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The Locus of Lawmaking: Uniform State Law, Federal Law, and Bankruptcy Reform

by

Edward J. Janger*

The common theme of these Articles is institutional comparison. Professors Carruthers and Halliday compare the politics of bankruptcy legislation in the United States in 1978 and in England in 1986. Professor Block-Lieb, here, and in her other work, compares the costs of political failure with the costs of market failure, maintaining a particular focus on the federal system.¹ My assignment is to compare federal bankruptcy lawmaking with the state uniform law process. The United States law of debtors and creditors, like most United States commercial law, is characterized by a jurisdictional split between uniform state law, nonuniform state law and federal law.² Bankruptcy law operates against the background of state lien law contained in Article 9 of the Uniform Commercial Code (UCC) and the state law of real

*Associate Professor of Law, Brooklyn Law School; J.D. 1987 University of Chicago; B.A. 1983 Yale College. I would like to thank Bob Lawless for inviting me to participate in the 2000 Annual Meeting of the Debtor-Creditor Section of the American Association of Law Schools where this paper was originally presented. I would also like to thank Dean Nancy Rapoport, Paul Schwartz and Susan Block-Lieb for helpful comments on an earlier draft, and Neil Cohen and Paul Shupack for helpful insights into the Article 9 revision process. Finally, I would like to thank Tally Wiener for essential and extraordinary research assistance, without which it would have been impossible to complete this article. Mistakes are, of course, mine alone.

¹See Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 9 ARIZ. L. REV. 80 (1997); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy* (unpublished manuscript, on file with author).

²In addition to the division between federal bankruptcy law and the state law of debt collection, Articles 3, 4, and 4a of the Uniform Commercial Code govern the payment system on the state law side, see U.C.C. § 3-102 (1999) and cmt.1; U.C.C. § 4-101 cmt.3 (1990), while Federal laws governing the payment system include the Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010 (1999), Regulation CC, 12 C.F.R. § 229 (1999), and the Electronic Fund Transfer Act (EFTA), 15 U.S.C. §§ 1693-1693r, 1693(b) (1999) (which "provide[s] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems" with the "primary objective of . . . provid[ing] individual consumer rights"), and the regulations issued by the Board of Governors of the Federal Reserve System to implement EFTA, 12 C.F.R. § 229.1(a) (1999). See also Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667(e) (1999), and Reg Z, 12 C.F.R. 226 (1999). A similar split exists in the area of securities law where Article 8 of the UCC shares the field with the federal Securities Act of 1933, 15 U.S.C. § 77a (1999) (1933 Act), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1999) (1934 Act).

estate mortgages. State lien law exists, to a large extent (*Lopez*³ notwithstanding), by federal sufferance.⁴ Where, as a policy matter, should the jurisdictional line be drawn?

In seeking to answer that question, my focus will not be on *substantive* law but on the relative strengths and weaknesses of the respective lawmaking processes. In order to facilitate a focus on political institutions, I will assume market failure.⁵ This assumption is at least plausible in the bankruptcy context. Markets are pretty good at allocating resources, but markets sometimes fail. In the business bankruptcy area, insolvency of an entity with widely disbursed creditors creates a collective action problem that often leads to inefficient liquidations.⁶ On the consumer bankruptcy side the market imperfection is much simpler. A significant number of American citizens seem to think that it makes rational economic sense to use a credit card with an interest rate of twenty percent, to borrow money to play games of chance where the house is guaranteed to win.⁷ Worse yet, the consumer credit industry seems to think that it makes rational economic sense to provide the credit cards that make such behavior possible.⁸

³United States v. Lopez, 514 U.S. 549, 559 (1995) (holding that Congress exceeded its regulatory power under the Commerce Clause in enacting the Gun-Free School Zones Act of 1990 because possession of a gun in a school zone is not an activity that "substantially affects interstate commerce").

⁴See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (holding that public accommodations provisions of the Civil Rights Act of 1954 were valid under the Commerce Clause because "the power of Congress to promote interstate commerce also includes the power to regulate local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce").

⁵Economists often assume market perfection. I majored in political science and, therefore, feel justified in assuming market imperfection.

⁶See Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738, 749-50 (1988) ("Because bankruptcy is a collective proceeding, the bankruptcy judge has the power in some cases to bind nonconsenting parties. Without such a power, there would be no way to overcome the collective action problem that is the justification for bankruptcy in the first instance."); Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 183-84 (1987). See also THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 7-19 (1986).

⁷See *Internet Games of Chance: The Growth of Gambling in Cyberspace is 'Exploding,' which Points Up the Need for Creative Regulation*, SAN FRANCISCO EXAMINER, Jan. 18, 2000, available in 2000 WL 6158088 ("In the next two years, [casino] revenues [from Internet gambling] are expected to nearly triple from \$1.2 billion last year to \$3 billion by 2002. . . . An estimated 14.5 million people have gambled on line. Most of them were Americans using credit cards."). SMR Research Corp. of Hackettstown, N.J. studied the frequency of bankruptcies in counties with legalized casino gambling.

SMR examined 1996 bankruptcies and found that the filing rate in 2,844 counties with no casinos was 3.96 per thousand. In 298 counties with legalized gambling within their borders, the rate was 4.67 per thousand. And 23 counties with five or more casinos had a bankruptcy rate of 5.33 per thousand.

"We don't actually have a problem with the (gambling) industry, but the odds favor the house," said Stu Feldstein of SMR Research. "Outside the gambling industry itself, does anyone really think that increased gambling helps consumers' bill-paying ability more than it hurts?" Joyce Smith, *When Luck Runs Out*, KANSAS CITY STAR, Jan. 9, 2000, available in 2000 WL 7719859.

⁸See Douglas Holt, *Gaming Chief Urges Session on Problem Gambling: Casino Loans, ATMs Among*

If these market imperfections need to be corrected—that is, the benefits of correction exceed its costs—which is the best political institution to do this?

