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### Consumer Bankruptcy Policy: Ability to Pay and Catholic Social Teaching

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## ESSAY

### CONSUMER BANKRUPTCY POLICY: ABILITY TO PAY AND CATHOLIC SOCIAL TEACHING

RICHARD E. FLINT\*

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#### I. INTRODUCTION

“[R]ights presuppose duties, if they are not to become mere license.”<sup>1</sup>

On June 29, 2009, the Vatican published Pope Benedict XVI’s encyclical letter, *Caritas in Veritate*.<sup>2</sup> The encyclical’s stated purposes were to pay tribute to Pope Paul VI and his earlier encyclical letter, *Populorum Progressio*,<sup>3</sup> and to apply its teaching and principles concerning “integral human development” to the

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1. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 43 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html).

2. *Id.* para. 79.

3. Pope Paul VI, Encyclical Letter, *Populorum Progressio* (1967), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_26031967\\_populorum\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html).

present.<sup>4</sup> In doing so, Pope Benedict XVI placed his own imprint upon Catholic social teaching<sup>5</sup> by applying the principles found in *Populorum Progressio* to the new social and cultural problems facing mankind resulting from increased globalization of the world.<sup>6</sup> Pope Benedict XVI was clear, however, that the Church's social teaching was and still is "a single teaching, consistent and at the same time ever new."<sup>7</sup> *Caritas in Veritate* followed the Holy Father's earlier encyclical letter, *Deus Caritas Est*,<sup>8</sup> in which he discussed the interrelationship between justice and charity as integral parts of Catholic social doctrine.<sup>9</sup>

In *Deus Caritas Est*, Pope Benedict XVI addressed the respective roles of the Church and the political realm in achieving integral human development.<sup>10</sup> He noted that the political system has the responsibility to build and achieve a just society and civil order that provides an environment for human development and fulfillment.<sup>11</sup>

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4. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 8 (2009). Pope Benedict XVI identified four critical areas that needed to be addressed in order to create an effective plan for human development: elimination of world hunger, respect for life, religious freedom, and interdisciplinary collaboration. *See id.* paras. 27–31 (describing conditions that should be addressed to improve human development).

5. Catholic social teaching is the body of social teaching that has been formally pronounced by the Magisterium of the Church from 1891 to the present, intended to "contribute to the formation of a society marked by peace, concord, and justice toward all." Avery Cardinal Dulles, *Catholic Social Teaching and American Legal Practice*, 30 *FORDHAM URB. L.J.* 277, 279 (2002). The first social encyclical letter was written in 1891. *See* Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 1 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_lxiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_lxiii_enc_15051891_rerum-novarum_en.html) (focusing on the major socio-economic issue of that time: "the enormous fortunes of individuals and the poverty of the masses" that created moral deterioration and massive worker poverty).

6. *See* Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 9 (2009) (acknowledging that the globalized world makes peoples and nations more interdependent, but such interdependence was "not matched by ethical interaction of consciences and minds that would give rise to truly human development").

7. *Id.* para. 12 (emphasis omitted). Pope Benedict XVI noted that there was a "coherence of the overall doctrinal corpus. Coherence does not mean a closed system: on the contrary, it means dynamic faithfulness to a light received." *Id.* (footnote omitted).

8. Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* (2005), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html).

9. *See id.* paras. 26–28 (discussing justice and charity within the Church).

10. *See id.* para. 26 ("It is true that the pursuit of justice must be a fundamental norm of the State and that the aim of a just social order is to guarantee to each person, according to the principle of subsidiarity, his share of the community's goods.").

11. *See id.* para. 28(a) (determining that it is the state's responsibility to advance a just society).

The Church, however, uses its social teaching to purify reason so that individuals in the political realm recognize it and are motivated to achieve a society that more truly reflects justice for all.<sup>12</sup> To perform its role, Pope Benedict XVI stated that the Church uses reason and natural law “to help form consciences in [the] political” realm to create an environment for the determination of what is just and how to act in compliance with that understanding.<sup>13</sup>

With these two encyclical letters, Pope Benedict XVI continued the tradition set by his predecessors on the seat of Saint Peter, to enter the public square and address issues of importance to all. While it is generally understood that the Church’s social teaching does not easily translate to clear policy imperatives, it has developed a set of fundamental guidelines that “takes on practical form in the criteria that govern moral action,” such as justice and the common good.<sup>14</sup> Therefore, Catholic social teaching should be considered a part of policy debates in the socio-economic arena. It is the purpose of this Essay to do just that. Specifically, this Essay purports to evaluate the ability-to-pay principle in consumer bankruptcy policy<sup>15</sup> in light of “the criteria that govern moral action[,]” as developed in the Church’s social teaching.<sup>16</sup>

This evaluation is especially timely given the significant changes in consumer bankruptcy wrought by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).<sup>17</sup> This Act

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12. *See id.* (developing the idea that it is the Church’s responsibility to “stimulate greater insight into the authentic requirements of justice”).

13. *Id.*

14. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html).

15. This Essay uses the term “Bankruptcy Code” to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532 (2006 & Supp. III 2009)). For the purpose of this Essay, “consumer bankruptcy” refers only to individuals who file under Chapter 7 or Chapter 13 of the Bankruptcy Code, as amended. *See* 11 U.S.C. §§ 701–784, 1301–1330 (2006 & Supp. III 2009) (providing statutory authority for Chapter 7 and Chapter 13). In Chapter 7, the debtor’s non-exempt assets are liquidated and creditors are paid from the proceeds. *See id.* §§ 701–784 (describing Chapter 7). In Chapter 13, the debtor uses his future income to fund a plan for the repayment of all or a portion of his creditors’ claims. *See id.* §§ 1301–1330 (describing Chapter 13). Chapter 7 bankruptcy proceedings are sometimes hereinafter referred to as “liquidation bankruptcy” or “straight bankruptcy.”

16. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009).

17. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). In the area of protecting creditor interests, Congress intended to eliminate abuse and

changed the course of consumer bankruptcy *policy* in the United States, while maintaining its basic fundamental structure. Historically, bankruptcy law in the United States has been a blend of social welfare legislation<sup>18</sup> and economic regulation.<sup>19</sup> Accordingly, bankruptcy legislation was intended to function as a safety net for those debtors overburdened by their financial difficulties<sup>20</sup> and to distribute the scarce resources of those debtors among their respective creditors.<sup>21</sup>

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“ensure that debtors repay creditors the maximum they can afford.” H.R. REP. NO. 109-31, pt. 1, at 2 (2005).

18. See, e.g., *United States v. Kras*, 409 U.S. 434, 446 (1973) (“[B]ankruptcy legislation is in the area of economics and social welfare”). Bankruptcy is, in effect, the last resort when the standard forms of social welfare are ineffective. See Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 TEX. REV. L. & POL. 393, 394 (2001) (explaining that the relief provided in consumer bankruptcy is social legislation); Joseph Pace, Note, *Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory to Abrogate State Sovereign Immunity*, 119 YALE L.J. 1568, 1611 (2010) (reporting that bankruptcy is the last available remedy for debtors overburdened by debt or loss of employment).

19. See, e.g., Samuel L. Bufford & Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1, 45 (2008) (acknowledging that bankruptcy legislation was a type of economic legislation); see also Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 181 (noting that bankruptcy has both economic and ethical ramifications); Lawrence H. White, *Bankruptcy as an Economic Intervention*, 1 J. LIBERTARIAN STUD. 281, 283–84 (1977) (discussing the economic consequences of bankruptcy).

20. At the signing ceremony following BAPCPA's passage by Congress, President George W. Bush acknowledged the public perception of bankruptcy as primarily a relief mechanism, stating “[o]ur bankruptcy laws are an important part of the safety net of America. They give those who cannot pay their debts a fresh start.” Press Release, President George W. Bush, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050420-5.html>. Elizabeth Warren has called bankruptcy legislation a “safety valve to deal with the financial consequences of the misfortunes [debtors] may encounter.” Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 492 (1997).

21. Although the primary functions of the bankruptcy process are debt collection and the resulting distribution to creditors, two factors have historically diminished these functions in consumer bankruptcies. First, most Chapter 7 cases were “no-assets” cases, so there were no distributions to creditors, and second, most Chapter 13 debtors made insignificant payments. See DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEMS, PROCESS, REFORM* 20–21 (1971) (noting that historically, from 1946 to 1969, over 70% of Chapter 7 cases were no-assets cases); TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS* 213–17 fig.12.1, 339 (1989) (discussing the lack of payments in Chapter 7 and the large number of incomplete Chapter 13 plans during the 1980s). The trend of no-assets Chapter 7 cases has continued. See U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, *PRELIMINARY REPORT ON CHAPTER 7 ASSET CASES 1994 TO 2000*, at 7 (2001), available at [http://www.usdoj.gov/ust/eo/private\\_trustee/library/chapter07/docs/assetcases/Publicat.pdf](http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/docs/assetcases/Publicat.pdf) (mentioning that “[h]istorically, the vast majority (about 95% to 97%) of

For nearly fifty years, Congress considered proposals to implement significant changes in consumer bankruptcy policy. However, it was not until the passage of BAPCPA that bankruptcy law incorporated an ability-to-pay test as a screen for the filing of Chapter 7 proceedings.<sup>22</sup> Despite criticism from its detractors, who have characterized BAPCPA as changing the underlying foundations of consumer bankruptcy legislation,<sup>23</sup> consumer bankruptcy

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[C]hapter 7 cases yield[ed] no assets”).

22. See 11 U.S.C. § 707(b)(2)(A)(i) (2006) (providing the formula to determine whether granting relief would be an abuse of discretion). This screen is generally referred to as means testing. See H.R. REP. NO. 109-31, pt. 1, at 2 (referring to the income-expense screening mechanism as means testing). In 1984, Congress imposed an ability-to-pay requirement in Chapter 13 in the event of an objection to the debtor's proposed plan by either the trustee or by a holder of an unsecured claim. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 317, § 1325, 98 Stat. 333, 356 (codified as amended at 11 U.S.C. § 1325(b)(1) (2006)). In that event, the court could not confirm the plan unless it was amended to provide that all of the debtor's projected disposable income would be used to fund his plan. *Id.*

23. One commentator stated that BAPCPA represents a “seismic” or “cataclysmic” change in bankruptcy policy. Margaret Howard, *The Law of Unintended Consequences*, 31 S. ILL. U. L.J. 451, 451 (2007); see also Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 619–20 (2001) (claiming that means testing would represent a significant shift in the treatment of the consumer debtor); Harvey R. Miller, *Chapter 11 in Transition—from Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 388 (2007) (arguing that BAPCPA “has effectively repealed the fresh-start principle for individuals”). *But see* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 226–27 (2007) (noting that the 2005 consumer amendments were not new or revolutionary). Professor Carlson asserted that the real change in bankruptcy policy occurred in 1984 with the substantial-abuse dismissal, or perhaps in 1986, when the United States trustee was given standing to move for dismissal under 11 U.S.C. § 707(b). *Id.* at 227. In addition, there were fears that BAPCPA would increase the costs of seeking bankruptcy relief, and thus deter potential filers. See Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 619 (2001) (alleging that means testing would increase the costs of filing for bankruptcy relief to the point that many “troubled debtors” would be unable to file); 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, 230 (2005) (noting that some debtors will be priced out of bankruptcy relief as a result of BAPCPA). These concerns have yet to be statistically verified. The BAPCPA Pilot Study concluded that BAPCPA has increased costs for debtors seeking bankruptcy protection. See Lois R. Lupica, *The Costs of BAPCPA: Report of the Pilot Study of Consumer Bankruptcy Cases*, 18 AM. BANKR. INST. L. REV. 43, 46 (2010) (pointing out increased filing fees, attorney's fees, and debtor counseling fees, among others). The Pilot Study noted that many questions had yet to be addressed, including whether the increased costs have made the process “less attractive to debtors and potential debtors.” *Id.* at 87. The cost of the Pilot Study was funded by the Anthony H.N. Schnellling Endowment Fund, “a foundation supported by the membership of the American Bankruptcy Institute.” *Id.* at 43 n.\*; see also *The Anthony H.N. Schnellling Endowment Fund: A History of Growth*

proceedings still remain viable legal mechanisms for a deserving debtor to receive a discharge and the coveted “fresh start.”<sup>24</sup> The only substantial change is that unwilling debtors<sup>25</sup> are now required to enter Chapter 13 proceedings in order to obtain a discharge. To achieve this policy objective, BAPCPA instituted a means test<sup>26</sup> specifically designed to restrict eligibility for Chapter 7 relief.<sup>27</sup> The means test is an income–expense screen that creates a rebuttable presumption that a Chapter 7 debtor whose net monthly income is

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*and Commitment*, ABI ENDOWMENT FUND, <http://endowment.abi.org/> (last visited Sept. 27, 2011) (describing the endowment and its purpose of furthering research and education).

24. Over 1.1 million individuals filed for Chapter 7 protection in 2010. See AM. BANKR. INST., QUARTERLY NON-BUSINESS FILINGS BY CHAPTER (1994–2011), available at <http://www.abiworld.org/AM/AMTemplate.cfm?section=Home&CONTENTID=63163&TEMPLATE=/CM/ContentDisplay.cfm> (containing the statistics for bankruptcy filings). The discharge is the legal mechanism provided in the Bankruptcy Code to free debtors from their existing debts, except in those circumstances where debtors have violated a specific norm identified in the Bankruptcy Code. See 11 U.S.C. §§ 523, 727, 1328 (2006) (providing the rules regarding discharge); see also Charles G. Hallinan, *The “Fresh Start Policy” in Consumer Bankruptcy: A Historical Inventory and an Interpretative Theory*, 21 U. RICH. L. REV. 49, 51 (1986) (noting that the discharge is the “principal (if not the sole) point” of filing consumer bankruptcy). The term “fresh start” is steeped in bankruptcy lore. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (relating that the primary purpose of bankruptcy legislation is to “relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.” (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915)) (internal quotation marks omitted)). In *Local Loan*, the Court stated that the “fresh start” was designed to permit “the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.” *Id.* (emphasis added).

25. Contrast this phrase from that made in a 1973 report following an extensive review of the bankruptcy system. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 71 (1973), reprinted in Vol. B COLLIER ON BANKRUPTCY App. pt. 4(c) (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 1996) (stating that the primary purpose of the bankruptcy system was to continue the credit based economy “in the event of a debtor’s *inability or unwillingness* generally to pay his debts”) (emphasis added).

26. 11 U.S.C. § 707(b)(2)(A)(i).

27. Senator Grassley, one of the chief proponents of BAPCPA, noted that the means test would not affect those who did not have the ability to repay their debts, “[b]ut the free ride is over for people who have higher incomes, and who can repay their debt.” 151 CONG. REC. 3037 (2005); see also Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 352 (2008) (reiterating that the purpose of means testing was to restrict eligibility for Chapter 7 relief); Robert M. Lawless et al., *Interpreting Data: A Reply to Professor Pardo*, 83 AM. BANKR. L.J. 47, 58 (2009) (asserting that the stated purpose of BAPCPA was to drive “legions of deadbeats from the consumer bankruptcy system”).

greater than the specified statutorily determined income is abusing the provisions of Chapter 7; thus, absent exceptional circumstances, that debtor's case will be dismissed unless it is converted to either a Chapter 11 or Chapter 13 proceeding.<sup>28</sup> The stated purpose of means testing is to institute an ability-to-pay limitation for Chapter 7 eligibility to ensure that debtors who are capable of paying back a portion of their debts either forgo bankruptcy altogether or participate in a Chapter 13 case.<sup>29</sup>

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28. See 11 U.S.C. § 707(b)(2)(A)(i) (providing the debtor's income must be less than a determined amount to remain in a Chapter 7 proceeding). BAPCPA provides a method where a prospective debtor can rebut the presumption. See *id.* § 707(b)(2)(B)(i) (noting the presumption of abuse can only be rebutted by showing special circumstances). Prior to BAPCPA, any individual was eligible to file a liquidation proceeding under Chapter 7, subject only to a dismissal for substantial abuse. See *id.* (stating a court may dismiss a case "if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter"), amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a), (f), 119 Stat. 23, 27-35 (codified as amended at 11 U.S.C. § 707 (2006 & Supp. III 2009)). Furthermore, there was a presumption in favor of granting the debtor the Chapter 7 relief he sought. See *id.* ("There shall be a presumption in favor of granting the relief requested by the debtor."). Professor Braucher has argued that the practice under former § 707(b) had already resulted in a type of means testing. See Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 3 (1998) (noting bankruptcy trustees frequently sought dismissal for substantial abuse when the schedules reflected that a debtor could repay a substantial portion of the obligations); see also *In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988) (recognizing the unanimous opinion of the bankruptcy courts that the debtor's ability to repay debts she sought to have discharged in the Chapter 7 case was the primary factor in determining substantial abuse). But see *In re Green*, 934 F.2d 568, 572 (4th Cir. 1991) (contending that a court was to consider the totality of the circumstances, not merely the debtor's ability to repay); A. Mechele Dickerson, *Lifestyles of the Not-So-Rich or Famous: The Role of Choice and Sacrifice in Bankruptcy*, 45 BUFF. L. REV. 629, 655 (1997) (arguing that the refusal of a Chapter 7 debtor to sacrifice future non-essential lifestyle items should never by itself support a finding of substantial abuse).

29. See H.R. REP. NO. 109-31, pt. 1, at 5, 12 (2005) (explaining that while studies showed some debtors could repay a substantial portion of their debts, current law had no "clear mandate requiring debtors to repay their debts[,] and discussing how if need-based reform was implemented, then repayment to creditors would increase as more debtors were moved to Chapter 13); see also Rafael I. Pardo, *Failing to Answer Whether Bankruptcy Reform Failed: A Critique of the First Report from the 2007 Consumer Bankruptcy Project*, 83 AM. BANKR. L.J. 27, 33 (2009) (arguing that Congress clearly intended the means test to drive can-pay debtors out of Chapter 7 proceedings). The National Bankruptcy Review Commission (NBRC) failed to recommend any means test for Chapter 7 eligibility, determining that there had been no rise in Chapter 7 filings by individuals capable of repaying their debts. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 83 (1997). However, two dissenting commissioners advocated a means-testing approach in consumer bankruptcy. See Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for*



Proponents of the legislation argued that means testing would result in a renewed awakening of personal financial accountability because debtors would be required to repay as much of their financial obligations as they were capable as a condition for receiving their fresh start.<sup>30</sup> Thus, these supporters concluded the very core of society would be the real winner in this enactment because the then-prevalent attitude of irresponsibility for one's actions would be replaced with a policy of responsibility.<sup>31</sup> Opponents of the

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*Reform of Consumer Bankruptcy Law*, in NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 1123, 1131–32 (1997) (criticizing the NBRC's recommendations to the Bankruptcy Code for not including means testing). As BAPCPA established, the dissenters were able to reach the ear of Congress. See generally Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 1 (1998) (lamenting that Congress failed to follow the recommendations of the NBRC Report and focused its reform legislation solely on the opinion of two dissenting commissioners who advocated means testing). At least one BAPCPA critic agreed with the basic logic incorporated in the ability-to-pay approach. See Margaret Howard, *The Law of Unintended Consequences*, 31 S. ILL. U. L.J. 451, 451 (2007) (agreeing with the concept that debtors who could pay back their debts should do so). However, other critics have refused to accept limitations on eligibility for Chapter 7. See NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 90 (1997) (claiming that means testing would further harm those in severe financial distress); Peter C. Alexander, *With Apologies to C.S. Lewis: An Essay on Discharge and Forgiveness*, 9 J. BANKR. L. & PRAC. 601, 601–02 (2000) (questioning the notion that forgiveness of debt is intended to be the purpose of bankruptcy).

30. See Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 1123, 1128 (1997) (expounding that the NBRC's framework for reform "is silent on [the] notion of personal responsibility for one's debts"); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 248 (detailing how means testing would restore public confidence in the system); Todd Zywicki, *With Apologies to Screwtape: A Response to Professor Alexander*, 9 J. BANKR. L. & PRAC. 613, 620 (2000) (stating that means testing would assist in policing fraud and abuse and thus increase public confidence in the bankruptcy system); see also Jean Braucher & Charles W. Mooney, *Means Measurement Rather Than Means Testing: Using the Tax System to Collect from Can-Pay Consumer Debtors After Bankruptcy*, AM. BANKR. INST. J., Feb. 2003, at 6 (noting that some sort of ability-to-pay measurement would shore up the legitimacy of a fresh start "for most debtors by demanding what is only fair—that those who can afford to repay do so").

31. See, e.g., A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 244 (2001) (commenting that means testing "is theoretically sound because it is not irrational to encourage (if not force) debtors to accept the consequences of their fiscally irresponsible behavior by making them attempt to repay debts within their means"). Professor Dickerson noted that the use of a system of means testing in bankruptcy would not be dissimilar to the "types of restrictions Congress

legislation asserted that it would deprive honest but unfortunate debtors of an opportunity to obtain the relief of a Chapter 7 discharge.<sup>32</sup> The conclusion was that after means testing drove a

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imposes on the recipients of nonentitlement public assistance benefits.” *Id.* at 276. She also noted “in exchange for accepting economic benefits, recipients of means[-]tested public assistance accept certain lifestyle burdens.” *Id.* at 247; *see also* Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, in NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 1043, 1116 (1997) (indicating that the NBRC’s refusal to consider means testing adversely affected the hard-working individuals who live within their means and pay their bills).

32. *See* NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 90 (1997) (noting some witnesses concluded that means testing would “fall hardest on [those] families already financially pressed past the breaking point”); Peter C. Alexander, *With Apologies to C.S. Lewis: An Essay on Discharge and Forgiveness*, 9 J. BANKR. L. & PRAC. 601, 601–02 (2000) (stressing that the reform movement was disregarding the main purpose of bankruptcy—the forgiveness of debt); Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission’s Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 2 (1998) (presuming that the reform legislation would raise costs, deprive needy debtors of relief, and unnecessarily increase consumer credit); Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 269–71 (2001) (concluding that the proposed means-testing reform failed to distinguish between culpability in determining abuse); Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 KAN. L. REV. 553, 576 (2010) (asserting that BAPCPA “seriously threatens the eradication of the fresh start for those in need”); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 5 (2001) (suggesting BAPCPA would reshape bankruptcy policy away from the needy debtor in favor of financial institutions); Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1079–80 (1998) (arguing the proposed reform legislation was wrong in its basic assumption that the increase in consumer bankruptcy cases was the result of abuse).

Many critics of the reform movement, which resulted in BAPCPA, asserted that the unprecedented increase in number of consumer bankruptcy filings that precipitated the call for bankruptcy reform was due to the increased availability of consumer credit. *See, e.g.*, H.R. REP. NO. 107-3, pt. 1, at 478–81 (2001) (containing the dissenting views to House Resolution 333—a predecessor bill to Senate Bill 256 that became BAPCPA—and noting that the bill ignored the transgressions of the credit industry while addressing every abuse, actual or perceived, of the debtors); *see also* TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 238–61 (2000) (discussing overwhelming consumer debt held by the middle class); David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311, 349 (1999) (opining that consumer bankruptcy filings will decline once available credit has declined). These authors reviewed various economic data and concluded that the increased filings were possibly the result of the ease and attractiveness of filing, declining social stigma, and the substantial increase in unsecured consumer credit at the lower income levels. *See, e.g.*, David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANK. L.J. 311, 328–34 (1999) (recognizing and explaining the increase in bankruptcy filings).

debtor from Chapter 7, the debtor would be compelled to repay all or a portion of her obligations in a Chapter 13 proceeding in order to obtain a discharge of those obligations.<sup>33</sup> That, of course, was what Congress intended BAPCPA to achieve with respect to consumer debtors—to stop potential abusers of Chapter 7 by instituting an ability-to-pay eligibility requirement for filing a Chapter 7 petition, and forcing can-pay debtors into a repayment plan under Chapter 13.<sup>34</sup> Notwithstanding BAPCPA's ability to achieve those goals,<sup>35</sup> it

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33. See Robert M. Lawless et al., *Interpreting Data: A Reply to Professor Pardo*, 83 AM. BANKR. L.J. 47, 48 (2009) (asserting the proponents of BAPCPA wanted to move high-income debtors from Chapter 7 into Chapter 13 or forgo relief under the bankruptcy laws); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States*, 18 BANKR. DEV. J. 1, 1–2 (2001) (contending that the purpose of the reform bill was to force debtors out of Chapter 7 and leave them with the options of either filing Chapter 13 or seeking no bankruptcy relief). According to Representative George Gekas, the primary House sponsor of the bill that subsequently became BAPCPA, debtors who failed to qualify for Chapter 7 would “repay their creditors the maximum that they [could] afford.” 147 CONG. REC. 1059 (2001).

34. The law's stated purpose was to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and [to] ensure that the system is fair for both debtors and creditors.” H.R. REP. NO. 109-31, pt. 1, at 2. The attempt to draft bankruptcy laws to discriminate between those worthy of relief and those abusing the system is not a new thing. See, e.g., Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 27 (1995) (demonstrating creditors' concerns over “debtor abuse of the bankruptcy discharge” during the Depression era). In fact, the issue is no different than it was over 300 years ago. See CHARLES WARREN, *BANKRUPTCY IN THE UNITED STATES HISTORY* 3 (unabr. rpt. 1972) (1935) (issuing a reminder that the “views and conditions of today are mere repetitions of the past”). Daniel Defoe, the celebrated author of *Robinson Crusoe*, noted that debtors are either “the Honest Debtor, who fails by visible Necessity, Losses, Sickness, Decay or Trade, or the like” or the “Knavish, Designing, or Idle, Extravagant Debtor, who fails because either he has run out of Estate in Excesses, or on purpose to cheat and abuse his Creditors.” DANIEL DEFOE, *AN ESSAY UPON PROJECTS* 206–07 (1697).

35. Several studies have been conducted to evaluate whether BAPCPA has achieved its twin goals of reducing overall filings and getting more “can-pay” debtors into Chapter 13. See Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 354 (2008) (studying “debtors who filed for bankruptcy in 2007”). For example, the Consumer Bankruptcy Project concluded in its initial report that the bankruptcy reform has failed in that “instead of functioning like a sieve, carefully sorting the high-income abusers from those in true need, the amendments' means test functioned more like a barricade.” *Id.* at 353. The scholarly interpretation of the empirical data found “the incomes of the families filing for bankruptcy after the amendments are indistinguishable from the incomes of the families filing for bankruptcy before the amendments.” *Id.* at 385. The report asserted that while BAPCPA did reduce the “projected number” of bankruptcy filings, it failed to achieve its stated purpose of sorting debtors according to their ability to repay past debts from future income. *Id.* at 350–53; see *id.* app. 1 at 387–98 (providing a description of the Consumer Bankruptcy

marked a new page in American bankruptcy policy.<sup>36</sup> In effect, what Congress did through the enactment of BAPCPA was superimpose a new duty of responsibility upon the moral, social, and cultural milieu of America by attempting to limit the access to Chapter 7 discharge to only those who lack the ability to pay their debts from their future income.<sup>37</sup>

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Project). The initial report from the Consumer Bankruptcy Project generated a vigorous exchange between its authors and Professor Pardo, a bankruptcy expert at the University of Washington. See Rafael I. Pardo, *Failing to Answer Whether Bankruptcy Reform Failed: A Critique of the First Report from the 2007 Consumer Bankruptcy Project*, 83 AM. BANKR. L.J. 27, 28–29 (2009) (asserting the conclusions of the Project were incorrect due to faulty assumptions and misunderstanding of the true purpose of the means test); see also Robert M. Lawless et al., *Interpreting Data: A Reply to Professor Pardo*, 83 AM. BANKR. L.J. 47, 48–51, 60–61 (2009) (defending the report’s methodology, assumptions, and understanding of the means test); Rafael I. Pardo, *Setting the Record Straight: A Sur-Reply to Professors Lawless et al.*, 33 SEATTLE U. L. REV. 93, 103 (2009) (clarifying the “mischaracterizations and misconceptions” of his initial critique of the Project’s report). Another study concluded that BAPCPA has had no long-term noticeable effect on the number of consumer bankruptcy cases. See Christian E. Weller et al., *Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Bankruptcy Rate*, 84 AM. BANKR. L.J. 327, 347–48 (2010) (“The post-BAPCPA bankruptcy rate may have grown faster than the pre-BAPCPA rate, suggesting a catching up to the level that would have prevailed without the new law.”). The study concluded that the initial effects of BAPCPA on reducing total filings and increasing Chapter 13 filings were merely temporary and based upon statistical estimates, both the number of total bankruptcy cases and the “actual Chapter 13 rate stayed relatively close to the rate that would have prevailed if BAPCPA had not been passed[.]” *Id.* at 347.

