Evaluation of the Proposal to Amend the Bankruptcy Code to Prohibit Private Employers from Refusing to Hire Applicants on the Basis of Bankruptcy Filing

By Dr. David D. Schein

Assistant Professor, Virginia State University

Virginia State University, VA

Introduction: §525 *of the U.S. Bankruptcy Code**

§ 525(a)

- (a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a **governmental unit** may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, **deny employment to, terminate the employment of, or discriminate with respect to employment against**, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, **solely because** such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

§ 525(b)

- (b) No **private employer** may **terminate the employment of, or discriminate with respect to employment against**, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, **solely because** such debtor or bankrupt – 1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act; 2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or 3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

* Source: Office of the Law Revision Council, U.S. House of Representatives. http://uscode.house.gov/lawrevisioncounsel.shtml

Chronology of Cases Interpreting §525(b)

Perez vs. Campbell (1971)	• The Court held that a state may not refuse to renew the driver's license of an individual whose tort claim against them resulting from a car accident was discharged in bankruptcy.
§525 of the Bankruptcy Code enacted (1978)	• *Perez vs. Campbell* was the basis of its anti-discrimination protections. • Its purpose was to preserve the congressional policy of "a fresh start for debtors."
Russello vs. the United States (1983)	• The U.S. Supreme Court stated "[where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Chronology of Cases Interpreting §525(b)

§525 of the Bankruptcy Code amended (1984)	• Amended to add protection for private sector employees who had filed for bankruptcy.
Pastore vs. Medford Sav. Bank (1995)	• The Court reasoned that Congress intentionally excluded protection for prospective private sector employees when they amended §525 to create subsection (b).
Fiorani vs. CACI (1996)	• The Court reasoned that Congress intentionally excluded protection for prospective private sector employees when they amended §525 to create subsection (b).

Chronology of Cases Interpreting §525(b)

Leary v. Warnaco, Inc. (2000)

- Contrary to all of the final rulings in cases from other jurisdictions, the Court held that denial of employment by a private employer solely because the debtor has filed for bankruptcy was a violation of §525(b) of the Bankruptcy Code.
- The Court held that a strict interpretation of the statute does not comport with the legislative purpose of §525.
- Court refused to allow the plaintiff to plead for punitive damages, stating: "There is no authority for an award of punitive damages or attorneys' fees under §525(b)."

In re Stinson (2002)

- The Court reasoned that the statement "[no private employer may] discriminate with respect to employment against" does not apply to hiring.

In re Martin (2007)

- The Court reasoned that the statement "[no private employer may] discriminate with respect to employment against" does not apply to hiring.

Chronology of Cases Interpreting §525(b)

Rea v. Federated Investors (2010)	• The Court held §525(b) "does not create a cause of action against private employers who engage in discriminatory hiring." It reasoned that when the language of a statute is plain, the Court should construe its language according to its terms. Since Congress used §525(a) as the basis for §525(b), any exclusion by Congress in drafting subsection (b) was intentional.
Burnett v. Stewart Title (2011)	• The Court reasoned that interpreting the phrase "discriminate in respect to employment" in §525(b) to apply to applicants in the private sector would make the phrase "deny employment to" in §525(a) unnecessary. The Court also reasoned that Congress had knowledge of the then existing legislation, and if they intended for §525(b) to include denial of employment, the legislators would have included it.
Myers v. TooJay's Mgmt. Corp. (2011)	• The Court held that the statement, "discriminate with respect to employment against" found in §525(b), "does not apply to refusals to hire." It took a plain meaning approach in interpreting the statute stating: "[j]udges and courts tempted to bend statutory text to better serve Congressional purposes would do well to remember that Congress enacts compromises as much as purposes."

The Case for Change

Shepard's and Yun's Arguments

Due to the prolonged financial crisis, many persons have damaged credit histories, while employers increasingly use these credit histories as a hiring criterion.

Shepard: 60% of employers rely on credit histories (rather than credit scores) when assessing applicants, although most limit the positions for which these histories are assessed. The histories are primarily used to determine whether an applicant is likely to steal, and to assess that applicant's level of responsibility, but are also used to confirm other information provided by the applicant, and to avoid negligent hiring claims.

