The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: A Return to Debtor Fraud

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Abstract

Historically, bankruptcy law has functioned for multiple purposes ranging from debt collection to providing a fresh start for financially distressed debtors. An investigation into the chronological evolution of bankruptcy legislation reflects its interaction with larger society, allowing for greater understanding into contemporaneous attitudes towards debt. Taking a comprehensive approach to past laws is of considerable importance to understanding the controversial code that governs American bankruptcy today: The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

The set of conversations present in the passing and enactment of the BAPCPA reflect an ongoing tension in bankruptcy that has been present since the first laws in 1800. Worries of moral hazard, along with many other contributing factors, have caused conflicting activism on the part of interest groups to reform the bankruptcy system. The notion of creditor versus debtor often poses conflicting interests for bankruptcy. But serving to satisfy either side has been a somewhat temporary decision, embedded in the period's bankruptcy laws that change with fluxes in economic climate and attitudes towards debtors pursuing financial relief. As the American economy cycled[1], and societal attitudes regarding distressed debtors have changed, bankruptcy laws have changed to reflect those attitudes.

The far-reaching effect and consequences of the BAPCPA are leading to intense debate over whether this change was warranted. This paper compares the current policy to past reforms of bankruptcy and the welfare system to shed light on policy discussions, and allow for a deeper insight into the pro-creditor BAPCPA. To do this I draw upon filing records, economic sources, socio-legal and legal texts, and bankruptcy literature to construct a retrospective study of bankruptcy from 1800 to present day. These materials and the analysis drawn from them will help to explore the true circumstances surrounding the enactment and implications of the BAPCPA.

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[1] Economic cycles refer to the theory that attempts to explain the natural fluctuation of the economy

I. Introduction

Bankruptcy law in the United States has embodied two aspects necessary to sustain a commercial economy: a method for the repayment of debts owed to creditors and a means to a "fresh start" for debtors by way of discharging debt. That description is accurate, but focusing on the sole interests of creditors and debtor's places limitations in addressing many significant attributes of consumer bankruptcy. An investigation into the chronological evolution of bankruptcy legislation reflects its interaction with larger society, allowing for greater understanding into contemporaneous attitudes towards debt. Taking a comprehensive approach to past laws is of considerable importance to understanding the controversial code that governs American bankruptcy today: The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).

Responding to a drastic increase in the number of consumer bankruptcy filings from 1980 to 2004, on average from "288,000 to 1.5 million per year" (White, 2007), congress fiercely debated a reform of the 1978 Bankruptcy Code. On April 20th, 2005 George W. Bush signed the BAPCPA into law, which included many provisions intended to discourage debtors from filing. The House of Representatives (HOR) commented on the necessity for reform by claiming debtors had a "lack of personal financial accountability" leading to an overuse of the system because debtors' petitions were "bankruptcy filings of convenience" (2005). Rather than evolving out of the necessity to curb opportunistic filings, others argued the "BAPCPA was written by, bought, and paid for by the consumer credit industry" (Dickerson, 2006).

Serving to satisfy the interests of creditors or debtors is commonplace among bankruptcy policy discussions. These two aspects are prevalent regarding BAPCPA policy, but furthermore reflect an ongoing tension that has been present since the first federal bankruptcy law in 1800. Arguments in the major reforms throughout history have given rise to either the creditor or debtor winning at various times, meaning one sides interests were at the forefront of policy creation, neglecting a common middle ground. The BAPCPA's governance display there has yet to be a resolution to the fundamental conflicts of consumer bankruptcy, and that current discussions of bankruptcy policy are deeply rooted in nineteenth century pro-creditor mentality.

Bankruptcy ideology in the past century was to provide a fresh start for debtors by discharging debt, a stark difference from the BAPCPA's aim to prevent financially solvent people from opportunistically abusing bankruptcy laws. Intentions to limit and regulate access to debt relief are not a revolutionary idea seen for the first time with the 2005 Act. These concerns, as well as others, that led to the reformation of the 1978 Code show evidence of policy cycling[2] present that has appeared time and time again. For this reason, reflections on the entirety of bankruptcy display similar motives and influences for current changes in the code as with previous reform efforts.

BAPCPA emerges from nineteenth century poor-relief systems where fears of inability to collect debt (also known as discharge) have lead to advocacy against the promotion of moral hazard. Within the framework rational choice theory[3], the concept of moral hazard asserts, "if you cushion the consequences of bad behavior, then you encourage that behavior" (Baker, 1996). Creditors and legislators have exhibited fears of moral hazard claiming availability for cancellation of debt and a "decline in stigma associated with bankruptcy" (Zywicki 2002) have motivated debtors to use bankruptcy despite their ability to pay creditors.

[2] For the purposes of this thesis, policy cycling will be defined as the reemergence of discussions regarding bankruptcy laws from past reforms in more current conversations

[3] An economic principle that assumes that individuals are rational actors who make decisions that provide them with the most benefit that are in their highest self-interest (Baker, 1996).

