankruptcy filing becomes “a debt relief agency” that must disclose such on all of its communications, including its letterhead and faxes. Or, the firm traditionally advising its client as landlord or creditor about bankruptcy is likewise a debt relief agency. Another example is the Bankruptcy Code’s computation of current monthly income as a six-month average that includes the income of a non-debtor spouse.⁷⁰

B. Preventing Abuse or Preventing Access?

The legislation’s lodestar is the presumed abuse of selecting chapter 7 by an individual debtor who meets the highly complex elements articulated in section 707(b)(2), the so-called “means test,” which is a presumption formula in section 707(b)(2)(A).⁷¹ The formula compares projected income with projected expenses for a five-year plan, the length of a chapter 13 plan confirmed according to section 1325(b)(1). A debtor with more than \$40,000 in debt will be presumed to abuse bankruptcy if net income is greater than \$10,000, or \$167 per month, as projected. The debtor with net income below \$6,000 as projected, or \$100 per month, is not presumed to abuse bankruptcy. The debtor with debt more than \$24,000 but less than \$40,000 will be presumed to abuse bankruptcy if net income as projected is greater than twenty-five percent of unsecured and nonpriority debt. Net income must be determined by turning to the standardized expenses. Section 707(b)(2)(A) defines “current monthly income” as “reduced by the amounts determined under clauses (ii), (iii), and (iv).”⁷² The following deductions from current monthly income are defined: living expenses,⁷³ secured debt payments,⁷⁴ and priority claims.⁷⁵ Some are actual expenses of the debtor; some are IRS standards that are national, regional, or local.

⁶⁷ See *id.* § 707(b)(2).

⁶⁸ See *id.* § 521(a)(1)(B)(v)–(vi).

⁶⁹ See *id.* §§ 101(3), 101(4A), 101(12A), 527.

⁷⁰ See *id.* §§ 101(10A), 707(b)(7).

⁷¹ See *id.* § 707(b)(2)(A)(i) (“[I]f the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or (II) \$10,000.”).

⁷² *Id.* § 707(b)(2)(A).

⁷³ *Id.* § 707(b)(2)(A)(ii)(I)–(V).

⁷⁴ *Id.* § 707(b)(2)(A)(iii)(I)–(II).

⁷⁵ *Id.* § 707(b)(2)(A)(iv).

Obviously, income is key but there are many different income computations expected, such as “current income,”⁷⁶ “current monthly income,”⁷⁷ “monthly net income,”⁷⁸ and “future income projection”⁷⁹; also, “current monthly income” of debtor’s spouse is anticipated by the Bankruptcy Code⁸⁰ and required by Official Form 22A if the debtor is not filing a joint petition but is not separated from a spouse.⁸¹ The problem is section 101(10A)(A), which defines “current monthly income” as the income “that the debtor receives,” and has a specific inclusion of contributions to household expenses by the debtor’s spouse in section 101(10A)(B).⁸² If chapter 13 is considered, “current monthly income” for the debtor and for the debtor’s spouse is required⁸³ and is needed to calculate “disposable income.”⁸⁴

Individual debtors may qualify for chapter 11 and, indeed, may be compelled to use chapter 11 if they are presumed to abuse chapter 7 under section 707(b)(2); yet their debt level exceeds the maximum for chapter 13 under section 109(e). In such a case, section 1115(a)(2) only directs that “earnings from services” are part of the chapter 11 estate. However, section 1129(a)(15)(B) uses a confirmation standard for individual debtors that incorporates the “disposable income” of section 1325(b)(2), thus making “current monthly income” a required calculation for individuals choosing chapter 11. Official Form 22B mirrors Official Form 22A to calculate current monthly income for individual debtors choosing chapter 11.⁸⁵ Comparable ambiguities may arise in chapter 12 when individual family farmers or family fishermen invoke it. Sorting out the drafting glitches will require congressional action or case development.

“[M]edian family income” is another income figure, but it is a Census Bureau item as defined by the Bankruptcy Code.⁸⁶ Applying the correct tabular entry requires decisions about family income that may require interpretation. Bringing the tabular figure current requires calculation by the debtor.

The most important of these many calculations is “current monthly income,” which is defined by the Bankruptcy Code as a six-month average, excluding Social

⁷⁶ *Id.* § 521(a)(B)(ii).

⁷⁷ *Id.* § 707(b)(2)(A)(i).

⁷⁸ *Id.* § 521(a)(1)(B)(v).

⁷⁹ *Id.* § 521(a)(1)(B)(vi).

⁸⁰ *See id.* § 707(b)(6)–(7).

⁸¹ Official Form 22A, Chapter 7 Statement of Current Monthly Income and Means-Test Calculation, Part II line 2, http://www.uscourts.gov/rules/BK_Forms_06_Official/Form_22A_1006.pdf (last visited Dec. 27, 2006).

⁸² 11 U.S.C. § 101(10A).

⁸³ *Id.* § 1322(d).

⁸⁴ *Id.* § 1325(b)(2).