I don't write on a completely blank slate. I have written two previous articles that bear on the topic, one focusing on the public choice of bank insolvency law,⁹ and the second examining the Article 9 revision.¹⁰ To oversimplify the conclusions of those two prior pieces, (1) the federal lawmaking process is better at making most distributive choices than the uniform and nonuniform state lawmaking processes;¹¹ and (2) early solicitation of participation by interested groups in the federal lawmaking process may improve the results of federal lawmaking.¹²

A few years ago, bankruptcy reform looked like an excellent opportunity to prove up these two theories. The National Bankruptcy Review Commission was gathering public input and making recommendations, seeking, as the report of the Commission later stated, "balance."¹³ The Commission itself contained a broadly representative mix of members and advisers, from the

Issues on Table, CHI. TRIB., Jan. 20, 2000, available in 2000 WL 3628397 ("Gambling critics recently have focused on the easy availability of cash as a contributor to compulsive gambling.").

⁹Edward J. Janger, *The FDIC's Fraudulent Conveyance Power Under the Crime Control Act of 1990: Bank Insolvency Law and the Politics of the Iron Triangle*, 28 CONN. L. REV. 67 (1995) [hereinafter Janger, *Iron Triangle*].

¹⁰Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998) [hereinafter Janger, *Article 9 Revision*].

¹¹See *id.* at 593. Other scholars have noted the difficulty that the uniform law process faces in addressing distributive questions. Most recently, Linda Rusch has detailed the difficulties faced by the drafting committee for Revised Article 2 in addressing the concerns of consumer groups and manufacturers. Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search For Balance*, 52 SMU L. REV. 1683 (1999). See also, James J. White, *Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 219, 222 (1997) (arguing that the lack of consensus regarding the rules contained in the Article 9 (and Article 2) revisions creates a significant risk that the proposed revisions will not achieve uniform adoption); William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 CORNELL L. REV. 1511, 1522 (1997) ("Enactability has confined the work product of the UCC revision process, and usually counsels restraint in moving too far from the perceived status quo. Enactability operates as the great leveling agent in the reform process; the need for enactability means that nothing too controversial can be included in the UCC or some states will balk and thereby defeat the uniformity that is so central to the validity of this unusual legislative process" (citation omitted)). See also Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, U. ILL. L. REV. 321, 327 (1962) ("Not only were conservative tendencies present during the drafting; they were visible on the horizon at the legislative stage. The draftsmen and the members of the sponsor organizations knew that to draft a dead-letter bill would accomplish nothing. The Code had to be enacted . . .").

¹²See Janger, *Iron Triangle*, *supra* note 9, at 105 n.128.

¹³See NATIONAL BANKR. REV. COMM'N FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS, i-ii (October 20, 1997) [hereinafter NBRC REPORT]. According to the preface to the NBRC REPORT: "The recommendations [of the Commission] are as diverse as the bankruptcy system itself, but they have been designed with a common theme: to improve the integrity, the accountability and the efficiency of that system. Above all else, the recommendations address the need to maintain—and, in some instances, to restore—balance. A bankruptcy system that does not balance the interests of creditors and the interests

reporter, Professor Elizabeth Warren, to Judge Edith Jones.¹⁴ Numerous public hearings were planned, and ultimately held.¹⁵

Well theory isn't everything, or more to the point, "better" can still leave us a very long way from perfect. The Commission Report has proven controversial, and oddly, did not form the basis for much of what subsequently materialized as the Bankruptcy Reform Acts before Congress in 1998, 1999 and 2000.¹⁶ Indeed, as bankruptcy reform unfolded, I began to believe that it had been created for the sole purpose of giving a black eye to my scholarly project. My concern grew as conversations at conferences began to run like this: "I really liked your uniform law piece - except for that ridiculous (positive) stuff you said about federal lawmaking process." Here, I take some time to reflect more carefully upon and to perhaps rehabilitate the federal lawmaking process (if not the Bankruptcy Reform Act).¹⁷

Broadly speaking, my thesis is that the relative strengths and weaknesses of the federal and uniform state lawmaking processes can be traced to the differences between government by consensus and government by minimum-winning-coalition and the resulting capacity/incapacity of the institution to assimilate conflict.¹⁸ As we proceed, however, it is crucial to pay close attention to the baseline, and to recall Winston Churchill's famous observation that "Democracy is the worst form of government except all [the others]."¹⁹ The baseline here is not perfection, but the various alternative forms of rulemaking: federal law, state law, uniform state law, judicial rulemaking, and the old standby, unregulated markets. Also, it is important to recognize that the most socially useful aspect of an institution may not be its most

of debtors will have neither their confidence nor, of even greater importance, the confidence of the American people." *Id.*

¹⁴Compare Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. REV. 177, 180 (1999) [hereinafter Jones & Zywicki, *Means-Testing*] ("The recent rise in personal bankruptcies has been significantly influenced by a decline in the personal shame and social stigma traditionally accompanying bankruptcy, and by changes in the law and legal practice that have facilitated filing bankruptcy."), with Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1101 (1998) ("Better health insurance coverage, limits on credit solicitations, and better consumer credit disclosures might help more families use credit wisely, which would help them survive the financial pitfalls many will encounter. . . . [A] decline in [bankruptcy filing] rates is good only if it is a sign that fewer families are failing.").

¹⁵See NBRC REPORT, *supra* note 13, at ix.

¹⁶H.R. 833, 106th Cong. (1999); S. 625, 106th Cong. (1999). See *infra* note 17 for dates of passage of these bills.

¹⁷This article was originally presented at the Annual Meeting of the American Association of Law Schools on January 7, 2000. S. 625 passed the Senate on February 2, 2000 by a vote of 83-14. H.R. 833 passed the house by a vote of 313-108 on May 5, 1999. As of this writing, the bill is in conference, as the two houses seek to resolve the differences between the bills.

¹⁸See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 75 VA. L. REV. 275, 283-85 (1988).