"The conventional lesson taken from the economics of moral hazard is that 'less is more'" (Baker, 1996). From this notion, less access to financial relief means more financially solvent Americans will take responsibility for their financial obligations. BAPCPA has measures to ensure this by implementing many constraints for a debtor to receive a discharge, including means testing[4] for bankruptcy relief, limits repeat filings, places limits on and creates new protections for involuntary creditors.

Methods to avoid moral hazard and place disincentives for those seeking aid has reappeared through numerous reform efforts and been emulated in a variety of poor-relief systems. Origins of bankruptcy and welfare systems were expected "in a great measure [to] deter many persons from applying for relief, except in cases of absolute necessity" (Katz, 1986). For a period of time bankruptcy characterized "the intensity of that law's focus on providing relief to the bankrupt debtor" (Hallinan, 1987), but the enactment of the BAPCPA swung the pendulum back toward finding a way to limit relief to only a portion of those who asked for help.

Legal debate surrounding bankruptcy continually addresses a familiar question: to what extent are financially insolvent debtors responsible for paying back their burdensome debts (Baker, 1996)? Bankruptcy legislation has placed varying degrees of responsibility on consumers, but receptiveness of congress to accept new actions to curb moral hazard has been largely dependent on outside factors. These factors include the influence of debtor and creditor interest groups, larger economic and societal conditions, and the impact of other actors in bankruptcy such as lawyers and judges. Evaluating the role of contributing outside influences on the progression of debt relief legislation from 1800 to present day is a necessary frame for gaining insight into the BAPCPA.

[4] Means Testing is a formulaic analysis to determine whether a debtor earns more than the state median income If so, they are required to repay a substantial portion of their debts in a structured repayment plan rather than being permitted to receive a complete discharge.

The far-reaching effect and consequences of the act are leading to intense debate over whether this change was warranted. To address this issue a comparison of the BAPCPA to past reforms of bankruptcy will be conducted to shed light on current policy discussions, and allow for a deeper insight into the pro-creditor law. In doing so, the following questions will be asked:

1. At the time of each reform had the current economic climate affected the change in bankruptcy legislation?
   - Who advocated for the reform and were their goals met?
   - What measures were implemented to reach the goals set out in each reform?
   - What were the consequences of the reform on the economy and perception of those filing bankruptcy, if any?
2. In what ways has past legislation been represented in the BAPCPA?
   - Does the impact of past legislation justify the drastic change in bankruptcy today?

These research questions are the goals of this paper. The argument presented is that the Bankruptcy Abuse Prevention and Consumer Protection Act emerges directly from past legislation and is encompassed by repeated arguments from the origins of bankruptcy law and welfare relief. It also argues that bankruptcy as a whole is the cumulative product of extraneous factors including conditions of the economic climate, advocacy of many actors in bankruptcy, and societal attitudes regarding the worthiness of those to be relived from financial distress.

To support this position this thesis will draw upon filing records, economic sources, socio-legal and legal texts, and bankruptcy literature to construct a retrospective study of bankruptcy from 1800 to present day. The findings will then be used to evaluate and clarify the current Bankruptcy Abuse Prevention and Consumer Protection Act and its consequences thereafter.

To gain a chorological reference for acts discussed in the paper section II will give a timeline of major economic and societal happenings, along with legislation beginning from the first bankruptcy law in 1800 to post-BAPCPA. This section provides a baseline for identifying the main events discussed in the paper. Section III will discuss the temporary emergence of bankruptcy laws from 1800-1878, along with its similarities to the development of welfare and poorhouses in the United States. Section IV evaluates the first permanent bankruptcy law and how the Great Depression influenced bankruptcy legislation. Next is Section V, discussing the 1978 Bankruptcy Code's major influence on the modern commercial economy. Section VI will evaluate the BAPCPA in regards to the previous sections of findings to explore the second and third research questions. The last section (VIII) will conclude the paper with an overview of the findings and final thoughts.

II. Historical Overview

Before the ratification of the United States Constitution a federal bankruptcy law would not have been possible. "Passage [under the Articles of Confederation] would have required the unanimous consent of the states. That was an impossibility on so controversial a question" (Coleman, 1999). During these times, states alone governed all debtor-creditor relations but laws from different states were inconsistent and contradictory. Many states enabled relief for debtors but "interfered with the reliability of contracts, and creditors [were] confronted still further obstructions in trying to use state courts to collect their judgments, especially when debtors absconded to other states to avoid collection" (Zywicki, 2002).

Article I, section 8 of the U.S. Constitution, adopted in 1789, gave congress the power to implement federal bankruptcy laws. In the Federalist number 42, James Madison articulated the goals of the Bankruptcy Clause of the constitution as “regulation of commerce, and [to] prevent so many frauds where the parties or their property may lie or be removed into different states” (1788). In other words, it aimed to protect creditors from the leniency of state laws on debtors.