⁸⁵ Official Form 22B, Chapter 11 Statement of Current Monthly Income, http://www.uscourts.gov/rules/BK_Forms_08_Official/Form_22B_1208_Combined.pdf (last visited Dec. 27, 2006).

⁸⁶ *See* 11 U.S.C. § 101(39A).

Security and reparation payments to victims of war and violence.⁸⁷ Is it gross income or net income? Section 101(10A) suggests gross income, stating “from all sources that the debtor receives . . . without regard to whether such income is taxable income.”⁸⁸ However, “debtor receives” suggests net income. Official Form 22A, Part II line 3, requests “[g]ross wages, salary, tips, bonuses, overtime, commissions.”⁸⁹

Unemployment compensation may be an excluded Social Security benefit. Official Form 22A,⁹⁰ Part II line 9, recognizes the dispute and leaves it to the debtor to decide. Therefore, “current monthly income” is not the actual income which the debtor is receiving but an average from the past with statutory inclusions and exclusions. The debtor may have landed a dream job shortly before the petition and wants to clean the slate of accumulated debt. This debtor will have an average income that is lower than actual income. Or, the debtor may have been let go a month before the petition. This debtor will have an average income that is higher than actual income. The debtor may schedule the filing to avoid reporting the big bonus given at the end of the year. It is more than just the debtor’s income that makes up the computation. In a single petition (i.e., not a joint petition by husband and wife),⁹¹ regular contributions to household expenses by a spouse, partner, roommate, parent, employer, or government agency are considered current monthly income.⁹² For example, child support would seem to qualify, but if it is sporadic and not paid on a regular basis it should be excluded.

The current monthly income thus calculated is multiplied by twelve and compared with the state median income for a household similar to the debtor’s household.⁹³ The state median income tables are found at various locations on the World Wide Web.⁹⁴ When the current year does not appear in the tables,

⁸⁷ See *id.* § 101(10A).

⁸⁸ *Id.*

⁸⁹ Official Form 22A, *supra* note 81.

⁹⁰ *Id.*

⁹¹ Section 302 allows a husband and wife to file a single petition with the advantage of a single filing fee and, perhaps but not necessarily, a consolidation of their assets and debts. 11 U.S.C. § 302 (2000). It is not changed by the 2005 amendments.

⁹² 11 U.S.C. § 101(10A)(B) (“[Current monthly income] includes any amount paid by any entity . . . on a regular basis for the household expenses.”). Child support, foster care support, and disability payments for a dependent child are excluded from disposable income in chapter 13. *Id.* § 1325(b)(2). Social Security benefits, which might include payments for a disabled child, are expressly excluded. *Id.*

⁹³ *Id.* § 101(39A)(A).

⁹⁴ Three easy choices are: (1) U.S. Census Bureau, Income, <http://www.census.gov/hhes/www/income/statemedfaminc.html>; (2) U.S. Department of Justice, U.S. Trustee Program, Means Testing, <http://www.usdoj.gov/ust/> (follow “Means Testing Information” hyperlink below “Bankruptcy Reform”); and (3) American Bankruptcy Institute, <http://abiworld.net/bankbill> (follow “Census Bureau Releases Current Median Income Values” hypelrink).

adjustments are updated from the year of the tables to the current year using the Consumer Price Index for All Urban Consumers.⁹⁵ The tables reflect the greater than seventy percent income spread between the lower median income states such as Arkansas, Louisiana, Mississippi, Montana, and New Mexico; and the higher median income states such as Connecticut, New Hampshire, and New Jersey.

If the debtor is married, then a current monthly income for the spouse of the debtor is needed unless the debtor provides a sworn statement of legal separation or living apart.⁹⁶ Partners in gay or lesbian unions would not provide a partner's current monthly income figure since such unions are not recognized for a joint petition.⁹⁷ However, the "amount paid . . . on a regular basis for the household expenses" by the non-debtor partner would be part of the calculation of the debtor's current monthly income.⁹⁸ The income of an adult child living at home may or may not be part of a debtor's current monthly income.⁹⁹

Living expenses are set by the IRS National Standards for Allowable Living Expenses, a table used for collection of delinquent taxes that Congress has adopted for bankruptcy application.¹⁰⁰ The national standards are most easily accessed from websites.¹⁰¹ The tables are grouped in monthly income divisions from \$833 to \$5834 and higher per month, subdivided into five categories: food, housekeeping, apparel, personal care, and miscellaneous. Family size can be from one person to more than four. A separate table allocates transportation costs for no car, one car, or two cars.¹⁰² For transportation, the table is divided by region and major city rather than a uniform national table. Finally, tables for housing and utilities are divided by state and county.¹⁰³ As with the definition of current monthly income average and the median income tables, the debtor cannot substitute his or her actual expenses. The debtor may have smaller actual expenses

⁹⁵ 11 U.S.C. § 101(39A)(B).

⁹⁶ *Id.* § 707(b)(7)(B).

⁹⁷ *In re Kandu*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004), and *In re Allen*, 186 B.R. 769, 774 (Bankr. N.D. Ga. 1995), reject joint petitions by homosexual couples.

⁹⁸ 11 U.S.C. § 101(10A)(B).