¹⁹The exact quote is: "Democracy is the worst form of government except all those other forms that have been tried from time to time." Winston Churchill, Address to the House of Commons (Nov. 11, 1947), in INTERNATIONAL THESAURUS OF QUOTATIONS 231 (1970).

attractive.²⁰

I. UNIFORM STATE LAW AND THE ARTICLE 9 REVISION

In my Iowa article,²¹ I suggested that uniform state law (in the form of the UCC) is a wonderful institution for addressing the mechanics of commercial transactions but that it is not well equipped to deal with rules that raise distributive issues (such as, to name just two, consumer protection, or allocating the costs associated with conquering the race of diligence). To flesh out the argument a little, I argued that there are two paradigmatic situations where uniform state law will not work well. First, uniform state law should *not* be used to promulgate rules where interest group theory²² would predict capture of the uniform law process or of state legislatures.²³ This is most likely where a proposed rule is distributive and there is an asymmetric allocation of power among interested groups. The classic example in the literature is military expenditures, where the defense industry reaps a concentrated benefit, and we all pay a small fraction of the cost.²⁴ Second, I argued, uniform state law should *not* be used to promulgate rules which would be likely to be subject to a race to the bottom, if left to the nonuniform state lawmaking process.²⁵ These concerns arise where a rule creates the possibility of either intrafirm or interstate externality. The classic example of a rule that creates an intrafirm externality is, arguably, a poison pill that allows corporate managers to insulate themselves from the market for corporate control at the expense of shareholders.²⁶ The classic example of an interstate externality is Delaware, a small state, which is said to benefit from the enactment of liberal corporate enabling laws, while exporting the costs of such laws to

²⁰Otto von Bismarck is often quoted as saying "If you like law and sausages, you should never watch either one being made." RESPECTFULLY QUOTED 190 (Suzy Platt ed., 1992).

²¹Janger, *Article 9 Revision*, *supra* note 10.

²²What I refer to here as "interest group theory" is sometimes referred to as "public choice" theory. For an excellent and accessible review of the literature, see KENNETH A. SHEPSLE AND MARK S. BONCHER, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR AND INSTITUTIONS* (1997). Here, I am specifically referring to the insights that follow from the insight, first articulated by Mancur Olson in his book, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965), that political participation is a "public good" and likely to be undersupplied where the costs or benefits of a particular political action are dispersed widely.

²³See Janger, *Article 9 Revision*, *supra* note 10, at 593.

²⁴See Janger, *Iron Triangle*, *supra* note 9, at 68-70; GORDON ADAMS, *THE IRON TRIANGLE* 15 (1981) ("A powerful flow of people and money moves between the defense contractors, the Executive Branch (DoD and NASA), and Congress, creating an 'iron triangle' on defense policy that excludes outsiders and alternative perspectives.").

²⁵See Janger, *Article 9 Revision*, *supra* note 10, at 588-91.

²⁶Cf. Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1462-63 (1992) [hereinafter Bebchuk, *Federalism*].

other states.²⁷

When a uniform law implicates any of these concerns, there is reason to believe that federal or nonuniform state legislation will produce more efficient and more equitable rules.²⁸ This is because the desire for uniform adoption creates a troublesome dynamic. Even if the uniform law process is not captured, the drafters may be forced to anticipate the capture of state legislatures, and adopt the "captured" rule. As such, even an uncaptured uniform law process might unwittingly, or even against its will, become an instrument of capture.²⁹ Similarly, wherever a race to the bottom³⁰ might cause states to deviate from the uniform rule, the uniform law drafters, again seeking uniform and universal adoption, will be forced to anticipate the effect of the race to the bottom in the uniform law.³¹ Thus the effect of a uniform law might be to facilitate and, indeed, effectuate a race to the bottom.

Both of these dynamics—anticipated capture and anticipated race to the bottom—were discernible in the Article 9 revision process. Anticipation of capture could be observed in connection with the debate over consumer protection. A number of controversial consumer protection provisions were included in early drafts of Revised Article 9.³² These provisions led the representatives of the consumer credit industry to "walk out" of the discussions. Ultimately, the relevant provisions were removed, in return for removal of a number of provisions that were perceived as harmful to consumers. A consumer "peace treaty" was brokered between representatives of the con-

²⁷See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 665-66 (1974) [hereinafter, Cary, *Delaware*].

²⁸There is a third category of statutes for which use of the uniform lawmaking process may not be appropriate. In some instances the existence of a race to the top will counsel against use of the uniform law process. There, actual state competition may be preferable to anticipated state competition. See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 140 (1996) ("A decentralized decision-making process normally can produce more possible solutions to a problem than could a single rulemaker."). See also F. Stephen Knippenberg & William J. Woodward, Jr., *Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda*, 45 BUS. LAW. 2519, 2524 (1990). In these instances, the benefits of competition must be weighed against the benefits of uniformity. Where commercial law is involved, however, the need for uniformity is paramount, and the relevant choice is between uniform state law and federal law.

²⁹See Janger, *Article 9 Revision*, *supra* note 10, at 584-88.

³⁰See generally Bebchuk, *Federalism*, *supra* note 26; Cary, *Delaware*, *supra* note 27, at 663; David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in European Communities*, 32 HARV. INT'L L.J. 423 (1991); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987); Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545 (1984).

³¹Anticipation of a race to the top may be a strength of the uniform law process. On the one hand, if the top can be identified, then its inclusion in a uniform law will encourage its uniform adoption. On the other hand, adoption of a uniform law may prevent states from competing by locking in a suboptimal rule.

³²See Janger, *Article 9 Revision*, *supra* note 10, at 612-14.

sumer credit industry and consumer advocates. Neither of the "signatory groups" had votes on the drafting committee, but both could make a credible threat to oppose enactment of Revised Article 9 in the states. The substance of the treaty was that, if the agreed changes were made to Revised Article 9, the consumer credit industry would support and the consumer advocates would not oppose passage of the statute in the various state legislatures.³³