Yun: There has been an increase in older Americans filing for bankruptcy.

The use of credit reports is unsupported by validation and may lead to racial discrimination.

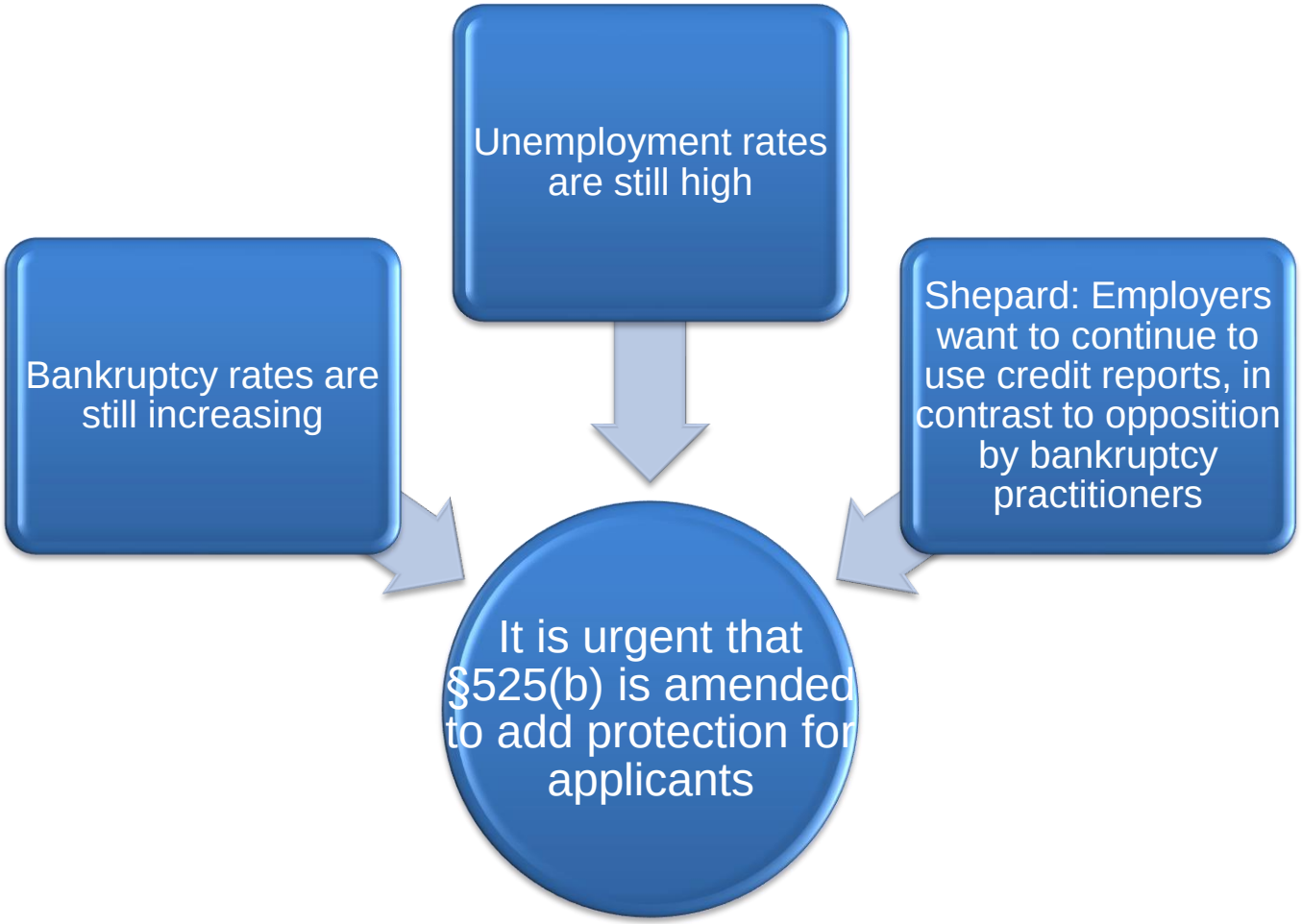
Persons with poor credit histories actually have no control over their financial situation, and this should be regarded as "analogous to traditional immutable characteristics."