⁹⁹ If the adult child makes regular contributions to household expenses, they are included according to § 101(10A)(B), but if the contributions are not regular they are not counted.

¹⁰⁰ *See id.* § 707(b)(2)(A)(ii)(I) ("The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards . . . issued by the Internal Revenue Service.").

¹⁰¹ *See* IRS, National Standards for Allowable Living Expenses, <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html> (last visited Dec. 27, 2006); U.S. Department of Justice, U.S. Trustee Program, IRS National Standards for Allowable Living Expenses, http://www.usdoj.gov/ust/eo/bapcpa/20061001/bci_data/national_expense_standards.htm (last visited Dec. 27, 2006).

¹⁰² *See* IRS, Allowable Living Expenses for Transportation, <http://www.irs.gov/businesses/small/article/0,,id=104623,00.html> (last visited Nov. 27, 2006).

¹⁰³ IRS, Housing and Utilities Allowable Living Expenses, <http://www.irs.gov/businesses/small/article/0,,id=104696,00.html> (last visited Dec. 27, 2006).

than the amounts designated by the tables, but since the national standards are for collection from delinquent taxpayers, the allowances are not generous.

To these standardized tables the debtor may add to the food and apparel categories amounts up to five percent “if it is demonstrated that it is reasonable and necessary.”¹⁰⁴ In addition the debtor may deduct “the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service.”¹⁰⁵ The most likely examples include health insurance and disability insurance. Also, “all priority claims (including priority child support and alimony claims) shall be calculated.”¹⁰⁶ Domestic support obligations are a first priority expense.¹⁰⁷ The “domestic support obligation” is broadly defined to include what formerly was singled out as property settlement in divorce, and the domestic support obligation costs.¹⁰⁸ Another deduction is allowed for charitable contributions to the debtor’s religion of choice.¹⁰⁹

The most obvious opportunity for pre-bankruptcy planning is the debt exclusion for the payment on secured debt. These are the “average monthly payments . . . [for] all amounts . . . contractually due.”¹¹⁰ Automobile installment payments and home mortgages are the items that immediately come to mind, but there is no qualifying language as to “reasonable and necessary.”¹¹¹ The most highly leveraged debtor, even if leveraged for snowmobiles, personal watercraft, entertainment centers, and the like, are the debtors who will fall below the median because of high expense deductions.

The fair conclusion is that Congress withdrew judicial discretion to determine “substantial abuse” by debtors with too much income, which it then replaced with a complex—and therefore costly to implement—formula fraught with ambiguity and opportunities to game the system.¹¹²

¹⁰⁴ 11 U.S.C. § 707(b)(2)(A)(ii)(I).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 707(b)(2)(A)(iv).

¹⁰⁷ *Id.* § 507(a)(1).

¹⁰⁸ *Id.* § 101(14A). A distribution upon divorce seems an unlikely opportunity to manipulate to the disadvantage of creditors, but it is not necessarily so. *See, e.g., In re Fordu*, 201 F.3d 693, 702 (6th Cir. 1999) (finding the debtor must forego an equitable share of lottery winnings and the marital home); *In re Hill*, 342 B.R. 183, 188 (Bankr. D.N.J. 2006) (finding a divorce settlement was actually intended to defraud a judgment creditor).

¹⁰⁹ The Bankruptcy Code recognizes the debtor’s charitable contribution and isolates the gift from a fraudulent transfer claim by the trustee. *See* 11 U.S.C. §§ 548(a)(2), 707(b)(1). Why Congress felt it should be so solicitous of creditors against victimization by profligate debtors while asking those creditors to subsidize the debtor’s church is another of the quixotic conflicts of the Bankruptcy Code.

¹¹⁰ *Id.* § 707(b)(2)(A)(iii)(I).

¹¹¹ *See id.* § 707(b)(2)(A)(ii).

¹¹² The chief lobbyist for the bankruptcy legislation, Jeff Tassey, is quoted in Peter G. Gosselin, *Judges Say Overhaul Would Weaken Bankruptcy System*, L.A. TIMES, Mar. 29, 2005, at A1, as dismissing bankruptcy judges as “part of the problem . . . [t]hey’re not real judges.”

C. Increased Costs

There are further imposed costs. An individual debtor must seek credit counseling from an approved source¹¹³ even before filing a petition, no matter which chapter is chosen for bankruptcy relief.¹¹⁴ It is curious that this obligation is imposed on all individual debtors including business debtors and professionals who are not consumers.¹¹⁵ Waiver of the obligation is possible.¹¹⁶ The counseling may be individual or group, in person or over the telephone or Internet.¹¹⁷ In fact, some small districts have no approved local provider. The obvious policy premise is that individuals contemplating bankruptcy should examine their concerns with a source that does not advocate choosing bankruptcy.¹¹⁸

The overhead cost of compliance with the income-less-expenses formula is substantial, but there are other compliance costs. For example, “payment advices”

¹¹³ The Bankruptcy Code requires the clerk of the court to provide a list of non-profit credit counseling agencies, which the United States trustee has approved. 11 U.S.C. § 111(a)(1). The list of approved counseling agencies is found on the website for the particular bankruptcy court where filing is anticipated. U.S. Dep’t of Justice, U.S. Trustee Program, List of Credit Counseling Agencies Approved Pursuant to 11 U.S.C. § 111, http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm (last visited Dec. 27, 2006).