The Panic of 1796-1797 caused a deep economic downturn when the burst of a land speculation bubble and war in Europe constricted credit from necessary international banks (Russell and Cohn, 2012). The multiplicity of financially distressed debtors increased numbers of incarcerated in debtors prisons and called for the necessity of national regulation of creditor and debtor relations. The first federal bankruptcy law was passed on April 4, 1800 designed to be a five-year plan as a “creditors’ remedy” (Tabb, 1995). Critics argued “the law encouraged risky investments by reducing the cost of failure” (Russell and Cohn, 2012), which encouraged its repeal after three years.

A number of unsuccessful attempts at national bankruptcy legislation occurred in the 1820’s, but the devastating Panic of 1837 and the election of the Whigs over the Democrats in the 1840 election changed the tide. The Whig party promoted bankruptcy as essential to the nation’s commercial development, but they were met with opposition from democrats who believed it would cause “destructive speculation” (Skeel, 2003). Several contributing factors lead to the decrease in profits, prices, and wages while unemployment rose (Morris, 1912).

Periods of prolonged unemployment were detriment to the working class because many were unable to save enough to tide them over. This left two options open to those deeply effected by economic downturns; to continue searching for employment or to pursue public assistance. Portions of the Whig party enacted the Bankruptcy Act of 1841 to relieve the plight of the mass of insolvent debtors (Sauer, 1994). Though many revolutionary aspects made it a watershed bankruptcy act, familiar opposition caused its repeal in early 1843.

The Panic of 1857 (NBER, 2009) was the world's first world wide economic crisis resulting from declining international economy and overexpansion of the domestic economy in the United States (Tabb, 1994). Combined with the financial cataclysm caused by the American Civil War[5], the pressure for another federal bankruptcy law lead to the Bankruptcy Act of 1867. The Act intended to serve the need of commerce for a settled system of insolvency relief (Sauer, 1994), and after partially achieving its goal, was repealed in 1878 for similar reasons as its two predecessors.

Permanent federal bankruptcy legislation first made its appearance with the Bankruptcy Act of 1898. On the heels of the worst economic depression of the time, the Panic of 1893 (NBER, 2009) exposed the need for a permanent bankruptcy law. State laws that governed insolvency were insufficient to handle the widespread financial problems caused by the numerous panics of the time. "The primary impetus for the 1898 Act, therefore, was the efforts of creditors to develop more streamlined procedures for debt collection, especially on interstate debts" but turned out to be more debtor-friendly than expected (Skeel, 2003).

The economic expansion of the 1920's (NBER, 2009) saw bankruptcy rates quadruple. Economic optimism encouraged consumers to become more confident leading to risky ventures. Many incurred a larger debt burden by financing their future based on current incomes (Pomykala, 2000). By the end of the 20's the credit industry had come to question the generosity of the discharge provisions granted by the 1898 Act.

However, as interest rates rose and credit supply tightened, the financial strain increased.

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[5] The Civil War was fought from April 12th, 1861 to May 9th, 1865

The Great Depression was deepening at the time creditors were advocating for a reform. Instead, the Great Depression incentivized Congress to pass many pro-debtor amendments to the 1898 Act that promoted rehabilitation in Bankruptcy.

Rising numbers of personal bankruptcy filings from 1950 to 1970, "from 25, 040 in 1950 to 178,202 in 1970" (Zywicki, 2002) encouraged the overhaul of the Bankruptcy Act of 1898. The Bankruptcy Reform Act of 1978 was unique in history in that it was the first time federal bankruptcy legislation was not enacted in response to a severe economic depression. The purpose of the 1978 Code which was to make "bankruptcy a more effective remedy for the unfortunate consumer debtor" faced with "the tremendous rise" in the consumer credit market and consequent "outstanding consumer" debt, it wanted to give debtors a "fresh start" (Coco, 2012).

Pro-debtor provisions in the 1978 Code caused filings from 1980 to 2004 to increase on average from "288,000 to 1.5 million per year" (White, 2007). This was detrimental to creditors, because their unsecured claims[6] were the easiest to exonerate in a bankruptcy (Chemerinsky, 2005). In 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) with the primary purpose of responding to the upward trend in consumer bankruptcy filings (House of Representatives, 2005). This act had several provisions intended to limit and regulate access to bankruptcy relief, and to prevent financially solvent people from opportunistically abusing bankruptcy laws.

In 2008 the United States entered into the deepest economic recession since the Great depression. The 12-month period following the Great Recession of 2008 (NBER, 2009) there was a 34.5% increase in consumer bankruptcy filings (United States Courts, 2013). According to the United States Court Bankruptcy Statistics, as of March 2013 consumer Bankruptcy filings

[6] "A claim or debt not secured by a mortgage or lien; an example would be credit card debt" (Bankruptcy Action).

have risen to 1.1 million per year.