36. BAPCPA’s ultimate success or failure will depend upon whether it accomplishes its goals—reducing the number of filings and stopping abuse by ability-to-pay debtors, while at the same time not reducing the number of people in need of such relief. Cf. Charles M. A. Clark, *Economic Justice and Welfare Reform: Was Welfare Reform an Example of Prudential Judgment in Public Policy?*, 4 U. ST. THOMAS L.J. 1, 3 (2006) (“Lowering the number of people on public assistance is only a valid goal if it is achieved by reducing the number of people in need of public assistance.”). However, it is beyond the scope of this Essay to determine whether BAPCPA has or has not accomplished its goal. This Essay is limited to evaluating whether the ability-to-pay principle for Chapter 7 eligibility is consistent with Catholic social teaching.

37. Some may argue that the moral obligation to honor contractual obligations has fallen out of favor in recent years in this country. See, e.g., Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 610 (2010) (arguing the moral obligation for repayment presupposes an arms-length arrangement between the debtor and creditor, which “is incorrect”). But see James T. Hubler, Comment, *The End Justifies the Means: The Legal, Social, and Economic Justifications for Means Testing Under the Bankruptcy Reform Act of 2001*, 52 AM. U. L. REV. 309, 331–34 (2002) (arguing that a bankruptcy system needs to support the moral obligation of repayment). See generally Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 516 (1991) (developing a moral justification for consumer bankruptcy discharge). The moral component has also found its way into case law. See,

This Essay proposes to evaluate this new bankruptcy policy in light of certain moral criteria of the Church's social teaching. While not specifically addressing the efficacy of the formalistic approach taken in BAPCPA, this Essay will primarily focus upon evaluating a bankruptcy policy that imposes an ability-to-pay requirement as a condition to receiving the benefits of a Chapter 7 discharge.<sup>38</sup> The

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*e.g.*, *Allen & Co. v. Ferguson*, 85 U.S. (18 Wall.) 1, 4 (1873) ("Neither the supreme will, so far as we can ascertain it, nor the laws of the land, require that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family. . .").

38. The ability-to-pay policy appears theoretically sound. *See, e.g.*, Tom Neubig et al., *Chapter 7 Bankruptcy Petitioners' Repayment Ability Under H.R. 833: The National Perspective*, 7 AM. BANKR. INST. L. REV. 79, 103 (1999) (presenting research findings indicating that a large number of "[C]hapter 7 filers had the ability to repay large portions of their debts"). However, this change in bankruptcy policy is still criticized by some of the opponents to bankruptcy reform in general. *See* Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 48 (2001) ("The vast majority of America's bankruptcy law professors have repeatedly expressed their vehement opposition to the bankruptcy reform bills."). Many academics who opposed congressional reform efforts feel that a change in bankruptcy policy—from eligibility for liquidation bankruptcy for all debtors subject only to judicial determination of substantial abuse—to a new system with a rebuttable presumption of substantial abuse based on an income screen is indefensible. *See, e.g.*, Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 214 (2006) (alleging that Congress, in the passage of BAPCPA, made bankruptcy filings more difficult, or even impossible, for many debtors); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 1–2 (2001) (opining that the proposed change in bankruptcy policy would drive many potential debtors from any bankruptcy relief or attempt to pay the maximum they can afford in a Chapter 13 plan). Elizabeth Warren, a reporter for the NBRC and staunch opponent of means testing, concluded that debt was the major cause of bankruptcy filings. *See* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 86 (1997) ("Bankruptcy is largely a function of debt."); *see also* Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1080, 1101 (1998) (clarifying that restricting bankruptcy relief was not the answer to the problem due to individuals' debts increasing faster than their income). *But see* Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 1123, 1126 (1997) (analogizing that Elizabeth Warren's controversial conclusion was as illogical as a statement that marriage caused the rising number of divorces). Professor Warren's conclusion reflects the growing tendency in this country to shift blame to others. *Cf.* Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1084 (1998) ("Notwithstanding strong statistical evidence that the rise in consumer bankruptcy filings is linked to the increase in debt loads per household, the credit industry—and many other observers—place the blame for the rise in filings on increased consumer abuse."). By shifting responsibility for one's own acts, Professor Warren's conclusion avoids having to address the question of the personal responsibility of an individual to repay debt when there is an ability to pay. *But see id.* at 1100 ("[T]he system is not in crisis; the evidence points toward a consistent use over time of consumer

approach taken in this Essay will be divided into three sections. Part II will undertake a review of congressional activities concerning eligibility for liquidation bankruptcy proceedings and congressional encouragement of debt repayment through bankruptcy proceedings.<sup>39</sup> While many academic commentators assert that BAPCPA is a draconian piece of legislation that departs from bankruptcy tradition,<sup>40</sup> the journey through United States bankruptcy legislative history will establish that the principle of imposing an ability-to-pay requirement upon the right to file a liquidation proceeding is not new—*what is new, is that it finally became law.*

This Essay will then turn to a brief review of Catholic social teaching to review and evaluate some of its fundamental principles concerning the interrelationship between the ultimate dignity of man and his rights and duties to promote justice and the common good. The review will focus primarily on Papal encyclicals dealing with Catholic social teaching. The Essay will establish that even though

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bankruptcy by the same kinds of families—families in serious financial trouble.” (emphasis in original)). Personal responsibility is true to the new bankruptcy policy instituted and affirmed in BAPCPA. See, e.g., Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 1123, 1128 (1997) (criticizing the report for failing to address the personal responsibility issue).

39. According to § 541(a)(6) of the Bankruptcy Code, the earnings from service performed following the commencement of the case are not property of the estate. 11 U.S.C. § 541(a)(6) (2006). Thus, in a Chapter 7 proceeding such future earnings are, with certain limitations, free from the obligations to pay pre-petition debt after the discharge. See *id.* (excepting “earnings from services performed by an individual debtor after the commencement of the case” from property of the estate). However, under Chapter 13, a debtor is required to dedicate a portion of his post-filing income to fund a repayment plan for his creditors. *Id.* § 1322(a)(1). Upon receipt of a discharge and completion of the plan, the remaining debts are discharged while future earnings are free, with certain limitations, from the obligation to pay any additional pre-petition debts. See generally *id.* § 1328 (discussing discharge procedures within the context of a Chapter 13 case).

40. See Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 5 (2001) (noting that the proposed bankruptcy reform would be “draconian” to those “most in need of bankruptcy relief”); see also Robert M. Lawless, *The Paradox of Consumer Credit*, 2007 U. ILL. L. REV. 347, 362 (2007) (asserting that those who perceive BAPCPA as a draconian change in bankruptcy policy would argue that it would discourage filings). The aforementioned observations are similar to comments made about earlier proposals regarding the imposition of a threshold test for Chapter 7 eligibility during the 1960s. See Vern Countryman, *Bankruptcy and the Individual Debtor—and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 827 (1983) (articulating that these earlier proposals did not mandate an involuntary servitude in Chapter 13, but such proceedings became the only remedy available if the individual desired relief and failed the threshold test).

Catholic social teaching does not interfere in the political realm or even propose a legislative agenda, its teaching forms the framework for evaluating the moral duties of a debtor to his creditors and society as a whole.

The concluding section of this Essay will then briefly evaluate the requirement of debt repayment by those with the ability to pay as an eligibility limitation for liquidation bankruptcy relief through the lens of Catholic social teaching. Under the approach developed here, it will become clear that an individual is responsible for the free choices made in incurring debt. Thus, in order to be the recipient of debt forgiveness, an individual has a corresponding duty to repay debts to the extent of his abilities that he must fulfill.

## II. A HISTORY OF THE INDIVIDUAL CONSUMER ELIGIBILITY FOR RELIEF IN THE UNITED STATES<sup>41</sup>

A constant theme throughout American bankruptcy history has been the imposition of certain limitations upon eligibility for obtaining the benefits of liquidation. In addition, the ability of an individual debtor to use a portion of future income to repay certain pre-petition debts has been an *optional* feature of consumer bankruptcy for decades. Adhering to the basic fundamental principles of bankruptcy legislation, BAPCPA is no different from earlier legislation. It imposes eligibility requirements for liquidation bankruptcy, and it encourages optional repayment plans through Chapter 13. However, BAPCPA imposes a new twist upon these basic principles. Debtors who file for Chapter 7 relief with the *ability to pay* as determined under the provisions of the statute,<sup>42</sup> absent exceptional circumstances,<sup>43</sup> will be required to repay a portion of

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41. There have been many scholarly works on the history of American bankruptcy laws. See F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY CLAUSE OF THE UNITED STATES OF AMERICA (1919) (tracing the Bankruptcy Clause and its ability to protect the American debtor); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (unabr. reprinted 1972) (1935) (examining the history of American bankruptcy as it coincides with the nation's development); see also Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 349-69 (1991) (acknowledging bankruptcy law's changes throughout the evolution of the United States). See generally Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (describing bankruptcy's far-reaching consequences).

42. 11 U.S.C. § 707(b)(2)(A)(i)-(iii) (2006 & Supp. III 2009) (creating an eligibility requirement for Chapter 7 proceedings under the Bankruptcy Code based on current monthly income reduced by certain items).

43. *Id.* § 707(b)(2)(B)(i)-(iii) (providing Chapter 7 eligibility, despite exceeding the

their debts through either Chapter 11 or Chapter 13 proceedings, or have their cases dismissed.<sup>44</sup> As will be shown below, Congress has struggled for years to reach a politically acceptable compromise between the rights and duties of debtors, creditors, and society in general during the bankruptcy process.<sup>45</sup>

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income limitations, upon a showing of special circumstances).

44. *Id.* § 707(b)(1). As will be shown in this section of this Essay, a debtor-bankrupt had the absolute right to file liquidation bankruptcy from 1898 until 1978. See Vern Countryman, *Bankruptcy and the Individual Debtor— and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 817 (1983) (“Under the 1898 Act, which governed bankruptcy proceedings in this country for eighty years, any individual could file a voluntary petition . . .”). Beginning in 1978, bankruptcy courts were vested with the right to dismiss a Chapter 7 case for cause. See Act of Nov. 6, 1978, Pub. L. No. 95-598, ch. 7, § 707, 92 Stat. 2549, 2606 (enumerating “for cause” as an unreasonable delay or non-payment of fees) (codified as amended at 11 U.S.C. § 707). From 1978 until BAPCPA’s passage, there were certain limitations on the absolute right to file liquidation proceedings, yet these limitations were never quantified into a financial-means test. See James T. Hubler, Comment, *The End Justifies the Means: The Legal, Social, and Economic Justifications for Means Testing Under the Bankruptcy Reform Act of 2001*, 52 AM. U. L. REV. 309, 325 (2002) (defining a means test as “the debtor’s ratio of income to unsecured debt”). BAPCPA does not impose a mandatory or involuntary Chapter 13 bankruptcy upon those individual debtors who do not satisfy the means test; it only requires that debtors voluntarily enter into such a plan to obtain a bankruptcy discharge. Cf. Samuel L. Bufford & Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1, 37 (2008) (“The principal function of the means test is to disqualify certain debtors from obtaining a discharge under [C]hapter 7 when they have the ability to make meaningful payments to their unsecured creditors under a [C]hapter 13 plan.”). Historically, there have been concerns that a true mandatory or involuntary Chapter 13 bankruptcy would violate the involuntary servitude provision of the Thirteenth Amendment to the Constitution. See U.S. CONST. amend. XIII (forbidding involuntary servitude); H.R. REP. NO. 595, at 2 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6080–81 (indicating that although the involuntary servitude provision had never been tested in a wage-earners context, Congress would not impose it as a matter of policy).

45. See Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 190 (1999) (“[B]ankruptcy laws can be understood, not only as a function of the internal intellectual coherence of the economic system, but as a function of the politics of adoption”). Prior to the enactment of the Bankruptcy Code, bankruptcy legislation followed major financial disasters. The 1800 Act followed the “financial ruin caused by land speculators” and the commercial losses caused by French capture of American vessels. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 18 (unabr. reprinted 1972) (1935). The 1841 Act followed the Panic of 1837 that had resulted in bank failures and general economic downturn. *Id.* at 55–57. The 1867 Act followed the Civil War and the resulting depreciation of currency. *Id.* at 105–07. The Bankruptcy Act followed currency devaluation problems and tremendous property devaluations. *Id.* at 134–40. Competing economic and political interests have traditionally been involved in the bankruptcy legislation process. See, e.g., Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509, 516–23 (2003) (detailing lobbying efforts for



Enacted in 1800, the first American bankruptcy statute did not provide for voluntary liquidation petitions, but instead provided only for involuntary proceedings brought by creditors against traders and merchants.<sup>46</sup> The statute did not provide any mechanism for a debtor, voluntarily or involuntarily, to apply future earnings to the repayment of his obligations.<sup>47</sup> Although originally passed as a temporary law to deal with the adverse economic conditions that followed the speculation in government script and stock,<sup>48</sup> the law was quickly abrogated before the time set for its automatic repeal.<sup>49</sup>

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bankruptcy reform by the credit industry following the NBRC Report); *see also* Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 45–46 (2001) (mentioning the intense lobbying effort by the consumer credit industry upon members of Congress in an attempt to get means-testing legislation); Mark Bradshaw, Comment, *The Role of Politics and Economics in Early American Bankruptcy Law*, 18 WHITTIER L. REV. 739, 748 (1997) (explaining that financial crisis “dramatically increased the number of debtors and . . . emphasized the need for federal bankruptcy legislation”). *See generally* Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343 (1999) (analyzing the political intrigues underlying the passage of the Bankruptcy Act and attempts to gain passage of the 1998 bankruptcy reform bill).

46. Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803). The Act provided only for involuntary proceedings brought on behalf of creditors against merchants or traders who had committed an act of bankruptcy as defined in the statute. *Id.* § 1. These acts included, among others, individual concealment and disposing of property with the intent to delay or defraud creditors, coupled with the consequence of remaining in jail for two months. *Id.* The statute was patterned after the then-existing English system. *See, e.g.*, Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 499 (1996) (noting that the 1800 statute was “a virtual copy of the existing English statutes”).

47. The “effects” of the debtor, at the time of the filing, were distributed among his creditors on a pro rata basis. Act of Apr. 4, 1800 § 31. A discharge from debts was permitted. *Id.* §§ 34, 36. However, the discharge was dependent upon a favorable vote by creditors owed more than fifty dollars. *See id.* § 36 (providing a discharge upon a vote of “two thirds in number and in value of the [bankrupt’s] creditors”).

48. *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 10–13 (unabr. reprinted 1972) (1935) (discussing the country’s economic situation leading up to the enactment of the legislation).

49. The 1800 Act was a temporary measure, which was to have effect for five years. Act of Apr. 4, 1800 § 64. Because of serious opposition, the 1800 Act was repealed within three years. Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. Charles Warren cited major opposition to the Act from members of the agricultural class who were ineligible to become bankrupts. *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 21 (unabr. reprinted 1972) (1935). As a result, a merchant could file and cancel the debts he owed to a farmer, whereas the farmer would remain the debtor of another merchant and his property was subject to seizure. *Id.* There was dissatisfaction with the Act because of the time and cost to travel to federal court to attend the proceeding, the small size of dividends paid to creditors, the extension of federal power into what was perceived to be a state matter, and limited applicability. Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 228 (1976).

The second bankruptcy statute, enacted in 1841, followed the Panic of 1837. The statute was the first of its kind in this country to provide for *voluntary* liquidation proceedings.<sup>50</sup> The 1841 Act provided that all property of the bankrupt, except property classified as exempt,<sup>51</sup> was to be vested in an assignee, sold, and distributed pro rata for the benefit of creditors.<sup>52</sup> Once again, however, the statute made no provision for the voluntary or involuntary use of future earnings to be applied to pre-petition debt. The ability of an individual to initiate proceedings of a voluntary nature was challenged as unconstitutional during the debates leading up to the passage of the 1841 Act.<sup>53</sup> After

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50. The 1841 Act permitted individuals (except those who had debts arising from “defalcation as a public officer or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity”) to voluntarily file for relief under the statute. Act of Aug. 19, 1841, ch. 9, § 1, 5 Stat. 440, 440–42 (repealed 1843). At the time of its enactment, English law did not permit voluntary petitions. See, e.g., John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361, 361–62 (1988) (establishing that Congress departed from English precedent by authorizing any individual, not just merchants and traders, to initiate voluntary proceedings). England did not incorporate procedures for voluntary bankruptcy proceedings until 1849. See *id.* at 361 n.4 (indicating that “[t]he English did not formally allow voluntary bankruptcy until 1849,” but it began moving “in that direction in 1825”).

51. The 1800 Act provided very modest exemptions, including only “wearing apparel” and bedding for the bankrupt and his family. Act of Apr. 4, 1800 § 5. The 1841 Act, being more debtor-oriented, exempted up to three hundred dollars of necessary household furnishings, wearing apparel, and bedding for the bankrupt and his family. Act of Aug. 19, 1841 § 3. However, because the statute did not provide for a homestead exemption, its opponents argued that Congress had once again shown a bias favoring the merchant and trader class over the agricultural class. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 34 (unabr. reprinted 1972) (1935); see F. REGIS NOEL, *A HISTORY OF THE BANKRUPTCY LAW* 139–43 (1919) (demonstrating a general dissatisfaction with the discharge provision and showcasing the constitutional arguments against its validity).

52. Like the first bankruptcy law, the discharge from debts was still contingent upon actions by the creditors. See Act of Aug. 19, 1841 § 4 (authorizing a discharge “unless a majority in number and value of his creditors who have proved their debts” filed written dissent).

53. See, e.g., F. REGIS NOEL, *A HISTORY OF THE BANKRUPTCY LAW* 140–41 (1919) (discussing opposition to the proposed bill based on constitutional grounds that it was an insolvency law and not limited to just traders and merchants); see also John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361, 371–87 (1988) (detailing the opposition to enacting any bankruptcy legislation that permitted voluntary bankruptcy proceedings from 1820 to 1841). Professor McCoid asserted the real objection to voluntary proceedings was concern for debtor abuse. He stated that “[t]he principal fear at the time covered by this account [(1820–1841)] was that debtors, who by tightening their belts would be able to repay their creditors in substantial measure, would seize on bankruptcy as a means of avoiding the repayment obligations.” John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEV. J. 361, 388 (1988).

its passage, the constitutionality of the Act was challenged.<sup>54</sup> Opponents argued that the power of Congress to enact bankruptcy laws was limited to English-styled acts that were solely involuntary proceedings brought by creditors. It was clear that at the time of the ratification of the United States Constitution in 1787, most of the original thirteen states had laws that dealt with insolvent debtors.<sup>55</sup> While each state law varied, the states uniformly permitted a debtor to initiate the proceedings and to obtain whatever relief might be available if he satisfied the conditions of the respective laws.<sup>56</sup> The laws were generally referred to as “insolvency laws” to distinguish them from bankruptcy laws that were brought by the creditors against a particular class of debtors in the English tradition.<sup>57</sup> In the United

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54. U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to establish “uniform Laws on the subject of Bankruptcies through the United States”).

55. See, e.g., Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 518–25 (1996) (discussing the various ways the colonies dealt with insolvent debtors); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1101 (1833) (noting that before the adoption of the Constitution, each individual state possessed the exclusive right “to pass laws upon the subjects of bankruptcy and insolvency”). See generally PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607–1900 (1974) (detailing the various state relief laws in New England, the Middle Atlantic region, and the South Atlantic region from colonization to the end of the 1800s).

56. “The debtors, not the creditors, initiated the proceedings by petition.” Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 520 (1996). “A very few jurisdictions during the later part of the seventeenth century and beginning of the eighteenth century, and Pennsylvania in 1795, enacted legislation styled on the English bankruptcy acts, in which the creditors initiated proceedings against merchants.” *Id.*

57. If the distinction between insolvency laws and bankruptcy laws was valid, creditors would have asserted that voluntary petition statutes were insolvency laws. Cf. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 84 (unabr. reprinted 1972) (1935) (indicating some lawmakers’ displeasure with “[t]he attempt to confound insolvency and bankruptcy”). Accordingly, the power to enact such a law was retained within the province of the states under the Constitution. But see Samuel Williston, *The Effect of a National Bankruptcy Law upon State Laws*, 22 HARV. L. REV. 547, 555 (1909) (“The closing sentence of the Bankruptcy Act also lends force to the argument that Congress intended to supersede all state legislation on the subject of bankruptcy.”). The Supreme Court previously held that the insolvency laws of a state could not discharge contractual obligations that had been incurred prior to the statute’s enactment. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 207–08 (1819) (“[I]f a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.”). However, Chief Justice Marshall stated that in the absence of a federal enactment, a state law could discharge debts if it did not impair the right of contract. *Id.* at 193–96. In *Ogden v. Saunders*, the Supreme Court held that in the absence of federal legislation, a state could enact laws to discharge debts incurred subsequent to the enactment of the laws, but could not discharge obligations owed to

States, the distinction between insolvency and bankruptcy laws had always been unclear. In discussing the matter, Justice Story stated:

No distinction was ever practically, or even theoretically attempted to be made between bankruptcies and insolvencies. And a[n] historical review of the colonial and state legislation will abundantly show, that a bankrupt[cy] law may contain those regulations, which are generally found in insolven[cy] laws; and that an insolven[cy] law may contain those, which are common to bankrupt[cy] laws.<sup>58</sup>

Though the constitutionality of the statute was eventually upheld,<sup>59</sup> the law was later repealed by the same Congress that enacted it.<sup>60</sup>

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nonresidents. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 368–69 (1827); see also Samuel Williston, *The Effect of a National Bankruptcy Law upon State Laws*, 22 HARV. L. REV. 547, 557 (1909) (“According to the English usage an insolvency law is aimed to relieve a debtor from imprisonment for debt, while the primary aim of a bankruptcy law is the equal distribution of his property among his creditors.”).

58. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1106 (1833).

59. See *In re Klein*, 14 F. Cas. 719, 730 (D. Mo.) (No. 7,866) (holding the 1841 Act unconstitutional because bankruptcies, under the Constitution, were limited to involuntary proceedings brought by creditors), *rev'd*, 42 U.S. (1 How.) 277 (1843). Justice Catron, sitting as a circuit judge, reversed *Klein* on appeal. *Klein*, 42 U.S. (1 How.) at 281. Justice Catron found the 1841 Act constitutional on the grounds that the Constitution authorized Congress to enact federal insolvency legislation as well as statutes similar to the English bankruptcy law. His expansive opinion concluded:

I hold [the Bankruptcy Clause] extends to all cases where the law causes to be distributed, the property of the debtor among his creditors: this is its least limit. Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation . . . are in the competency and discretion of Congress.

*Id.* The Supreme Court never had a chance to rule on the constitutionality of the 1841 Act. See *Nelson v. Carland*, 42 U.S. (1 How.) 265, 266 (1843) (dismissing a constitutional attack on the 1841 Act on grounds of lack of jurisdiction). However, Justice Catron filed a dissent asserting that the 1841 Act was constitutional. *Id.* at 266–77 (Catron, J., dissenting). Interestingly, by the time the 1867 Act was passed, the constitutionality of a federal bankruptcy law that permitted voluntary petitions was unquestioned. See *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) (indicating that voluntary petitions are “really not open to discussion”). Both the Bankruptcy Act and the Bankruptcy Code have been upheld as proper enactments under the Constitution. See *id.* at 188 (holding that the uniformity requirement of the Constitution did not prohibit the use of state exemptions in bankruptcy proceedings); *In re Sullivan*, 680 F.2d 1131, 1137 (7th Cir.) (finding that the constitutional mandate for uniformity was not violated by the Bankruptcy Code, which permitted states to opt out of federal exemptions), *cert. denied sub nom. Sullivan v. United States*, 459 U.S. 992 (1982).

60. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614. The leading causes of the repeal included the failure to permit state exemptions and the inadequate payments to creditors. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 82 (unabr. reprinted 1972).

The next bankruptcy act, the 1867 Act,<sup>61</sup> like its predecessor, permitted voluntary liquidation petitions.<sup>62</sup> As initially enacted, the Act did not provide for the possibility of using future income to pay creditors.<sup>63</sup> However, in 1874, Congress passed a far-reaching amendment to the 1867 Act, permitting compositions.<sup>64</sup> Under the composition provision, the debtor, before or after being adjudicated a bankrupt, could offer to pay his unsecured creditors a certain percentage of their claims in exchange for a release from liability and the right to stay in possession of all his property.<sup>65</sup> The unsecured

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(1935).

61. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

62. *Id.* § 11 (permitting voluntary proceedings by any debtor owing debts of more than \$300 who was willing to give up his nonexempt property for distribution to his creditors). An early bankruptcy commentator claimed that the statute was merely a copy of the insolvency law of Massachusetts. J. ADRIANCE BUSH, *THE NATIONAL BANKRUPTCY ACT OF 1898* 12 (1899). The statute was subject to repeated amendments and, like its predecessors, was quickly repealed. Act of June 7, 1878, ch. 160, 20 Stat. 99.

63. In fact, the voluntary bankruptcy provision prohibited the bankrupt from paying debts or transferring property; instead, it required the bankrupt to surrender his property for the benefit of the creditors. Act of Mar. 2, 1867 § 11.

64. Act of June 22, 1874, ch. 390, § 17, 18 Stat. 178, 182–84 (repealed 1878). The legislative history of this bill is rather remarkable. On December 16, 1873, the House of Representatives passed legislation by a vote of 219 to 44 to repeal the 1867 Act. *See* 2 CONG. REC. 239 (1873) (listing the members who voted for and against the 1867 Act's repeal). The main reason for opposition to the bill was its ineffectiveness regarding debtor rehabilitation as compared to state insolvency laws. *Id.* at 229–39. However, the Senate revived the bill and made extensive amendments, including the provision for composition, and thereafter overwhelmingly passed the bill. *Id.* at 1350–59. The Senate's recommendation for the composition was considered to be “expedient in substance.” *Summary of Events: The Bankruptcy Law*, 8 AM. L. REV. 609, 611 (1874). The composition section was patterned after the then British law. *See* Bankruptcy Act, 1869, 32 & 33 Vict., c. 71, § 126 (Eng.) (indicating the composition section that the American law was modeled after); *see also In re Scott*, 21 F. Cas. 805, 806–09 (E.D. Mo. 1876) (No. 12,519) (comparing the English and American statutes relating to composition); 2 CONG. REC. 1143 (1874) (justifying the composition provision by explaining the success of a similar provision under English law). One commentator noted that the composition statute, by allowing confirmation without unanimous agreement, helped remedy a serious problem that hindered the success of common law voluntary compositions. *See* ORLANDO F. BUMP, *COMPOSITIONS IN BANKRUPTCY* 1 (1877) (indicating that “an exacting and unscrupulous creditor” single-handedly had the power to cause great inequity in the satisfaction of debts to all creditors). In many cases, even when such composition was in the best interest of all, one creditor would refuse to agree to the composition unless he was paid in full. *See id.* (“[A] creditor at common law could refuse to receive less than the full amount due him in satisfaction and discharge of his demand, although such compromise might be for the best interest not merely of other creditors, but of himself.”).

65. Act of June 22, 1874 § 17. Although cash was not required at the time the court approved the composition, a discharge of debts occurred upon the complete performance

creditors had the option of accepting or rejecting the proposal.<sup>66</sup> However, if the requisite percentage of unsecured creditors—in number and amount of claims—accepted the debtor’s composition plan,<sup>67</sup> it became binding on all unsecured creditors if the court found that the composition was in “the best interests of all concerned.”<sup>68</sup> Although the statutory language stated that the composition must “provide for a [pro rata] payment or satisfaction, in money,” to the unsecured creditors, the courts held that payment in installments by

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of the composition via statutorily acceptable payments. *See* *Liebke v. Thomas*, 116 U.S. 605, 608 (1886) (noting that the debtor was released from his debts upon completion of the conditions of the bankruptcy statute); *Wilmot v. Mudge*, 103 U.S. 217, 220 (1880) (determining that the performance of a composition had the same effect as a formal discharge); *In re Becket*, 3 F. Cas. 27, 28 (C.C.D. La. 1875) (No. 1,210) (clarifying that after compliance with its terms, the debtor was discharged of the claims properly contained in an accepted and approved composition without the need for a formal discharge). Of course this “informal discharge,” arising by operation of law, did not release the bankrupt from debts that were not dischargeable, such as those arising from breach of fiduciary duty or fraud. *See Wilmot*, 103 U.S. at 220–21 (holding that the 1874 amendments were *in pari materia* with the 1867 Act and that if certain classes of claims were not dischargeable in a bankruptcy proceeding, they were also not dischargeable in a composition, “for it is a proceeding in bankruptcy”).

66. Fully secured creditors were unable to vote on the composition plan unless their security was relinquished to the debtor. Act of June 22, 1874 § 17.

67. *See id.* (establishing that in order for the composition to be approved by the court, the plan first had to be “passed by a majority in number and three-fourths in value of the creditors” and then confirmed by two-thirds in number of creditors and one-half in amount of creditors’ claims).