A race to the bottom may also have been "anticipated" in connection with drafting Revised Article 9's choice-of-law provisions.³⁴ Initially, the drafters rejected "state of incorporation" filing for corporate debtors, in favor of "location of the debtor" filing, out of concern that the rule would shift filing fees to Delaware. An empirical study conducted by Professor LoPucki suggested that the amount of the fee shift would be only two to three million dollars.³⁵ This amount was viewed as tolerable, and the "state of incorporation" rule was adopted.³⁶ Later, it was recognized that the "state of incorporation" rule might create conflicts with, or even override nonuniform local lien law intended to govern assets within a particular jurisdiction. This led the drafters to bifurcate the choice-of-law provisions, such that the "law of perfection" would be governed by the state of incorporation, and the "law governing the effect of perfection" would be governed by the law of the jurisdiction where the collateral was located.³⁷ Thus the drafters showed themselves to be aware of the "Delaware" problem in corporate law, and, while the drafters may not have been thinking about a "race to the bottom" in connection with the decision to bifurcate the choice of law itself, the rule that they adopted deftly eliminates the incentive to adopt nonuniform lien law in order to attract incorporations.³⁸ Similarly, the rejection of the so-called "Warren Proposal," or anything resembling it,³⁹ might be attributed, at least in part, to concern that any modification of the rule of full priority for secured credit might endanger uniform enactment.⁴⁰

³³See *id.*

³⁴"Where the collateral is ordinary goods, old Article 9 generally followed a situs ruling requiring a filing in the jurisdiction where the goods were located." See Julian B. McDonnell, *Is Revised Article 9 a Little Greedy?*, 104 COM. L.J. 241, 251 & n.21 (1999) (citing U.C.C. § 9-103(b)).

³⁵Lynn M. LoPucki, *The Article 9 Filing System: Why the Debtor's State of Incorporation Should be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577, 638-645 (1995).

³⁶Janger, *Article 9 Revision*, *supra* note 10, at 624.

³⁷Revised U.C.C. § 9-301(3) (1999), and cmt. 7.

³⁸I am grateful to Neil Cohen and Paul Shupack for sharing with me the reasons for the drafting committee's bifurcation of the law of perfection and the effect of perfection under Revised U.C.C. § 9-301. E-mail of Paul Shupack to Ted Janger dated February 27, 2000 (on file with author).

³⁹Janger, *Article 9 Revision*, *supra* note 10, at 611-12, 623. See also, Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857 (1996); Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887 (1994). But see Steven L. Schwarcz, *The Easy Case for the Priority of Secured Claims in Bankruptcy*, 47 DUKE L.J. 425 (1997).

⁴⁰See generally, Janger, *Article 9 Revision*, *supra* note 10.

II. COMPARING UNIFORM AND FEDERAL LAWMAKING

Some, but not all of these concerns are eliminated if one shifts the locus of lawmaking to the federal system. While a large literature on the power of interest groups in Congress attests to the fact that capture remains a concern at the federal level,⁴¹ two of the troublesome dynamics associated with uniform state law drafting are absent. First, anticipated capture is not a concern. Capture need only be addressed in one place. If it can be prevented in Congress, then, because federal law is self-executing, there is no concern that it will reassert itself at the state level. Second, because of preemption, there is no concern about a race to the bottom, either actual or anticipated, at least at the domestic level.⁴² If Congress speaks, states cannot overrule federal legislation. Third, the federal legislative process is more open and accessible. There is nothing comparable to the Congressional Quarterly for meetings of the American Law Institute or the National Conference of Commissioners on Uniform State Laws. Fourth, representation enhancement is possible at the federal level through the use of federal advisory committees and other forms of input.

These comparisons led me to conclude that for most distributive questions, and more specifically for the distributive questions raised by commercial law, Congress provides a better forum than uniform (or nonuniform) state lawmaking.⁴³ Be careful what you ask for. The controversy surrounding the legislation in 1998, 1999 and 2000 is well known. While means testing,⁴⁴ in some form, may be a good idea, as might accelerated procedures for

⁴¹See JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 81-105 (1997); MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965).

⁴²A race to the bottom may be a problem with regard to enactments with international effect.

⁴³See Janger, *Article 9 Revision*, *supra* note 10, at 628.

⁴⁴Section 707(b) of the Bankruptcy Code provides, in part:

After notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a *substantial abuse* of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b) (1994) (emphasis added). Means testing refers to legislation which proposes to create a presumption of "abuse" when an individual debtor files a chapter 7 petition if she has the ability to pay a certain amount of unsecured debt, thereby forcing the debtor to seek relief under chapter 13. See H.R. 833, 106th Cong. § 102 (1999); S. 625, 106th Cong. § 102 (1999). Circuit courts have set up various standards for determining when ability to pay gives rise to substantial abuse of chapter 7. See, e.g., *First U.S.A. v. Lamanna* (*In re Lamanna*), 153 F.3d, 1, 4 (1st Cir. 1998) ("Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings. . . . [A] court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease."); *Kornfield v. Schwartz* (*In re Kornfield*), 164 F.3d 778, 784 (2d Cir. 1999) ("The record depicts debtors with substantial . . . income. Most of the present debt could have been avoided and all of it can be repaid over time. This is a paradigm

small business bankruptcies⁴⁵ or limitations on extensions of exclusivity,⁴⁶ the

of the case that Section 707(b) was designed for[.]; *Green v. Staples* (In re Green), 934 F.2d 568, 572 (4th Cir. 1991) ("The debtor's relative insolvency may raise an inference [of substantial abuse]"); *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989) ("In determining whether to apply § 707(b) to an individual debtor, then, a court should ascertain from the totality of the circumstances whether he is . . . 'honest' . . . and whether he is 'needy[.]' . . . Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings."). See also NBRC REPORT, *supra* note 13, at 270-71.

⁴⁵Section 427 of the Senate Bill provides:

Section 1121 of title 11, United States Code, is amended by striking subsection (e) and inserting the following:

(e) In a small business case-

- (1) only the debtor may file a plan until after 90 days after the date of the order for relief, unless that period is
 - (A) shortened on request of a party in interest made during the 90-day period;
 - (B) extended as provided by this subsection, after notice and hearing; or
 - (C) the court, for cause, orders otherwise;
- (2) the plan, and any necessary disclosure statement, shall be filed not later than 90 days after the date of the order for relief; and
- (3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e), within which the plan shall be confirmed, may be extended only if—
 - (A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;
 - (B) a new deadline is imposed at the time the extension is granted; and
 - (C) the order extending time is signed before the existing deadline has expired.