III. Enumeration of Bankruptcy and Early 19th Century Legislation

The long-standing purpose of bankruptcy has been debt collection, but during the initial years of colonization in America most state debt-relief laws were favorable to debtors. Sympathetic laws toward borrowers failed to negate an overwhelming punitive character displayed in debt collection by creditors (Pomykala, 1999). Stigmatization of the bankrupt began with public assistance, which was restricted to those who were very poor or had very high accumulations of debt (Katz, 1986). This restriction had lead to feelings of the poor unworthy of state relief due to accusations of fraudulence and abuse. The following section will investigate the bankruptcy reforms of the nineteenth century and their similarities to other emerging poor-relief systems. The purpose of comparison is to gain a comprehensive picture of relief during the 1800's and to evaluate progression of public assistance laws.

States in the colonial era had comprehensive laws regulating debtor-creditor relations (Coleman, 1999), since the regional nature of the American economy initially proved little need for national bankruptcy legislation. Cohesiveness of state laws accounted for the absence of a federal statute for some creditor-debtor relations but not all. America's lack of a national system left the population with varied and permissive state laws that governed all debtor-creditor relations. As a consequence, "arrangements differed among towns and counties within the same state" (Katz, 1986).

Lenders faced obstructions in obtaining repayment because many colonial obligations were book debts or promissory notes, endorsed by no more than the word of a debtor (Coleman, 1999). With no debts secured by pledges of property, such as a mortgage, lenders had difficulty in recovering funds. Often times, their only method of salvaging debts was to imprison debtors until the obligation had been paid off. Debtor's prisons and other formal impositions of unforgiving penalties originated a harsh view of the defaulting debtor and promoted repayment by disciplining the poor (Efrat, 2005).

Enforcement of debtor's prisons helped creditors financially, but also protected them against debtor fraud. If creditors feared that a debtor intended to hide, run to another state, or conceal property that could be used to divvy up for multiple creditors, they had the right to direct the sheriff to incarcerate the debtor (Coleman, 1999). Thus, creditors were plaintiffs accusing debtors of committing an act of bankruptcy, punishable with up to ten years imprisonment.

Bankruptcy laws advertised the right to imprison a person who defaulted on their loans as an assurance to prospective creditors and a warning to debtors. For those "whose liabilities exceeded his assets [could be held] until his family or friends took pity on him by paying off the debt themselves" (Coleman, 1999). In some cases debtors could not bear the harsh conditions of prison institutions, which gave rise to debtor's prison famous nickname as a pauper's[7] grave. In practice, debtor's prisons were designed to frighten perspective borrowers from defaulting by the prospect of subhuman and stigmatized descent.

With ability to evade debt and punishment quickly by leaving state jurisdiction, local officials everywhere claimed pauperism was rising at an alarming rate. But state regulation continued under the Articles of Confederation since federal bankruptcy legislation would have been an impossibility needing a unanimous consent of the states (Coleman, 1999). Proponents of federal bankruptcy legislation emphasized both the wide variation in these laws and their serious constitutional limits. These limits included the inability of state law to bind out-of-state debtors

[7] A pauper is another name for a very poor person

(Skeel, 2003). Many states had pro-debtor provisions that “interfered with the reliability of contracts, and creditors [were] confronted still further obstructions in trying to use state courts to collect their judgments” (Zywicki, 2002).

Problems of varying and discriminatory state laws on creditors and interstate commerce made apparent the necessity of federal bankruptcy legislation. The Bankruptcy Clause of the United States Constitution finally empowered congress to “pass uniform laws on the subject of bankruptcies” (U.S. Constitution, 1787) in order to override debtor-friendly state laws. In the Federalist number 42, James Madison articulated this goal and others of the Bankruptcy Clause as “regulation of commerce, and [to] prevent so many frauds where the parties or their property may lie or be removed into different states” (1788).

The Bankruptcy Clause of the United States Constitution went largely unexercised for the nineteenth century. Federal bankruptcy laws were enacted in a boom-and-bust pattern (Skeel, 2003). Economic crises brought three separate bills in 1800, 1841, and 1867, but as the crisis passed, so did the need for a federal bankruptcy law. Between the years 1800 and 1878 federal bankruptcy laws were enacted for a total of sixteen years.

The first federal bankruptcy law was a result of pressure from the Panic of 1796-1797, which caused deep economic downturn when the burst of a land speculation bubble and war in Europe constricted credit from necessary international banks (Russell and Cohn, 2012). “Federalist representatives of commercial interests pushed the bill” (Tabb, 1995) after widespread ruin subjected thousands to debtor’s prisons. The Bankruptcy Act of 1800 was passed on April 4, 1800 as a creditors remedy to collect debts. Filings were exclusively the choice of creditor but leniency for discharge was permitted to previously contracted obligations (Federal Judicial Center 2013). Allowance of discharge required the certification that the debtor had cooperated with the proceedings, and two-thirds of the creditors, "by number and by value of claims," consented (Tabb, 1995).

Discharge provisions confirmed creditors fears that bankruptcy "encouraged risky investments by reducing the cost of failure" (Russell and Cohn, 2012). The 1800 Act included giving little help to smaller creditors and further confirming recklessness by discharging debts of those who intended to manipulate the law. Accusations of abuse and corruption plagued consumers as not only misfortunate but as moral failures (Katz, 1986), encouraging congress's repeal of the Act after a short three years.