68. *Id.* The issue of when the composition would be in the best interest of all concerned was never a settled issue under the short-lived statute. *See, e.g., In re Whipple*, 29 F. Cas. 929, 930 (D.C. Mass. 1875) (No. 17,513) (pointing out that Congress imposed upon the courts the responsibility of rejecting a composition “even if opposed by a small minority of creditors, when it is made to appear that a settlement in bankruptcy would be more for their advantage”). *But see In re Weber Furniture Co.*, 29 F. Cas. 531, 531–34 (D.C.E.D. Mich. 1876) (No. 17,330) (illustrating a reluctance to substitute the court’s judgment for that of the majority of unsecured creditors). Judge Brown, delivering the opinion in *Weber Furniture*, stated:

I should be very reluctant to overrule their judgment [of a large majority of the unsecured creditors] simply because I thought the estate would yield a larger dividend in bankruptcy. Much would depend upon the character of the property and the state of the markets. In [the *Whipple* case], Judge Lowell intimated “that a difference of five per cent upon the amount of the debts, and the probable amount of the assets, would not be sufficient to induce me to reject the resolution.” I would go even further than that, and say that, where the property consisted of real estate or of goods, the value of which depended upon the caprices of fashion, or other like contingencies, I would not overrule the discretion of the creditors, fairly exercised, if the difference were ten, or even fifteen per cent.

*Id.* at 533–34.

way of unsecured notes satisfied the statutory language.<sup>69</sup> While the constitutionality of the composition provision was vigorously debated in the halls of Congress before enactment,<sup>70</sup> the composition amendment was upheld by the courts as a valid exercise of congressional power under the Bankruptcy Clause.<sup>71</sup>

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69. Act of June 22, 1874 § 17. Senator George Edmunds, the Chairman of the Senate Judiciary Committee in which the composition amendment arose, stated that since the composition procedure dealt with private rights, instead of immediate liquidation, "it may go on for ten years" if agreed to by the requisite number of creditors, and the judge was satisfied that such proposal was fair and honest. 2 CONG. REC. 1143-44 (1874). However, after the amendment's passage, many creditors asserted that payment by way of installment notes was not money, and that it was therefore not allowable under the amendment. See *In re Reiman*, 20 F. Cas. 490, 498 (S.D.N.Y. 1874) (No. 11,673) (addressing these assertions), *aff'd*, 20 F. Cas. 500 (C.C.S.D.N.Y. 1875) (No. 11,675). Before being elevated to the Supreme Court, District Judge Samuel Blatchford, rejected the creditors' argument:

A composition providing for a payment or satisfaction in 'money,' is placed in contradistinction to one for payment or satisfaction in property. It could scarcely have been intended that a composition should exclude all deferring of payments. Voluntary compositions almost always provide for successive payments at stated times. A composition may well provide for successive payments in money at stated future times, and, if so, there can be no good reason why the stated payments may not be evidenced by notes, to be indorsed, if desired, the notes being payable in money. A note is not payment, especially where, as in the present case, it is provided that the payments evidenced by the notes must be made or the agreement will be void.

*Id.*

70. See, e.g., 2 CONG. REC. 1354-58 (1874) (recording the debate between Senators Stevenson and Thurman over the constitutionality of the composition amendment); see also CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 119 (unabr. rept. 1972) (1935) (reporting that many members of Congress doubted the constitutionality of a composition provision as "it was not such a bankruptcy law as was known at the time of the framing of the Constitution").

71. *Reiman*, 20 F. Cas. at 501-02 (rejecting the argument that Congress's constitutional power to pass laws on the subject of bankruptcy was limited to those in existence in Great Britain at the time of the Constitution's enactment). In *Reiman*, the court also rejected the argument that the Constitution required Congress to make a debtor surrender his entire estate as a condition for discharge. *Id.*; see also *Wilmot v. Mudge*, 103 U.S. 217, 218 (1880) ("The provision for composition is a proceeding in bankruptcy . . ."). The final argument that the composition amendment was unconstitutional revolved around the fact that under a composition the bankrupt's discharge was left to the decision of a majority of his creditors. See *Reiman*, 20 F. Cas. at 502 (denying the argument and emphasizing the creditors' suitability to make such determinations). It should be noted that by 1874, Congress's power to enact legislation by execution of its constitutionally vested power was well established. Chief Justice Marshall had stated over and over that Congress could choose between various options to carry out its constitutionally vested powers. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 195-96 (1819) (emphasizing that Congress had extensive discretion in determining eligibility for filing bankruptcy); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805) ("Congress must

Composition plans were the first step in American bankruptcy law to permit a debtor to use future earning power to rehabilitate himself or his business. The debtor could, in effect, ransom his present estate by promising to pay his creditors over time.<sup>72</sup> Although the primary purpose of compositions was the rehabilitation of merchants and other businesses, there was nothing in the statutory language that prevented individual wage earners from participating in a composition.<sup>73</sup> However, because the law did not apply to secured debt, compositions under the 1874 Act were not viable means of rehabilitating debtors.<sup>74</sup> Like its two predecessors, the 1874 Act was the subject of much criticism and was repealed in 1878, soon after its enactment.<sup>75</sup>

It was twenty years later before the country had a new bankruptcy act, the Bankruptcy Act of 1898,<sup>76</sup> which, while amended from time

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possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the [C]onstitution.”); *see also* *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (acknowledging that Congress has discretion over the means used to exercise its constitutional powers).

72. *See, e.g.*, THOMAS K. FINLETTER, *THE LAW OF BANKRUPTCY REORGANIZATION* 23 (1939) (citation omitted) (contending that “[b]y substituting a new estate—the terms of composition—the old estate was ransomed”).

73. *See, e.g.*, *Perry v. Commerce Loan Co.*, 383 U.S. 392, 403 (1966) (admitting that distressed wage earners could avail themselves of the 1867 Act, as amended).

74. *See* Act of June 22, 1874 § 17 (providing that a fully secured creditor could participate in a composition only upon giving up its collateral “for the benefit of the estate”); *see also* *Cavanna v. Bassett*, 3 F. 215, 217 (C.C.N.D. Ill. 1880) (explaining that a secured creditor could not participate in compositions because it had a right to its security and, therefore, “could not be compelled to surrender [its] security” or prove its claim). Under the 1874 amendments, in the event of a deficiency following a foreclosure, a secured creditor (now undersecured) whose collateral was not valued during the composition proceeding was entitled to compel payment of his deficiency at the same percentage received by the other unsecured creditors. *See, e.g.*, *Paret v. Ticknor*, 18 F. Cas. 1093, 1094 (C.C.E.D. Mo. 1877) (No. 10,711) (containing an opinion by Supreme Court Justice Miller, sitting as a circuit judge).

75. Act of June 7, 1878, ch. 160, 20 Stat. 99. The major reasons for its repeal were the inordinate delays in the administration of the estates and the excessive fees and expenses of the administration. *See* J. ADRIANCE BUSH, *THE NATIONAL BANKRUPTCY ACT OF 1898* 14–15 (1899) (analyzing bankruptcy law leading to the Bankruptcy Act of 1898). The composition law of 1874 was subject to complaint from its inception. *See* John Lowell, *The Repeal of the Bankruptcy Act*, 10 AM. L. REV. 393, 394 (1876) (asserting that the composition section encouraged fraudulent debtors “to extort an unfair concession” from creditors); *Summary of Events*, 9 AM. L. REV. 349, 350–51 (1875) (commenting that the amendments encourage preference and fraud); *Summary of Events*, 9 AM. L. REV. 148, 149 (1874) (questioning the “doubtful constitutionality” of the composition statute that bound a minority of the creditors).

76. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).



to time, governed bankruptcy proceedings for eighty years. The Bankruptcy Act provided voluntary relief for an individual through liquidation proceedings, without regard to the nature or extent of the bankrupt's indebtedness.<sup>77</sup> Like the 1867 Act, section 12 of the Bankruptcy Act provided that the bankrupt could offer to pay all or a portion of his obligations by way of composition.<sup>78</sup> Under the Bankruptcy Act of 1898, a composition could only be offered subsequent to the examination of the bankrupt, and after he had filed with the court a schedule of his property and a list of his creditors.<sup>79</sup> The Bankruptcy Act further provided that an application for composition confirmation could be filed by the bankrupt after it had been approved by the requisite number of creditors; the debtor must also have deposited the agreed-upon consideration to be paid to unsecured creditors as well as that required to pay priority creditors and the costs of the proceeding.<sup>80</sup> Similar to the previous statute, the

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77. See *id.* § 4(a) ("Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt."). In 1910, corporations were granted authority to file voluntary bankruptcy. See Act of June 25, 1910, ch. 412, § 3, 36 Stat. 838, 839 (prohibiting only municipalities, railroads, insurances, or banking corporations from filing a voluntary petition).

78. Bankruptcy Act of 1898 § 12 ("A bankrupt may offer terms of composition to his creditors."). One author declared that an objective of the law was "[t]o enforce the acceptance of compositions, and thereby put it out of the power of a few creditors to prevent the acceptance of terms of settlement offered by an insolvent, when manifestly better for the whole mass of creditors than a legal settlement of his affairs." Henry G. Newton, *The United States Bankruptcy Law of 1898*, 9 YALE L.J. 287, 287 (1898).

79. Bankruptcy Act of 1898 § 12(a). The term "bankrupt" was an all-inclusive term in the statute and included, among others, an individual adjudged a bankrupt, one against whom an involuntary proceeding had been filed, or an individual who had filed a voluntary petition. *Id.* § 1(4). The 1874 amendments to the 1867 Act permitted the offer of a composition after the filing of a petition, but either before or after adjudication. Act of June 22, 1874 § 17. The Bankruptcy Act of 1898 was amended in 1910, authorizing offers of composition before adjudication for the protection of the estate. Act of June 25, 1910 § 12(a). This amendment also provided a stay in the adjudication proceedings until it could be determined whether the composition was going to be confirmed. *Id.* However, this particular provision was later amended to mandate a continuation of the petition for adjudication absent good cause. Act of May 27, 1926, ch. 406, sec. 5, § 12(a), 44 Stat. 662, 663. The stay provision had created a useful opportunity for "shifty lawyers for fraudulent bankrupts" to dissipate the assets of the debtor before he could be adjudicated. James McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 341, 349 (1927).

80. Bankruptcy Act of 1898 § 30. According to the Act, after the court confirmed the composition and the consideration was distributed as directed, the case would be dismissed. *Id.* § 12(e). In explaining the legal principles of a composition, Justice Day stated:

[T]he effect of the composition proceeding is to substitute composition for bankruptcy proceedings in a certain sense, and in a measure to supersede the latter

consideration could come from future income.<sup>81</sup> The court was required to confirm the composition if it determined that the plan was proposed and accepted in good faith,<sup>82</sup> the debtor qualified for a discharge,<sup>83</sup> and the composition was in the best interest of the creditors.<sup>84</sup> Upon confirmation of a composition plan, the proceedings were dismissed,<sup>85</sup> the bankrupt reacquired title to his

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proceeding, and to reinvest the bankrupt with all his property free from the claims of his creditors. True, the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire act.

Cumberland Glass Mfg. Co. v. De Witt, 237 U.S. 447, 454 (1915) (citing *Wilmot v. Mudge*, 103 U.S. 217, 220 (1880)); *see also In re Lane*, 125 F. 772, 773 (1902) (examining the nature of composition under the Bankruptcy Act of 1898).

81. It was clearly contemplated that “the consideration must be either after acquired property, which in the ordinary case will be a mere pittance; exempt property, which will rarely be of greater values, or money borrowed by the bankruptcy from some friend; or else the bankrupt’s own notes.” WM. MILLER COLLIER, *THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898* 144 (James W. Eaton ed., Matthew Bender 3d. ed. 1900); *see also Zavelo v. Reeves*, 227 U.S. 625, 632 (1913) (finding that the Bankruptcy Act of 1898 contemplated that the consideration for the composition plan would be paid out over time).

82. Bankruptcy Act of 1898 § 12(d).

83. *Id.*

84. *Id.* In trying to determine whether the proposed consideration was in the best interests of creditors, Circuit Judge Day, before being elevated to the Supreme Court, articulated that:

It comes, then, to this: If the court is satisfied upon the hearing that the composition offered would pay creditors very considerably less than they might reasonably be expected to realize in the administration of the assets in due course, then the composition is not for the best interest of creditors. In determining this question, the courts will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in [the] course of judicial proceedings with compulsory sales and expense of administration.

*Adler v. Jones*, 109 F. 967, 969 (6th Cir. 1901). Composition plans under the Bankruptcy Act of 1898 were viewed by some commentators no differently than liquidation proceedings because “the creditors would get . . . substantially what they would have gotten” if the estate had been liquidated. THOMAS K. FINLETTER, *THE LAW OF BANKRUPTCY REORGANIZATION* 24 (1939). Until the passage of the reorganization provisions during the 1930s, the main type of bankruptcy was liquidation. Although composition was provided as an alternative, it was considered to be a mere settlement with the debtor’s creditors and to be separate and distinct from bankruptcy proceedings. *See Nassau Smelting & Ref. Works v. Brightwood Bronze Foundry Co.*, 265 U.S. 269, 271 (1924) (citing *Cumberland Glass*, 237 U.S. at 454) (noting that a composition began with a “voluntary offer by the bankrupt” and in a large part, ended “from voluntary acceptance by his creditors”).

85. Bankruptcy Act of 1898 § 12(e).

property,<sup>86</sup> and he was discharged of all dischargeable debts.<sup>87</sup> The bankrupt's only future obligation to his former creditors was to make whatever payments the terms of the composition plan required.<sup>88</sup> However, since composition proceedings were still limited to participation by unsecured creditors (or undersecured creditors),<sup>89</sup>

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86. *Id.* § 70(f).

87. *See id.* § 17 (listing the non-dischargeable debts).

88. *Id.* § 14(c); *see In re Mirkus*, 289 F. 732, 733 (2d Cir. 1923) (asserting that the order of confirmation serves as a discharge of all debts handled in the composition order, except the portion that the debtor has agreed to pay under the plan). The ability to get a discharge upon the confirmation of the composition was a significant departure from the early law. Under the composition provision of 1874, the discharge did not occur until all obligations detailed in the composition were accepted by the requisite creditors and approved by the court, and the court was satisfied that the plan was in "the best interests of all concerned." Act of June 22, 1874, ch. 390, § 17, 18 Stat. 178, 182–84 (repealed 1878). In addition, the court retained jurisdiction over the case until the composition plan was finalized. *Id.* Furthermore, under the 1874 amendments creditors could make an application with the bankruptcy court to enforce the composition, and if the debtor was unable to comply with the terms of the composition, the bankruptcy proceedings would be resumed. *Id.*; *see In re Bayly*, 2 F. Cas. 1085, 1086 (C.C.D. La. 1879) (No. 1,144) (recognizing that when a composition was set aside, the case resumed where it had been prior to the acceptance of the confirmation). Under the Bankruptcy Act of 1898, as originally enacted, the bankruptcy court lost jurisdiction upon an order of confirmation, except to set aside the composition for fraud within six months following confirmation. Bankruptcy Act of 1898 § 13. After the six-month period, the only remedy for a creditor was to sue on the composition itself in a court of competent jurisdiction. *See Mirkus*, 289 F. at 733–34 (bringing a new involuntary proceeding against the former debtor). The *Mirkus* court held that the failure to pay such notes agreed to in the composition does not revive the original debt. *Id.* at 735–36. The creditor's claim was limited to the unpaid amount he was entitled to under the confirmed composition. *Id.*

89. In this regard, the treatment of secured creditors in composition proceedings under the Bankruptcy Act of 1898 was identical to their treatment in proceedings under the 1874 amendments to the 1867 Act. Secured creditors were not parties to offers of composition, unless the bankrupt's schedules showed that a secured creditor was undersecured. Act of June 22, 1874 § 43. In that case, the deficiency was to be included in the composition offer. *See, e.g., In re Everick Art Corp.*, 39 F.2d 765, 768 (2d Cir. 1930) (concluding that to the extent the value of the secured creditor's claim was greater than the value of his collateral as shown in the debtor's schedules, that unsecured portion must be included in the composition offer). As under the 1874 amendments, in the event of a deficiency following a foreclosure, a secured creditor was entitled to compel payment of the same percentage as received by the other unsecured creditors. *See, e.g., In re Kahn*, 121 F. 412, 414–16 (S.D.N.Y. 1902) (holding that a mortgagee having a deficiency after foreclosure and not being a party to the composition would receive the same percentage as the unsecured creditors under the composition). The issue in *Kahn* was whether a secured creditor was a "necessary and proper party" to the confirmation of the composition. *Id.* at 416. The referee determined that a secured creditor who had not foreclosed on the bankrupt's property—to create a deficiency—was not a creditor under section 12 of the Bankruptcy Act of 1898, as he had no provable claim under section 63 of the Act. *See id.* at 414 (establishing that under the Bankruptcy Code, secured creditors only have claims in

they were not entirely useful in rehabilitation. Although the composition provision of the Bankruptcy Act did not differ significantly from that of the 1874 Act, it represented a continuing awareness that an alternative to straight liquidation was a good idea because it prevented the wastes and expenses that often accompanied liquidation or state procedures.<sup>90</sup> It also provided a method for the working trader or merchant to continue business unabated. However, the provision provided little relief for the plain wage earner.<sup>91</sup>

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the event their collateral has been valued and determined to be undersecured). Because section 12 of the 1898 Act provided that the debtor was to offer terms of composition to his creditors, the mortgage holder was not a proper party to the composition since he was not considered a creditor under the Act. *Id.* As “the bankruptcy court has nothing to do with [the secured creditors] except so far as their claims may exceed their security, or they may elect to surrender their security.” WM. MILLER COLLIER, *THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898* 146 (James W. Eaton ed., Matthew Bender 3d ed. 1900). As noted by the Supreme Court, “[t]he principle of composition was first applied to the interest of secured creditors in their security[.]” under the Bankruptcy Act of 1898 as amended by various acts in 1933 and 1934. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 586 n.16 (1935) (citing Act of Mar. 3, 1933, ch. 204, § 74, 47 Stat. 1467, 1467–70 (codified as amended at 11 U.S.C. §§ 202–203, 205 (2006)); Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 911, 912 (codified as amended at 11 U.S.C. § 207 (2006)); Act of May 24, 1934, ch. 345, § 80, 48 Stat. 798, 798–803 (codified as amended at 11 U.S.C. § 303 (2006))).

90. *See, e.g.*, *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966) (asserting that in liquidation proceedings “everyone lost—the creditors [lost] by receiving a mere fraction of their claims, the debtor by bearing thereafter the stigma of having been adjudged a bankrupt”). *See generally* John Lowell, *The Repeal of the Bankrupt Act*, 10 AM. L. REV. 393, 393 (1876) (acknowledging the limitations of state laws because of their lack of extraterritorial effect).

91. *See, e.g.*, *Perry*, 383 U.S. at 394–95 (explaining how the composition provision provided little relief for wage earners). In that case Justice Clark, writing for the majority, observed:

Although statutory relief for the financially distressed wage earner had been available to some extent as early as the Bankruptcy Act of 1867, . . . Congress found in its study prior to the 1938 revision of the bankruptcy laws that there were no effective provisions for the complete repayment of the wage earners debts suited to his problems. . . . For example, compositions under § 12 of the 1898 Act . . . were available to the wage earner, but the relief afforded was unsatisfactory. Section 12 proceedings, which were primarily adaptable for use by business entities, were disproportionately expensive in view of the small sums ordinarily involved in wage-earner cases; they lacked flexibility; and they did not provide for jurisdiction of the court subsequent to confirmation.

*Id.*; *see also In re Scher*, 12 B.R. 258, 261 (Bankr. S.D.N.Y. 1981) (noting that section 12 of the Bankruptcy Act of 1898 “proved unequal to the task envisioned by Congress for the special circumstances of the wage earner whose only hope for the relief given by the section was recourse to his future earnings”). The *Scher* court acknowledged that the

As America moved into the twentieth century, the increasing rise in the use of consumer credit by families and individuals<sup>92</sup> paralleled the significant rise in bankruptcy filings by wage earners.<sup>93</sup> As a result of the increased number of bankruptcy cases and the perceived abuses by corrupt debtors and bankruptcy administrators, an investigation of bankruptcy administration in the Southern District of New York was directed by William J. Donovan under the guidance of then United States District Judge Thomas D. Thacher.<sup>94</sup> The investigation resulted in the Donovan Report,<sup>95</sup> which outlined the patterns of abuse, their probable causes, and suggestions for reform. As it related to wage earners and the compositions, the Report documented a number of abuses.<sup>96</sup> The Report concluded that

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confirmation requirement of depositing "all moneys necessary to pay priority debts and administrative expenses . . . placed . . . relief beyond the reach of the average individual wage-earner." *In re Scher*, 12 B.R. at 261.

92. See David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311, 315 (1999) (stating that the consumer credit grew at a real rate of 11.9% per year from 1920 to 1929). These authors also found that in urban areas over 50% of all consumer sales were done on credit in 1931 and 1932. See *id.* (relying on a study conducted by the Department of Commerce); see also S. DOC. NO. 72-65, at 8-9 (1932) (Thacher Report) (noting the encouragement by lenders to consumers to live beyond their means through credit purchases in the 1920s).

93. See David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution or Both?*, 73 AM. BANKR. L.J. 311, 316 (1999) (finding that from 1920 to 1929 closed non-business bankruptcy cases grew at a compound rate of 18.2%). The authors note that there was analysis finding that the increased number of consumer bankruptcy cases was the result of the indifference to debt or the decline in the social stigma associated with bankruptcy. See *id.* (acknowledging a 1931 report from Rolf Nugent of the Russell Sage Foundation). On the other hand, the Thacher Report noted that medical expenses, unemployment, and the rise in consumer credit were the principal causes for the increased filings. S. DOC. NO. 72-65, at 85 n.59 ("It would be a mistake to assume that the wage-earner bankruptcies in recent years have been caused solely, or even mainly, by installment buying."); see also Wesley A. Sturges & Don E. Cooper, *Credit Administration and Wage Earner Bankruptcies*, 42 YALE L.J. 487, 487 (1933) (noting that almost one half of all bankruptcies in 1931 were filed by wage earners). "Wage earner" was a defined term in the Bankruptcy Act of 1898 to mean "an individual who works for wages, salary or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." Bankruptcy Act of 1898 § 1(a)(27). As enacted in 1898, the Bankruptcy Act prohibited involuntary proceedings against wage earners. *Id.* § 4.

94. See Mitchell S. Dvoret, *Federal Legislation: Bankruptcy Under the Chandler Act: Background*, 27 GEO. L.J. 194, 197-99 (1938) (discussing the investigation and its report).

95. See generally H. COMM. ON THE JUDICIARY, 71ST CONG., ADMINISTRATION OF BANKRUPTCY ESTATES (Comm. Print 1931) (Donovan Report) (reporting the findings from the investigation).

96. See *id.* at 46-48 (outlining the abuses in the case of composition proceedings, including the use of composition proceedings to avoid examination of the bankrupt and

referees should be granted original jurisdiction to confirm or reject the composition, subject to judicial review, in any attempt to shorten the “cumbersome, long-drawn-out machinery of composition” that was “an invitation to fraud.”<sup>97</sup>

Shortly thereafter, at the request of President Herbert Hoover, the Attorney General was authorized to conduct a thorough investigation of the whole of bankruptcy practice and procedure.<sup>98</sup> The investigation resulted in the Thacher Report, which outlined the defects in the current law and its administration,<sup>99</sup> along with a proposed bill thought to remedy such defects.<sup>100</sup> The proposed bill offered the wage earner an opportunity to file a voluntary plan to amortize all of his debts over a two-year period of time.<sup>101</sup> To

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buying off objecting creditors).

97. *Id.* at 116–20.

98. *See* S. DOC. NO. 72-65, at 1 (containing the announcement by President Herbert Hoover on July 29, 1930, authorizing the Attorney General to “undertake an exhaustive investigation” of the bankruptcy law and practice). The investigation was done under the direction of Solicitor General Thomas D. Thacher and assisted by the Department of Commerce. *See* Mitchell S. Dvoret, *Federal Legislation: Bankruptcy Under the Chandler Act: Background*, 27 GEO. L.J. 194, 199 (1938) (discussing the Thacher Report).

99. In his letter to Congress transmitting the Thacher Report, President Herbert Hoover wrote that his review of the Report convinced him that the substantial increase in bankruptcy filings and the resulting losses to creditors were “not due to the economic situation, but to deeper causes.” S. DOC. NO. 72-65, at xi. He thus concurred with the findings and conclusion of the Report and asked Congress to act on the recommendations of the Report. *Id.* at xi–xii. Among the defects that President Hoover noted regarding the present consumer bankruptcy law was that it did not discriminate among those who could pay back their debts without hardship and those who could not. *Id.* at xi. Thus, he favored the Report’s recommendation for a suspended discharge during which time a bankrupt could pay back some of his obligations out of after-acquired property. *Id.* at xii.

100. The recommendations of the Thacher Report were introduced in Congress as the Hastings-Michener Bill in early 1932. *See* S. 3866, 72d Cong. (1932) (introduced by Senator Hastings); H.R. 9968, 72d Cong. (1932) (introduced by Congressman Michener). The two bills were identical. *See Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary*, 72d Cong. 309 (1932) (noting that joint hearings were being held by the Judiciary Committees of both the House and Senate on S. 3866, as H.R. 9968 was an identical bill). A copy of the Hastings-Michener Bill is contained in *Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary*, 72d Cong. 50–306 (1932).

101. *Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary*, 72d Cong. 288–92 (1932). The problem of honest wage earners who tried to repay their debts by being forced into bankruptcy to prevent garnishment and wage assignment was well documented in the Thacher Report. The Report noted that, in attempting to avoid bankruptcy, wage earners would borrow money at exorbitant rates of interest to consolidate their debts. S. DOC. NO. 72-65, at 81–85 (noting wage earners in 1929 borrowed money to stave off creditors of about \$2,125,000,000 at interest rates as high as 480% from unlicensed lenders). The Report

eliminate the perceived stigma of filing bankruptcy, the proposal suggested that individuals choosing to amortize their debts were to be referred to as debtors, not bankrupts.<sup>102</sup> Upon completing the amortization of debts, the case would be dismissed; in the event that the debtor was unable to liquidate all of his obligations from future earnings in the two-year period, the proposed bill offered the debtor a possible discharge from the unpaid portion of his liabilities.<sup>103</sup> The wage-earner proposal was the result of the Thacher Report's conclusion that most wage earners desired to repay their debts, and also upon the evidence presented during the investigation that "at least a third of the wage earners who are now forced into bankruptcy and released from their debts could, if given time and protection, pay their creditors in full."<sup>104</sup> The proposed bill included a suspension of

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concluded that approximately one-third of wage earners who filed bankruptcy could, "if given time and protection," pay their creditors in full. *Id.* at 80. More importantly the Report noted that wage earners had a desire to pay their debts. *Id.* The Report discussed the informal private amortization programs administered by employers and others that wage earners voluntarily entered into. *See id.* at 80–81 (concluding that these programs were successful at least as long as no creditor instituted a garnishment or wage assignment).

102. Chapter VIII of the Hastings-Michener Bill included section 73 (Composition), section 74 (Assignments for the benefit of creditors), section 75 (Amortization of debts), and section 76 (Corporate reorganization), captioning provisions for the relief of debtors. *Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary, 72d Cong. 274–304 (1932)*. These sections referred to the petitioner as a debtor as opposed to bankrupt. *Id.* The amortization proposal was specifically drafted to provide relief to wage earners. *See id.* at 289 (stating that the composition was for merchants, and its procedures were too inflexible for wage earners). Under the proposal, a debtor would remain in possession of all his property and make periodic payments within his means to a trustee. *Id.* at 288. This avoids the requirements of the composition for full payment of all administrative and priority claims upon the filing of the plan. *Id.* at 289.

103. Upon payment in full of all debts proved and allowed, the case would be dismissed. *Id.* at 290. The proposed bill permitted the granting of a discharge even if all the debts were not repaid upon a finding by the court that the failure was unavoidable on the part of the debtor. *Id.* The Thacher Report noted that under the existing law, in order for a wage earner to avoid the stigma of being adjudicated a bankrupt, he could file a composition before adjudication. S. DOC. NO. 72-65, at 9 (mentioning, however, that only 1% of bankruptcy cases were compositions). This amortization proposal was based upon two assumptions. First, most wage earners wished to pay their debts, and second, the success of the various private agreements to amortize debt would continue under this proposal. *Id.* at 80–85; *see Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary, 72d Cong. 20 (1932)* ("[M]ost wage earners who fall into debt genuinely desire to pay their debts, if given time, and if they are not harassed by their creditors.").