S. 625, 106th Cong. § 427 (1999). Bankruptcy Judge Wesley Steen has suggested that these deadlines may prove impractically short:

The exclusivity period is shortened from 120 to 90 days. The proposed statute would require plan confirmation in 150 days

The deadline for filing proofs of claim (except for governmental units) is 90 days after the first meeting of creditors; creditors' meetings should occur 20-40 days after the case is filed. Therefore, the deadline for claims is frequently more than 120 days after the case is filed. Requiring the debtor to file a plan prior to the proof of claim deadline can be very counterproductive. If a plan is filed and if notices are sent out prior to the proof of claim deadline, all the cost of producing and mailing the plan will be wasted if a significant claim is subsequently filed. (In addition, the court will have wasted significant time in reviewing and in tentatively approving the disclosure statement.) A second plan must be negotiated and filed. The court will be required to review and to tentatively approve a second set of documents. Creditors will be confused by receiving two sets of plans and disclosure statements and two ballots.

More important, the government proof of claim deadline is 180 days after the order for relief. Therefore, under its present terms, the statute would require that the plan be confirmed 30 days prior to the deadline for filing government proofs of claim Therefore, under the statute as presently written and proposed, it

ham-handed way in which these proposals are implemented in the pending bills have occasioned much criticism, and have forced me to consider augmenting my model.

In comparing uniform state law to federal lawmaking, I concluded that the absence of certain characteristics of the uniform process make federal lawmaking better. Bankruptcy reform has forced me to consider whether the absence of certain characteristics of the uniform law process might make the federal lawmaking worse, or at least different. After some thought, here are some caveats that I would add, and a qualified defense of federal lawmaking.

Interest Group Participation. First, more interest groups play actively at the federal level than at the state level.⁴⁷ As a result, for better and for worse, interest group participation will more obviously condition the federal process.

Government by Minimum Winning Coalition. Second, because federal law is self-executing (that is, doesn't have to be considered and passed in all fifty states), a minimum winning coalition, or even a minimum veto-proof majority will do. By contrast, consensus is required in the uniform law process. As a result, it will not be necessary to justify each reform in terms of greater good for all (Pareto-superiority). Instead, it will be sufficient to garner the support of fifty-one percent (or sixty-seven percent if a veto is likely)

appears that government claims could be discharged even though the deadline for filing the claims has not passed

Finally, introduction of an absolute 150 day deadline creates the incentive for some parties to engage in strategic litigation rather than good faith bargaining. With an absolute deadline in effect, a party that is fully secured (perhaps over-secured) might actually find it profitable to obfuscate and delay rather than negotiate in good faith

In addition, the statute makes no provision for extension of time so that creditors can file motions to appoint a trustee or for creditors to file a plan. Theoretically, a creditor could file a plan on the 91st day, but because of the requirement for two notice periods (of 25 days each) and because of the realities of court schedules, it is unlikely that a confirmation hearing on a creditor plan could be concluded before the 151st day. Under § 1121(e), the court has authority to extend the deadline only if the *debtor* demonstrates that the court will confirm a plan. There is no authority to extend the time on motion of a creditor or a court-appointed trustee.

The court should be allowed substantial discretion to match the statute to the financial realities of each case.

Hon. Wesley W. Steen, *Analysis of Selected Business Bankruptcy Provisions of Senate Bill 625 Providing for Reform of the Bankruptcy Code*, (visited Oct. 27, 1999) <<http://www.abiworld.org/legis/bills/106anal/99apranalS625.html>> (on file with author).

⁴⁶See S. 625, 106th Cong. § 413 (1999).

⁴⁷In the bankruptcy context, there is the American Bankruptcy Institute, National Bankruptcy Conference, the National Conference of Bankruptcy Judges, the Commercial Law League, and more recently women's groups, the gun control lobby and others, in addition to the banking and other creditor interests that participate in the uniform law drafting process.

of the legislators, and perhaps substantially less of the electorate.⁴⁸ The good news, and the bad news, is that legislation can go forward in the face of tough distributive choices.

Horse-Trading. Third, since federal law is self-executing, and a minimum winning coalition will do, horse-trading among interest groups is easier and more effective.⁴⁹

Volatility. Fourth, because federal law is self-executing, and since horse-trading is possible, the federal legislative process is likely to be more volatile. If by virtue of a cobbled-together coalition, that commands a bare majority, a bill can make its way through Congress and get signed, there's no room for a rear-guard action of the sort fought by consumer interests with regard to Articles 3 and 4 of the UCC.

Dialectic Adaptation. Finally, and this softens and is a logical corollary of the previous points because federal law is self-executing, it can be corrected (or corrupted) more quickly. There have been significant amendments to the Bankruptcy Code every four to six years since 1978,⁵⁰ whereas since 1966, major revisions to articles of the UCC seem to run on a much slower ten- to twenty-year schedule.⁵¹

⁴⁸Public choice theorists James Buchanan and Gordon Tullock have noted that in a unicameral legislature where members are elected by a majority of their constituents, a minimum winning coalition (able to garner 51% of the vote in the legislature) may represent as few as 25% of the electorate (51% of the members of each district elect 51% of the members of the legislature). To the extent that the two houses of Congress represent diverse constituencies bicameralism in the federal system may increase the size of the necessary coalition, but still, legislation may not need the support of a majority of the governed in order to be enacted. JAMES BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF A CONSTITUTIONAL DEMOCRACY* 244 (1962) [hereinafter, BUCHANAN AND TULLOCK, *THE CALCULUS OF CONSENT*]. See also, WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 255 (1962). Cf. Saul Levmore, *Bicameralism: When are Two Decisions Better Than One?*, 12 INT'L. REV. L. & ECON. 145 (1992) (Pointing out that bicameralism increases the size of the minimum winning coalition only when the constituencies of the members of the two houses are diverse, but noting that bicameralism may limit the danger of cycling majorities).

⁴⁹Political theorists are divided on the merits of horse-trading. On the one hand, horse-trading may yield package deals that are good for particular groups but are not necessarily good for everybody. On the other hand, horse-trading may be efficient because it allows voters to put together packages that take into account the intensity of legislative preferences. BUCHANAN AND TULLOCK, *THE CALCULUS OF CONSENT*, *supra* note 48 at 144-45. See also, Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1279-80 (1994) ("The legislator's ability to reveal intensity of preferences, rather than mere ordinal ranking of preferences, through strategic voting and logrolling . . . allows legislatures, in a manner that more closely resembles markets than courts, to move toward Pareto optimality."); Gordon Tullock, *Why So Much Stability?*, 37 PUB. CHOICE 189-205 (1981).