During the time bankruptcy legislation was emerging as a way for relief form financial distress, poorhouses dominated the welfare system. Poorhouses were government institutions for those unable to financially support themselves (Wagner, 2005). Welfare relief paralleled the sentiment and objectives of debtor's prison for insolvent consumers. For persons able to at least partially support themselves, both institutions were meant to curb the demand for relief with the threat of demoralization.

In the decade following the first bankruptcy code, debtor's prisons began to phase out as a means of discharging debt. Usually used as a weapon of last resort to scare debtors into repaying debts, widespread turmoil and overcrowded prisons created other alternatives to imprisonment. One such method included "servitude in lieu of imprisonment" (Coleman, 1999). Poor in need of welfare relief were also "sold… to those who agree to support them on the lowest terms" (The Yates Report, 1844). Emerging alternatives to debtor's prison lessened the nature of its deterrence effect. Also, legal safeguards for loans were being put in place to with more effective debt collection methods. Thus creditors no longer needed the physical institution to morally detract people from using poor-relief laws.

The abolition of outdoor relief and the heightening of moral blame in Philadelphia captured the sentiment toward the poor, stating all who are "willing to work may procure employment…[and] earn a decent and confortable support (Carey, 1828). The report went even further by blaming the problems of the poor on "idleness, dissipation, and worthlessness" (Carey, 1828). Sigma and moral criminalization of bankruptcy remained persistent despite the diminishing popularity of debtor's prisons. Institutional development of formal bankruptcy systems was designed to help build the character of certain groups including the poor. Poorhouses shared in this rehabilitative vision by trying to suppress intemperance and incite work ethic, two main qualities that made someone a pauper (Katz, 1986).

In 1819 the Supreme Court in *Sturges v. Crowninshield* deemed it unconstitutional for states to discharge any preexisting debt. During intermittent periods of federal bankruptcy legislation when states continued to govern debtor-creditor relations, *Sturges* created a situation where debtors had no possible avenue to discharge preexisting debts. As rates of poor began to rise steadily, taxpayers tried to come up with an objective explanation for the phenomenon. An 1821 committee commissioned the Quincy Report concluding, "that of all the causes of pauperism, intemperance… is the most powerful and universal." The Quincy report heavily blamed the poor for their financial distress and further demoralized them.

In addition, the report clearly distinguished and classified the two types of poor that have used the welfare system. The "impotent poor" or "worthy poor" were incapable of work, and the "able poor" were those who could labor to help support them. The "able poor" were seen as personally to blame for their own condition. According to this, all the evils attributed to the system of poor relief could be traced to the difficulty of discriminating between the able poor and the impotent poor (The Quincy Report, 1821). Bankruptcy also feared for the able poor using a system reserved only for the worthy poor.

Many claimed that poor-relief would only encourage idleness, that it would inspire someone to “beg in preference to working” (Katz, 1986) and with wide availability for help they would be left without feeling the consequences of their idleness. Resulting attempts to bring back federal legislation by interest groups were rebuffed, until the Panic of 1837 forced Congress to do something in regards to financial relief. The Panic caused a severe decrease in profits, prices, and wages while unemployment rose (Morris, 1912) leading many people unable to pay back loans.

Those who advocated for bankruptcy attempted to pass a bill permitting voluntary relief of debtors, but others believed voluntary bankruptcy was unconstitutional (Swisher, 1974). This issue came to a compromise when the Panic of 1837 coupled with the election of the Whigs over the Democrats in the 1840 election urged the adoption of the Bankruptcy Act of 1841 to relieve the plight of the mass of insolvent debtors (Sauer, 1994). It finally went into effect on February 2, 1842, a revolutionary moment in bankruptcy history because the Act included both voluntary and involuntary filings.

The act provided that "[a]ll persons whatsoever . . . owing debts" who did petition and “declare themselves to be unable to meet their debts . . . shall be deemed bankrupts within the purview of this act” (The Bankruptcy Act of 1841, 1841). For the first time in American history, the 1841 Act allowed an insolvent debtor to execute his own case rather than relying on the creditor to involuntarily charge a debtor with a bankruptcy proceeding. Creditors were awarded the ability to block discharge under voluntary procedures, but the process to do so included writing a dissent filed in the majority of creditors (Tabb, 1995).

The 1800 and 1841 Acts were viewed similarly in the eyes of creditors, as a failure in achieving payment on their loans. The Whigs goal to relieve the unfortunate situation of many debtors, in turn allowed thousands of debtors were able to obtain a complete discharge (Swisher, 1974). Creditor's again feared abuse of the system and accomplished a repeal in 1843 after one short year of operation, but the feature of voluntary bankruptcy lasted through all future codes.

The Yates Report in New York addressed system wide abuse of poor-relief laws. According to the report, the charitable aspects of relief encouraged financially secure people to advantageously abuse the system (1844). The guarantee of welfare went beyond harming a person's will to work, but actually corroded their character. Benefits derived from quick discharge or supplemental state income made the needy ultimately dependent on the state, lacking a will for financial freedom.