104. S. DOC. NO. 72-65, at 80. *But see* William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 YALE L.J. 591, 626–35 (1933) (analyzing data

the discharge in certain cases to address the perceived fraud of individuals with the ability to pay their debts seeking liquidation and the resulting discharge, and to provide adequate protection for creditors.<sup>105</sup> During the suspension period, the bankrupt would be required to turn over to the trustee all non-exempt assets and income acquired after the commencement of the case, except that which was necessary for living and for maintaining any business that the bankrupt may be involved in.<sup>106</sup> These proposals did not advance

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from Boston and New Jersey and concluding that the amortization proposal in the Hastings-Michener Bill would not result in substantial repayment of debt by wage earners). Douglas also noted that the conclusion of the Thacher Report was based upon an improbable assumption that if an amortization program were available, wage earners would resort to this mechanism long before they became overwhelmed by debt, and thus would enter the amortization program with less debt that needs to be repaid. *Id.* at 635–36.

105. *Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary*, 72d Cong. 100–04 (1932) (providing for an order suspending discharge for up to two years in cases where the assets of the bankrupt were not equal to at least 50% of his provable debts, or that within four months of his petition he incurred debts without a reasonable expectation of being able to pay them, or that the proceeding was brought about by his extravagant living, gambling, or other hazardous speculation); *see also* S. DOC. NO. 72-65, at 85 (noting that the amortization provision and the suspended discharge were proposed to protect creditors). Earlier bankruptcy laws had provisions that made discharge conditional. *See* Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, 533 (repealed 1898) (asserting that no discharge was granted if the bankrupt's assets did not satisfy 50% of provable claims, unless the majority of creditors gave written consent); Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, 443 (repealed 1843) (authorizing a denial of discharge upon the written dissent filed by a majority of creditors in number and amount of claims); Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, 36 (repealed 1803) (permitting discharge only upon the consent of two-thirds in number and amount of creditors holding provable claims of over \$50). Furthermore, even the Bankruptcy Act of 1898, like its predecessors, provided for limited discharge. *See* Bankruptcy Act of 1898 § 17 (making the following debts non-dischargeable: taxes; judgments based on fraud, false representations, or willful and malicious injuries; debts not duly scheduled; and obligations arising from breaches of fiduciary responsibility). Although a suspended discharge was something new in American law, it was commonplace in England at this time. *See Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary*, 72d Cong. 23–24 (1932) (recognizing that the three grounds for suspension were taken “verbatim from the English and Canadian laws”). The law Lloyd Garrison referred to was the 1914 Bankruptcy Act. *See* Bankruptcy Act, 1914, 4 & 5 Geo. 5, c. 59, § 26 (Eng.) (stating that the court may either grant or refuse an absolute order of discharge, suspend the operation of the order “for a specified time[.]” or grant an order subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after acquired property).

106. *Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary*, 72d Cong. 102–04 (1932). Lloyd K. Garrison, Special Assistant to the Attorney General, who along with Solicitor General Thomas D. Thacher, conducted the investigation at the behest of the Justice Department that led to the



beyond the hearing stage,<sup>107</sup> and the bill was not enacted into law.<sup>108</sup>

The law of composition entered into a new phase in 1933 when Congress enacted comprehensive legislation making it possible for individuals to reorganize and readjust their debts. These enactments became the new Chapter 7 of the Bankruptcy Act, entitled "Provisions for the Relief of Debtors."<sup>109</sup> In order to provide relief

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Thacher Report, gave testimony in support of the suspended discharge. He testified that the purpose of the suspended discharge was to force a wage earner who could pay, but who did not want to, to pay some of his debts in order to receive a discharge. *Id.* at 23. There was substantial opposition to the concept of suspended discharge. In fact, during the hearings on the bill, one witness went so far as to label the suspended discharge as "un-American" and testified that Washington and Jefferson "would turn over in their graves." *Id.* at 546-47 (testimony of Herbert Feibelman, bankruptcy committee chairman of the Dade County Bar Association). Garrison refuted his assertions by noting that it had been Jefferson, who as President, had presided over the 1800 bankruptcy law that allowed only limited discharge for traders, and then only with two-thirds consent of the creditors. *Id.* at 643.

107. See H.R. REP. NO. 75-1409, at 53 (1937) (noting that the bill was "never reported out of committee" and that relief for the wage earner did not reappear until the Chandler Act).

108.

While the measure had much merit, there were at least two fundamental objections which precluded its enactment, these being the opposition to the establishment of a central bureau for the administration of the law and the objection to a complete revision because of its effect on the interpretation of the act through court decisions extending over a period of more than [thirty] years.

*Id.* at 2. One of the primary opponents to the Hastings-Michener Bill was the American Bar Association (ABA). The ABA objected to the innovations in the bill for the reason that the bankruptcy process has to be "defended against all assault on the grounds that its heritage is so priceless, its age so venerable and its status so impregnable that nothing should be done to change its essential characteristics." William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 YALE L.J. 591, 591-92 (1933) (outlining the ABA's opposition). But see Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 27 (1995) (asserting boldly, without any authority, that the legislation failed because it was hard to sell to Congress that debtors were abusing the discharge with the Depression deepening daily). However, there was little, if any, criticism leveled at the amortization procedure. The amortization provision had been geared to prevent debtors from becoming victims of "loan sharks" who refused to participate in voluntary amortization programs but lent money at exorbitant interest to keep debtors for a while longer. See *Uniform System of Bankruptcy: Hearings on S. 3866 Before the Subcomm. of the Comms. on the Judiciary*, 72d Cong. 20 (1932) (noting that the burdens to wage earners of borrowing money from loan sharks to hold off their creditors were staggering); S. DOC. NO. 72-65, at 83-84 (detailing the activities of loan sharks in lending money to wage earners).

109. Act of Mar. 3, 1933, ch. 204, § 74, 47 Stat. 1467, 1470-82 (enacting section 74 of the Bankruptcy Act, relating to compositions and extensions, section 75, relating to agricultural compositions, and section 77, relating to railroad reorganization) (repealed 1978).

to the distressed wage earner, whose financial situation did not warrant or require liquidation proceedings, the new law authorized a debtor to propose an extension or composition plan.<sup>110</sup> While the new legislation did not repeal the existing section 12 of the Bankruptcy Act,<sup>111</sup> it did provide that any person, other than a

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110. *Id.* (containing the provisions of the new Chapter 74 of the Bankruptcy Act). A Congressional Report several years later noted that the legislation failed to define the terms or make “any clear distinction between them.” H.R. REP. NO. 75-1409, at 50. The courts, however, recognized the difference between the two terms. Under an extension plan, a debtor proposed to pay all of his debts back and only sought an extension of time in order to do so. However, under a composition, the debtor would propose only to offer partial payment of his creditors’ claims. *See, e.g., Perry v. Commerce Loan Co.*, 383 U.S. 392, 398–99 (1966) (discussing the material differences between “straight bankruptcy, arrangements under Chapter XI and XII, and wage-earner plans by way of composition, all of which contemplate only a partial payment of the wage earner’s debts.”); *see also In re Thompson*, 51 F. Supp. 12, 13–14 (W.D. Va. 1943) (noting that compositions under section 12 of the Bankruptcy Act contemplated payment by agreement with creditors of a sum less than what was owed). While not entirely effective in accomplishing its objective, many wage earners participated in the new section 74 proceedings. *See, e.g., Comment, A Survey of Sections 74 and 75 of the Bankruptcy Act in Actual Operation*, 43 YALE L.J. 1285, 1288–89 (1934) (noting that the majority of the filings under Chapter 7 during the past year were wage earners). *See generally* TOM. D. MCKEOWN & ALBERT LANGELUTTIG, FEDERAL DEBTOR RELIEF LAWS 1–7 (1935) (detailing the legislative history of the 1933 bankruptcy legislation).

111. The original bill, introduced by Representative Sumner in the House, contained in its enacting clause the repeal of sections 12 and 13 of the Bankruptcy Act. H.R. 14,359, 72d Cong. (1933), *reprinted at* 76 CONG. REC. 2902–07 (1933) (“Be it enacted, . . . and [the Bankruptcy Act] is hereby, amended by repealing sections 12 and 13. . . .”); *see also* H.R. REP. NO. 72-1897 (1933), *reprinted in* David L. Bleich, *Transportation Company Insolvencies: History and Overview*, 610 PRACTISING L. INST. 15, 15–30 (1992) (noting that the bill amended the Bankruptcy Act by adding “Chapter VIII, Provisions for the Relief of Debtors” and repealing sections 12 and 13). H.R. 14,359 originally contained three main divisions dealing with individuals, corporations, and railroads. The Senate Judiciary Committee felt the corporate and railroad reorganization provisions were “so far reaching and so controversial” that these provisions were omitted from the bill reported out of the Judiciary Committee. *See* S. REP. 72-1215 (1933), *reprinted in* David L. Bleich, *Transportation Company Insolvencies: History and Overview*, 610 PRACTISING L. INST. 7, 31–49 (1992). The Senate, however, decided to insert a provision dealing directly with farmers, and passed an amended bill on February 27, 1933. This bill also included the railroad reorganization provisions but omitted the corporate reorganizations provisions. *See* 76 CONG. REC. 5136, 5350–55 (1933) (illustrating that H.R. 14,359 was subsequently amended and passed by Congress providing for individual composition, farmer composition, and railroad reorganization provisions). Those amendments were approved by the House on March 1, 1933. *Id.* at 5360. However, the enacting clause failed to delete the repeal of sections 12 and 13 of the Bankruptcy Act. *Id.* Thus, there would be no provision for corporate reorganization under the Bankruptcy Act as now amended. This oversight, along with a few other technical corrections, were remedied the next day by a concurrent resolution. S. Con. Res. No. 45, 72d Cong. (1933). President Hoover signed the bill on March 3, 1933. Act of Mar. 3, 1933 § 74; *see* Lloyd K. Garrison, *The New*

corporation, could proceed under these new provisions and be referred to as a “debtor” rather than a “bankrupt,” as one would continue to be referred to under section 12.<sup>112</sup> As in section 12, the composition plan outlined in section 74 of the new legislation was an offer by the debtor “to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities.”<sup>113</sup> The extension proposal under section 74 was something new, and it permitted the debtor to pay all his debts back over an extended period of time.<sup>114</sup> In addition, for the first time the law authorized a debtor to affect secured debt by extending the time for payment.<sup>115</sup>

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*Bankruptcy Amendments: Some Problems of Construction*, 8 WIS. L. REV. 291, 292–93 (1933) (outlining the differences between old section 12 and new section 74 of the Bankruptcy Act). Section 74 was only available for individuals and partnerships, while section 12 was available for individuals, partnerships, and corporations. *Id.* Thus, wage earners could avail themselves of either procedure. However, section 74 was a quicker proceeding because an offer of composition could be made before examination by creditors and did not need a judge’s approval, as a referee could approve it. *Legislation: Composition and Extensions under the Recent Bankruptcy Amendments*, 33 COLUM. L. REV. 704, 710–11 (1933). The earlier Donovan Report had criticized the time delay of section 12, noting that there were “six different meetings or hearings, three before the referee and three before the judge, consuming nearly two months of valuable time.” H. COMM. ON THE JUDICIARY, 71ST CONG., ADMINISTRATION OF BANKRUPTCY ESTATES 15 (Comm. Print 1931). The Report noted that each day of delay made it more difficult to achieve a successful rehabilitation. *Id.* at 116.

112. *See* Bankruptcy Act of 1898 § 12(a) (stating that a person filing for a composition under section 12 was a bankrupt); Act of Mar. 3, 1933 § 74(a) (stating specifically that persons proceeding under either a composition or extension under section 74 were debtors); S. REP. NO. 72-1215 (noting that relief could be granted to a debtor under the new composition provisions without ever being adjudicated a bankrupt). This apparent stick sought to encourage individuals to file compositions or extensions under section 74 to avoid the stigma of bankruptcy. *See, e.g.*, H.R. REP. NO. 75-1409 (recognizing that section 74 allowed a wage earner to avoid the “stigma” of bankruptcy and gave him the opportunity to repay his debts as he would like to do). This stick of not being labeled a bankrupt was also possible under Chapter 12 from 1910 to 1926, since adjudication was stayed until the court determined whether the composition could be confirmed. Act of June 25, 1910, ch. 412, § 5, 36 Stat. 838, 839 (repealed 1978). However, this provision was later amended to authorize a continuation of the petition for adjudication absent good cause. Act of May 27, 1926, ch. 406, § 5, 44 Stat. 662, 663 (amended 1938).

113. *In re Lane*, 125 F. 772, 773 (D. Mass. 1902).

114. Act of Mar. 3, 1933 § 74(h) (stating that the extension proposal could extend the time for payment of secured debts, “the security for which is in the actual or constructive possession of the debtor”).

115. *Id.* Under the Bankruptcy Act a secured creditor’s claim could not be proved except to the extent that it was undersecured. Bankruptcy Act of 1898 § 1(a)(9) (defining a creditor as one who held a provable claim); *cf. id.* § 57(e) (specifying the secured portion of a claim was not allowable and thus not provable). However, the new section 74 expanded the definition of creditor, for the sole purpose of extension proposals, to include

However, neither the new composition nor the extension was particularly effective to lift wage earners out of their financial predicaments.<sup>116</sup> Most wage earners had secured debt in the form of mortgages on their homes, and in the largest number of cases, such mortgage debt made up the majority of the wage earners' liabilities.<sup>117</sup> Section 74 required that under any proposal to extend payments on such mortgage debt, the debtor would have to have a majority, in amount of his total debts, accept the plan.<sup>118</sup> Thus, the

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secured creditors, even if their claims were not provable under the other provisions of the Bankruptcy Code. Act of Mar. 3, 1933 § 74(a). Subsections 74(h) and (i) specifically provided that extensions could affect the rights of secured creditors by extending the time for payment. *Id.* § 74(h)–(i) (providing that an extension agreement could extend the time of payment of a secured debt but could not reduce the amount or impair the holder's lien). However, under subsection 74(e), an extension to pay a secured debt could not occur unless a majority, in number and amount, of secured creditors whose claims were to be affected by the extension agreement accepted the proposal. *Id.* § 74(e). Of course, secured creditors could consent to reduce their secured indebtedness or change the terms of their lien. *See* *Armstrong v. Alliance Trust Co.*, 112 F.2d 114, 117 (5th Cir. 1940) (acknowledging that the court, in confirming a plan, could not impose a reduction of the amount, but that a creditor could consent to a reduction); *see also* TOM D. MCKEOWN & ALBERT LANGELUTTIG, *FEDERAL DEBTOR RELIEF LAWS 25* (1935) (noting that nothing in the new law prevented secured creditors from reducing their claims or changing their liens). It needs to be noted that in dealing with secured creditors, the new act created serious interpretation problems. In subsections 74(e) and (h), the legislation was clear that secured creditors could be affected *only in an extension plan* by extending the time of payment. Act of Mar. 3, 1933 § 74(e), (h). However, subsection 74(i) noted that neither an extension nor composition could “reduce the amount of or impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.” *Id.* § 74(i). It thus seemed possible that a composition plan could also “affect” secured debt. The legislative history did not pick up on this apparent contradiction in the statute. *See* S. REP. NO. 72-1215 (1933), *reprinted in* David L. Bleich, *Transportation Company Insolvencies: History and Overview*, 610 PRACTISING L. INST. 7, 31, 34–35 (1992) (Exhibit 2) (specifying the need for debtors to obtain relief from secured creditors, and stating that the bill authorizes both extension and composition to affect the time and method of its liquidation); *see also* Jacob I. Weinstein, *Chapter VIII of the Bankruptcy Act*, 38 COM. L.J. 171, 178 n.75 (1933) (asserting boldly that compositions could affect secured creditors to the same manner and with the same limitations as prescribed for extensions). *But see* Lloyd K. Garrison, *The New Bankruptcy Amendments: Some Problems of Construction*, 8 WIS. L. REV. 289, 300 (1933) (hoping that the courts would not permit this ambiguity to allow compositions to affect secured creditors); *cf.* *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 586 (1935) (stating that the Court was not aware of any case where a composition had affected a single creditor's secured claim).

116. *See* H.R. REP. NO. 75-1409, at 49 (concluding that in those cases where section 74 was intended to be applied, it afforded no relief).

117. *Id.*

118. Act of Mar. 3, 1933 § 74(e) (requiring that prior to the filing of an application for extension, a “majority in amount of such claim[]” must have accepted the extension offer in writing).

mortgagee's consent was, in most cases, absolutely necessary for confirmation. However, if the debtor could obtain the mortgagee's consent for the extension proposal, in all likelihood, these proceedings would not have been necessary in the first place.<sup>119</sup> In addition to this problem of secured debt, the new section proved totally unsatisfactory in regards to the availability of a debtor's discharge. The Bankruptcy Act provided a discharge for *bankrupts*, not debtors.<sup>120</sup> Therefore, the issue of a debtor's discharge was in limbo and did not get addressed until future legislation. Furthermore, as the composition case was dismissed after confirmation, the bankruptcy court lost its jurisdiction, and there were serious problems that arose concerning enforcement of such plans with the bankruptcy court out of the picture.<sup>121</sup> Under sections 12 and 74, there was an

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119. See H.R. REP. NO. 75-1409, at 49 (noting that to deal with recalcitrant unsecured creditors, a debtor could always file for section 12 relief).

120. See Bankruptcy Act of 1898 § 14(c) (remarking that the "confirmation of a composition shall discharge the *bankrupt* from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge" (emphasis added)). Concern was raised that since a composition under section 74 related to a *debtor* and not a *bankrupt*, the confirmation of a composition under section 74 would not lead to a discharge. See Lloyd K. Garrison, *The New Bankruptcy Amendments: Some Problems of Construction*, 8 WIS. L. REV. 289, 308-09 (1933) (concluding that proper interpretation of the statute should lead to the granting of a discharge because "Congress, with its solicitude for debtors, must have intended" that result); see also Wolfgang S. Schwabacher & Sydney C. Weinstein, *Rent Claims in Bankruptcy*, 33 COLUM. L. REV. 213, 213 n.\* (1933) (noting that in the case of a confirmed composition plan, the issue of discharge "will probably have to be worked out by implication or through § 14c, which is confined to 'bankrupts'"). But see Jacob I. Weinstein, *Chapter VIII of the Bankruptcy Act*, 38 COM. L.J. 171, 184 n.120 (1933) (recognizing that because "[t]here is no provision in [s]ection 74 which gives to the confirmation of a proposal to the effect of a discharge of the debts affected thereby[.]" a problem was created with unsecured debt). The issue was sufficiently unsettled several years later, and in commenting on the deficiencies of section 74 of the Bankruptcy Code, Representative Chandler said:

The section is unsatisfactory in respect to the debtor's discharge. Section 14c of the [A]ct gives to the confirmation of a composition the effect of a discharge; but this provision was intended to relate to Section 12[,] which deals with compositions . . . . Thus[,] it may be doubted whether under Section 74 the confirmation of a proposal discharges a debtor from the debts affected by such proposal; and it would seem rather clear that in the event of a liquidation under this section or even an adjudication, the debtor, though deprived of his property, is not entitled to the privilege of a discharge.

H.R. REP. NO. 75-1409, at 50.

121. See Bankruptcy Act of 1898 § 12(e) (stating that the composition case was dismissed upon confirmation and distribution of the consideration). Within six months after the confirmation the court could set aside the confirmation of the composition and reinstate the case in the event of fraud. *Id.* § 13. After this six-month period, the

additional problem that confirmed plans could not be modified in the event of unexpected circumstances.<sup>122</sup> Thus, sickness or loss of job with resulting loss of wages created situations that were not addressed in the statutes. The administrative costs of both procedures were

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jurisdiction of the bankruptcy court over the section 12 composition plan ceased, leaving creditors with only two options. Creditors could bring suit in a court of competent jurisdiction to enforce the composition or institute a new involuntary petition against the former bankrupt. See *In re Mirkus*, 289 F. 732, 733–34 (2d Cir. 1923) (involving an involuntary proceeding against the former debtor in a failed composition plan); Jerome B. Weinstein, *The Debtor Relief Chapters of the Chandler Act*, 5 U. PITT. L. REV. 1, 21 (1938) (noting that when the debtor fell down on his obligations on the section 12 plan, the “only practical hold on the bankrupt had been lost”); see also H.R. REP. NO. 75-1409, at 53 (stating that there were no procedures for enforcement of a composition under section 12). A noted advantage of section 74 was that it allowed for retention of jurisdiction in the cases of extensions. H.R. REP. NO. 75-1409, at 53; accord Bankruptcy Act of 1898 § 74(j) (providing only for dismissal of the composition upon confirmation, but giving the court the option of retaining jurisdiction over the debtor and his property upon confirmation of an extension). Like the original Bankruptcy Act, the 1933 statute also provided for the retention of jurisdiction for six months in order to set aside the confirmation of the either an extension or composition plan in the case of fraud. Bankruptcy Act of 1898 § 74(k). In the event of a failure of a composition (whether under section 12 or 74), no liquidation, adjudication, or revival of all debts would occur. The confirmation of the composition created a discharge of the debts, except those agreed to be paid in the composition assuming that the discharge provisions of section 14 of the Bankruptcy Act applied (which surely did in section 12 cases). See *Cumberland Glass Mfg. Co. v. De Witt*, 237 U.S. 447, 452 (1915) (noting that the order of confirmation of the section 12 composition became “in effect a discharge” and operated to free the debtor of all debts except “those agreed to be paid” pursuant to the terms of the composition); *In re Greenman*, 10 F. Supp. 452, 452–53 (D. Me. 1935) (holding that confirmation of a composition under section 74 of the Bankruptcy Act discharged the debtor); see also *Mirkus*, 289 F. at 735 (finding that failure to pay notes given as part of consideration for composition under section 12 did not revive those debts, therefore, the creditors’ claims are restricted to the amount of unpaid composition notes). However, in the event of a failure to complete the terms of an extension under section 74, the debts were revived to the extent that they had not been paid, for an extension only delayed the time of payment and did not discharge the underlying liability. However, case law had established that a debtor could withdraw the extension agreement and seek the benefits of voluntary bankruptcy. See *McKeever v. Local Fin. Co.*, 80 F.2d 449, 452 (5th Cir. 1935) (holding that an extension agreement could be withdrawn and the debtor was free to enter into a voluntary liquidation proceeding). However, such was not the case under section 12. See, e.g., *In re Bryer*, 281 F. 812, 813 (2d Cir. 1922) (finding that a section 12 composition agreement could not be withdrawn).

122. See H.R. REP. NO. 75-1409, at 53 (articulating that there were no procedures in the existing law for modification of confirmed plans); see also JACOB I. WEINSTEIN, *THE BANKRUPTCY LAW OF 1938: CHANDLER ACT* 334 (1938) (noting that under both sections 12 and 74 there were no provisions for modification of the composition plan to meet unforeseen or unavoidable circumstances); Jerome B. Weinstein, *The Debtor Relief Chapters of the Chandler Act*, 5 U. PITT. L. REV. 1, 21 (1938) (stating that without the retention of jurisdiction and the ability to modify the plan “no composition could be really effective”).

extremely high, reducing the amount that would reach the creditors.<sup>123</sup> Finally, the requirement to deposit cash for the priority expense and administrative costs was beyond the pale for most wage earners.<sup>124</sup>

By 1937, Congress had determined that there were no effective procedures available to provide adequate relief for the unique circumstances facing wage earners.<sup>125</sup> Being faced with inadequate relief under federal law and being subjected to the vagaries of creditors under state law,<sup>126</sup> wage earners resorted to straight liquidation under which neither the creditors (receiving a mere liquidation penitence) nor the debtor (being adjudged a bankrupt)

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123. See *Perry v. Commerce Loan Co.*, 383 U.S. 392, 394–95 (1966) (explaining that section 12 proceedings were unsatisfactory for wage earner-cases, in part, because of the small amount of debts and the high expenses of administration); H.R. REP. NO. 75-1409, at 53 (noting the disproportionate expense of section 12 proceedings); see also Comment, *A Survey of Sections 74 and 75 of the Bankruptcy Act in Actual Operation*, 43 YALE L.J. 1285, 1292 (1934) (comparing the disproportionate expense to the benefit received by creditors in a section 74 proceeding).

124. See Comment, *A Survey of Sections 74 and 75 of the Bankruptcy Act in Actual Operation*, 43 YALE L.J. 1285, 1292 (1934) (“Extensions and compositions are . . . inapplicable to the ordinary wage earner . . . [as these are] considered unduly burdensome on the debtor and of little value to the creditor in view of the size of payments and the trouble entailed in collecting them.”); see also *In re Scher*, 12 B.R. 258, 262 (Bankr. S.D.N.Y. 1981) (asserting that the deposit of monies requirement of subsection 74(e) was the “rock upon which this predecessor of [United States] Code Chapter 13 foundered”). However, the statute itself only provided that money or security to cover the priority claims had to be deposited before the court could consider the confirmation. Act of Mar. 3, 1933, ch. 204, § 74(e), 47 Stat. 1467, 1468 (repealed 1978); accord H.R. REP. NO. 75-1409, at 50 (noting dissatisfaction with the fact that a majority of creditors under section 74 could authorize security being posted instead of cash money for the costs of administration).

125. H.R. REP. NO. 75-1409, at 53 (reporting the deficiencies of both sections 12 and 74 of the Bankruptcy Code). The Report noted that several courts had established procedures under section 74 that worked effectively for the wage earners. *Id.* But see Jerome B. Weinstein, *The Debtor Relief Chapters of the Chandler Act*, 5 U. PITT. L. REV. 1, 21 (1938) (finding that the appellate courts disapproved of the “rention of jurisdiction for the sole purpose of enforcing the composition” as being outside the statute).

126. One author put the wage earner’s problem very poignantly as follows:

The wage earner’s problem is a peculiar one. In most states, wages are attachable by creditors, and an insolvent wage earner soon finds himself overwhelmed with attachments. This not only [harasses] and worries him because of the strain on his wages, but it also frequently annoys and burdens his employer, all with the result that either the wage earner has to give up his job, leave the jurisdiction and get his employment elsewhere, or his employer grows weary of the annoyance and discharges him.

Jerome B. Weinstein, *The Debtor Relief Chapters of the Chandler Act*, 5 U. PITT. L. REV. 1, 20–21 (1938).

profited.<sup>127</sup> Congress finally responded and once again proposed a remedy that it thought would solve the wage earners' dilemma. The new Chapter 13 was specifically designed to protect wage earners from creditor harassment and allow them to repay their debts without being labeled a bankrupt.<sup>128</sup> Like section 74 of the Bankruptcy Act, Chapter 13 gave the debtor the option of proposing a composition or an extension for the payment of debts.<sup>129</sup> However, in reality, the statute was designed to encourage individuals to voluntarily enter into extensions to pay their obligations in full from their future income, instead of choosing the method of partial payment through composition.<sup>130</sup> Specifically, the Chandler Act gave unsecured

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127. The author and House of Representatives' sponsor of the Chandler Act put it in these words:

A number of states had debt composition statutes, and section 74 of the Bankruptcy Act was already in existence. But those various enactments failed to prevent repeated garnishment proceedings at heavy costs, sheriffs' fees, and unconscionable judgments against those unable to be represented by counsel. Debtors were rendered virtually helpless except through resort to voluntary bankruptcy. Millions of dollars were being lost annually by bona fide creditors, poverty among low income groups was increasing steadily, and a federal statute which would protect wage earners and salaried people in "hard" times was sorely needed.

Walter Chandler, *The Wage Earners' Plan: Its Purpose*, 15 VAND. L. REV. 169, 169 (1961). There was a general feeling that wage earners would prefer a workable procedure under which they could repay their debts out of future income as opposed to being adjudged a bankrupt and receiving a discharge. See Jerome B. Weinstein, *The Debtor Relief Chapters of the Chandler Act*, 5 U. PITT. L. REV. 1, 21 (1938) (remarking that there was a belief that "wage earners wanted to pay their debts" and, therefore, wanted a system that paid those debts out of future earnings rather than discharge through bankruptcy); see also H.R. REP. NO. 75-1409, at 54 (asserting that the average debtor would prefer to come to an accord with his creditors if "afforded the reasonable opportunity").

128. The Chandler Act made extensive revisions to the Bankruptcy Act and added Chapter 13 for wage earners. Chandler Act, Pub. L. No. 75-696, §§ 601-686, 52 Stat. 840, 930-38 (1938) (repealed 1978). The Act explicitly stated its intention to provide for wage earners in section 606(3). *Id.* § 606(3) (defining the wage earner who files under the provisions of Chapter 13 as a debtor).

129. *Id.* § 606(6). In either case, the debtor would use his future income to fund the plan. See *id.* § 646(4) (providing that the plan had to contain a provision for submission of future earnings or wages of the debtor to the court "for the purpose of enforcing the plan").