⁵⁰See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

⁵¹The UCC was approved by its sponsors and the ABA in 1952, then revised in 1958, 1962, and 1966. After the initial spate of revisions, however, change has come much more slowly. Article 9 was revised in 1972, but not again until 1999. Article 8 was revised in 1977, and again in 1994. Article 6 was

III. THE POLITICS OF BANKRUPTCY REFORM

How are those differences playing out in connection with the Bankruptcy Reform Act?

A. INTEREST GROUP PARTICIPATION

First, for better or for worse, more interest-group interplay has been obvious. The influence of the consumer credit industry was apparent from the beginning, but more recently, other groups have weighed in. Law professors have taken positions on both sides of the debate over the pending statute.⁵² Bankruptcy judges, the American Bankruptcy Institute, the National Bankruptcy Conference, and the National Conference of Bankruptcy Judges have weighed in. Women's groups⁵³ and consumer groups⁵⁴ have voiced their opinion against the statute. Indeed, late in the process, advocates of gun control and abortion rights managed to propose amendments which had the potential to derail the current bill.⁵⁵

B. GOVERNMENT BY MINIMUM WINNING COALITION AND HORSE-TRADING

Second, the federal response to interest group activity has been different from the response by uniform law drafters, at least in part, because of the ability to horse-trade. In the uniform law process, balanced interest group

revised in 1989. Article 2A was approved in 1987, and substantially amended in 1990. Article 3 was revised in 1990. See ALI & NCCUSL, UNIFORM COMMERCIAL CODE III (1999). A sixth concern is that we lose the benefit of anticipated state competition in those situations where such competition would lead to identification and promulgation of efficient rules.

⁵²Numerous letters in response to the Bankruptcy Reform Act appear on the American Bankruptcy Institute web site (www.abiworld.org). See, e.g., *Nation's Professors Criticize Bankruptcy Bill* (visited Jan. 7, 2000) <http://www.abiworld.org/legis/prof_crit.html> (on file with author); *Letter from Academics Opposes S. 625* (visited Jan. 7, 2000) <<http://www.abiworld.org/legis/bills/106anal/99nov2proflett2.html>> (on file with author); *Profs. Zywicki & White: Letter Supports S. 625* (visited Jan. 7, 2000) <<http://www.abiworld.org/legis/bills/106anal/gmulaw.html>> (on file with author).

⁵³Letter (dated September 17, 1999) addressed to the U.S. Senate Regarding S. 625 and its Potential Impact on Women Who File for Bankruptcy Prepared by the National Women's Law Center and the National Partnership for Women & Families (visited February 24, 2000) <<http://www.abiworld.org/legis/reform/nwlclets625.html>> <<http://www.abiworld.org/legis/reform/nwlclets625.html>> (on file with author) [hereinafter, *Women's Letter*].

⁵⁴Letter of the Alliance for Justice, American Association of University Women, American Federation of State, County and Municipal Employees, Aces, Association for Children for Enforcement of Support, Inc., Business and Professional Women/USA, Consumer Federation of America, Consumers Union, Center for Law and Social Policy, Ralph Nader, National Consumer Law Center, National Council of Senior Citizens, National Organization for Women, National Partnership for Women and Families, National Women's Law Center, Public Citizen, Unite, UAW-United Automobile, Aerospace and Agricultural Implement Workers of America, U.S. Public Interest Research Group, YWCA of the U.S.A., visited February 24, 2000 <<http://www.abiworld.org/legis/bills/9-22-99cfaletter.html>> <<http://www.abiworld.org/legis/bills/9-22-99cfaletter.html>> (on file with author) [hereinafter *Alliance for Justice Letter*].

⁵⁵See *infra* notes 73 and 74.

activity (that is, controversy) has tended to lead to a narrowing of the jurisdictional scope of the enactment. For example, in the consumer context, the conflict between the consumer credit industry and consumer advocates led the drafters to leave the remedies available to the consumer credit industry to nonuniform state law and to the courts.⁵⁶ By contrast, with regard to the rule of absolute priority, absence of organized advocacy⁵⁷ for the interests of nonadjusting and nonconsensual creditors facilitated, at least in part, the expansion of Article 9 to cover additional and novel forms of collateral.⁵⁸ In the uniform law process, interest group thrust and parry quickly leads to stalemate. Group conflict therefore tends to lead to maintenance of the status quo.⁵⁹ In the federal process, the dynamic seems to be somewhat different. A jurisdiction expanding strategy of "*quid pro quo*" dominates a jurisdiction narrowing strategy of maintaining the status quo. The strategy appears to be to hang interest group tinsel on the underlying statutory architecture. Means testing⁶⁰ is met with credit card disclosures.⁶¹ Credit card nondischargeability⁶² is met with priority and nondischargeability for support and nonsupport marital obligations.⁶³

C. VOLATILITY

Thus, and third, the ability to horse-trade appears to contribute to the volatility of the federal process. The strategy of *quid pro quo* seems somehow to be linked to a tendency toward interest group grandstanding. Advocates of means testing seize on the sound bite of one million bankruptcy filings, the bankruptcy tax, and the ethic of debtor responsibility.⁶⁴ Opponents respond with public criticism of consumer lending practices, and the proposition that bankruptcy reform is bad for women and children.⁶⁵

⁵⁶See Janger, *Article 9 Revision*, *supra* note 10, at 612-14.

⁵⁷While the "Warren Proposal" was presented to the Drafting Committee, it did not have the backing of any group that was in a position to make a credible threat to block the statute at the state level. Tort claimants, who do not yet know who they are, are not well represented in the legislative process. To the extent that they are represented by ATLA, that group appears to have its hands full trying to block tort reform.

⁵⁸See Revised U.C.C. § 9-109 (1999) and its comment.

⁵⁹Either because the interest groups agree to maintain the status quo (as in Article 9) or because the interest groups scuttle the Revision as Article 2.