Furthermore, taxing the rich to aid the poor aka "the poor tax" hurt the poor in terms of stigmatization and resentment form the upper classes. The poor tax depersonalized aiding the poor because it was a tax paid by the rich without being able to see where their funds are going. This deep rift eroded the deference that governed class relations because the the rich were perceived as oppressors while the poor were poachers (Burroughs, 1834).

Until the third bankruptcy act 24 years after the repeal of the 1841 Act, the Whig part made no effort to propose national bankruptcy legislation (Coleman, 1999). Bankruptcy again became a matter pushed by creditors after the Panic of 1857 (NBER, 2009), the world's first world wide economic crisis. During the Civil War[8] the North saw an increasing nationalization of American economy attributed to war production and the innovation that spurred the industrial infrastructure. Growth in the American economy did not translate into steady work for the common people. The availability of work varied with demand and the seasonal nature of each job meant, "few manufacturers employed a consistent number of workers throughout the year"

[8] The Civil War was fought from April 12th, 1861 to May 9th, 1865

(Katz, 1986). Both the North and the South experienced irregular employment and the inability to accumulate a substantial savings quickly descended families into poverty.

The Panic of 1857 created a “host of new special-interest groups… to represent interstate constituency” (Zywicki, 1994). Northern creditors needed to collect debts form Southern debtors, who state laws proved insufficient to do. Resulting from declining international economy in 1857 and overexpansion of the domestic economy in the United States due to post Civil War production (Tabb, 1994) made the need for federal bankruptcy legislation inevitable. Congress passed the Bankruptcy Act of 1867 to serve the need of commercial commerce for a settled system of insolvency relief (Sauer, 1994). It continued to include voluntary proceedings but expanded the scope of involuntary filings by extending the list of acts that would support an involuntary proceeding. Almost identical criticisms of the 1800 and 1841 Acts were seen in the repeal of the 1867 eleven years after its implementation. High administrative costs and worries of abuse and small dividends paid to creditors left those who advocated for the reform disappointed. Specifically, Northern creditors were unable to advantageously utilize the bankruptcy system to collect debts from Southern borrowers.

Southerners feared that the 1867 Act would allow Northern creditors as a “collection device to displace [southerners] from their homestead” (Skeel, 2003). Strong influence for the revocation of the Act came also from Southerners, but many western lawmakers opposed bankruptcy for similar reasons. The repeal came from creditors and debtors alike, but disadvantages to creditors were matched by the sanctions imposed on debtors. In the Annual Report of the Attorney General of the United States the Department of Justice acknowledged that the inclusion of numerous grounds for denying discharge only allowed for about one-third of debtors to receive discharge (1879). Discharge was also subject to consent of the majority of creditors and a law that required a fifty percent dividend as a prerequisite to granting the discharge.

The 1878 repeal of the 1867 Act left Americans with no federal bankruptcy legislation until 1898. These twenty years were the last time in United States history where no federal bankruptcy law was enacted. University of Pennsylvania Law Professor and Author David A Skeel discusses the federal instability of bankruptcy laws and attributes it to "legislative cycling, a phenomenon identified by economists… that arise when law makers hold [conflicting] opinions" (2003) over whether the country should hold a national bankruptcy law.

Periodic destitution and economic variations transformed debtor-creditor relations. Harsh economic times left people jobless, without resources and dependent on outside relief (Katz, 1986). Bankruptcy legislation was sensitive to economic fluctuations, which went hand in hand with the influence of other interest in the political sphere. During this time Skeel argues there were no dominant coalitions in support of a permanent bankruptcy law (2003). The actors who had influenced the passing of early legislation had temporary formed groups during periods of economic crisis to meet urgent financial needs. Like the laws they advocated for, when the economic turmoil was not at a high the coalitions would also temporarily disassemble.

The selection of bankruptcy policy had reflected the values and goals it was intended to serve but did not exactly accomplish them. Poorhouses also "failed to meet any of the goals so confidently predicted by their sponsors" (Katz, 1986), due to miserable and underfunded institutions. They reflected the primary goal of setting up a system of relief, but designing it in such a way that it deterred people from applying for relief unless in cases of absolute necessity. Bankruptcy evaded goals for other reasons, advocates proposed legislation to further their own benefit, but borrowers have managed to use the system as a means to obtain their own relief.

Laws were responsive to shifts in America's economic structure from "the nascent capitalism of the late eighteenth and…nineteenth centuries" (Katz, 1986).

Unfortunately, the increasing use of bankruptcy by debtors and harsh measures to reduce it, including debtor's prisons, created a last stigma of being morally inept. To nineteenth century taxpayers and policymakers, welfare relief and debt discharge drained the working class of their incentive to work. Paupers and insolvents were proof to the remainder of society that despite overwhelming financial hardships a person could still have a comfortable life without hard labor (Katz, 1986).