130. The Chandler Act denied a discharge to a bankrupt who had a composition confirmed within six years of the new filing. *Id.* § 14(c)(5). Such discharge limitation apparently did not apply in extensions. See *In re Verlin*, 148 F. Supp. 660, 661-62 (E.D.N.Y. 1957) (holding that an individual who had an extension arrangement confirmed was not barred from obtaining a discharge for six years following the confirmation), *aff'd sub nom. Fishman v. Verlin*, 255 F.2d 682 (2d Cir. 1958). This distinction was specifically mentioned in the report of the Commission to study the bankruptcy law in the early 1970s as one of the reasons for limited use of the composition plan under the Chandler Act.



creditors leverage over the debtor. The court could not confirm a plan unless all unsecured creditors affected by the plan approved of it.<sup>131</sup> Without a unanimous agreement, however, the court could approve a plan only if a majority in number and amount of unsecured creditors approved.<sup>132</sup> Such provisions made it difficult for a debtor to offer less payment over time.<sup>133</sup> In fact, the Supreme Court noted in 1966 that the history of Chapter 13 demonstrates that it was fulfilling congressional intent of “encourag[ing] wage earners to pay their debts *in full*, rather than to go into straight bankruptcy or composition.”<sup>134</sup> Congress amended Chapter 13 twice prior to the enactment of the Bankruptcy Code to further the availability of its provisions to more wage earners.<sup>135</sup> As late as 1959, Congress appeared satisfied with the effectiveness of Chapter 13, noting:

We think there can be no doubt . . . that a procedure by which a debtor who is financially involved and unable to meet his debts as they mature, over a period of time, works out of his involvement and pays his *debts in full* is good for his creditors and good for him.<sup>136</sup>

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H.R. REP. NO. 93-137, pt. 1, at 161 (1973).

131. Chandler Act § 651. In the case of a plan that sought to affect a claim of a secured creditor, that creditor had to approve the proposal. *Cf. id.* § 652(1) (implying that secured creditors had to approve the plan by stating that only unsecured creditors could be appeased via a majority vote). While the unsecured creditors could be treated as a group, each secured creditor affected by the plan had to be dealt with severally. *See, e.g.*, Jerome B. Weinstein, *The Debtor Relief Chapters of the Chandler Act*, 5 U. PITT. L. REV. 1, 23 (1938) (“[E]ach secured debt will be *sui generis*.”).

132. Chandler Act § 651.

133. In addition, the discharge provision encouraged extension agreements. Section 17 of the Chandler Act listed certain debts that were not affected by the discharge. *Id.* § 17 (listing unaffected debts as taxes, unscheduled debts, liabilities arising out of false pretenses, and liabilities arising from willful or malicious injuries). In a composition, the debtor would not be discharged from debts that were “not dischargeable under section 17 . . . held by creditors who ha[d] not accepted the plan.” *Id.* § 660.

134. *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395 (1966) (emphasis added). The Supreme Court cited statistics from the Administrative Office of the United States Courts, which stated that 95% of all funds paid by debtors to creditors in Chapter 13 cases came from extension plans. *Id.* at 395 n.4.

135. As enacted, the Chandler Act defined a wage earner as “an individual who works for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 per year.” Chandler Act, Pub. L. No. 75-696, § 1, 52 Stat. 840, 840-42 (1938) (repealed 1978). The definition of a “wage earner” was amended twice prior to the enactment of the Bankruptcy Code. *See* Act of Dec. 29, 1950, ch. 1193, 64 Stat. 1134, 1134 (increasing the ceiling on eligibility for Chapter 13 to \$5,000), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2682.

136. S. REP. NO. 86-179, at 2 (1959), *reprinted in* 1959 U.S.C.C.A.N. 1446, 1447 (emphasis added). Walter Chandler realized that voluntary bankruptcy and discharge of debts was still a viable option for those who did not choose Chapter 13. However, he later

Despite this rather optimistic outlook, the history of Chapter 13 was characterized by infrequent use.<sup>137</sup> In fact, during the period from 1953 to 1962, only about 18% of the non-business voluntary proceedings were Chapter 13 petitions.<sup>138</sup> Apparently, it was more advantageous to file for voluntary liquidation under Chapter 7 and free one's future stream of income from creditors' claims. This was especially true if the debtor had an expectation of significant future income, from which all or part of the debts could have been paid.<sup>139</sup>

Concern over the alarming increase in consumer liquidation bankruptcies<sup>140</sup> and the perception of consumer debt avoidance<sup>141</sup>

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wrote: "That manner, however, is not the American way, since it destroys not only the credit standing, but also the self respect of the bankrupt. In fact, the bankruptcy law as a whole is intended to help people, not embarrass them." Walter Chandler, *The Wage Earner's Plan: Its Purpose*, 15 VAND. L. REV. 169, 170 (1961).

137. See H.R. REP. NO. 95-598, at 117 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6077 (stating that the strict procedures of Chapter 13 had discouraged many debtors from filing under this chapter). The House Report stated that the primary focus of the 1938 revisions was toward business bankruptcy, and therefore, it just "was not designed to provide adequate relief to the consumer debtor." *Id.* at 116. In conclusion, Congress determined that the "Bankruptcy Act ha[d] not kept pace with the modern consumer credit society." *Id.* at 117; accord *In re Scher*, 12 B.R. 258, 263 (Bankr. S.D.N.Y. 1981) (commenting that Chapter 13 was a "dead letter in most bankruptcy courts" (citing DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 74 (1971))). This pessimistic conclusion was directly contrary to Congress's opinion of the effectiveness of Chapter 13 less than twenty years earlier. See David A. Hardy, Comment, *Conversion from Chapter 13 to Chapter 7 of the Bankruptcy Code: What Constitutes Property of the Post-Conversion Estate?*, 1992 BYU L. REV. 1105, 1110 (noting that Congress had earlier stated that Chapter 13 was a "desirable method" of addressing the financial problems of individuals, especially dealing with the "financial problems generated by heavy installment buying" (quoting H.R. REP. NO. 86-193, at 2 (1959)) (internal quotation marks omitted)).

138. See Vern Countryman, *The Bankruptcy Boom*, 77 HARV. L. REV. 1452, 1461 (1964) (reporting, based on the statistics contained in the reports of the Administrative Office of the United States Courts, that 13,000 of 71,000 (18%) voluntary petitions were Chapter 13 petitions).

139. See, e.g., Richard E. Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge*, 62 ALB. L. REV. 467, 495-96 (1998) (implying that a debtor could select to file under Chapter 7 even with the good prospect of significant future income).

140. See *Wage Earner Plans Under the Bankruptcy Act: Hearings on H.R. 1057 and 5771 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 3 (1967) (statement of Hon. Richard H. Poff) (emphasizing the alarming 420% increase in non-business bankruptcies from 1940 to 1966). Analyzing the statistical data compiled by the Administrative Office of the United States Courts, Professor Countryman noted that during the period from 1953 to 1962, bankruptcy filings more than tripled. Vern Countryman, *The Bankruptcy Boom*, 77 HARV. L. REV. 1452, 1452 (1964). He stated that unsecured general creditors received "only eight cents on the dollar in [those] 13% of the

led to renewed efforts in Congress to force debtors seeking bankruptcy relief to enter into Chapter 13, as opposed to straight liquidation under Chapter 7.<sup>142</sup> These efforts began in earnest during the 1960s when several bills were introduced in Congress.<sup>143</sup> The bills that were introduced in the House of Representatives in 1964 and 1965 would have required a bankruptcy court at the first meeting of a wage earner's creditors to determine "whether the bankrupt [had] shown that adequate relief [could] not be obtained under Chapter 13 of [the] Act."<sup>144</sup> If the debtor could not establish

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[liquidation] cases where creditors receive[d] anything." *Id.* at 1454. The remaining 87% of the cases involved no assets, therefore no distributions were made to creditors. *See id.* at 1453 ("[O]nly 13% of the straight bankruptcy cases are 'asset' cases in which there is something for creditors."). His most telling conclusion from the data was that in Chapter 13, nearly all plans were by way of extension, and in those cases, the creditors received 95% payment. *Id.* at 1461. Given this statistical information, he found it hard to understand why creditors were hostile to Chapter 13. *Id.* Countryman noted, ironically, "the creditors know not what they do." *Id.*

141. *See Wage Earner Plans Under the Bankruptcy Act: Hearings on H.R. 1057 and 5771 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 3 (1967) (statement of Hon. Richard H. Poff) (noting that statistical studies conducted by "great universities" showed that between 25% and 50% of wage earners who file liquidation bankruptcy could, "under proper [C]hapter [13] plans, pay their debts out of future earnings without undue family hardship").

142. The primary features of Chapter 13 were that it was purely voluntary and was not subject to involuntary procedures. Chandler Act, Pub. L. No. 75-696, § 621, 52 Stat. 840, 931 (1938) (repealed 1978). Furthermore, at this time there were no restrictions imposed upon wage earners entering a Chapter 7 proceeding.

143. *See* H.R. 292, 89th Cong. (1965) (requiring the court to halt further adjudication unless either a bankrupt shows inadequate relief under Chapter 13 or amends his petition to comply with Chapter 13); S. 613, 89th Cong. (1965) (proposing that upon a motion by a creditor, the court could order the debtor into Chapter 13 so that the debtor will be required to "pay into the court a certain sum of money each month, and this money could then be paid out to his creditors over a period of time"); H.R. 12,784, 88th Cong. (1964) (promoting a change to the Bankruptcy Act that would require wage earner bankrupts to show that Chapter 13 provided inadequate relief before further adjudication), *reprinted in* C. William Garratt, Comment, *The Problem of Consumer Bankruptcy: Is Amendment to the Bankruptcy Act the Answer?*, 63 MICH. L. REV. 1449 app. B (1965); *see also* William K. Adam, Comment, *Should Chapter XIII Bankruptcy Be Involuntary?*, 44 TEX. L. REV. 533, 541 n.80, n.86 (1966) (referencing S. 613 and H.R. 292).

144. H.R. 12,784 (seeking to expand the use of Chapter 13); *see* H.R. 292. These two bills were identical and proposed to amend only section 55(b) of the Bankruptcy Act. Similar versions of these bills were reintroduced in 1967. *See* H.R. 1057, 90th Cong. (1967), *reprinted in Wage Earner Plans Under the Bankruptcy Act: Hearings on H.R. 1057 and 5771 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 2 (1967) (allowing a judge to proceed with bankruptcy proceedings when a bankrupt wage earner is unable to show inadequate relief under Chapter 13 only when the bankrupt amends his petition to comply with Chapter 13); H.R. 5771, 90th Cong. (1967), *reprinted in Wage Earner Plans Under the Bankruptcy Act, Hearings on H.R. 1057 and 5771 Before*

such a showing, the court was to dismiss the proceeding, unless the debtor voluntarily amended his petition to comply with Chapter 13.<sup>145</sup>

In 1967, there were two days of hearings held in the House on similar bills.<sup>146</sup> These hearings focused on the number of debtors resorting to liquidation proceedings.<sup>147</sup> In addition, in 1965, a bill was introduced in the Senate that expressly provided for mandatory Chapter 13 proceedings.<sup>148</sup> This bill authorized the court to compel a Chapter 7 wage earner to file a converted petition under Chapter 13 “whenever [the court] determine[d] it to be feasible and desirable, and for the best interest of creditors.”<sup>149</sup> All of these proposals had

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*Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 2 (1967). Both of these bills were also identical (requiring a debtor to amend his petition to comply with Chapter 13 to receive further adjudication if the debtor was unable to show inadequate relief under Chapter 13). *Wage Earner Plans Under the Bankruptcy Act, Hearings on H.R. 1057 and 5771 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 2 (1967).

145. See H.R. 12,784 (requiring a debtor to amend his petition to comply with Chapter 13, for further adjudication, if there was no showing of inadequate relief).

146. See generally *Wage Earner Plans Under the Bankruptcy Act, Hearings on H.R. 1057 and 5771 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 2–137 (1967) (holding hearings on the proposed bills to force debtors into Chapter 13). The sponsor of H.R. 1057 noted the explosion in personal bankruptcy was not the blame of the growth of installment sales but:

[The blame for the personal bankruptcy explosion] belongs not with the institution but with the methodology of the institution. [It belongs with t]he misuse and abuse of the system. It belongs, too, with changes that have taken place in society’s attitudes about principles, values, and priorities. With these changes, every echelon of society, material, and spiritual, must be concerned.

*Id.* at 3 (statement of Hon. Richard H. Poff).

147. Vern Countryman asserted that the studies that showed that many wage earners could repay their debts if they wanted to were questionable, and that additional studies should be conducted before changes were made to the law. *Id.* at 72–73 (statement of Vern Countryman, Professor, Harvard Law School). He doubted whether debtors had the ability to repay their obligations, even if they wanted to, because their assets had not kept pace with their consumer credit obligations. *Id.* at 73. On the other hand, Carroll Wetzel, on behalf of the ABA, stated that as long as a wage earner had the ability to pay his debts, “it is only fair to his creditors that he should be expected to do so.” *Id.* at 38 (statement of Carroll R. Wetzel, American Bar Association). Wetzel also testified that this amendment would “be in the interest of the general economy and of individual responsibility and morality.” *Id.* at 72–73.

148. S. 613, 89th Cong. (1965) (“During the pendency of a proceeding in bankruptcy, the court may, upon application of any creditor or on its own motion, whenever it determines it to be feasible and desirable, and for the best interest of the creditors, order any voluntary bankrupt who is [a wage earner] to file a petition [in Chapter 13].”).

149. *Id.* The caption to the bill was styled “to require filing under Chapter [13] . . . in certain bankruptcy proceedings[.]” 111 CONG. REC. 905 (1965). In introducing the bill, Senator Gore stated:

the approval and support of the American Bar Association, but were opposed by the National Bankruptcy Conference.<sup>150</sup> However, none of these efforts made it out of their respective committees.<sup>151</sup> At best, these initial efforts to impose some sort of ability-to-pay requirement on liquidation bankruptcy reflected a growing concern in Congress that something needed to be done about the increased number of liquidation petitions by individuals who could, if given

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There was a time when it was considered shameful to avoid the payment of just debts by filing a petition in bankruptcy. Unhappily, this is not longer true. . . .

. . . .

. . . I realize that we cannot legislate morals, but we, as responsible legislators, must bear the responsibility of writing laws which discourage immorality and which encourage morality; encourage honesty and discourage deadbeating[.]

*Id.* (statement of Sen. Albert Gore, Sr.).

150. See *Wage Earner Plans Under the Bankruptcy Act: Hearing on H.R. 1057 and 5771 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 38 (1967) (statement of Carroll R. Wetzel, American Bar Association) (reporting a copy of the resolution of the ABA approving the principle of H.R. 292). Linn K. Twinem, Chairman of the Consumer Bankruptcy Committee of the ABA, acknowledged that the House proposals originated within his ABA committee. *Id.* at 121 (statement of Linn K. Twinem, American Bar Association). In discussing the underlying policy considerations behind the ABA's proposal, he testified that it "is fundamentally not sound from a social or an economic point, . . . that a person who incurs their obligations from a creditor who grants the credit in good faith should have some responsibility in discharging those obligations if they are so able." *Id.* at 122. But see Vern Countryman, *Proposed New Amendments for Chapter XIII*, 22 BUS. LAW. 1151, 1151 (1967) (noting that the ABA's proposal was "more objectionable" than the Hastings-Michener bill's proposed suspended discharge (citing S. 3866, 72d Cong. (1932); H.R. 9668, 72d Cong. (1932))). The National Bankruptcy Conference, of which Vern Countryman was chairman of the committee on Chapter 13, "shared an interest" in expanding the use of voluntary Chapter 13, and strenuously opposed the proposed mandatory Chapter 13. *Id.* at 1153. He noted that the proposed "involuntary feature" of the amendment was not consistent with the "genius of our institution." *Id.* at 1152 (quoting *Joint Hearings on S. 3866 Before the H. and S. Subcomm. on the Judiciary*, 72d Cong. 641 (1932) (statement of Lloyd D. Garrison, Special Assistant to the Att'y Gen. of the United States)) (internal quotation marks omitted). He also asserted that the mandatory Chapter 13 would not work. See *id.* (comparing its potential for success as similar to that of compulsory counseling for a spouse who wanted a divorce). Other commentators have criticized these proposed bills. See William K. Adam, Comment, *Should Chapter XIII Bankruptcy be Involuntary?*, 44 TEX. L. REV. 533, 541-44 (1965) (commenting that the Senate bill had no objective criteria for determining the meaning of "feasible" and "desirable"); C. William Garratt, Comment, *The Problem of Consumer Bankruptcy: Is Amendment of the Bankruptcy Act the Answer?*, 63 MICH. L. REV. 1449, 1454-57 (1965) (complaining about the excessive administrative discretion in the House bill's adequate relief language).

151. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 158 (1973) (recognizing that the House Judiciary Committee decided not to recommend enactment of H.R. 1057 or H.R. 5571).

time, repay all or a portion of their obligations.<sup>152</sup>

Although not ready to make significant changes in the eligibility requirements for Chapter 7, Congress's concern with the vast increase in consumer credit and the continuing rise in consumer bankruptcies led it to authorize a commission in 1970 to determine the necessity of reforming the Bankruptcy Act.<sup>153</sup> The Commission on the Bankruptcy Laws of the United States conducted numerous hearings and was advised of the large number of debtors who desired to repay their debts in preference to the consequences of straight bankruptcy.<sup>154</sup> However, the Commission found limited use of Chapter 13 for many reasons, including poor advice from debtors' lawyers.<sup>155</sup> During its investigation, the Commission considered "encouraging" debtors to seek Chapter 13 relief by limiting access to Chapter 7 to only those debtors who would be unable to obtain relief under Chapter 13.<sup>156</sup> However, after studying the proposal, the Commission rejected such forced or mandatory participation in Chapter 13 on the grounds that it "has so little prospect for success that it should not be adopted as a feature of a bankruptcy system."<sup>157</sup>

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152. *But see* C. William Garratt, Comment, *The Problem of Consumer Bankruptcy: Is Amendment of the Bankruptcy Act the Answer?*, 63 MICH. L. REV. 1449, 1456 (1965) (opposing proposed changes and observing that "it would seem preferable to allow a few high-income bankrupts to abuse the [A]ct than to subject many low-income wage earners to a form of wage servitude").

153. S.J. Res. 88, 91st Cong. (1970). The Joint Resolution outlined the reasons for the creation of the Commission:

- (1) the increase in the number of bankruptcies by more than [1,000%] in the preceding twenty years; (2) the widespread feeling among referees in bankruptcy that problems of administration required substantial improvement in the Act; (3) the impact on the operation of the Act of the vast expansion of credit; and (4) the limited experience and understanding in the Federal Government and the nation's commercial community in assessing the operation of the Bankruptcy Act.

H.R. DOC. NO. 93-137, pt. 1, at 1.

154. H.R. DOC. NO. 93-137, pt. 1, at 157.

155. *Id.* at 161. The report noted that debtors were being discouraged by lawyers from filing Chapter 13 unless they could pay all their debts back in three years. *Id.* at 160. While the Chandler Act did not have any limitation on the length of the plan, apparently most plans were for three years. The Commission determined that the large number of three-year plans was the result of the hardship discharge provision of the Chandler Act. *Id.* The Chandler Act provided that "if at the expiration of three years after the confirmation" the debtor had not yet fully completed payments under the plan due to circumstances beyond his control, the court could grant the debtor a discharge. Chandler Act, Pub. L. No. 75-696, § 661, 52 Stat. 840, 936 (1938) (repealed 1978).

156. H.R. DOC. NO. 93-137, pt. 1, at 158.

157. *Id.* at 159. This conclusion was possibly the result of the Commission's rejection of the premise that many debtors could repay their debts if they wanted to. It is

Congress responded to the Commission's report by holding extensive hearings that eventually led to the enactment of the Bankruptcy Code.<sup>158</sup> It was hoped that this new code would continue the basic fundamental understanding that Congress intended bankruptcy to be a last resort for overburdened debtors, and that debtors should attempt repayment of debts rather than straight liquidation.<sup>159</sup> To achieve this goal, Congress recognized that changes needed to be made to Chapter 13 to make it more flexible to address the various circumstances of each individual debtor.<sup>160</sup>

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interesting to note that one of the witnesses who testified during the hearings leading up to the Commission's report was David Stanley, the principal author of the study conducted by the Brookings Institute. *Id.* at vii. The Brookings Institute study attempted to discredit those earlier studies that concluded that a "majority of bankrupts could repay their debts if they wanted to." See DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 38 (1971) (asserting that studies which had concluded that debtors could repay their debts had made "uncommonly bold assumptions").

158. See generally Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1532 (2006 & Supp. III 2009)) (enacting Title XI of the United States Code governing bankruptcy).

159. H.R. REP. NO. 95-595, at 120 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078. Following the extensive hearings on proposed bills, each house of Congress issued extensive reports. See *id.* at 1-549, *reprinted in* 1978 U.S.C.C.A.N. 5963-6435 (full text of the House Report pertaining to the Bankruptcy Reform Act of 1978); S. REP. NO. 95-989, at 1-176 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787-5962 (full text of the Senate Report pertaining to the Bankruptcy Reform Act of 1978). These reports were prepared regarding earlier bills than the one that was finally enacted. However, they contain significantly important legislative history for those portions of the Bankruptcy Code that were finally enacted as originally proposed. In regard to Chapter 13, the reports are accurate legislative history, as no amendments were made to the House or Senate bills following the hearings and the issuance of the reports.

160. See H.R. REP. NO. 95-595, at 124 (noting explicitly that the "[c]urrent chapter XIII does little to recognize [the] difference between the true value of [collateral] and [its] value as leverage"). In order to institute this flexibility, Congress made several significant changes to the old Chapter 13. The new Chapter 13 provided that modifications to increase or decrease the amounts to be paid on claims were allowable. Bankruptcy Reform Act of 1978 § 1329(a). This remedied one of the major deficiencies in the Chandler Act. Although the Code provided that modifications could be made, it was silent as to who was eligible to seek a modification. See Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 141 (1986) (indicating that the few cases that had addressed the issue held that only the debtor could seek a modification (citing *In re Fluharty*, 23 Bankr. 426, 429 (Bankr. N.D. Ohio 1982))). Furthermore, instead of being at the mercy of the creditors for confirmation, the new Chapter 13 provided that confirmation was taken out of the hands of a majority of creditors and given to the court. Bankruptcy Reform Act of 1978 § 1325. The Bankruptcy Code noted that the court "shall" confirm the plan if certain conditions were established. See *id.* (including such conditions as a finding that the plan was feasible, proposed in good faith, and that the value to be distributed under the plan was not less than the claims would have received

Following the Commission's recommendation, however, Congress did not make filing under the new Chapter 13 mandatory; thus, only voluntary Chapter 13 proceedings were permitted under the new Bankruptcy Code.<sup>161</sup> Nevertheless, in furtherance of its goal to increase Chapter 13 filings, Congress provided encouragement by permitting Chapter 13 debtors to discharge more debts than under a Chapter 7 straight liquidation.<sup>162</sup> In the case of liquidation proceedings, the Bankruptcy Code remained faithful to its predecessors and left the decision to file such proceedings in the hands of the debtors themselves, irrespective of their ability to repay debts out of future income.<sup>163</sup> Congress was still apparently

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in a Chapter 7 liquidation). Finally it should be noted that the new Chapter 13 was premised on a repayment of only a portion of one's indebtedness and not the favored extension plan of the Chandler Act.

161. See Bankruptcy Reform Act of 1978 § 1301 (providing no mandatory language for filing under Chapter 13). The House Report specifically addressed why it rejected a mandatory or involuntary Chapter 13. See H.R. REP. NO. 95-595, at 120 (noting that a mandatory plan might be involuntary servitude under the Thirteenth Amendment; it "would be unwise to let creditors force a debtor in to a repayment plan," and "the plan would be preordained to fail" because the debtor would be "less likely to retain his job or to cooperate with the repayment plan"); see also *Toibb v. Radloff*, 501 U.S. 157, 165-66 (1991) (stating that Congress's primary concern about a mandatory or involuntary Chapter 13 was concern that such procedure would violate the Thirteenth Amendment). But see Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431, 448 (1997) (asserting that no serious argument can be made that a compulsory Chapter 13 violates the Thirteenth Amendment's prohibition against involuntary servitude). Interestingly, the Senate Report contained no direct reference to mandatory or involuntary Chapter 13.

162. Compare Bankruptcy Reform Act of 1978 § 1328(a) (identifying debts available for discharge under Chapter 13), with *id.* § 727 (addressing discharge of debts under Chapter 7). Most types of debts not dischargeable in a Chapter 7 proceeding were dischargeable under Chapter 13. This super discharge (the ability to have more debts discharged in a Chapter 13 proceeding than in a Chapter 7 proceeding) was a clear sign that Congress wanted to encourage individuals to file Chapter 13. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35-36 (1995) (observing that the "super discharge" was one of many inducements to filing under Chapter 13 as opposed to Chapter 7); see also H.R. REP. NO. 95-595, at 118 (listing other benefits to be gained by the debtor in filing a Chapter 13—protection of all assets, protection of credit standing, avoiding the stigma of liquidation, and retaining pride in "being able to meet one[']s obligations").

163. See Bankruptcy Reform Act of 1978 § 707 (limiting a debtor's ability to seek liquidation bankruptcy to the court's own motion for cause, including, but not limited to, the "(1) unreasonable delay by the debtor that is prejudicial to creditors; and (2) nonpayment of any fees and charges required under Chapter 123 of title 28"). The legislative history expressly stated that the two causes listed were "not exhaustive, but merely illustrative." H.R. REP. NO. 95-595, at 380; S. REP. NO. 95-989, at 154. The committee reports also stated with identical language that it was not the purpose of



operating on the basic ethical assumption that most debtors, if given the opportunity, would seek to repay their debts, and that the changes it made in the new Chapter 13 made it more user friendly and acceptable to more debtors.

The consumer credit industry was not pleased with the new code. In response to the perceived strong debtor orientation of the new Bankruptcy Code,<sup>164</sup> the industry took immediate steps to have Congress make changes in the Code.<sup>165</sup> In conjunction with

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section 707 that “the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal.” H.R. REP. NO. 95-595, at 380; S. REP. NO. 95-989, at 94 n.154. Thus, it was fairly clear that a large percentage of high wage earners could still avail themselves of Chapter 7.

164. The primary criticism was aimed at the broader discharge provisions of the Bankruptcy Code. See Paul M. Black & Michael J. Herbert, *Bankcard's Revenge: A Critique of the 1984 Consumer Credit Amendments to the Bankruptcy Code*, 19 U. RICH. L. REV. 845, 845 (1985) (declaring that opponents of the new code were claiming that it encouraged debtors to shed their debts painlessly); see also Marc S. Cohen & Kenneth N. Klee, *Caveat Creditor: The Consumer Debtor Under the Bankruptcy Code*, 58 N.C. L. REV. 681, 721 (1980) (concluding that the Bankruptcy Code granted the debtor the most “potent arsenal of weapons” thus far).

165. Initially the consumer credit industry undertook a massive statistical analysis of the bankruptcy process. See 1 CREDIT RESEARCH CTR., KRANNERT GRADUATE SCHOOL OF MGMT., PURDUE UNIV., CONSUMER BANKRUPTCY STUDY, CONSUMERS' RIGHT TO BANKRUPTCY: ORIGIN AND EFFECTS 72 (1982) (concluding that “15 percent to 30 percent of bankrupt debtors probably could repay all of their non-mortgage debts out of their future income, while as many as 37.4 percent of bankrupt debtors probably could repay at least half their debts out of future income”); *id.* at 139 (pointing out that the broader discharge provisions of the Code would increase the risk of lenders and therefore the costs of unsecured credit). “The study was financed by the Coalition for Bankruptcy Reform, a group made up of a broad cross section of the consumer credit industry and associated organizations.” Robert W. Johnson et al., *Preface* to 1 CREDIT RESEARCH CTR., KRANNERT GRADUATE SCHOOL OF MGMT., PURDUE UNIV., CONSUMER BANKRUPTCY STUDY, CONSUMERS' RIGHT TO BANKRUPTCY: ORIGIN AND EFFECTS vi, vi (1982). But see Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091, 1146 (1983) (finding that the Purdue study contained “fundamentally flawed evidence”); Teresa A. Sullivan et al., *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087, 1095, 1103 (determining that her two articles have discredited the findings of the Purdue study). Secondly, the consumer credit industry began a massive lobbying effort to achieve what it perceived to be needed reform to the bankruptcy system. See Vern Countryman, *Bankruptcy and the Individual Debtor—and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 822 (1983) (outlining Ralph Nader's Congress Watch Report on contributions to Congress by the credit industry); see also Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 76–80 (1986) (discussing the criticism of the Bankruptcy Code by the consumer credit industry and its lobbying efforts from the passage of the Bankruptcy Code until the passage of the Consumer Credit Amendments); Charles Jordan Tabb, *The History of the Bankruptcy*

increasing loan defaults and rising consumer bankruptcy filings, the industry's lobbying efforts led to a flurry of activity by Congress. The legislative activity focused on two key aspects of consumer bankruptcy—eligibility for liquidation bankruptcy and ability-to-pay requirement proposals for Chapter 13 cases. In the case of Chapter 13, Congress initially proposed to add a “good faith effort”<sup>166</sup> or a “bona fide effort”<sup>167</sup> requirement for confirmation.<sup>168</sup> These

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*Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 37 (1995) (mentioning the lobbying efforts of the credit industry following the passage of the Bankruptcy Code).