¹¹⁴ Without counseling within 180 days of the petition, “an individual may not be a debtor under this title.” 11 U.S.C. § 109(h)(1). In addition, the debtor must file a “certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h).” *Id.* § 521(b)(1).

¹¹⁵ A court rejected a business debtor’s argument that coercing him into credit counseling when identical professionals who incorporated were immune, discriminated against him and offended his Fifth Amendment right to due process. *In re Watson*, 332 B.R. 740, 747 (Bankr. E.D. Va. 2005). Also, an (apparent) consumer debtor choosing chapter 11 was not successful in arguing credit counseling imposed on individuals but not corporations was a denial of equal protection and due process. *Hedquist v. Fokkena*, 342 B.R. 295, 299 (B.A.P. 8th Cir. 2006) (dismissing petition for failure to provide counseling certificate without showing exigent circumstances).

¹¹⁶ The obligation “shall not apply with respect to” a debtor who resides where the United States trustee finds the counseling is not reasonably available; a debtor whom the court finds has “exigent circumstances that merit a waiver” when counseling services are not provided within five days after debtor request; or when a debtor is disabled or on military service in a combat zone. 11 U.S.C. § 109(h)(2)(A), (3)(A), (4).

The debtor obtaining a “waiver” under section 109(h)(3)(A) is really getting a deferral of thirty days after the petition, with a possible fifteen days additional. *See id.* § 109(h)(3)(B). Depending upon how individual bankruptcy courts respond, the deferral may accommodate the familiar debtor who seeks help just before the foreclosure sale.

Further, a debtor speaking Creole with limited English was not required to undergo counseling when the approved agencies could not provide a Creole-speaking counselor. *In re Petit-Louis*, 338 B.R. 132, 134 (Bankr. S.D. Fla. 2006).

¹¹⁷ 11 U.S.C. § 109(h)(1).

¹¹⁸ H.R. REP. NO. 109-31, pt. 1, at 18 (2005).

for the prior sixty days must be supplied.¹¹⁹ For the debtor who is not diligent about keeping records, a trip to the employer or the source of commissions may be required. Tax returns must be supplied.¹²⁰ Any Educational I.R.A. or 529 plan must be reported.¹²¹

The cost of legal representation has also increased in a number of ways. A direct cost is the increased burden on the lawyer whose service measure is time. The lawyer is responsible for assembling and evaluating the large number of documents now required. More significant, the lawyer must sign off on the debtor's information, putting a due diligence burden that is reflected in increased fees.¹²² Some burdens seem pointless, such as the notice the attorney for the debtor must provide that duplicates the notice the clerk must provide.¹²³ Judge Thomas Waldron lists the following as some of the obligations imposed on attorneys representing a consumer debtor:

The following are merely, some, but not all, of the items which may develop in a particular court as components of "reasonable inquiry", "reasonably diligent inquiry" to obtain "reasonably sufficient information."

- Check for protection of minor child information? [§ 112]
- Review the certificate from the credit counseling agency? [§ 109(h)]
- Review the debtor notice, disclosure statement, and contract records for any audit [28 U.S.C. § 586(f)]

¹¹⁹ 11 U.S.C. § 521(a)(1)(B)(iv).

¹²⁰ *Id.* § 521(e)(2)(A)(i). Surprisingly, what qualifies as a "tax return" is not a simple question. *In re Payne* holds that a tax return signed under penalty of perjury, disclosing income and tax liability but filed six years late and after the IRS assessed the debtor for presumed tax liability, did not qualify as a return for the discharge conditions of 11 U.S.C. § 523(a)(1) because it was not an honest and genuine endeavor to satisfy the law. 431 F.3d 1055, 1057–60 (7th Cir. 2005). Section 523 was amended in 2005 to add "or equivalent report or notice" following "return." See 11 U.S.C. § 523(a)(1)(B). Also, an undesignated or "hanging paragraph" was added to define "return," but only "for the purposes of this subsection." See *id.* § 523(a). This prompted Judge Easterbrook to dissent from the imposition of an "equitable override" by the majority. See *In re Payne*, 431 F.3d at 1062 (Easterbrook, J., dissenting). If a creditor so requests, a copy of the return must be provided to the creditor. 11 U.S.C. § 521(e)(2)(A)(ii).

¹²¹ 11 U.S.C. § 521(c).

¹²² *Id.* § 707(b)(4)(C)(i)–(ii). "The going rate for low-end Chapter 7 bankruptcies ranges from \$700 to \$1,100. The added burden of the new law could add another \$1,000 or so to those fees, bankruptcy lawyers predict." Terry Carter, *The Exodus Begins: Lawyers Wonder Whether Chapter 7 Will Be a Viable Practice Area under New Law*, A.B.A. J., June 2005, at 12.