Nineteenth century discussion regarding debt relief marks the beginning of a dichotomy between bankruptcy advocates against opponents. As seen with the first three acts the goal of bankruptcy does not necessarily match the realities of each law. The power of interest groups to influence Congress leads to unstable outcomes, and without stability policies were easily repealed and drastically changed by the next federal act. The legislative cycling of policy discussions and creditor complaints pertaining to debt collection and discharge exemplifies the prominent issue that has plagued bankruptcy and welfare. When debtors have accessible relief to burdensome financial issues it conflicts with the "objective of deterring the poor from asking for relief" (Katz, 1986).

Economic depressions veered far from the only reason to initiate bankruptcy legislation. Periods of growth still included numerous professions with a "deficiency of employment that consumed the savings of the most frugal and industrious" (Carey, 1828). Again after 20 years without bankruptcy legislation pressure from interest groups enacted a law that revolutionized the bankruptcy system, the 1898 Act.

IV- Permanence of Bankruptcy in 1898 and the Great Depression

While most political differences eventually have one competing position or compromise succeed, it took 98 years for congress to reach some stability with bankruptcy.1898 brought a crucial year for bankruptcy, for in the first time in a century of the nation's existence was finally a permanent bankruptcy law. This act was the first in nation's history to have continued to expand rather than been repealed.

The Bankruptcy Act of 1898 transformed the system and implemented the beginnings of modern day bankruptcy law. It was astounding for many reasons, one of which was its ability to withstand the post-act backlash that toppled each of its three predecessors. But the impetus that drove bankruptcy in the direction of permanence was long and complicated, and the ways in which it varied from the previous acts lends insight into the development of poor-relief legislation.

Previous nineteenth century acts can be attributed to the lack of political influence in the bankruptcy sphere to enact permanent legislation. The nation's episodic economic crises affected thousands of people, provoking congress to provide some way to aid debtors. Temporary bankruptcy laws served their purpose during these hard times, but support for them receded when relief were no longer a necessity.

In a similar story, University of Illinois College of Law Professor Charles Tabb argues the Panic of 1884 and 1893 encouraged the passing of the 1898 Act (1995). The Panic of 1884 arose from the depletion of gold reserves in the New York City national banks, while the Panic of 1893 resulted from a series of bank failures (Sobel, 1999). Tabb's argument is reasonable considering that both panics were detrimental to the American economy, especially the Panic of

1893; to date is the second worst depression in American depression in history (NBER, 2009). Unemployment reached 18.4 percent, the stock market crashed, and a plethora of default and bankruptcies followed (Pomykala, 2000). Each panic may have been a contributing factor to the passage of the 1898 Act, but issues ascend when claiming they were the sole cause.

Minor political support and response to economic downturn would foreseeably categorize the 1898 Act into Skeel's boom-and-bust pattern; but its permanent characteristic dejects it from this group. What differentiated this act from the previous three to make it one that revolutionized bankruptcy?

Previous to the Panic of 1893, the decades following the Civil War saw an increasing nationalization of the American economy, for example the number of factories quadrupled and their size grew more rapidly than ever (Putnam, 2000). Regardless of a nationalized economy, a nonexistent federal bankruptcy act left the country in a state-based debt collection system. In addition, eliminating differentiating state regulations would contribute to the expansion of commerce through discharge provisions. Bankruptcy would free insolvent consumers and merchants from bearing debt to return to commercial activity (Sauer, 1999).

Initially, a host of new special interest groups developed from the large number of commercial organizations that largely influenced the creation of yet another new bankruptcy overhaul. Commercial creditors made efforts to develop a more comprehensive and effective approach to debt collection, and the increase of national commerce made this goal more important than ever. But in realizing widely unpopular high administrative costs of previous reforms, commercial organizations knew the adoption of the 1898 Act would partially rest on keeping costs as low as possible. This concern is apparent in numerous congressional reports issued in debates before 1898, displaying that a new law would not be as cumbersome as the

1867 Act (see e.g. United States. Cong. H. Rept. 52-1674, 1892).

The minimalist administrative structure made it nearly impossible to eliminate federal bankruptcy law. Without any full-time bankruptcy officials or administrators to oversee the process, bankruptcy lawyers "came out of the woodwork to fill the need" (Zywicki, 2002). Previous to 1898, bankruptcy lawyers played a limited role in proposed legislation, but once the Act was in place lawyers played an increasingly prominent role and soon dominated discussions of bankruptcy. This aspect is evident in a 1902 House of Representatives Report arguing for repeal, it listed bankruptcy professionals and lawyers advocating for the retention of the law.

Lawyers possessed the incentive to preserve national bankruptcy legislation in the interest of their livelihood and individual status, and they had the influence to do so. Bankruptcy lawyers and professionals thrive on large filing rates because their livelihood depends on the promulgation of bankruptcy. High use of the system allows for greater opportunity to profit. Also, their experience and comprehensive knowledge of law allowed them to increase their influence in bankruptcy by assisting congress in understanding the technicalities in proposed bankruptcy legislation (Skeel, 1998).