⁶⁰See *supra* note 44.

⁶¹See Sarbanes Amendment No. 1694, submitted to the Senate on Sept. 21, 1999. See also H.R. 1276, 106th Cong. (1999) (Credit Card Consumer Protection Act of 1999).

⁶²See H.R. 3150, 105th Cong. § 142 (1998) (Bankruptcy Reform Act of 1998, as reported in the House, on May 18, 1998).

⁶³See H.R. 3150, 105th Cong. §§ 146, 147, 150 (1998).

⁶⁴See, e.g., Commissioners Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law* at 10-15, in NBRC REPORT, *supra* note 13, at 1029.

⁶⁵See, e.g., Alliance for Justice Letter, *supra* note 54.

D. DIALECTIC ADAPTATION

Fourth, and this is perhaps the most important difference between the federal process and the uniform law process, because the federal process can legislate on the basis of majority, or super-majority coalitions cobbled together by horse-trading, public controversy can be accommodated as part of the process. Indeed, the ability to assimilate controversy may encourage such controversy (in order to generate leverage for a horse-trade). This is both good and bad. While there are many fundamental changes being wrought in Revised Article 9 (its scope has been expanded; more things can be "hocked" more easily; and this is likely to have distributive effects), nobody knows about it. Not one major newspaper appears to have published an editorial on Revised Article 9.⁶⁶ By contrast, whatever the outcome, the progress of Bankruptcy Reform through Congress has not been private. There have been multiple editorials and op-editorials in such newspapers as the Washington Post, New York Times and Wall Street Journal.⁶⁷ There is a lay understanding of the stakes that is quite unusual for complex legislation about commercial law. Some students this year showed up for class already understanding that there was something called a "bankruptcy tax," while others showed up with a sense of outrage about irresponsible extensions of consumer credit. Needless to say, this is *not* typical.

The debate over bankruptcy policy, at least consumer bankruptcy policy, has moved above the fold, and the interest group trade-offs have been made express. In sum, the issue of "fairness" in bankruptcy is actually being debated, directly in public, and in a backhanded way in Congress. This should, perhaps, be viewed as an advantage of the federal system, rather than a cost. Unlike the uniform law process which is hamstrung by public debate, Congress can accommodate it, and it appears to be having a salutary effect on the legislation, either by blocking it, or by improving it.

E. LONG-TERM DIALECTIC ADAPTATION

This brings me to my final observation about the federal process. I call it "long-term dialectic adaptation." When evaluating the comparative merits of legislative processes, there is a strong tendency to take temporal snapshots, to

⁶⁶A Westlaw search using the terms "Article 9" and "Uniform Commercial Code" or "UCC" located no articles about Article 9 in the Boston Globe, the Chicago Tribune, the Dallas Morning News, the Los Angeles Times, the San Francisco Chronicle, the Toronto Globe and Mail, USA Today, the Wall Street Journal, the Washington Post, NY Times, the Economist, Business Week, Newsweek, or Time Magazine.

⁶⁷See, e.g., David Frum, *Bankruptcy Reform is a Moral Issue*, WALL ST. J., Feb. 11, 2000, available in 2000 WL-WSJ 3017572; Jacob M. Schlesinger, *House Approves Bankruptcy Bill Amid Criticism Bill May Be Too Tough*, WALL ST. J., May 6, 1999, available in 1999 WL-WSJ 5451471; Kathleen Day, *Bill Would Require Warnings on Debt; Amendment Targets Credit-Card Firms*, WASH. POST, Jan. 28, 2000, available in 2000 WL 2282370; Eric Schmitt, *Senate Approves a Bill to Toughen Bankruptcy Rules*, NY TIMES, Feb. 3, 2000, at 1.

look at the process at one moment in time and to view the current state-of-the-law reform effort as the sum total of the process not just as a datum. In this regard, I'm lucky that the legislation is not yet in place. This allows me to take the longer view and suggest that we look not just at this statute, in draft form, or even the statute that ultimately passes, or is enacted, but instead look at the discussion that started last year as part of an ongoing process of our society figuring out who and what we are. As it stands today, after more than \$40,000,000 in lobbying money has been spent,⁶⁸ no statute has been enacted.⁶⁹ A year and a half ago, the Bankruptcy Reform Bill of 1998 looked like a sure thing, passing the Senate by a vote of 97-1,⁷⁰ but it was derailed at the last minute by the inability of the House and Senate Democrats to reach a compromise.⁷¹ Over the last six months, the Bankruptcy Reform Bill has variously looked like a sure thing and a dead duck. As it steamed toward passage in the fall of 1999, it was stalled by the reluctance of the bill's managers to bring two amendments to a vote.⁷² One of these amendments, proposed by Senator Schumer, would have made claims based on abortion clinic violence nondischargeable,⁷³ and the other, proposed by

⁶⁸See Robert K. Heady, *Congress Tries its Hands at Bankruptcy Reform*, DAYTON DAILY NEWS, MAR. 8, 1999, at 9. Along with lobbying expenses,

In the last election cycle, according to the Center for Responsive Politics, the members of the National Consumer Bankruptcy Coalition, an industry lobbying group made up of credit card companies such as Visa and Mastercard and associations representing the nation's big banks and retailers, gave more than \$4.5 million in contributions to parties and candidates. Significant sums came from the same groups in the form of soft-money contributions to both political parties.

Russ Feingold, *Lobbyists' Push for Bankruptcy Reform*, WASH. POST, June 7, 1999, available in 1999 WL 17007081. A recent Common Cause study places the total of campaign contributions and soft money at \$23.4 million. Common Cause, *Bankruptcy Legislation Enters Final Stages; Consumer Credit Industry Gave \$7.5 Million in Campaign Contributions in 1999, According to Common Cause*, (visited May 3, 2000) <<http://www.commoncause.org/publications/april00/bankruptcy01.htm>>.

⁶⁹On February 2, 2000, the Bankruptcy Reform Act passed the Senate, by a vote of 83 to 14. See Helen Dewar & Kathleen Day, *Senate Approves Bankruptcy Bill: Industry-Sought Overhaul Passes* 83-14, WASH. POST, Feb. 3, 2000, available in WL 2283515.