166. S. 658, 96th Cong. § 128(b) (1980). An accompanying House Report analyzed in detail each section of S. 658 as amended by the Committee of the Judiciary of the House of Representatives. H.R. REP. NO. 96-1195, at 8 (1980). Section 128(b) of S. 658 proposed that § 1325(a)(3) be amended to add an additional requirement for Chapter 13 plan confirmation that not only must the plan have been proposed in good faith, but that the plan represented the debtor's good faith effort. *Id.* at 24–25. The stated purpose of this proposed amendment was to prevent debtors from filing for Chapter 13 relief who had the ability, “but not the willingness, to make whatever payments their particular circumstances reasonably permit over and above their primary obligation to support themselves and their dependents.” *Id.* at 25.

167. S. 863, 97th Cong. § 128(b) (1981). The accompanying Senate Report analyzed in detail each section of S. 863, which, with modest amendments, was similar to S. 658 as amended by the House. S. REP. NO. 97-150, at 2 (1981). Section 128(b) of the bill proposed to amend § 1325(a)(4) and require a bona fide effort by the debtor to repay his unsecured debts. The legislative intent was to force the debtor to make a genuine effort to repay his creditors by making necessary changes to his standard of living. *Id.* at 18–19; *see also* S. 445, 98th Cong. § 220 (1983) (stating that the plan should represent “a bona fide effort which is consistent with the debtors ability to repay his debts, after providing for himself and his dependents”); S. 2000, 97th Cong. § 18(a) (1981) (amending 11 U.S.C. § 1325(a) by inserting, “and the plan represents a bona fide effort which is consistent with the debtor's ability to repay his debts, after providing support for himself and his dependents”); H.R. 4786, 97th Cong. § 19(1) (1981) (proposing to insert into 11 U.S.C. § 1325(a) “and the plan represents a bona fide effort which is consistent with the debtor's ability to repay his debts, after providing support for himself and his dependents”).

168. As originally enacted in 1978, one of the requirements for confirmation of a Chapter 13 plan was that the plan was “proposed in good faith.” Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 1325(a)(3), 92 Stat. 2549, 2649–50 (codified as amended at 11 U.S.C. § 1325 (2006)). As one can imagine, being an undefined term in the Bankruptcy Code, courts had conflicting views over the meaning of the phrase “good faith.” *See generally* Conrad K. Cyr, *The Chapter 13 “Good Faith” Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 274–75 (1981) (recognizing that courts had a tendency to use their own understanding of the purpose of Chapter 13 in interpreting the phrase); Steven F. Bines, Note, *Bankruptcy: Good Faith and the Zero Payment Plan in Chapter 13*, 69 KY. L.J. 327, 344–51 (1981) (noting the various arguments put forth by the courts in finding “good faith” even in plans that paid zero to unsecured creditors). A Senate Report put the problem in these words:

[O]ften instead of meaningful payments to unsecured creditors, the norm has become “zero” or nominal payment plans in many jurisdictions. In other areas, judges have

proposals sought to make a debtor who had the ability, but not the willingness, pay his creditors all income that was not necessary for the support of the debtor and his family.<sup>169</sup> In the case of Chapter 7, Congress considered imposing an ability-to-pay standard on filing eligibility. Specifically, the proposals would have prohibited an individual from obtaining relief under Chapter 7 if that individual could “pay a reasonable portion of his debts out of anticipated future income.”<sup>170</sup> The stated purpose of this ability-to-pay standard was to

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had to strain the provisions of section 1325 by decisions or informal rule to reach the right result [vis-à-vis] the level of payments of the debtor for the particular case.

S. REP. NO. 97-150, at 18. In discussion on the purpose of an earlier proposal to create uniformity in this good faith standard by inserting language that the plan “represents the debtor’s good faith efforts,” a House Report made the following statement of its intent:

The purpose of the “good faith effort” test of subsection 1325(a)(3) is to prevent the use of [C]hapter 13 composition plans by debtors having a demonstrated ability, but not the willingness to make whatever payments their particular circumstances reasonably permit. . . .

H.R. REP. NO. 96-1195, at 25. See generally Conrad K. Cyr, *The Chapter 13 “Good Faith” Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 271–89 (1981) (discussing in detail the good faith efforts and the bona fide efforts proposals); Bruce E. Kosub & Susan K. Thompson, *The Religious Debtor’s Conviction to Tithe as the Price of a Chapter 13 Discharge*, 66 TEX. L. REV. 873, 876–80 (1988) (outlining the detailed history leading to the passage of the ability-to-pay requirement in Chapter 13).

169. See S. REP. NO. 97-150, at 19 (acknowledging that the debtor would have to give up luxuries and adjust his standard of living); H.R. REP. NO. 96-1195, at 25 (establishing that a debtor needed to show a willingness to repay his debts); see also Conrad K. Cyr, *The Chapter 13 “Good Faith” Tempest: An Analysis and Proposal for Change*, 55 AM. BANKR. L.J. 271, 281 (1981) (“[T]here is little, if any, quarrel with the view that the law should encourage debtors voluntarily to repay their just obligations to the extent reasonable able to do so. The ethical premise upon which this near-universal view is based is the core of our consumer credit system.”).

170. S. 445 § 203; S. 2000 § 2. As no action was taken on S. 2000, Senator Dole introduced S. 445 in the 98th Congress originally containing the same provision on eligibility for Chapter 7. S. REP. NO. 98-65, at 2 (1983). However, after hearings and discussions among members of the Subcommittee on Courts of the Senate Committee on the Judiciary, the Chapter 7 eligibility provision was deleted from S. 445. *Id.* Senators Howard Metzenbaum and Edward Kennedy argued that the original S. 445, with its future income test for eligibility for Chapter 7, was “a radical departure from this century-old bankruptcy tradition[, the fresh start].” *Id.* at 90. As passed by the Senate Judiciary Committee, the future income test was eliminated and replaced with language authorizing the court on its own motion to dismiss the case in the event there was substantial abuse of Chapter 7. See *id.* at 53 (describing the substantial abuse test in subsection 202(c) of the proposed bill). Nothing in the legislative history explains the change from a future income test to a substantial abuse test. The House never acted on S. 445, but did pass H.R. 5174, which contained the same substantial abuse language as in S. 445. H.R. 5174, 98th Cong. § 212 (1984). The Senate subsequently approved the House bill. 130 CONG. REC. 17,158 (1984). A conference committee resolved the minor differences and H.R. 5174 became

prevent the perceived abuse of debtors seeking liquidation proceedings when they were able to repay their debts.<sup>171</sup> While none of these more significant proposals became law,<sup>172</sup> they clearly focused congressional attention on the perception, if not the fact, that many individuals opted for liquidation bankruptcy to avoid their financial obligations. These efforts, however, eventually culminated in the enactment of the Consumer Credit Amendments.<sup>173</sup> The Amendments were a further pronouncement by Congress that individual debtors who resort to bankruptcy should opt for Chapter 13, and that those individuals in Chapter 13 should make every effort to repay their debts.<sup>174</sup>

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law as the Bankruptcy Amendments and Federal Judgeship Act of 1984. Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 and 28 U.S.C.).

171. See S. REP. NO. 97-446, at 34 (1982) (analyzing that the new bill “would prohibit an individual from obtaining relief under [C]hapter 7 where that individual [could] pay ‘a reasonable portion of his debts out of anticipated future income’” (citations omitted)). Relying upon the findings of the Purdue study, the Senate Report concluded that there was a “substantial percentage of debtors who are not financially incapacitated at the time of filing bankruptcy, and for who a discharge in bankruptcy constitutes a ‘head start’ rather than a ‘fresh start’ when their expectation of substantial future earnings is taken into account.” *Id.* at 7. The Report asserted that this happening was an abuse of the system that needed to be remedied. See *id.* at 14 (concluding that “the present bankruptcy laws, by failing to take future earnings capabilities into account in determining eligibility for [C]hapter 7, have contributed to abuse of the bankruptcy system by individuals who are not actually in need of straight liquidation relief”).

172. See generally *In re Balaja*, 190 B.R. 335, 339–41 (Bankr. N.D. Ill. 1996) (reviewing the suggested changes and their eventual synthesis into the new § 707(b)); Robert E. Ginsberg, *The Bankruptcy Improvements Act—An Update*, 3 N. ILL. U. L. REV. 235, 235–51 (1983) (analyzing, in detail, the criticisms of the proposals and why they were not passed into law); Robert E. Ginsberg, *The Proposed Bankruptcy Improvements Act: The Creditors Strike Back*, 3 N. ILL. U. L. REV. 1, 1–73 (1982) (examining the proposed Bankruptcy Improvements Act and commenting on its propriety).

173. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended in scattered sections of 11 and 28 U.S.C.). Subtitle A of Title III of this law was entitled the “Consumer Credit Amendments.” *Id.* §§ 301–552. Notwithstanding congressional concern of debtor abuse, the real impetus for these amendments was the Supreme Court’s decision holding unconstitutional the broad grant of jurisdiction to bankruptcy courts in the Bankruptcy Code. *N. Pipe Line Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982). This problem was exacerbated by the later Supreme Court decision holding that a Chapter 11 debtor-in-possession could reject a collective bargaining agreement. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984). Many special interest groups, as well as the credit industry, took advantage of the need to resolve these major deficiencies in the Bankruptcy Code to get some of their ideas incorporated into the law.

174. See, e.g., Jeffrey W. Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984*, 27 WM. & MARY L. REV. 91, 98, 137 (1985) (stating that by these amendments Congress sought to encourage increased Chapter 13

The Consumer Credit Amendments did not impose any entry level requirement for the filing of a Chapter 7 proceeding.<sup>175</sup> However, two of the amendments clearly reflected Congress's desire to increase payment of unsecured debt and to channel more debtors into Chapter 13.<sup>176</sup> First, the legislation imposed a new requirement for Chapter 13 plan confirmation. In the event that an unsecured creditor objected to the proposed plan, the court could not confirm the plan unless the debtor amended her plan and utilized all of her disposable income to fund the plan.<sup>177</sup> Secondly, and the most controversial at the time, was the addition of a subsection that permitted the court to dismiss a Chapter 7 proceeding for substantial abuse; however, the amendment stated that there was a presumption that the Chapter 7 debtors were entitled to the relief they sought.<sup>178</sup> Of course, once

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filings by consumers). There was no official report from either house of Congress relating to these amendments. See 130 CONG. REC. H1809 (daily ed. Mar. 21, 1984) (statement of Rep. Henry Hyde) (lamenting the fact that there would be no resource for courts to use to discern legislative intent). The most comprehensive informal legislative history can be found in *In re Grant*, where it was noted that "[l]egislative history suggests that Congress was determined to reduce the number and amount of consumer debts which are annually discharged by debtors who are able to repay a significant portion of their debts, yet continue to guarantee the truly needy a 'fresh start.'" *In re Grant*, 51 B.R. 385, 392 (Bankr. N.D. Ohio 1985).

175. See 130 CONG. REC. 20,224 (1984) (introducing H.R. REP. NO. 98-882 (1984), the conference committee report that resolved all differences in the bill between the House and Senate, to the House, and stating that these amendments were fair to all and "contain no threshold or future income test" (emphasis added)).

176. *But cf.* Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 62 (1986) (alleging that the amendments "threatened the eradication of the fresh start policy" for individual debtors); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 39-40 (1995) (asserting these amendments "tightened the reins on consumer debtors").

177. 11 U.S.C. § 1325(b) (1984) (amended 1986). This particular ability-to-pay standard ("projected disposable income") was initially suggested by the National Bankruptcy Conference as an alternative to the "bona fide efforts" proposal. See *Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary H.R., Personal Bankr.*, 97th Cong. 7 (1981) (testimony of Vern Countryman on behalf of the National Bankruptcy Conference proposing an "ability-to-pay" amendment for Chapter 13 cases). The National Bankruptcy Conference's ability-to-pay standard required a Chapter 13 debtor to pay a portion of his future income for a reasonable period of time. *Id.* at 29, 32. Congress convened these hearings because of the confusion and lack of uniformity in the courts over the proper Chapter 13 confirmation standard. *Id.* at 1.

178. See Bankruptcy Amendments & Federal Judgeship Act § 312 (applying only to individual debtors whose debts were primarily consumer debts). In 1986, trustees were given the right to make motions to dismiss under § 707(b). Bankruptcy Judges, United States Trustees, & Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219(b),

the case was dismissed for substantial abuse, the only alternative available to obtain relief would be to file (or convert before dismissal) a Chapter 13 proceeding. While no definition of substantial abuse was provided in the legislation,<sup>179</sup> the availability of surplus income to a debtor that could be used to pay pre-petition creditors quickly became the prevailing understanding of what constituted substantial abuse.<sup>180</sup> Some courts added a refinement to this prevailing view,

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100 Stat. 3088, 3101 (current version at 11 U.S.C. § 707(b) (2006)). Section 707(b) sought to prevent debts from being discharged through Chapter 7 in favor of debtors who had future income sufficient to meet those obligations. *See Grant*, 51 B.R. at 393–95 (using the legislative history of § 707 and prior bankruptcy case law to determine whether to grant relief to a debtor). The hope was that if a debtor was denied access to Chapter 7 relief, he would turn to Chapter 13 and repay a portion of his debts. *See id.* (noting that a debtor’s likelihood of successfully filing a Chapter 13 plan was a factor used in determining whether to grant relief). Another amendment to the Bankruptcy Code allowed the debtor, the trustee, or any unsecured creditor to file for modifications of confirmed Chapter 13 plans as a result of unforeseen circumstances that increased or reduced the debtors’ ability to pay. Bankruptcy Amendments and Federal Judgeship Act § 319.

179. *Grant*, 51 B.R. at 393–94. This failure led to a lack of uniformity among the various bankruptcy courts as to its meaning and application. *See generally In re Attanasio*, 218 B.R. 180, 184–239 (Bankr. N.D. Ala. 1998) (detailing the lack of uniformity in the selection of factors to be considered in determining substantial abuse). The overall lack of uniformity in interpretation and application of Bankruptcy Code provisions was one of the major complaints raised by the Bankruptcy Reform Commission. *See NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT* 81, 125, 235 (1997) (noting the inequities present in current bankruptcy proceedings). The Commission’s report stated that often outcomes in particular cases depended “more on geography than on law.” *Id.* at 81. The dissenting commissioners specifically pointed out the lack of uniformity in the application of § 707(b). *See Edith H. Jones et al., Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, in NAT’L BANKR. REVIEW COMM’N, *BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT* 1113 n.117 (1997); *see also* H.R. REP. NO. 109-31, pt. 1, at 12–13 (2005) (noting the disparate applications of § 707(b) by the courts). This admitted lack of uniformity is ironic given the fact that the lack of uniformity in practice and procedure was the primary reason argued to abandon the Bankruptcy Act and push for new legislation that subsequently became the Bankruptcy Code of 1978. *See* H.R. DOC. NO. 93-137, pt. 1, at 4 (1973), *reprinted in* Vol. B COLLIER ON BANKRUPTCY App. pt. 4-246 (15th ed. rev. 1996) (noting, for example, the “nonexistence” of Chapter 13 plans in some districts and the “virtual exclusion” of Chapter 7 in others).

180. *See, e.g., In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988) (noting that it was the opinion of numerous bankruptcy courts that a debtor’s ability to repay debts he sought to discharge in a Chapter 7 proceeding was the primary factor in determining substantial abuse). This understanding of the meaning of substantial abuse might have been the result of the legislative history of the original § 707 of the Bankruptcy Code, which became § 707(a) after the enactment of § 707(b). *See* S. REP. NO. 95-989, at 94 (1978) (discussing actions that constitute cause for dismissal of a Chapter 7 filing). Under the proposals reflected by that history, a court, in considering a dismissal for cause under original § 707, was not to consider a debtor’s ability to pay. *Id.* By substituting the new substantial abuse

holding that substantial abuse would exist if the debtor could make payments to creditors without difficulty.<sup>181</sup>

As the country moved toward the end of the twentieth century, Congress had considered eligibility limitations for Chapter 7 that would have been tied to one's ability to pay his debts, yet it had not made future income a requirement for such filings. Congress's continued concern with the increasing number of filings and awareness of the need to significantly reform the American bankruptcy system led to the enactment of the Bankruptcy Amendments of 1994.<sup>182</sup> In retrospect, the greatest long-range significance of the 1994 legislation was the creation of the Bankruptcy Review Commission.<sup>183</sup> The Commission conducted extensive hearings in an attempt to accomplish its statutory mandate: to provide Congress with suggestions for improving and updating the

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language, Congress apparently was changing its mind and accepting the premise that repayment ability could be a basis for dismissal of a Chapter 7 case. See, e.g., Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 476 (2007) (stating that the substantial abuse provision "marked a pointed shift in the orientation of bankruptcy law" for the individual debtor). But see *In re Green*, 934 F.2d 568, 572 (4th Cir. 1991) (noting that a court was to consider the totality of circumstances, not merely the debtor's ability to repay).

181. See, e.g., *In re Balaja*, 190 B.R. 335, 339-41 (Bankr. N.D. Ill. 1996) (summarizing the legislative history of § 707(b) and concluding that "ability to pay" was to apply only in those cases where the debtor could pay his former obligations without difficulty). Bankruptcy Judge Wedoff, who authored the *Balaja* opinion, wrote an article incorporating his conclusions and opinions concerning § 707(b). Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 233 (2005) (citing only his *Balaja* opinion for the conclusion that § 707(b) was not intended to result in a dismissal of a Chapter 7 case if the debtor's income "was enough to pay some specified debt amount").

182. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. The Senate, in its report on the bill, stated:

The purpose of this bill is to adopt a number of amendments to the Bankruptcy Code. This bill contains provisions for the establishment of a National Bankruptcy Review Commission to aid Congress in identifying and addressing problems found in the bankruptcy field. This bill further seeks to address several substantive issues [that] have developed over time, including the establishment of a pilot program to test how the Bankruptcy Code may more efficiently operate regarding small businesses. The bill also contains numerous technical corrections to the Bankruptcy Code. For these reasons, this legislation deserves to be passed by the Senate.

S. REP. NO. 103-168, at 38 (1993).

183. The Commission's creation has been considered the genesis of the enactment of BAPCPA. See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005) (noting, ironically, that the NBRC was charged with only a "modest mandate to review the state of the bankruptcy law and system," but resulted in contributing to the most major overhaul of the bankruptcy laws in twenty-five years).

Bankruptcy Code.<sup>184</sup> The Commission's recommendations contained only modest proposed changes to the consumer bankruptcy system.<sup>185</sup> Four of the nine commissioners filed a strongly worded dissent to the majority's consumer recommendations.<sup>186</sup> In addition, two commissioners chastised the Commission for not making any recommendations "over whether bankruptcy relief should be means-tested like all other programs available in the social safety net."<sup>187</sup> Interestingly, just over a month before the Commission filed its report, House Resolution 2500 was introduced in Congress, which contained an initial version of means testing for consumer debtors, adopting in large part the dissenting commissioners' position.<sup>188</sup>

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184. Congress noted that it was "generally satisfied with the basic framework established in the current Bankruptcy Code" and charged the Commission with making recommendations that did "not disturb the fundamental tenets and balance of current law." H.R. REP. NO. 103-835, at 59 (1994); S. REP. NO. 103-168, at 54. The Commission was composed of nine members who conducted numerous hearings, considered more than 2,300 written submissions and recommendations, and finalized their report containing 172 recommendations. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT v-vi (1997).

185. See generally NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 77-301 (1997) (stating the Commission's recommendations to Congress concerning consumer bankruptcy). The consumer recommendations consisted primarily of changes in exemptions, reaffirmation agreements, and modest alterations to Chapter 13. See *id.* at 79-82 (discussing the Commission's proposals for certain areas of bankruptcy). The Commission made no recommendations seeking any changes to § 707(b), nor for that matter did it give any advice as to a proper interpretation of the section. *Id.* at 272. The Commission proposed guidelines based on a graduated percentage of a debtor's income to replace the Chapter 13 disposable income requirement, but noted that such guidelines were "not intended to be applied to Chapter 7 debtors to be a proxy for substantial abuse, for this would stretch the term 'substantial abuse' beyond recognition." *Id.* at 7, 272.

186. See *id.* at 1045-46 (discussing the proposals that the dissenting commissioners "disagree most strongly with" and regarding the opinions of the majority as "misguided and unresponsive").

187. See Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 1132-49 (1997) (advocating means testing and criticizing the Commission for failing to adopt or even address the proposal). The authors proposed several different ways that the objective of means testing could be achieved and attempted to disarm the major objections to this type of testing. See *id.* at 1139-47 (identifying the various steps that could be taken to implement means testing). Their dissent concluded with the observation that "[means testing] is not a radical idea. We already use it to determine child care benefits, Medicaid benefits, social security benefits, supplemental security income, food stamp benefits and student aid benefits at the federal level alone." *Id.* at 1147-48.

188. Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. § 101 (1997) (proposing to amend § 109 regarding eligibility to be a Chapter 7 debtor). The day



Congress then began the long, arduous task of enacting bankruptcy reform legislation.<sup>189</sup> Seven years later, following extensive hearings,<sup>190</sup> the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was enacted and signed into law.<sup>191</sup> The

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after the NBRC report was filed, on October 21, 1997, a means-testing bill was introduced in the Senate. Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 102 (suggesting an amendment to § 707 requiring the court to dismiss a Chapter 7 proceeding if the debtor could pay a sum of 20% to his unsecured creditors); *see also* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 493-94 (2005) (outlining the provisions contained in the two bills dealing with consumer bankruptcy); Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 285 (2005) (noting that the bills that were introduced from 1997 until BAPCPA's enactment reflected only the two dissenting commissioners' positions).

189. In discussing the history of bankruptcy reform over the nearly eight years prior to BAPCPA's enactment, the House Report concluded with the following:

Since the 105th Congress, the House has passed bankruptcy reform legislation on eight separate occasions. In the 105th Congress, for example, the House passed both H.R. 3150, the "Bankruptcy Reform Act of 1998," and the conference report on that bill by veto-proof margins. In the 106th Congress, the House passed H.R. 833, the successor to H.R. 3150, by a veto-proof margin of 313 to 108 and agreed to the conference report by voice vote. Although the Senate subsequently passed this legislation by a vote of 70 to 28, President Clinton pocket-vetoed it. In the 107th Congress, the House again registered its overwhelming support for bankruptcy reform on two more occasions. On March 1, 2001, the House passed H.R. 333, the "Bankruptcy Abuse Prevention and Consumer Protection Act," by a vote of 306 to 108. The House thereafter passed a modified version of the conference report on H.R. 333, as previously noted. In the last Congress, the House passed H.R. 975, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2003," by a vote of 315 to 113 and S. 1920, which consisted of the text of H.R. 975, as passed by the House, by a vote of 265 to 99.

Likewise, the Senate has on numerous occasions expressed strong bipartisan support for bankruptcy reform legislation. In the 105th Congress, the Senate passed bankruptcy reform legislation by a vote of 97 to 1. In the 106th Congress, the Senate passed similar legislation by a vote of 83 to 14 and a subsequent conference report by a vote of 70 to 28. In the 107th Congress, the Senate passed a bankruptcy reform bill by a vote of 82 to 16. Last month, the Senate passed S. 256, as amended, by a vote of 74 to 25.

H.R. REP. NO. 109-31, pt. 1, at 6 (2005).

190. The House Report accompanying the bill Congress enacted (S. 256) lists over twenty separate hearings held from 1997 to 2005 on the subject of bankruptcy reform. *Id.* at 6-10.

191. BAPCPA was signed on April 20, 2005. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). The final House Report gives four reasons justifying BAPCPA's passage. First, with over 1.6 million bankruptcy cases filed in 2004, there was a growing perception that bankruptcy relief was becoming "a first resort, rather than a last." H.R. REP. NO. 109-31, pt. 1, at 4. Secondly, the Report noted that the

centerpiece of the legislation on consumer bankruptcy was the need-based reform to Chapter 7 and the institution of means testing.<sup>192</sup> BAPCPA completely amended § 707(b) in the following ways: deleting the provision concerning substantial abuse and its related presumption that the debtor was entitled to Chapter 7 relief; creating a presumption of abuse for a Chapter 7 individual debtor whose current net monthly income exceeded the statutorily permitted amount; and, in that event, requiring dismissal unless the debtor converted his case to either Chapter 11 or 13.<sup>193</sup> Congress's clear intent was to encourage a debtor with the ability to pay his financial obligations to do so to the extent possible.<sup>194</sup> To achieve this goal, in addition to creating the presumption of abuse, BAPCPA changed the law to permit any interested party to file a motion to have a case dismissed for abuse.<sup>195</sup>

As one can see from this historical journey, for more than 100 years, Congress has had a consistent theme of seeking to encourage wage earners to enter into repayment plans with their creditors. For nearly half of that time, Congress used a carrot approach, presuming that moral, social, or cultural pressures alone would encourage debt repayment whenever possible. Beginning in 1984, however, Congress added a stick to its carrot approach as it became obvious that the moral, social, and cultural pressures no longer weighed as heavily on the debtor; the stigma of bankruptcy was fast becoming an anachronism and itself a part of bankruptcy lore. With the enactment

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creditor's associated losses as debts were being discharged in liquidation proceedings. *See id.* at 4–5 (noting that according to one estimate these losses represented a \$400 annual tax on each household reflected in higher borrowing costs). The Report also noted that the present system was subject to abuse due to loopholes and improper incentives. *Id.* at 5. Finally, the Report noted that several studies showed that some debtors could repay significant portions of their obligations, but that the present law had “no clear mandate requiring these debtors to repay their debts.” *Id.*

192. Bankruptcy Abuse Prevention and Consumer Protection Act § 102(a)(1).

193. *Id.* BAPCPA provided an exception to the presumption in cases of exceptional circumstances. *Id.*

194. *See* H.R. REP. NO. 109-31, pt. 1, at 12 (noting that need-based reform would increase payment to creditors as more debtors were “shifted into [C]hapter 13”); *see also* 151 CONG. REC. 3037 (2005) (statement of Sen. Grassley) (“This bill does this by providing for a means-tested way of steering people who are filers, who can repay a portion of their debts, away from [C]hapter 7 bankruptcy.”).

195. Bankruptcy Abuse Prevention and Consumer Protection Act § 102(a) (codified as amended at 11 U.S.C. § 707(b)(1)(2006)). Under the then-existing provision of § 707(b), the motion to dismiss could only be brought by either the judge or the Chapter 13 trustee. *See id.* (noting the changes made to the previous version of the statute).

of BAPCPA, Congress finally acknowledged that it was necessary to legislate “ability to pay” into the Bankruptcy Code in order to “encourage” repayment of financial obligations by those capable of doing so—apparently, Congress had finally come to realize that debtors would not voluntarily live a reduced lifestyle in order to repay their financial obligations.<sup>196</sup> While many see means testing as a rejection of the fresh start policy,<sup>197</sup> from a true historical perspective it more closely resembles the end of a continuous movement to legislatively impose what Congress had hoped that moral, social, and cultural pressures would implement by choice.<sup>198</sup>

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196. See H.R. REP. NO. 109-31, pt. 1, at 2 (seeking to have debtors pay the “maximum they can afford”); *id.* at 12–13 (noting a desire for uniform application of § 707(b) and a reduction of judicial discretion); see also DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 205 (2001) (stating that the proposal for means testing would move our system to a more rigorous system, similar to that of England); Karen Gross et al., *Legislative Messaging and Bankruptcy Law*, 67 U. PITT. L. REV. 497, 505 (2006) (concluding that it was distrust of the central participants in the bankruptcy process, particularly the judiciary, that led to the less flexible standard); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 473 (2007) (noting that while BAPCPA blurred the judicial and administrative functions of the bankruptcy court, the legislation was relatively ineffective in reining in judicial discretion). While it is generally recognized that Congress was trying to reduce judicial discretion and create uniformity with respect to dismissals under § 707, recent analysis shows that it is not having that effect. See generally Jean Braucher, *Getting Realistic: In Defense of Formulaic Means Testing*, 83 AM. BANKR. L.J. 395, 396 (2009) (noting that means testing has turned out to be easier on Chapter 13 debtors than the old law was); David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007) (concluding that BAPCPA did not make Chapter 7 proceedings “less accessible to high-income debtors” and has not had much impact on bankruptcy proceedings).