¹²³ Compare 11 U.S.C. § 342(b), with *id.* § 521(a)(1)(B)(iii). The debtor must be told of the "general purpose, benefits, and costs" of the different bankruptcy chapters and warned of the consequences of fraudulent concealment. *Id.* § 342(b).

- Review the creditor communications and notice issues [§ 342]
- Review all the required § 521 documents and actions [There is a lengthy list of required documents, which must be timely filed, and actions, which must be timely taken, and, in the absence of an order, granting additional time or excusing compliance, failure to timely complete these filings or take these actions often results in dismissal or conversion. Additionally, such failures expose counsel for an assisted person to liability. § 526(c)(2)(b).]
- Review any required “first day” consumer orders
- Conduct a consumer conflict check
- Consider separate filings, under separate chapters for related consumer debtors and obtain any consumer informed consents and/or waivers
- Examine the appropriate state or federal exemptions [§ 522(b)]
- Conduct a local search for any prior filings and dismissal orders? [§§ 109(g) and (h), 362(d), (e), (g), (h), & (k), 727(a)(8) & (11), 1328(f) & (g)]
- Conduct a national PACER search for any prior filings and dismissal orders? [§ 109(g) and (h), 362(d), (e), (g), (h), & (k), 727(a)(8) & (11), 1328(f) & (g)]
- Obtain an Internet asset search
- Obtain a report from a credit agency
- Obtain a local land record search
- Obtain a local U.C.C. search
- Obtain available IRS records, assessments and judgments¹²⁴

Then there is the “scarlet letter”¹²⁵ imposed on each lawyer as a “debt relief agency.” The designation of “debt relief agency” must be disclosed by every lawyer who gives bankruptcy advice to a consumer client whose income is below \$150,000.¹²⁶ The Code recommends the following disclosure: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” *Id.* § 528(a)(4).¹²⁷ As discussed above, the designation is required of all

¹²⁴ Judge Thomas F. Waldron, U.S. Bankr. Court, Ethics: Swearing Contest—Certifications of Information and Other Ethical Quandaries of the New Law, Remarks at the American Bankruptcy Institute Winter Leadership Conference, 120105 ABI-CLE 261, 284–85 (Dec. 3, 2005) (bracketed information in original).

¹²⁵ This phrase comes from the classic American novel, NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850), in which Hester Prynne must wear a letter “A” upon her gown in colonial Massachusetts to signify her adultery as part of a Puritan code to deter conduct by creating shame.

¹²⁶ 11 U.S.C. §§ 101(3), 101(4A), 101(12A), 526–528.

¹²⁷ The United States Bankruptcy Court for the Southern District of Georgia denied that attorneys who engaged in regular law practice were subject to the label. *In re Attorneys at Law & Debt Relief Agencies*, 332 B.R. 66, 71 (Bankr. S.D. Ga. 2005).

lawyers who might touch bankruptcy.¹²⁸ It is no surprise that some lawyers choose to find a different practice.¹²⁹

The attorney cannot simply tell the debtor to assemble the data and do the math. Neither can the attorney slough it off as a problem for the paralegal.¹³⁰ The attorney for the debtor must certify accuracy of the schedules.¹³¹ If the court, on its own motion, as well as on motion by a party in interest, finds that Federal Rule of Bankruptcy Procedure 9011 has been violated, the court may impose civil penalties against the attorney.¹³² The obvious solution for the financially strapped debtor is self-representation.

Pro se bankruptcy drops the cost of lawyering, but the new law is salted with little land mines making the savings foolish and deceptive. One obligation that particularly confounds many pro se debtors is the requirement to obtain credit counseling within six months *before* filing bankruptcy.¹³³ The obligation may be deferred upon the proper application by the debtor, but the uncertainty is the form the application must take: certification or not? The term is not defined. Title 28 describes a “certificate” as part of a “sworn declaration, verification, certificate,

¹²⁸ See *supra* note 69 and accompanying text.

¹²⁹ Carter, *supra* note 122, at 12–13 (explaining that non-lawyer petition preparers abound, bankruptcy will be limited to boutique firms, and firms are revising their prior practice of doing bankruptcy as a pro bono activity).

¹³⁰ Stuart A. Gold, Ethics: Swearing Contest—Certifications of Information and Other Ethical Quandaries of the New Law, Remarks at the American Bankruptcy Institute Winter Leadership Conference, 120105 ABI-CLE 235, 247–51 (Dec. 3, 2005) (stating an attorney’s professional responsibility is to supervise the accuracy of the paralegal).

¹³¹ 11 U.S.C. § 707(b)(4)(C)(i) (requiring certification the attorney has made a “reasonable investigation”); *id.* § 707(b)(4)(C)(ii)(I) (requiring certification that the petition is “well grounded in fact”); *id.* § 707(b)(4)(D) (requiring certification that the “attorney has no knowledge after inquiry” that the schedules and petition contain incorrect information).

¹³² *Id.* § 707(b)(4)(A)–(B). Rule 9011 set out the representations to the court implied by the petition. FED. R. BANKR. PROC. 9011(b)(1)–(4).