⁷⁰See 144 Cong. Rec. S10,767 (daily ed. Sept. 23, 1998).

⁷¹See Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343, 351-53 (1999).

⁷²*Unfinished Legislative Business*, NATIONS CITIES WEEKLY, NOVEMBER 29, 1999, at p. 6 ("BANKRUPTCY REFORM IS SLATED AS THE FIRST ITEM OF BUSINESS WHEN THE SENATE RETURNS NEXT JANUARY. THE BILL, S.625, WAS PULLED FROM THE SENATE FLOOR WHEN TWO CONTROVERSIAL AMENDMENTS WERE [PROPOSED]. THE FIRST DEALT WITH ABORTION CLINIC VIOLENCE, AND THE SECOND WAS THE [NATIONAL LEAGUE OF CITIES]-SUPPORTED GUN MANUFACTURERS' AMENDMENT . . . WHICH WOULD HAVE MADE THE DEBTS OF SUCH ENTITIES NON-DISCHARGEABLE IN BANKRUPTCY.").

⁷³Schumer Amendment, No. 2763, submitted to Senate on Nov. 5, 1999. The Schumer Amendment was ultimately included in the bill which passed the Senate on February 2, 2000. Eric Schmitt, *Senate Approves A Bill to Toughen Bankruptcy Rules*, THE NEW YORK TIMES, Feb. 3, 2000 at p. A6. One wire service reports the vote as follows:

Until the final vote, it was unclear whether the Schumer Amendment would pass.

Senator Levin, would have made claims against gun manufacturers based on handgun violence nondischargeable.⁷⁴ Both amendments, it was feared, would have created difficulties for Republicans otherwise inclined to vote in favor of the bill. In short, "it's not over until it's over."⁷⁵

Indeed, and this is what I mean by "Long-Term Dialectic Adaptation," even once it's over, it's not over. If it turns out that this statute is too harsh, or has unsuspected consequences, then the work will not be done. There'll be another round of amendments and perhaps the pendulum will swing back

The vote count appeared to be so close that the Democratic Leadership called Vice President Gore yesterday to ask him to revise his campaign schedule and journey to Washington today to cast a potentially tie-breaking vote. After the Vice President's arrival and a press conference featuring Gore and the amendment's supporters, including NARAL, Sens. Trent Lott (R-Miss.) and Orrin Hatch (R-Utah) instructed their majority to vote for the Schumer Amendment, which subsequently passed by a vote of 80-17.

Senate Backs Effort to Hold Abortion Clinic Violence Perpetrators Accountable, U.S. NEWSWIRE, Feb. 2, 2000, available on Lexis/Nexis.

⁷⁴Levin Amendment, No. 2658, submitted to Senate on Nov. 5, 1999. "The proposal, sponsored by Sen. Carl M. Levin (D-Mich.), would have barred gun manufacturers from escaping court judgments by declaring bankruptcy. It was defeated 68 to 29. Several gun manufacturers have declared bankruptcy to avoid liability resulting from product liability suits." See Dewar & Day, *supra* note 69. I can't resist noting, even if only in a footnote, that the Shumer and Levin amendments appear to be a result of strategic use of cyclical preferences. It is plausible to believe that the proponents of the amendments analyzed the situation as follows: On the one hand, a majority of Senators would like to enact S.625, and the Republican majority appears to have the votes to do it. On the other hand, a number of Republican Senators are "pro-choice" or favor gun control. As a result, there may be enough votes to incorporate either, or both of these amendments. At the same time, many Republicans rely heavily on the support of "pro-life" constituents or of the NRA, and would oppose a statute that contained either provision. As a result, the following three inconsistent statements might be true: (1) there is a majority which favors enactment of the statute without these two amendments; (2) there may also be a majority which favors enactment of the two amendments; but (3) there is also a majority for maintaining the status quo rather than enacting a statute containing these two amendments. The preferences of the legislature would therefore be incoherent. If the amendments come to the floor and were incorporated, the result might be defeat of a statute that would have passed without inclusion of the amendments. A question which bears more consideration is whether such cycling is more likely in the federal system than in the uniform state law process, and which system is better equipped to deal with cyclical preferences when they do arise.

⁷⁵In this regard, there has been some evolution between the 1998 majority compromise bill (much harsher than the bill that passed the Senate in 1998) and the 1999 bill. The credit card nondischargeability provisions have been limited in scope, excluding all but purchases on the eve of bankruptcy to purchase luxury goods. Compare H.R. 3150, 105th Cong. § 142 (1998) (presumption of nondischargeability attaches to "consumer debts owed to a single creditor incurred by an individual debtor on or within ninety (90) days before the order for relief"), with H.R. 833, 106th Cong. § 135 (1999) (presumption of nondischargeability attaches to "consumer debts owed to a single creditor and aggregating more than \$250 for 'luxury goods or services' incurred by an individual debtor" or "cash advances aggregating more than \$250 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor" when such debt is incurred on or within 90 days before the order for relief). The means testing threshold has been raised somewhat. The longer the bill percolates, the more likely it is to moderate. Last year, Professor Tabb pointed out that the Bankruptcy Act of 1896 started out as a creditors' bill, but over a few years of legislative review changed into something much more balanced. See Tabb, *supra* note 71, at 366-81.

the other way. Moreover, the process of fixing the statute, while cumbersome, can proceed more quickly in the federal process than in the uniform law process. As previously observed, the various articles of the UCC are fundamentally revised every ten to twenty years, while the Bankruptcy Code has been amended every four to six years since 1978. Thus, while the volatility of the federal process is greater, its ability to adapt may be greater as well.

CONCLUSION

While the federal lawmaking process is not pretty, it may be essential. What we are observing today in connection with Bankruptcy Reform is the contortion that a society goes through when trying to make a resource allocation choice that matters. Unlike the uniform law process, and the securitization provisions described by Professors Block-Lieb, Carruthers and Halliday where the discussions have been tidy because they were conducted below the level of public awareness, this discussion has been open, unpleasant and messy. So, to answer the question, "Isn't democracy awful?" Well, it's the worst form of government, except for all the others.