197. See, e.g., Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 KAN. L. REV. 553, 576 (2010) (“[BAPCPA s]eriously threatens the eradication of the fresh start policy for those in need[.]”); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 5 (2001) (describing the means-testing approach as “draconian”). But see Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model For a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31–34 (1999) (concluding that less than 4% of debtors would be affected by the means-testing proposal).

198. See, e.g., A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 244 (2001) (“[Means testing] is theoretically sound because it is not irrational to encourage (if not force) debtors to accept the consequences of their fiscally irresponsible behavior by making them attempt to repay debts within their means.”); Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L.J. 855, 857, 896 (2003) (suggesting that forcing debtors to pay creditors from future income is not “an unnatural and undesirable development in the historical evolution of bankruptcy relief”); see also Jean Braucher, *Getting Realistic: In Defense of Formulaic Means Testing*, 83 AM. BANKR. L.J.

Whether this objective has been successful or not is, of course, subject to serious debate. What is not subject to debate is that, through its enactment of means testing, Congress sought to reduce Chapter 7 filings by those debtors who had the ability to repay a portion of their past indebtedness out of future income.<sup>199</sup> This Essay will now turn to a brief review of the Catholic social teaching tradition to glean certain fundamental principles and values to evaluate the “ability to pay” bankruptcy policy.

### III. CATHOLIC SOCIAL TEACHING<sup>200</sup>

It is widely recognized that modern magisterial teaching on social doctrine<sup>201</sup> realized its inception in 1891 with Pope Leo XIII’s Papal encyclical, *Rerum Novarum*.<sup>202</sup> In that encyclical, Pope Leo XIII

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395 415–21 (2009) (suggesting ways to fix the means-testing formula in order to assist judges in its application).

199. The House Report noted:

A . . . factor motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse. . . .

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... [S]ome bankruptcy debtors are able to repay a significant portion of their debts, according to several studies. Current law, however, has no clear mandate requiring these debtors to repay their debts.

H.R. REP. NO. 109-31, pt. 1, at 5 (footnote omitted).

200. “The term ‘social doctrine’ . . . designates the doctrinal ‘corpus’ concerning issues relevant to society which . . . developed in the Church through the Magisterium of the Roman Pontiffs and the Bishops in communion with them.” PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 87 (Libreria Editrice Vaticana trans., USCCB Publ’g 2005), available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html). It is not the purpose of this Essay to discuss the entire social teaching of the Church—that has been done elsewhere. For a thorough discussion of Catholic social teaching, see generally CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER: BUILDING ON ONE HUNDRED YEARS (Oliver F. Williams & John W. Houck eds., 1993); DONAL DORR, OPTION FOR THE POOR: A HUNDRED YEARS OF VATICAN SOCIAL TEACHING (rev. ed. 1992); MICHAEL J. SCHUCK, THAT THEY BE ONE: THE SOCIAL TEACHING OF THE PAPAL ENCYCLICALS 1740–1989 (1991). The primary focus of this section of the Essay considers the Magisterium’s social teaching concerning the rights and duties of individuals living in society. Thus, not all significant documents of Catholic social teaching are mentioned or discussed, and those discussions contained in this Essay of particular encyclicals are limited to the scope of this Essay.

201. PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 87 (Libreria Editrice Vaticana trans., USCCB Publ’g 2005).

202. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_)

rerum-novarum\_en.html; accord Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* para. 27 (2005), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html) (noting that Pope Leo XIII's encyclical letter, *Rerum Novarum*, was the Magisterium's first intervention addressing the just structuring of society); see also Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* para. 39 (1931), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html) (referring to *Rerum Novarum* as the "Magna Charta" upon which all Catholic social teaching is based); Lucia Ann Silecchia, *On Doing Justice & Walking Humbly with God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 CATH. U. L. REV. 1163, 1168 (1997) (describing *Rerum Novarum* as the "first great social encyclical"). For a discussion of select statements from the Magisterium on social matters prior to *Rerum Novarum*, see MICHAEL J. SCHUCK, THAT THEY BE ONE: THE SOCIAL TEACHING OF THE PAPAL ENCYCLICALS 1740-1989, at 1-31, 191 (1991). However, modern Catholic social doctrine had significant roots reaching back to the "person and message of Jesus." CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 2 (David J. O'Brien & Thomas A. Shannon eds., 1992) (noting that, although Jesus offered no specific economic message, his life, words, and deeds sowed the seeds of what was to germinate and give rise to modern social teaching of the Church). Jesus showed remarkable compassion and love for the downtrodden and outcasts of society. When Jesus came in contact with those who were hurting, he responded to their immediate needs. See *John* 11:1-57 (describing the raising of Lazarus); see also *Luke* 13:10-14 (driving out a person's unclean spirit); *Luke* 17:11-19 (cleansing ten lepers); *Mark* 5:30-34 (healing a woman with hemorrhages); *Mark* 5:40-43 (raising Jairus's daughter); *Matthew* 8:2-4 (cleansing a leper); *Matthew* 8:6-13 (curing a centurion's paralyzed servant). Jesus also taught the true meaning of charity. See *Luke* 10:29-37 (recounting the parable of the Good Samaritan). Referring to the parable of the Good Samaritan, Pope Benedict XVI echoed the principle that "Christian charity is first of all the simple response to immediate needs and specific situations." Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* para. 31(a) (2005). In addition, Jesus was constantly reminding the religious leaders of his day that there was more to entering the kingdom of God than simply complying with the letter of the law, as there were "weightier matters of the law[—]justice and mercy and faith." *Matthew* 23:23 (New American Bible). His "weightier matters" have played significant roles in the social teaching of the Church. See, e.g., Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* para. 28(a) (2005) (noting that the aim of faith was to "help purify reason and to contribute, here and now, to the acknowledgment and attainment of what is just"); see also Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 7 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html) (proclaiming that to "desire the *common good* and strive toward it *is a requirement of justice and charity*" (emphasis added)); Pope John Paul II, Encyclical Letter, *Dives In Misericordia* para. 14 (1980), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_30111980\\_dives-in-misericordia\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30111980_dives-in-misericordia_en.html) (finding that mercy was the "most profound source of justice"). See generally Pope John Paul II, Encyclical Letter, *Laborem Exercens* para. 3 (1981), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html) (elaborating that sacred scriptures have been a part of the social teaching of the Church, "especially[] the social morality which she worked out according to the needs of the different ages"). It should be noted that, long before Christ, the "social prophets" stated that the measure of justice was based on how the powerless in society were treated. Amos, Micah, Isaiah, and Hosea were, in their respective times, "serving as a conscience for his [God's] people in precisely those matters

addressed the social problems facing the working class that resulted from the radical transformation of the economic and political landscape following the European Industrial Revolution.<sup>203</sup> Pope

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where conscience was needed.” Bruce Vawter, *Introduction to Prophetic Literature*, in NEW JEROME BIBLICAL COMMENTARY 186, 196 (Raymond Brown et al. eds., 1990) (noting that these prophets sought to remind the recipients of their prophecies that they should not jettison the morality of God for a morality of their own making). Like the Church’s social teaching, the message of social justice prophesied by these early prophets served to remind the people that God’s moral imperatives, vis-à-vis the less fortunate, had not changed even though the economic, political, and social world of their ancestors had long since vanished. The social ethic of these prophets can be summed up in the words of Micah: “[D]o the right, . . . love goodness, and to walk humbly before . . . God.” *Micah* 6:8 (New American Bible). For a thorough discussion of Biblical social welfare laws reflecting God’s morality and justice, see Richard H. Hiers, *Biblical Social Welfare Legislation: Protected Classes and Provisions for Persons in Need*, 17 J.L. & RELIGION 49, 57–90 (2002).

203. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* paras. 29–44 (1891) (calling for remedies for the working poor who were being exploited by the owners of capital). The subject of the encyclical was clearly stated by Pope Leo XIII as follows:

[S]o have [w]e thought it expedient now to speak on the condition of the working classes. . . . It is a subject on which [w]e have already touched more than once, incidentally. But in the present letter, the responsibility of the apostolic office urges [u]s to treat the question of set purpose and in detail, in order that no misapprehension may exist as to the principles which truth and justice dictate for its settlement. . . . It is no easy matter to define the relative rights and mutual duties of the rich and of the poor, of capital and of labor.

*Id.* para. 2 (footnote omitted). The significance of this encyclical in the life of the Church has been demonstrated by the encyclicals that followed and commemorated *Rerum Novarum*. See Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* para. 10 (1931) (noting that, on *Rerum Novarum*’s fortieth anniversary, the encyclical was “forever memorable”). Pope Pius XI went on to state:

The Supreme Pastor in this Letter, grieving that so large a portion of mankind should “live undeservedly in miserable conditions,” took it upon himself with great courage to defend the cause of the workers whom the present age had handed over, each alone and defenseless, to the inhumanity of employers and the unbridled greed of competitors.

*Id.* para. 10 (quoting Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 2 (1891) (internal quotation marks omitted)); see also Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 5 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html) (honoring Pope Leo XIII on the 100th anniversary of *Rerum Novarum* for creating a new paradigm in the Church’s teaching, and spreading its social message, as the “doctrine points out the direct consequences of that message in the life of society and situates daily work and struggles for justice in the context of bearing witness to Christ the Saviour”); Pope John Paul II, Encyclical Letter, *Laborem Exercens* para. 2 (1981) (asserting that human work has been “at the very centre of the ‘social question’” since *Rerum Novarum*); Pope Paul VI, Apostolic Letter, *Octogesima Adveniens* para. 5 (1971), available at [http://www.vatican.va/holy\\_father/paul\\_vi/apost\\_letters/documents/hf\\_p-vi\\_apl\\_19710514\\_](http://www.vatican.va/holy_father/paul_vi/apost_letters/documents/hf_p-vi_apl_19710514_)

Leo XIII, relying heavily on Biblical references,<sup>204</sup> mentioned many issues that have become touchstones in Catholic social teaching—justice,<sup>205</sup> the common good,<sup>206</sup> dignity of the human being,<sup>207</sup> love,<sup>208</sup> and truth,<sup>209</sup> among others.<sup>210</sup> The Church had indeed shown interest in the social issues facing earlier societies;<sup>211</sup>

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octogesima-adveniensi\_en.html (commemorating the eightieth anniversary of *Rerum Novarum* and noting that the earlier encyclical “denounced in a forceful and imperative manner the scandal of the condition of the workers in the nascent industrial society”).

204. See Pope Leo XIII, Encyclical Letter, *Rerum Novarum passim* (1891) (citing to Biblical references in twenty-eight notes).

205. The encyclical discussed in detail the rights and duties of the worker vis-à-vis the employer in terms of the obligations of justice. See *id.* para. 17 (suggesting that employers had the obligation to pay a just wage). The encyclical also asserted that the responsibility of every state was, first and foremost, to act with justice toward both the rich and the working class. *Id.* para. 27.

206. See *id.* para. 22 (noting that man’s possessions were to be used for the common good). Pope John Paul II, commenting on Pope Leo XIII’s affirmation of the rights of workers, noted that “work has a ‘social’ dimension through its intimate relationship not only to the family, but also to the common good, because ‘it may be truly said that it is only by the labour of working men that [s]tates grow rich.’” Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 6 (1991) (quoting Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 34 (1891)).

207. See Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 36 (1891) (contending that public authorities must step in when a particular class suffers, especially “if employers laid burdens upon their workmen which were unjust, or degraded them with conditions repugnant to their dignity as human beings”). Pope Leo XIII cited *Romans* in asserting that there was no difference between rich and poor, as God is Lord overall. *Id.* para. 36; accord Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 6 (1991) (noting that the key to reading *Rerum Novarum* was to understand the dignity of the worker and the dignity of work).

208. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 29 (1891) (stating that alms giving from one’s excess was an act of Christian charity); accord *id.* para. 22 (asserting that Christ’s objective was to touch “innermost heart and conscience, and bring men to act from a motive of duty, to control their passions and appetites, to love God and their fellow men with a love that is outstanding and of the highest degree”). He concluded the encyclical by quoting from Paul’s First Letter to the Corinthians: “Charity is patient, is kind, . . . seeketh not her own, . . . suffereth all things, . . . [and] endureth all things.” *Id.* para. 45 (quoting 1 *Cor.* 13:4–7) (internal quotation marks omitted). It is this particular characteristic of social doctrine that Pope Benedict XVI addresses in detail in *Deus Caritas Est*. See generally Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* paras. 26–29 (2005), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html) (preaching the value of love and charity).

209. See Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 40 (1891) (noting that one of the “final purpose[s]” of man is the “attachment of truth”).

210. With hope, Pope Leo XIII noted, “[w]ould it not seem that, were society penetrated with ideas like these, strife must quickly cease?” *Id.* para. 25.

211. See MICHAEL J. SCHUCK, *THAT THEY BE ONE: THE SOCIAL TEACHING OF THE PAPAL ENCYCLICALS 1740–1989*, 3–43 (1991) (detailing some of the problems and

however, it was the extremely inhumane conditions facing the workers during the late nineteenth century that compelled Pope Leo XIII to speak out. Since the time of Pope Leo XIII, the social teaching of the Magisterium has come forth with new insights reflecting changes in the political, economic, cultural, and social conditions<sup>212</sup> that impact the lives of individuals.<sup>213</sup> The social teaching is both forever constant and new.<sup>214</sup>

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solutions that Popes as early as 1740 had addressed in family, economic, and cultural matters); see also CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 2–5 (David J. O'Brien & Thomas A. Shannon eds., 1992) (discussing the Church's role in society from the time of Christ until that of Pope Leo XIII).

212. In 2004, the Pontifical Commission for Peace and Justice published the *Compendium of the Social Doctrine of the Church*, which systematically presented the foundations of Catholic social doctrine. See PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH paras. 20–583 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005) (describing social doctrine of the Catholic Church); see also CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 14–448 (David J. O'Brien & Thomas A. Shannon eds., 1992) (containing twelve social encyclicals from Pope Leo XIII through Pope John Paul II). Pope Benedict XVI contributed two additional encyclicals to this corpus of work. See Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* paras. 34–42 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html) (proclaiming that the Church's social doctrine is based on the concept of “charity in truth”); Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* paras. 2–39 (2005) (explaining “God's love” in relation to the social teaching of the Church).

213. See Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 9 (2009) (noting that the Church sought the truth from all branches of knowledge and arranged it “into a unity the fragments in which it is often found, and meditates it within the constantly changing life-patterns of the society of peoples and nations”).

214. See *id.* para. 12 (citing Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* para. 3 (1987), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_30121987\\_sollicitudo-rei-socialis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html)) (referring to the Church's social teaching as a single, consistent, yet ever new teaching). In *Sollicitudo Rei Socialis*, Pope John Paul II stated:

On the one hand [the social teaching] is constant, for it remains identical in its fundamental inspiration, in its “principles of reflection,” in its “criteria of judgment,” in its basic “directives for action,” and above all in its vital link with the Gospel of the Lord. On the other hand, it is ever new, because it is subject to the necessary and opportune adaptations suggested by the changes in historical conditions and by the unceasing flow of the events which are the setting of the life of people and society.

Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* para. 3 (1987) (footnote omitted); see also PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 86 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005) (referring to the Church's social doctrine as a “work site” where work was always in progress); Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 3 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html) (noting that the Church's social



Pope John Paul II succinctly articulated a definition of Catholic social doctrine in the following words:

[T]he accurate formulation of the results of a careful reflection on the complex realities of human existence, in society and in the international order, in the light of faith and of the Church's tradition. Its main aim is to interpret these realities, determining their conformity with or divergence from the lines of the Gospel teaching on man and his vocation, a vocation which is at once earthly and transcendent; its aim is thus to guide Christian behavior. It therefore belongs to the field, not of ideology, but of theology and particularly moral theology.<sup>215</sup>

More recently, Pope Benedict XVI wrote that the Church's social teaching is simply the "proclamation of the truth of Christ's love in society."<sup>216</sup> Like his predecessor, Pope Benedict XVI stated that this fundamental principle of the Church's social teaching "takes on practical form in the criteria that govern moral action."<sup>217</sup> Thus, the

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teaching was part of the tradition of the Church that "contains 'what is old'—received and passed on from the very beginning—and which enables us to interpret the 'new things' in the midst of which the life of the church and the world unfolds").

215. Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* para. 41 (1987); see also Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes* para. 76 (1965) (Ronan Lennon trans.) (stating that the Church should have the right to make moral judgments in the realm of economics and social relationships whenever "fundamental rights" or "salvation of souls" made it necessary), reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 903, 984–85 (Austin Flannery ed., Liturgical Press new rev. ed. 1992). By placing the social teaching and its concern of man and his dignity at the level of a moral theology, the Church contrasted its position of man from the atheistic approach, which deprived man of his spiritual side, and from the individualistic approach, which asserted man was free from the restraints of law and God to do as he pleased. See Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 55 (1991) (recognizing the relationship between Christian anthropology, moral theology, and the Church's social doctrine).

216. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 5 (2009). The Congregation for the Doctrine of the Faith, to which Pope Benedict XVI served as Prefect at the time, noted in 1986 that the social teaching of the Church was "born of the encounter of the Gospel message and of its demands summarized in the supreme commandment of love of God and neighbor in justice with the problems emanating from the life of society." CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION para. 72 (1986) (footnote omitted), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19860322\\_freedom-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html).

217. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009) (asserting that two of these criteria were "justice and the common good"); see also CATHOLIC CHURCH, CODE OF CANON LAW Canon 747.2 (Latin-English ed., 1999) ("It belongs to the Church always and everywhere to announce moral principles, even about the social order, and to render judgment concerning any human affairs insofar as the

Church has not hesitated to condemn situations that are injurious to human dignity and to judge the moral value of social and political structures.<sup>218</sup> While the demands of the Gospel message have a strong individual ethic, Catholic social teaching not only relates to the proper ordering of one's individual moral life but also has a social dimension because man lives in society with others. The social teaching tradition recognizes that man faces constant challenges while living in society and that he must respond to those challenges in ways that are consistent with the Gospel's moral principles. Thus, the Church's social teaching has developed specific moral norms that individuals must use to judge those challenges and, based upon a proper understanding of those norms, act accordingly.<sup>219</sup>

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fundamental rights of the human person or the salvation of souls requires it."); Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 57 (1991) ("[T]he social message of the Gospel must not be considered a theory, but above all else a basis and a motivation for action."); Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* para. 41 (1987) (noting that the purpose of the Church's social teaching has been to direct the behavior of man); PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 73 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005) (contending the social doctrine of the Church has been to appeal to, guide, and form consciences). The Code of Canon Law also noted the Catholic laity has the obligation to promote social justice. CATHOLIC CHURCH, CODE OF CANON LAW Canon 222.2 (Latin-English ed., 1999).

218. See CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION para. 73 (1986), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19860322\\_freedom-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html) (rejecting collectivism); Pope Leo XIII, Encyclical Letter, *Rerum Novarum* paras. 15–17 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html) (rejecting socialism and its main tenet of a "community of goods").

219. See Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (June 29, 2009) (noting that the principle "around which the Church's social doctrine turns" has practical form in the criteria that direct moral actions); CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION para. 72 (1986), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19860322\\_freedom-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html) (stating the social teaching of the Church set forth "*principles for reflection* and *criteria for judgment* and also directives for action" (emphasis added) (footnote omitted)). See generally 2 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 262 (1993) (noting the importance of moral truths to govern actions). Indeed, the Church recognizes its focus is on its religious mission of helping man on the path to salvation; however, political, economic, or social order is not within the scope of its mission. See Pope Benedict XVI, Encyclical Letter, *Deus Caritas Est* para. 28(a) (2005), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html) (explaining that although the building of a just and civil order is a political task, the Church "is duty-bound to offer, through the purification of reason and through ethical formation, her own specific contribution towards

In the following pages, this Essay focuses on two key criteria that govern moral actions: justice and the common good.<sup>220</sup> In looking at these criteria, the focus is on how they impact the economic life of the individual.<sup>221</sup> However, before beginning this discussion, this Essay turns to the foundational principle of the Church's social teaching.

The cornerstone principle of the Church's social teaching is the individual dignity of each human person.<sup>222</sup> This dignity results from

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understanding the requirements of justice and achieving them politically"); Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* para. 41 (1987) (stating that the Church does not propose or show preference to any economic or political system as long as it protects human dignity and allows the Church to perform its religious function); Pope Paul VI, Encyclical Letter, *Populorum Progressio* para. 13 (1967), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_26031967\\_populorum\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html) (noting that in carrying out its mission, the Church has not interfered in the political realm).

220. See Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009) (discussing the role of these two criteria to evaluate development in our globalized society).

221. Catholic social teaching, of course, goes beyond the economic sphere and has more than only two key social concepts. In fact, the *Compendium* listed four principles that form the basis of its social teaching: the dignity of the human being, the common good, solidarity, and subsidiary. PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 160 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005). That document also identified four social values that underlie its social teaching: justice, truth, freedom, and love. *Id.* para. 197. Discussing the relationship between the principles and values, the *Compendium* stated:

Social values are an expression of appreciation to be attributed to those specific aspects of moral good that these principles foster. . . . *All social values are inherent in the dignity of the human person, whose authentic development they foster.*

*Id.* (emphasis added). The principle of solidarity imposes a duty upon all mankind to contribute to the common good, while the principle of subsidiary requires that no institution substitute itself for the "initiative and responsibility of individuals and of intermediate communities at the level on which they can function." CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION para. 73 (1986), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19860322\\_freedom-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html).

222. See Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 61 (1991) (noting that the Church, since World War II, has put the "dignity of the person at the center of her social messages, insisting that material goods were meant for all, and that the social order ought to be free of oppression and based on a spirit of cooperation and solidarity"). Therefore, the center of all the Church's pronouncements on social issues has been "a correct view of the human person and of his unique value." *Id.* para. 11 (emphasis added) (declaring that man was willed by God). Pope John XXIII stated that the "cardinal point of [the Church's social teaching] is that individual men are necessarily the foundation, cause and end of all social institutions," and, therefore, the Church's social teaching affirms and defends the dignity of the person. Pope John XXIII, Encyclical Letter, *Mater et Magistra* paras. 219–20 (1961), available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_15051961\\_mater\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html); see

the understanding that God made man in his own image,<sup>223</sup> and that, through the incarnation of Jesus, God became united with all

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also Pope John Paul II, Encyclical Letter, *Evangelium Vitae* para. 2 (1995), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html) (asserting that “upon the recognition of this right [sacred value of human life], every human community and the political community itself are founded”).

Christ gave the Church the obligation to care for and, more importantly, to be responsible for man’s destiny; consequently, dignity of the human person has been the foundational principle of the Church’s social teaching. See Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 53 (1991) (echoing that the Church’s primary purpose is the care of man). Thus, the Church has developed its social teaching to fulfill her obligation of helping man on the path to salvation. *Id.* para. 54; see also PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 69 (Libreria Editrice Vaticana trans., USCCB Publ’g 2005) (“This mission [helping man on the path to salvation] serves to give an overall shape to *the Church’s right and at the same time her duty* to develop a social doctrine of her own and to influence society and societal structures with it by means of the responsibility and tasks to which it gives rise.” (emphasis added)); Pope John Paul II, Encyclical Letter, *Redemptor Hominis* para. 14 (1979), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_04031979\\_redemptor-hominis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis_en.html) (stating that man “is the primary and fundamental way for the church” because of the inscrutable mysteries of “Incarnation” and of redemption in Christ). Pope John Paul II further noted that the social encyclicals must constantly return to man in the reality of his work and, due to changing circumstances, follow his way ever anew. See Pope John Paul II, Encyclical Letter, *Laborem Exercens* para. 1 (1981), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_14091981\\_laborem-exercens\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html) (“[M]an’s life is built up every day from work, from work it derives its specific dignity, but at the same time work contains the unceasing measure of human toil and suffering, and also of the harm and injustice which penetrate deeply into social life within individual nations and on the international level.”).

223. See Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes* para. 12 (1965) (Ronan Lennon trans.) (noting that this understanding was given in sacred scripture), reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 903, 985 (Austin Flannery ed., Liturgical Press new rev. ed. 1992). The Apostolic Constitution then quoted from *Psalms* 8:

What is man that thou art mindful of him, and the son of man that thou dost care for him? Yet thou hast made him little less than God, and dost crown him with glory and honor. Thou hast set him dominion over the works of thy hands; thou hast put all things under his feet.

*Id.* (quoting *Psalms* 8:5–6); see also Pope John XXIII, Encyclical Letter, *Mater et Magistra* para. 249 (1961) (stating that the Church must defend the dignity of man because he is “endowed with a soul in the image and likeness of God”); Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 53 (1991) (affirming that man was “the only creature on earth that God willed for its own sake”); Pope John Paul II, Encyclical Letter, *Redemptor Hominis* para. 13 (1979) (stating that the solicitude of the Church toward every man was based on “his unique unrepeatable human reality, which keeps intact the image and likeness of God himself” (citing *Genesis* 1:26)).

mankind.<sup>224</sup> Thus, because man's dignity is inherent in his very nature and creation, each person's human dignity<sup>225</sup> deserves to be respected by other individuals as well as the society in which he resides.<sup>226</sup> Encompassed in the Church's concept of the dignity of man are certain natural rights and duties. These rights and duties are a direct consequence of man's nature.<sup>227</sup> The Church speaks of these

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224. Second Vatican Council, *Pastoral Constitution on the Church in the Modern World*: Gaudium et Spes para. 22 (1965) (Ronan Lennon trans.), reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 903, 985 (Austin Flannery ed., Liturgical Press new rev. ed. 1992); see also Pope John Paul II, Encyclical Letter, *Redemptor Hominis* para. 14 (1979), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_04031979\\_redemptor-hominis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_04031979_redemptor-hominis_en.html) (stating that all men were redeemed by Christ and therefore united with Christ). See generally JEAN-YVES CALVEZ & JACQUES PERRIN, THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII 104 (J.R. Kirwan trans., 1961) ("Man is the image of the one and triune God and, therefore, he is also a person, brother of the man Jesus Christ and with him and by him, the heir to eternal life. Such is his true dignity." (quoting Pope Pius XII, Address to Fiat employees (Oct. 31, 1948)) (internal quotation marks omitted)).

225. The Church teaches that, although there may be physical, intellectual, and other differences, each person is entitled to equal dignity. See THE HOLY SEE, CATECHISM OF THE CATHOLIC CHURCH paras. 1934–36 (Doubleday 2d ed. 1995) (noting that, even though men were not given equal "talents," they all enjoy an equal dignity); Second Vatican Council, *Pastoral Constitution on the Church in the Modern World*: Gaudium et Spes para. 29 (1965) (Ronan Lennon trans.) (recognizing that, although there were differences between men, they all had equal dignity), reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 903, 929 (Austin Flannery ed., Liturgical Press new rev. ed. 1992).

226. See Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* para. 47 (1987), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_30121987\\_sollicitudo-rei-socialis\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html) (requesting a commitment from all individuals to work toward remedying the social problems of the world in order to give respect to the human dignity of all peoples); see also PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 132 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005) ("A just society can become a reality only when it is based on the respect of the transcendent dignity of the human person.").

227. Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 9 (1963), available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html). Pope Pius XII had earlier stated that inalienable rights are "given to the individual at the beginning, in himself and for himself, and only afterwards in relation with other men and with society." JEAN-YVES CALVEZ & JACQUES PERRIN, THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII 104, 107 (J.R. Kirwan trans., 1961) (quoting Pope Pius XII, Address to the Seventh Congress of Catholic Physicians (Sept. 11, 1956)). Calvez and Perrin asserted that these rights were abstract natural rights and not only received a specific content in social life but also preceded society. *Id.* "Doubtless, man sees his dignity expressed and confirmed in his social relations, but he does not derive his dignity from society. In other words, there is no society without men, there are no concrete rights [those established in society] without bearers of rights, without persons already made with rights." *Id.*

rights as “universal and inviolable,” and, therefore, altogether inalienable.<sup>228</sup> In terms of economic rights, the Church recognizes the right to work and to obtain from that work the means to support one’s family.<sup>229</sup> The Church also recognizes the obligation of the state to provide security in such situations as old age, unemployment, or “whenever[,] through no fault of his own[, an individual] is deprived of the means of livelihood.”<sup>230</sup>

According to Catholic social teaching, rights do not stand alone. With each natural right there is a corresponding obligation or duty.<sup>231</sup> These duties have an inward orientation and address how

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228. Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 9 (1963). Pope Leo XIII put these principles in these words:

No man may with impunity outrage that human dignity which God Himself treats with reverence, nor stand in the way of that higher life which is the preparation of the eternal life of heaven. Nay, more; no man has in this matter power over himself. To consent to any treatment which is calculated to defeat the end and purpose of his being is beyond his right; he cannot give up his soul to servitude, for it is not man’s own rights which are here in question, but the rights of God, the most sacred and inviolable of rights.

Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 40 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html). The Church has held that these rights are universal because they exist in all of mankind. PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 153 (Libreria Editrice Vaticana trans., USCCB Publ’g 2005). They are inviolable and must be respected in all and by all because they are inherent in the human person; they are inalienable because no one has the right to legally deprive another of these rights. *Id.*

229. Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 47 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html). Pope John XXIII made the first formal listing of these rights, grouping them under subtitles. See Pope John XXIII, Encyclical Letter, *Pacem in Terris* paras. 11–27 (1963) (including the right to life, rights relating to moral and cultural values, right to worship, and economic and political rights in the list of human rights).

230. Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 11 (1963); see also Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 29 (1891) (reiterating the need for state assistance for those who have no resources to “fall back upon”); Pope Pius XI, Encyclical Letter, *Divini Redemptoris* para. 52 (1937), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19031937\\_divini-redemptoris\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19031937_divini-redemptoris_en.html) (stressing that social justice demanded “public or private insurance for old age, for periods of illness and unemployment”).

231. See Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 28 (1963) (noting that, like rights, duties were inviolable and found their source and sustenance “from the natural law, which in conferring the one imposes the other”); see also CONGREGATION FOR THE DOCTRINE OF FAITH, INSTRUCTION ON CHRISTIAN FREEDOM AND LIBERATION para. 73 (1986), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19860322\\_freedom-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html)

one is to properly exercise these rights.<sup>232</sup> In this manner, the Church acknowledges the inherent contradiction of claiming rights without acknowledging the responsibilities to others and society that arise from the corresponding duties.<sup>233</sup> In effect, duties impose certain limits on the exercise of rights “because they point to the anthropological and ethical framework of which rights are a part, in this way ensuring that they do not become license.”<sup>234</sup> Thus, the moral duties of social teaching provide the underlying basis and justification for rights.<sup>235</sup> Moreover, there is also a duty on each individual to acknowledge and respect the rights of others.<sup>236</sup> Thus, the Church rejects the erroneous secular, individualistic assertion that each person is free to exercise her rights without any regard for a duty to respect the rights of others.<sup>237</sup> Instead, the Church believes that

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(stating that natural duties, like natural rights, are inherent in man because of his dignity); Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes* para. 26 (1965) (Ronan Lennon trans.) (recognizing that these duties were not only inviolable but also universal), reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 903, 929 (Austin Flannery ed., Liturgical Press new rev. ed. 1992).

232. See John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL'Y 513, 538 (2009) (giving two examples of this inward orientation from *Pacem in Terris*, where Pope John XXIII had written “the right of every man to life is correlative with the duty to preserve it; his right to a decent standard of living with the duty of living it becomingly” (quoting Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 29 (1963))).

233. See Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 30 (1963) (declaring that “to claim one’s rights and ignore one’s duties, or only half fulfill them, is like building a house with one hand and tearing it down with the other”).

234. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 43 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html).

235. See John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL'Y 513, 539 (2009) (noting that the relationship was like the understanding that “obligations give rise to freedoms”).

236. See Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 30 (1963) (noting that from one man’s rights there was a corresponding duty for all to respect them); see also Second Vatican Council, *Declaration on Religious Liberty: Dignitatis Humanae* para. 7 (1965) (Laurence Ryan trans.) (stating that “in exercising their rights[,] individual men and social groups are bound by the moral law to have regard for the rights of others, their own duties to others[,] and the common good of all”), reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 799, 805 (Austin Flannery gen. ed., Liturgical Press new rev. ed. 1992).

237. See Pope Pius XI, Encyclical Letter, *Divini Redemptoris* para. 29 (1937), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19031937\\_divini-redemptoris\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19031937_divini-redemptoris_en.html) (“[I]ndividualism subordinates society to the selfish use of the individual.”). Pope Benedict lamented the growing proliferation of rights for rights’ sake in these words: “On the one hand, appeals are made to alleged rights, arbitrary

individual rights can only be realized in a society that nurtures the rights and development of all individuals.<sup>238</sup> That is a society that promotes the common good.<sup>239</sup>

The Second Vatican Council defined the term “common good” as being “the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily.”<sup>240</sup> Just as an individual’s moral actions are achieved by doing good, a society that promotes the common good has likewise accomplished a moral action.<sup>241</sup> The common good is achieved in a

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and non-essential in nature, accompanied by the demand that they be recognized and promoted by public structures, while, on the other hand, elementary and basic rights remain unacknowledged and are violated in much of the world.” Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 43 (2009) (citing Pope John Paul II, Message, *Pacem in Terris: A Permanent Commitment* para. 5 (2003), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/messages/peace/documents/hf\\_jp-ii\\_mes\\_20021217\\_xxvi-world-day-for-peace\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_20021217_xxvi-world-day-for-peace_en.html)).

238. See Pope Pius XI, Encyclical Letter, *Divini Redemptoris* para. 29 (1937) (“But God has likewise destined man for civil society according to the dictates of his very nature. . . . [S]ociety is a natural means which man can and must use to reach his destined end. Society is for man and not vice versa.”); see also Pope John XXIII, Encyclical Letter, *Mater et Magistra* para. 219 (1961), available at [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_15051961\\_mater\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html) (“[I]ndividual human beings are the foundation, the cause[,] and the end of every social institution[.]”).

239. The interrelationship between rights, duties, and the common good was addressed by Pope Benedict XVI in the following words: “An overemphasis on rights leads to a disregard for duties. . . . Duties thereby reinforce rights and call for their defence and promotion as a task to be undertaken in the service of the common good.” Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 43 (2009); see also JEAN-YVES CALVEZ & JACQUES PERRIN, *THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII* 114 (J.R. Kirwan trans. 1961) (noting that the Popes referred to “the common good as the guarantee and the realization of the fundamental rights of the person”). The Church recognized that the justification for government action in the area of rights is the promotion of the common good. Pope John XXIII, Encyclical Letter, *Mater et Magistra* para. 151 (1961). The *Catechism of the Catholic Church* pronounced that the responsibility for attaining the common good belongs not only to individuals but also the state because the common good was the reason for the existence of a political authority. THE HOLY SEE, *CATECHISM OF THE CATHOLIC CHURCH* para. 1910 (Doubleday 2d ed. 1995).

240. Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes* para. 26 (1965) (Ronan Lennon trans.), reprinted in VATICAN COUNCIL II: THE CONCILIAL AND POST CONCILIAL DOCUMENTS 903, 927 (Austin Flannery ed., Liturgical Press new rev. ed. 1992). More recently, Pope Benedict XVI stated “[t]o desire the *common good* and strive towards it *is a requirement of justice and charity*.” Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 7 (2009) (emphasis added). The Pope further noted that the “more we strive to secure a common good corresponding to the real needs of our neighbours, the more effectively we love them.” *Id.*

241. See PONTIFICAL COUNCIL FOR JUSTICE & PEACE, *COMPENDIUM OF THE*



society when the rights and duties of individuals are maintained.<sup>242</sup> The Church recognizes that each individual has the responsibility to contribute to the common good.<sup>243</sup> The individual assists in achieving this goal by obeying laws and conforming to the basic norms of social life.<sup>244</sup> Furthermore, the civil authorities are charged with ensuring that the natural rights of persons “are recognized, respected, co-ordinated, defended and promoted, and that each individual is enabled to perform his duties more easily.”<sup>245</sup> In performing this task there should be no preference between individuals, except those incapable of protecting and exercising their own rights.<sup>246</sup> The Church acknowledges that civil authorities may

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SOCIAL DOCTRINE OF THE CHURCH para. 164 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005) (stating that the common good can be “understood as the social and community dimension of the moral good”). Moral goodness for both an individual and in regard to the common good is more than making some virtuous choices; common good is establishing a set of moral resolutions and uniformly living by them. 1 GERMAIN GABRIEL GRIZEZ, *THE WAY OF THE LORD JESUS: CHRISTIAN MORAL PRINCIPLES* 128 (Franciscan Herald Press 1983).

242. Under the Church's social teaching, the principle of the common good stemmed from the foundational principle of human dignity. PONTIFICAL COUNCIL FOR JUSTICE & PEACE, *COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH* para. 164 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005); *see also* Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 60 (1963), *available at* [http://www.vatican.va/holy\\_father/john\\_xxiii/encyclicals/documents/hf\\_j-xxiii\\_enc\\_11041963\\_pacem\\_en.html](http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html) (asserting that the chief responsibility of civil authorities is to recognize and safeguard rights so that the corresponding duties may be carried out).

243. *See* Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes* para. 30 (1965) (Ronan Lennon trans.) (“The best way to fulfill[] one's obligations of justice and love is to contribute to the common good according to one's means and the needs of others, even to the point of fostering and helping public and private organizations devoted to bettering the conditions of life.”), *reprinted in* VATICAN COUNCIL II: *THE CONCILIAR AND POST CONCILIAR DOCUMENTS* 903, 930 (Austin Flannery ed., Liturgical Press new rev. ed. 1992).

244. *See id.* (decrying hypocrites who professed noble sentiments, but who made light of laws, resorted to fraud and deception to avoid their obligations to society and paid little attention to social norms designed to protect society).

245. Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 60 (1963). According to Pope John XXIII, “to safeguard the inviolable rights of the human person, and to facilitate the performance of his duties, is the principal duty of every public authority.” *Id.* (quoting Pope Pius XII, *Pentecost* (June 1, 1941)).

246. *See id.* para. 56 (recognizing the state's responsibility to promote the common good for all); *see also* Pope Pius XI, Encyclical Letter, *Divini Redemptoris* para. 51 (1937), *available at* [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19031937\\_divini-redemptoris\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19031937_divini-redemptoris_en.html) (stating that in order to provide for the good of the whole, it was necessary that each individual member in society be given all that is necessary to perform social functions). The Church recognizes that, in democratic societies, the promotion of the common good is a delicate task. Specifically, the elected

need to provide safety nets so that in the event of misfortune or additional responsibilities individuals can maintain a decent standard of living.<sup>247</sup> Additionally, to promote and defend the common good, the requirements of justice must be satisfied.<sup>248</sup>

For eighty years the Church has applied its understanding of “social justice”<sup>249</sup> as the basic norm for evaluating social and economic relationships, and for proposing the rights and duties of individuals and political institutions.<sup>250</sup> The term has been clearly explained by Pope Pius XI in the following words:

Now it is of the very essence of social justice to demand for each individual all that is necessary for the common good. But just as in

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officials should “interpret the common good[.]” not solely in accord with the demands of the majority, but for the good of all. PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 169 (Libreria Editrice Vaticana trans., USCCB Publ’g 2005).

247. See generally Pope John XXIII, Encyclical Letter, *Pacem in Terris* para. 64 (1963) (encouraging the government to provide insurance facilities to assist citizens in need).

248. The interrelationship between the common good and the principle of justice has been a theme of the Church’s social teaching since Pope Leo XIII. In *Rerum Novarum* he wrote:

As regards the State, the interests of all, whether high or low, are equal. The members of the working classes are citizens by nature and by the same right as the rich; they are real parts, living the life which makes up, through the family, the body of the commonwealth . . . . It would be irrational to neglect one portion of the citizens and favor another, . . . otherwise, that law of justice will be violated which ordains that each man shall have his due. . . . Among the many and grave duties of rulers who would do their best for the people, the first and chief is to act with strict justice—with that justice which is called *distributive*—toward each and every class alike.

Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 33 (1891); see also Pope Pius XI, Encyclical Letter, *Divini Redemptoris* para. 51 (1937), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19031937\\_divini-redemptoris\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19031937_divini-redemptoris_en.html) (“Now it is of the very essence of social justice to demand for each individual all that is necessary for the common good.”).

249. The term “social justice” was first used in an encyclical by Pope Pius XI. See Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* para. 57 (1931), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html) (noting that the principles of “social justice” dictated that wealth arising from economic activity must be distributed among members of society to promote the common good of all); see also JEAN-YVES CALVEZ & JACQUES PERRIN, THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII 147 (J.R. Kirwan trans. 1961) (stating that the term “social justice” was introduced in *Quadragesimo Anno*).

250. YVES CALVEZ & JACQUES PERRIN, THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII 134 (J.R. Kirwan trans. 1961).

the living organism it is impossible to provide for the good of the whole unless each single part and each individual member is given what it needs for the exercise of its proper functions, so it is impossible to care for the social organism and the good of society as a unit unless each single part and each individual member—that is to say, each individual man in the dignity of his human personality—is supplied with all that is necessary for the exercise of his social functions.<sup>251</sup>

Even before the concept of social justice was used as the objective norm of social and economic relationships, the Church had a well-developed theory of justice primarily based upon the work of Thomas Aquinas.<sup>252</sup> From his seminal work, the Church took Aquinas's concepts of general justice<sup>253</sup> and particular justice,<sup>254</sup> and

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251. Pope Pius XI, Encyclical Letter, *Divini Redemptoris* para. 51 (1937). The *Compendium of the Social Doctrine of the Church* defines social justice as “the justice that regulates social relationships according to the criterion of observance of the *law*.” PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 201 (Libreria Editrice Vaticana trans., USCCB Publ'g 2005) (emphasis added).

252. The work of Aquinas laid the framework for the Church's understanding of the virtue of justice. See generally 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II, qq. 57–58, at 1425–1522 (Fathers of the English Dominican Province trans., Christian Classics rev. ed. 1948) (1911) (setting forth his philosophies on morals and justice). Relying in part upon the insight of justice as developed by Aristotle, Aquinas elaborated and built an entire framework on the virtue of justice from a theological standpoint. In Book V of *Nicomachean Ethics*, Aristotle gave his detailed description of the moral virtue of justice. ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 111–45 (Martin Ostwald trans., Bobbs-Merrill Educational Publ'g 1st ed. 1962). Aristotle described justice as the virtue that regulates all proper conduct within a society, among individuals, and even to some extent the individual towards himself. *Id.* at 111.

253. According to Aquinas, “since it belongs to the law to direct to the common good, . . . it follows that the justice which is in this way styled general, is called *legal justice*, because thereby man is in harmony with the law which directs the acts of all the virtues to the common good.” 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II, q. 58, at 1432 (Fathers of the English Dominican Province trans., Christian Classics rev. ed. 1948) (1911) (emphasis added). Aquinas's understanding of general or legal justice was similar to that of Aristotle. According to Aristotle, general justice in law and in relationships sought to secure the common good by being fair and lawful. ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 112–13 (Martin Ostwald trans., Bobbs-Merrill Educational Publ'g 1st ed. 1962).

254. Aquinas distinguished general from particular justice. He noted that general justice primarily directed man in regard to the common good, and secondarily to the good of other individuals. Particular justice directed man to the good of others immediately. 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II, q. 58, at 1433 (Fathers of the English Dominican Province trans., Christian Classics rev. ed. 1948) (1911). Aquinas identified commutative justice and distributive justice as two aspects of particular justice. He described commutative justice as the aspect of justice concerned with the dealings

developed a framework to evaluate social and economic conditions.<sup>255</sup> The concept of social justice practiced by the Church today continues to demonstrate the Church's concern for reflecting God's love and the Church's commitment to bring justice into the world.<sup>256</sup>

Pope Benedict XVI has taken the Church's teaching on justice and infused it with an understanding of charity. According to Pope Benedict XVI, "justice is inseparable from charity, and intrinsic to it."<sup>257</sup> Charity is more than justice. Pope Benedict XVI notes that

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among individuals, while describing distributive justice as the form of justice dealing with distributing common goods proportionately. *Id.* q. 61, at 1446. Aristotle identified two forms of particular or partial justice along similar lines. He defined distributive justice as providing for the just proportionate distribution of common goods, while commutative or corrective justice as providing that each individual be treated equally under the law. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 115–28 (Martin Ostwald trans., Bobbs-Merrill Educational Publ'g 1st ed. 1962). See generally ST. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE'S *NICOMACHEAN ETHICS* 293–96 (C. I. Litzinger trans., 1993) (analyzing Aristotle's description of distributive and commutative justices). The *Catechism of the Catholic Church* states that commutative justice "regulates exchanges between persons and between institutions in accordance with a strict respect for their rights[.]" while "*distributive* justice . . . regulates what the community owes its citizens in proportion to their contribution and needs." THE HOLY SEE, CATECHISM OF THE CATHOLIC CHURCH para. 2411 (Doubleday 2d ed. 1995).

255. See Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html) (identifying justice as prompting individuals to give to others what is due); Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 33 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html) (delineating that the state must act with distributive justice in dealings toward individuals in society).

256. See, e.g., Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009) (emphasizing that charity manifests God's love and provides value to the commitment for justice).

257. *Id.* (footnote omitted) (citing Pope Paul VI, Encyclical Letter, *Populorum Progressio* para. 22 (1967), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_26031967\\_populorum\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html)). Pope Benedict XVI expanded upon earlier understandings of the relationship between justice and charity. Even Aquinas noted that other virtues could become annexed to justice. See 3 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, q. 80, at 1521 (Fathers of the English Dominican Province trans., Christian Classics rev. ed. 1948) (1911) (noting that all virtues that were directed to other individuals could be annexed to justice). More recently, Pope Pius XI stated:

But in effecting . . . [the Christianizing of the modern social order], the law of charity, which is the bond of perfection, must always take a leading role. How completely deceived, therefore, are those rash reformers who concern themselves with the enforcement of justice alone—and this, commutative justice—and in their pride reject the assistance of charity! . . . Yet even supposing that everyone should finally receive all that is due him, the widest field for charity will always remain open.

justice is to give to one what is due, whereas the very structure of charity is to “gift” to another what is “mine.”<sup>258</sup> Pope Benedict XVI asserts that charity completes justice in that “[t]he earthly city is promoted not merely by relationships of rights and duties, but to an even greater and more fundamental extent by relationships of gratuitousness, mercy and communion.”<sup>259</sup>

Having infused justice with the virtue of love, Pope Benedict XVI takes his expanded concept of justice and explains that it must be applied to every phase of economic activity, because “every economic decision has moral consequences.”<sup>260</sup> In this extremely globalized economic society, commutative justice is not enough; there is a need for justice that is imparted with the “spirit of gift.”<sup>261</sup> All aspects of

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For justice alone can, if faithfully observed, remove the causes of social conflict but can never bring about union of minds and hearts.

Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* para. 137 (1931), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19310515\\_quadragesimo-anno\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html) (footnotes omitted) (internal quotation marks omitted).

258. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009).

259. *Id.* Pope Benedict XVI further acknowledged that even in the most just society there would always be a need for the “service of love.” *Id.* para. 28.

260. *Id.* para. 37 (emphasis omitted). Pope Benedict XVI articulated that the purchasing of items was a moral act and, thus, individual consumers have a social responsibility in their decisions on buying. *Id.* para. 66; see also Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 36 (1991), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html) (“A given culture reveals its overall understanding of life through the choices it makes in production and consumption.”). Pope John Paul II decried the rise of what he called “artificial consumption” that focused on “having” rather than “being” and “which wants to have more, not in order to be more but in order to spend life in enjoyment as an end in itself.” Pope John Paul II, Encyclical Letter, *Centesimus Annus* para. 36 (1991) (citing Second Vatican Council, *Pastoral Constitution on the Church in the Modern World: Gaudium et Spes* para. 35 (1965) (Ronan Lennon trans.), reprinted in VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 903, 934 (Austin Flannery ed., Liturgical Press new rev. ed. 1992)).

261. See, e.g., Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 37 (2009) (conveying that more is needed in the global era than the logic of contractual exchange); see also JEAN-YVES CALVEZ & JACQUES PERRIN, THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII 157–58 (J.R. Kirwan trans. 1961) (“Justice demands that all recognize and respect the sacred rights of liberty and of human dignity; that the immense resources which God has spread throughout the world be shared out for the good of his children.” (quoting Letter from Mgr. Dell’Acqua to the 1956 Italian Social Week) (internal quotation marks omitted)). Pope Pius XI clarified that social justice was separate and distinct from commutative justice as known in the scholastic tradition. See Pope Pius XI, Encyclical Letter, *Divini Redemptoris* para. 51 (1937), available at [http://www.vatican.va/holy\\_father/pius\\_xi/encyclicals/documents/hf\\_p-xi\\_enc\\_19031937\\_divini-redemptoris\\_en.html](http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19031937_divini-redemptoris_en.html) (stating that the essence of social justice is that each individual has what is necessary for the common

economic life involve human activity, and therefore, it “must be structured and governed in an ethical manner.”<sup>262</sup> The concept of charity in truth takes practical form in criteria that govern moral action—the search for justice in economic decisions to pursue the common good.<sup>263</sup>

As shown above, Catholic social teaching does not provide any clear blueprint for legislative policies or for political or economic structures. However, since the time of Pope Leo XIII, it is clear that the Magisterium of the Church has fostered its God-given obligation and duty to speak out forcibly against economic, social and cultural conditions that “threaten peace, violate justice, or assault human dignity.”<sup>264</sup> The social question has gone from the narrow condition of the working class in Italy to that of a truly globalized world where the social problems and concerns are universal.

Through it all, the Church has taken its teaching into the public square to influence societal structures and to purify reason so that a just society may be achieved. As a result of its overriding concern for the dignity of all individuals, the Church strives to ensure that the respective natural rights and duties of all individuals are identified, understood, promoted, attained, and preserved. The social teaching’s moral criteria of the common good and social justice fused with charity provide useful beacons for states and individuals to seek and achieve peace and economic security for all.

#### IV. CONCLUSION: ABILITY TO PAY AND CATHOLIC SOCIAL TEACHING

As noted earlier, whether BAPCPA has been successful in

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good). Furthermore, the concept of social justice was clearly distinguished from the scholastic concept of distributive justice. *See, e.g.*, JEAN-YVES CALVEZ & JACQUES PERRIN, *THE CHURCH AND SOCIAL JUSTICE: THE SOCIAL TEACHINGS OF THE POPES FROM LEO XIII TO PIUS XII* 152–53 (J.R. Kirwan trans. 1961) (noting that the term social justice had been identified with the scholastic general or legal justice). Social justice was in fact general justice as understood by Thomas Aquinas and applied to the economic realm. *Id.* at 153.

262. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 36 (2009). “The Church’s social teaching is quite clear on the subject, recalling that the economy, in all its branches, constitutes a sector of human activity.” *Id.* para. 45 (footnote omitted) (citing Pope Paul VI, Encyclical Letter, *Populorum Progressio* para. 14 (1967)).

263. *Id.* para. 6. Pope Benedict XVI clarified that “[t]o desire the *common good* and strive towards it *is a requirement of justice and charity.*” *Id.* para. 7 (emphasis added).

264. William J. Byron, *The Future of Catholic Social Thought*, 42 *CATH. U. L. REV.* 557, 560 (1993).

achieving its objectives is still open to debate. Of course, the scope of that debate solely involves a determination of whether the stated objectives and policies have been met. Another way to judge the effectiveness of the change in bankruptcy policy is to assess it in light of other criteria. It is to that task this Essay turns.

The fundamental principle underlying means testing is that one qualifies for a particular social welfare program and its benefits based upon a statutorily imposed income and expense screen. Prior to BAPCPA, a form of means testing was being used in almost every form of social welfare enacted in state and federal law. Although bankruptcy has historically been viewed as social welfare legislation, means testing did not truly enter the realm of bankruptcy policy until BAPCPA. However, means testing has occupied the area for almost as long as the existence of national bankruptcy statutes. The only difference is that the congressional proponents finally outnumbered the opponents. In the abstract, the concept of means testing in bankruptcy has a good logical feel—an individual wanting to obtain a benefit (discharge) must satisfy certain criteria.

Furthermore, means testing has an appealing moral argument to support it. Means testing presupposes a willful act on the part of the proposed debtor of incurring contractual obligations of debt, but choosing not to repay his creditors when he is otherwise able to do so. However, whether the logic in support of means testing passes muster under the social teaching of the Church is another issue.

Catholic social teaching holds that, in enacting laws, the state should strive to promote the common good and not favor one group or interest in the society over another.<sup>265</sup> Thus, the means testing limitation for eligibility to file for Chapter 7 relief has to comport with the common good of all individuals that will be impacted. This includes not only the debtor who seeks a fresh start, but also the various creditors whose financial claims will be adjusted in the proceeding.

As noted by Pope Benedict XVI, the very act of purchasing items involves a moral decision.<sup>266</sup> This moral decision implicates the rights and duties of the debtor, as well as the creditor in a credit

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265. See, e.g., Pope Leo XIII, Encyclical Letter, *Rerum Novarum* para. 33 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html) (directing the State not to favor one group over another as “the interests of all, whether high or low, are equal”).

266. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 66 (2009).

transaction. Initially, the moral decision involves whether the purchase is necessary, and then, once the transaction has been accomplished, implicates the moral obligation to pay for the item. A bankruptcy law that imposes an ability-to-pay standard makes a definite statement concerning the duties of the debtor—it requires the payment of as much as possible while maintaining a decent standard of living. Under the Church’s social teaching, the dignity of the individual requires that the state provide a minimal standard of living for all.

Furthermore, while repayment will impose a hardship on the debtor, it will promote the rights of the creditors who had extended credit under the expectation that repayment would follow. As long as the hardship to the debtor does not rise to the level of violating her natural rights, the mere existence of a lessened lifestyle will not implicate the strictures of the Church’s social teaching. In addition, the ability-to-pay policy clearly supports the common good as the rights and duties of all individuals are promoted and the social and moral fabric of society will benefit from increased financial accountability and responsibility.<sup>267</sup> Finally, the ability-to-pay policy provides the needed safety net for those who are still eligible for liquidation proceedings, once again promoting the common good of all.

A debtor who asserts a “right” to discharge an obligation without repayment is in violation of her duties owed to others. Demanding recognition of such an arbitrary and non-essential right fails to meet the requirements of the Church’s social teaching.<sup>268</sup> Moreover, the Supreme Court has already ruled that debtors do not have a

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267. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23 (H. L. A. Hart ed., 1980) (explaining that a law should give “due respect for the human rights which embody the requirements of justice, and for the purpose of promoting a common good in which such respect for rights is a component”). John Finnis asserted that modern bankruptcy law is an example of justice in the manner of Aristotle because it contains the concepts of distributive and commutative justice. *Id.* 188–93; see also Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 531–43 (1991) (discussing the view of John Finnis related to justice); Veryl Victoria Miles, *Assessing Modern Bankruptcy Law: An Example of Justice*, 36 SANTA CLARA L. REV. 1025, 1028 (1996) (analyzing John Finnis’s perspective on justice).

268. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 43 (2009) (decrying the rise of individualism by persons who “claim that they owe nothing to anyone, except to themselves”).



constitutional right to discharge.<sup>269</sup> Therefore, a debtor clearly has no corresponding right to file a Chapter 7 proceeding.

The only true concern of whether means testing passes muster under the moral principles of the Church's social teaching involves whether such a policy is consistent with the principle of social justice as developed by Pope Benedict XVI. In discussing his development, the Pope noted:

Charity goes beyond justice, because to love is to give, to offer what is "mine" to the other; but it never lacks justice, which prompts us to give the other what is "his", what is due to him by reason of his being or his acting. I cannot "give" what is mine to the other, without first giving him what pertains to him in justice. If we love others with charity, then first of all we are just towards them.<sup>270</sup>

In acting out of love for the other person, one cannot at the same time be unjust to her. Thus, in treating others justly, one must give "recognition and respect for the legitimate rights of individuals and peoples."<sup>271</sup> Absent an ability-to-pay standard, a debtor who is unwilling to repay any of his obligations could avoid doing so by filing a Chapter 7 claim. The debtor would not be giving others what was "due" to them and would be violating the principle that charity "never lacks justice." With an ability-to-pay standard, a debtor receives the gift of charity through discharge by giving the creditors what is "due" them under justice through a repayment plan under Chapter 13.

The grant of a discharge to the honest but unfortunate debtor is a statutory right given by Congress. However, such right does not rise to the level of a natural right under the Church's social teaching. The moral criteria of the common good and social justice reinforce and support the dignity of each person, but the duties and obligations of each person demand respect for and recognition of the rights of all other individuals. Thus, the ability-to-pay limitation for filing Chapter 7 bankruptcy is consistent with and supported by the Church's social teaching. For in this way, the rights and duties of creditors and debtors are respected, because, without corresponding duties, the debtors' rights would "become mere license."<sup>272</sup>

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269. U.S. v. Kras, 409 U.S. 434, 446 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy.").

270. Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* para. 6 (2009).

271. *Id.*

272. *Id.* para. 43 (emphasis omitted).