¹³³ 11 U.S.C. § 109(h); see, e.g., *In re Henderson*, 339 B.R. 34, 36 (Bankr. E.D.N.Y. 2006) (holding the need of a pro se debtor to find an attorney is not an exigent circumstance); *In re Thomas*, No. 06-10242, 2006 Bankr. LEXIS 362, at *1 (Bankr. D. Kan. Mar. 14, 2006) (holding a pro se debtor’s certificate failed to describe exigent circumstances and an effort to seek counseling); *In re Mingueta*, 338 B.R. 833, 835 (Bankr. C.D. Cal. 2006) (holding the unsubstantiated request for a waiver by a pro se debtor who failed to respond to an order to show cause justified dismissal); *In re Ashley*, No. 06-10072-SSM, 2006 Bankr. LEXIS 354, at *1 (Bankr. E.D. Va. Feb. 8, 2006) (demonstrating a pro se debtor’s claim of ignorance about the counseling requirement did not satisfy a certificate for exigent circumstances); *In re Valdez*, 335 B.R. 801, 802 (Bankr. S.D. Fla. 2005) (holding a pro se debtor’s ignorance of the requirement is not an excuse; the exigent circumstances must be what precludes counseling); *In re Monteiro*, No. 05-85018, 2005 Bankr. LEXIS 2695, at *1 (Bankr. N.D. Ga. Oct. 31, 2005) (dismissing a pro se debtor’s assertion that she had a complicated case and found credit counseling futile in the past as not complying with the required certification to waive counseling).

statement, oath, or affidavit” as being a writing that is subscribed under penalty of perjury.¹³⁴ The pro se debtor who errs faces more than the cost and burden of re-filing with the correct documents. The repeat filer is punished by termination of the automatic stay within thirty days if another case was filed within the prior year.¹³⁵ Some courts have ruled dismissal is the required action if the debtor failed to obtain the required counseling and the request to waive the requirement is denied. The effect is to trigger the sanction of no automatic stay after thirty days if the dismissed debtor refiles.¹³⁶ But if the required counseling certificate is missing, the petition may be declared void rather than dismissed. The effect may be to finesse the sanction arising from a prior petition that is dismissed.¹³⁷ In another case, the court denied a motion to reconsider denial of an extension of time for credit counseling.¹³⁸ The court ruled a petition filed without the required counseling is a nullity, therefore it does give rise to a case and does not initiate the automatic stay.¹³⁹ The question was certified to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A)(i) (2000). Debtors could seek help from a petition preparer, regulated by the Bankruptcy Code, but at least one court found that unworkable.¹⁴⁰

¹³⁴ 28 U.S.C. § 1746; *see, e.g., In re Mingueta*, 338 B.R. 833, 837 (Bankr. C.D. Cal. 2006) (holding an unsubstantiated request for a waiver by a pro se debtor cannot be considered); *In re Miller*, 336 B.R. 232, 240 (Bankr. W.D. Pa. 2006) (stating a fax from an unpaid agency is not a certificate, treating it as a motion to extend time, and noting that the agency can receive a reasonable fee as an administrative expense); *In re Hubbard*, 333 B.R. 373, 375–76 (Bankr. S.D. Tex. 2005) (holding a sworn statement must comply with 28 U.S.C. § 1746); *In re La Porta*, 332 B.R. 879, 881–82 (Bankr. D. Minn. 2005) (holding the statement must be made under penalty of perjury); *cf. In re Graham*, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005) (stating the motion must be signed by the debtor but need not comply with 28 U.S.C. § 1746); *In re Childs*, 335 B.R. 623, 625 (Bankr. D. Md. 2005) (holding the certification need not be under oath); *In re Talib*, 335 B.R. 417, 420 (Bankr. W.D. Mo. 2005) (holding a certification under penalty of perjury is not required); *In re Cleaver*, 333 B.R. 430, 434 (Bankr. S.D. Ohio 2005) (finding a motion signed by the debtor and debtor’s attorney to be sufficient).

¹³⁵ 11 U.S.C. § 362(c)(3).

¹³⁶ *See, e.g., In re Tomco*, 339 B.R. 145, 156, 159 (Bankr. W.D. Pa. 2006); *In re Ross*, 338 B.R. 134, 136 (Bankr. N.D. Ga. 2006); *In re Wallert*, 332 B.R. 884, 889 (Bankr. D. Minn. 2005) (finding a missing counseling certificate is cause for dismissal); *In re Laporta*, 332 B.R. 879, 882 (Bankr. D. Minn. 2005).

¹³⁷ *See, e.g., In re Rios*, 336 B.R. 177, 178 (Bankr. S.D.N.Y. 2005) (arguing dismissal would result in an automatic stay limit under section 362(c)(3), a result Congress did not intend); *In re Valdez*, 335 B.R. 801, 804 (Bankr. S.D. Fla. 2005) (holding dismissal is “without prejudice”); *In re Hubbard*, 333 B.R. 377, 388 (Bankr. S.D. Tex. 2005) (stating that, without a certificate, no case is commenced by filing within section 301).

¹³⁸ *In re Salazar*, 339 B.R. 622, 623 (Bankr. S.D. Tex. 2006).