The lack of a bar to consideration of bankruptcy by private sector employers amounts to de facto age discrimination.

Conclusion: §525(b) should be amended to add protection for applicants

The Case for Change

Urgency



The Case for Not Changing

Financial History Not Abused by Employers

Using credit histories has remained stable since 2004, and most employers use them only where most relevant and in connection with other factors.

- Use of credit background checks has not changed from 2004-2010. Most organizations conduct them only where most relevant, and not to screen out large numbers of applicants. They are also not as critical as other factors.
- A number of large employers do not use credit histories to screen applicants, but reserve the right to do so. Of those that do, none use them for all applicants

Credit histories rather than credit scores are used, which means employers investigate the details.

- This is significant because employers are required to actually review the applicants' credit histories when requested, and cannot simply rely on a number provided by a third-party agency. If a good credit history is relevant, the employer can ask the applicant to explain the circumstances that lead to the filing.

There are good reasons employers use credit histories, and this does not result in discriminatory hiring.

- Credit histories are primarily used to screen for positions with access to employer or client funds or access to sensitive information.
- Credit histories serve as a reason to do further investigation, not to block applicants based on an adverse credit history.
- The U.S. Government requires credit history reports for many of its positions.
- Fewer racial minorities have filed for bankruptcy than have non-minorities.

The Case for Not Changing

Urgency is Fading

Bankruptcy rates are dropping.

- Only a small percentage of Americans file for bankruptcy each year
- The post BAPCPA peak in bankruptcy filings was in 2011. Filings dropped in 2012, and as of March 2013, fillings were 14% below the year earlier period.

Unemployment rates are dropping.

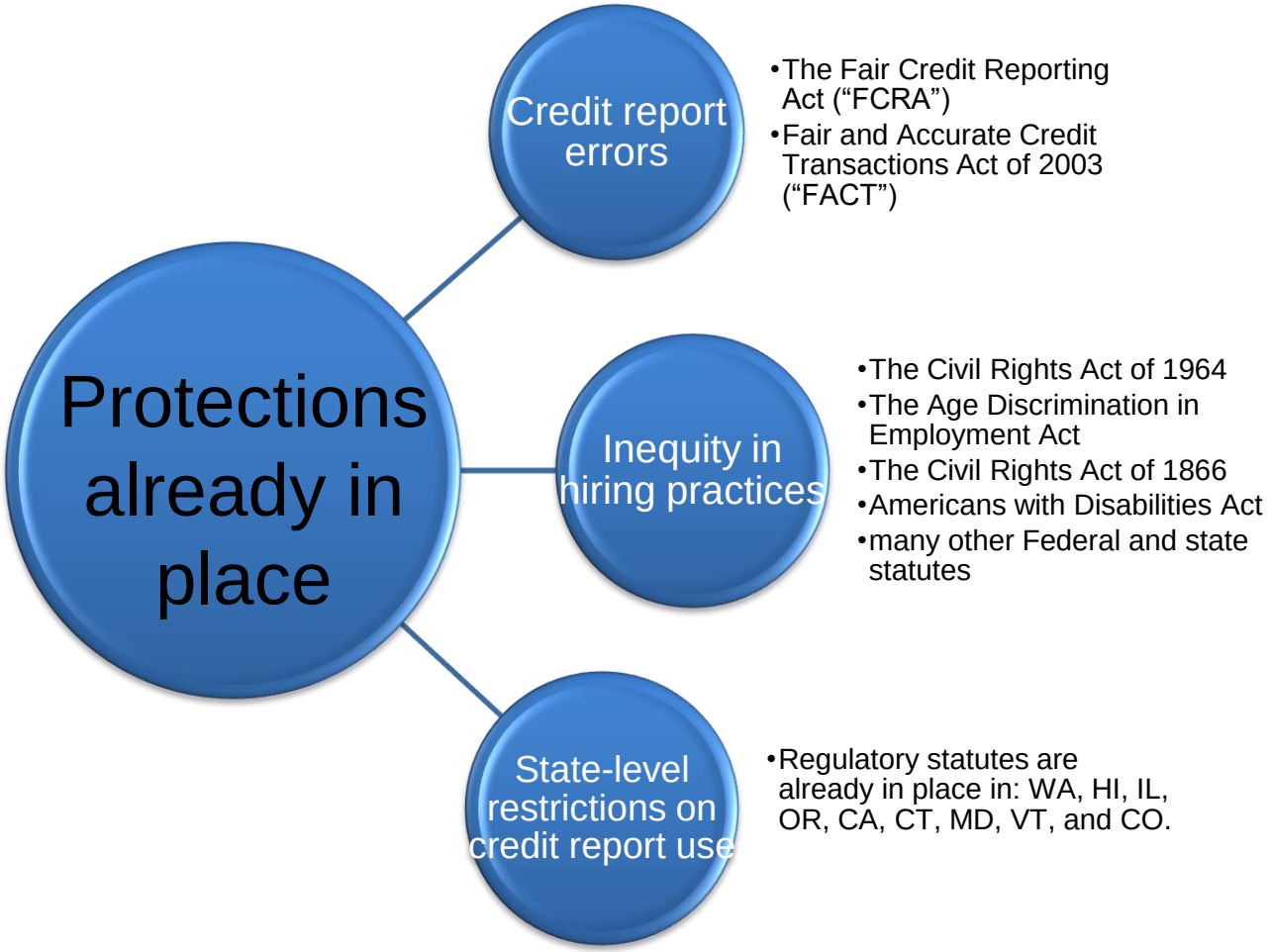
- While unemployment rates in excess of 9% were referenced by various advocates, the official unemployment rate was 7.5% as of April 2013. So, there has been a significant drop in the unemployment rate. If a 9% unemployment rate was a reason to amend §525(b), that is not the case today.