¹³⁹ *Id.* at 624.

¹⁴⁰ *See In re Payton*, 338 B.R. 899, 902 n.6 (Bankr. D.N.M. 2006) (“The Debtors were assisted in preparing and filing their case by a bankruptcy petition preparer. How the

An especially confusing concept centers on exemptions which would vex a skilled and experienced specialist and baffle the pro se debtor. The policy choice to defer to state law has operated for many years.¹⁴¹ The debtor may choose the exemption law of the applicable state or the federal exemptions listed in section 522(d), “unless the state law . . . specifically does not so authorize.”¹⁴² About three-quarters of the states, including Utah, have so declared, making the federal list of exemptions not available to debtors in those states. The twist that Congress added in 2005 is to apply the state exemption law where the debtor has resided for the 730 days prior to the petition. However, if the debtor has not resided in a single place, then the exemption of the state where the debtor has resided the longest in the 180 days prior to the 730 days applies, and if there is no such state, the federal exemption list is the backup choice.¹⁴³

The mandated filing of documents and certification carries a sanction of automatic dismissal,¹⁴⁴ a new concept that is confusing to the courts.¹⁴⁵ These extensive and often confusing requirements effectively prevent many less-wealthy consumers from utilizing bankruptcy protection.

III. CONCLUSION

Bankruptcy is not available to some consumer debtors. So what? There is no constitutional entitlement to bankruptcy relief. *United States v. Kras* held that imposition of a filing fee was not a denial of due process.¹⁴⁶ Congress created a

Debtors could have elected to reaffirm the debt on their mobile home and ‘retain and pay’ on the vehicles absent some fairly explicit legal advice from the petition preparer is not at all clear to the Court. What is clear is that the Congressional policy of expecting petition preparers to aid debtors without providing legal advice is completely unworkable.”).

¹⁴¹ See 11 U.S.C. § 522(b)(2).

¹⁴² *Id.* § 522(b)(2).

¹⁴³ *Id.* § 522(b)(3).

¹⁴⁴ See *id.* § 521(i)(1) (“[I]f an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) [statements and certificates other than tax returns and statements of intention] within 45 days of the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.”). As discussed in *supra* note 45–49 and accompanying text, the “automatic” description of the dismissal is questioned because a creditor can “request the court to enter an order” and the court must comply within five days. *Id.* § 521(i)(2). The court can give limited extension to avoid dismissal. *Id.* § 521(i)(3)–(4).

¹⁴⁵ See, e.g., *In re Fawson*, 338 B.R. 505, 510–11 & n.11 (Bankr. D. Utah 2006) (discussing the interplay between §§ 521(i)(1) and 521(i)(2) and finding the court is without discretion or authority to enter an extension if not requested within forty-five days). The court urged attorneys for confused debtors to file notices, for example, when no payment advices are received because the debtor is unemployed. *Id.* at 507 n.4.

¹⁴⁶ 409 U.S. 434, 450 (1973). Congress has since allowed a bankruptcy petition *in forma pauperis*. See 28 U.S.C. § 1930(f).

bankruptcy law that excludes redress elsewhere.¹⁴⁷ It may not withhold access to redress in an arbitrary and capricious way. At what point does the policy of *Boddie v. Connecticut* apply, that having established the only forum for legal redress, access to it may not be arbitrarily refused?¹⁴⁸ Imagine the single individual, perhaps living with parents so that deductible expenses are low, who unexpectedly loses a well-paying job. Since “current monthly income” is a six-month average, the individual may exceed income tables and be ineligible for chapter 7 because abuse is presumed by section 707(b)(2).¹⁴⁹ The debtor is without employment now so cannot qualify for chapter 13 because the debtor lacks the required regular income to satisfy the requirements of sections 109(e) and 101(30).¹⁵⁰ Or, imagine the high-income debtor who can—and should—be obligated to pay creditors. Chapter 7 may be denied but so is chapter 13 because the debt threshold of the chapter is exceeded.¹⁵¹ Chapter 11 is the obvious answer but the debtor may be denied the recognition of exempt assets that apply in the other chapters because creditors who dissent in chapter 11 may invoke the absolute priority rule of section 1129(b)(2)(B)(ii).¹⁵²

Access may be arbitrarily barred to creditors as well. An example is the change to discharge in section 1328(a)—the now-compulsory chapter 13—expanding the debts, which are not excepted from discharge.¹⁵³ The creditor must take action for the court to rule on these within strict time limits.¹⁵⁴ Federal Rule of Bankruptcy Procedure 4007 sets that limit as shortly following the first meeting

¹⁴⁷ See, e.g., *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1204 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 397 (2005) (holding the preference recovery provision of the California assignment for the benefit of creditors statute was preempted by the Bankruptcy Code).

¹⁴⁸ 401 U.S. 371, 380–81 (1971) (holding due process requires fair access to the only forum available for redress of a grievance by way of divorce, so a mandatory filing fee to obtain a divorce injured a class of poor claimants).

¹⁴⁹ See 11 U.S.C. § 707(b)(2).

¹⁵⁰ See *id.* §§ 109(e), 101(30).

¹⁵¹ Section 109(e) confines chapter 13 to individuals with regular income whose fixed security debt is under \$922,975 and whose fixed unsecured debt is under \$307,675. See *id.* § 109(e).

¹⁵² See, e.g., *In re Gosman*, 282 B.R. 45, 52–53 (Bankr. S.D. Fla. 2002) (denying plan confirmation where debtor retained exempt property and creditors objected to the plan); *cf. In re Fross*, 258 B.R. 26, 29–30 (B.A.P. 10th Cir. 2001), *aff'g reversal per curiam of* 220 B.R. 405 (Bankr. D. Kan. 1998) (holding the retention of a homestead did not offend absolute priority); *In re Henderson*, 341 B.R. 783, 790 (M.D. Fla. 2006) (allowing debtor to retain the homestead, an insurance policy, and an individual retirement account with a fair market value of over \$3.5 million); *In re Egan*, 142 B.R. 730, 733 (Bankr. E.D. Pa. 1992) (allowing exemptions where no creditors raised a timely objection and the statutory criteria were met).

¹⁵³ See 11 U.S.C. § 1328(a).

¹⁵⁴ *Id.* § 523(c).

of creditors set in section 341 of the Bankruptcy Code.¹⁵⁵ Yet Congress has made the discharge hearing for the chapter 13 debtor at the end of the plan, generally a five-year period.¹⁵⁶

In short, as noted by one commentator, the recent changes to the Bankruptcy Code have had some inequitable effects:

There is no doubt that bankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law. At the same time, other debtors, often the higher income individuals the bill was ostensibly aimed at, will find themselves better off than before because of generous new exemptions for retirement and education savings accounts and a means test which can be turned to the debtor's advantage, in both Chapters 7 and 13, by the careful planning that only higher income debtors can afford.¹⁵⁷

Speculating on the proper construction of the silly conundrums that result from Congress playing the inept puzzle master misses the point. Denying access to bankruptcy imposes the cost of a fundamental asset—release from the shackles of taking risk in a market legal order. The leading American legal historian James Willard Hurst referred to the “release of individual creative energy” from the positive use of law as distinctive to America.¹⁵⁸ More particular to the use of bankruptcy, he observed:

Bankruptcy law began mainly as a protection to creditors against the dishonesty of debtors. But by mid-nineteenth century, both in national bankruptcy laws and in state insolvency legislation, the trend of policy was as much to provide means by which debtors might be saved from irretrievable ruin and salvaged as venturers who might yet again contribute productively to the market.¹⁵⁹

¹⁵⁵ Rule 4007 was amended by 2005 US Order 05-48 (C.O.48) and US Order 05-42 (C.O.42). The substance, however, remained the same. *See* FED. R. BANKR. PROC. 4007.

¹⁵⁶ *See* 11 U.S.C. § 1325(b)(1)(B). Section 1325(b) requires payment of “projected disposable income” for the “applicable commitment period” which is, if the debtor’s income is above the median, not less than five years. *Id.* § 1325(b)(4)(A)(ii).

¹⁵⁷ Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 AM. BANKR. L.J. 191, 191 (2005).

¹⁵⁸ *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 6 (1964).

¹⁵⁹ *Id.* at 26.

Those who studied the use of bankruptcy since American independence agree that these are the values at issue.¹⁶⁰ In another context, middle-east analyst Thomas Friedman points to the perils of our current myopic vision:

We Americans often forget what an incredibly open, say-anything-do-anything-start-anything-go-bankrupt-and-start-anything-again society the United States is. There is no place like it in the world, and our openness is a huge asset and attraction to foreigners, many of whom come from countries where the sky is not the limit.¹⁶¹

Congress has sought to exclude the few miscreant debtors with a bungled zeal that denies access to the many who truly are shackled by debt. Congress has lost sight of what bankruptcy is about.

¹⁶⁰ See, e.g., EDWARD J. BALLEISEN, NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA 222 (2001) (discussing how the experience of middle-class individuals with the law of 1841 helped to transform American businesses from small proprietorships to large enterprises, especially in life insurance); KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 94 (1997) (stating reintegration of the risk taker is essential to commercial good); BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 2 (2002) (focusing upon financial distress at the end of the eighteenth century and the Bankruptcy Act of 1800, and stating that “[w]hether a society forgives its debtors and how it bestows or withholds forgiveness are matters of economic and legal consequences. They also go to the heart of what a society values”); F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW, especially ch. XI (William S. Hein & Co. 2003) (1919) (explaining that the moral foundation of bankruptcy law is to extend humanity to the misfortunate victim of a barter society); DAVID A. SKEEL JR., DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 16 (2001) (noting the continual tension between creditors’ interest in collection and a debtor’s release from debt characterizes the public debate over bankruptcy law); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 144 (1935) (discussing that the debate over the bankruptcy laws shows continual expansion of the protection of consumers and producers against the obligation of contracts).

¹⁶¹ THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 248 (2005) (stating the new world of communication flattens national borders and empowers individuals in ways that enable more scientifically and technically focused societies to be more successful than America, particularly India and China).