H.R. 646

- The Bankruptcy Nondiscrimination Enhancement Act of 2013 has been proposed in Congress, and would amend §525(b) to add the language from subsection (a) protecting applicants. There are no co-sponsors, and the bill is presently before the Judiciary Committee, where it is not expected to pass.

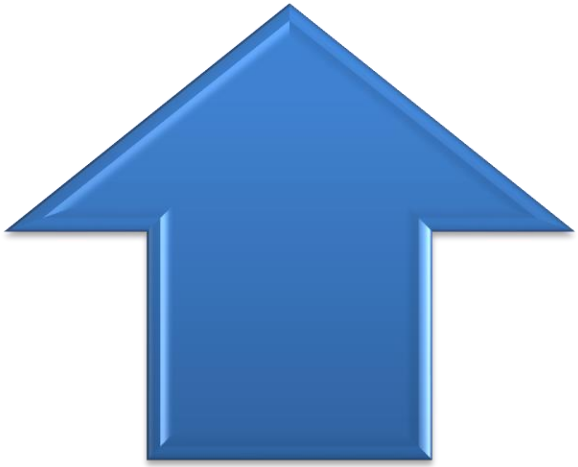
The Case for Not Changing

Other Protective Statutes

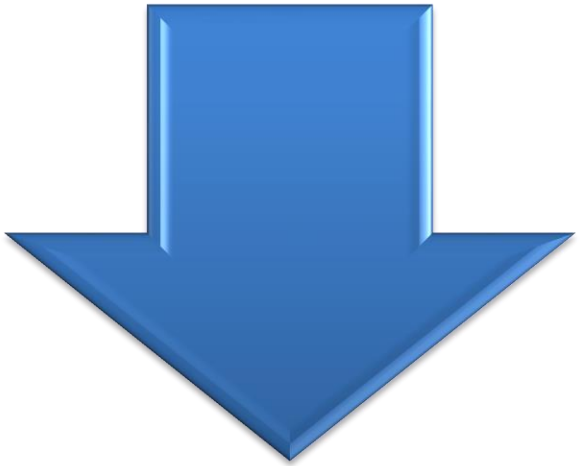


The Case for Not Changing

Paying Bills and Good Employees



There are many arguments for sympathy for persons who have filed for bankruptcy and this is certainly not to be ignored as we enter the waning days of the “Great Recession.”



Absent come compelling reason, employers expect that potential employees will generally pay their bills, as this may be an indication of ethical behavior that will be practiced at work. Even in bankruptcy, it is the moral thing to pay what can be paid.

Conclusions