The prominence and importance of bankruptcy lawyers and professions developed in a well-organized community named the bankruptcy bar. The creation of the bar could be counted on to oppose any future repeal or major innovation, thereby ensuring lasting bankruptcy legislation and ending the previous boom-and-bust pattern (Skeel, 2003). Ensuring the continued existence of the bankruptcy system, the bar also had a significant impact of the course of legislative cycling. Unlike earlier 19th century laws that were created and displaced every few decades, the 1898 allowed legislative cycling to occur within the accepted framework of an already existing bankruptcy regime (Mueller, 1979).

Adoption of permanent legislation exacerbated the difficulty of settling on an agreed upon approach to bankruptcy. A major point of contention that complicated the enactment of the 1898 Act was that lawmakers held three views: voluntary only, a "complete system" with voluntary and involuntary proceedings, and the opposition of bankruptcy all together (Skeel, 1998). Creditor groups detested voluntary only law, believing that it was worse than no bankruptcy at all because it would benefit only debtors and ruin credit (Cong. Rec., 1896). Pro-debtor groups claimed that inclusion of involuntary filings would force struggling debtors into bankruptcy by malevolent creditors. Congress adopted a "complete" system to gain support of reach side.

The bar further supported debtors by reflecting the rise of American populist ideology, which viewed bankruptcy as an economic and social safety valve to redistribute wealth to the poor (Zywicki, 2002). Their debtor-friendly nature opposed strict debt collection advocates. "These characteristics- the generally debtor-friendly approach to bankruptcy, and the primacy of lawyers rather than administrator- distinguish[ed the 1898 Act]" (Skeel, 2003).

The 1898 Act transformed liberal debtor treatment from what was seen previously in bankruptcy. Discharge had been available in previous legislation but it was restricted and hard to obtain. The 1867 Act is exemplary of this fact in that it provided numerous grounds for denial of discharge, and consistent with the 1800 and 1841 Acts, discharge needed the consent of creditors (Tabb, 1995). The 1898 Act created a wide availability of discharge with very few restrictions, to the extent that it allowed a discharge to any debtor who filed a petition on time unless there were accusations of fraudulence. Unlike 1800,1841, and 1867 discharge was granted to petitioning debtors without regard to the level of payments to creditors and without any requirement of creditor consent (Bankruptcy Act of 1898). Thus, the Act had necessarily adopted a view of debtor relief as a legitimate objective of the bankruptcy system.

In contrast to the pro-creditor approach seen previously, 1898 signified a shift into favoring debtors' interests in many respects. James Olmstead referred to the overall effect of the 1898 Act as a "jubilee" for debtors (1902). The network of professionals involved in the bar lessened the stigmatization associated with bankruptcy by acknowledging bankruptcy as a salvation to the citizenry. One member of congress orated this position in 1898:

> The obligations of the debtor does not include the forfeiture of all the rights which belong to humanity. Honest misfortune has its penalties, which are grievous enough; but it is no part of such penalty to doom the debtor to the most odious slavery that the human imagination can conceive… which enervates and subdues the mind, at the same time that it condemns.

In this sense, the discharge is a "societal act of forgiveness or mercy, which is mandates by moral or ethical concerns" (Currie, 2009). A full discharge under bankruptcy would make credit easier to obtain because participants would be free from the heavy financial burden (Efrat, 1999). It allowed the bankrupt to remain members of society and to return to a productive economic life. Discharge is the basis for giving debtors a fresh start because it dissipates legitimate indebtedness. It also conveys the acceptability to take risks and potentially fail. Fresh start policies reflect the reality that those using debt relief systems are humans, who may underestimate the risks involved in credit. In fact research suggests that more generous discharge "establish the incentive between business activity and an incentive to take risks" (Martin, 2005). Financial failure was viewed as an unavoidable consequence of entrepreneurial risk taking necessary to foster economic growth.

Lax discharge restrictions were not generally accepted among all players in the bankruptcy sphere. One commentator suggested that congress went too far with the availability for discharge, observing that the principal object of the law appears to make discharge easy, inexpensive, and certain" (Newton, 1900). Discharge negated bankruptcy's historical purpose of debt collection, as it was difficult to fill needs of creditors and debtor interests simultaneously. Discharge came at the cost of repayment, promulgating the view of an unearned benefit to debtors with an imposing uncompensated loss on creditors (Hallinan, 1987).

Though bankruptcy was moving toward becoming increasing friendly to debtors, these additional concerns kept bankruptcy stigma pervasive during the first part of the 1900's. The first half of the 20th century still had comments from government questioning the morality of bankruptcy, asserting that bankruptcy stigma was as strong as it used to be in the previous centuries (Efrat 2005). This was true during the roaring twenties, where United States asserted America's status as a top economic power in the world. The capacity to produce products and service accelerated with inventions to facilitate mass production expanded the economy (white, 2007).

The economic expansion of the 1920's saw bankruptcy rates quadruple. Economic optimism made people more confident in their financial situations, leading to risky ventures. Financing their future based on current incomes lead many to incur a larger debt burden (Pomykala, 2000). Critics from Congress, the Solicitor General, and the Department of Congress noted that the increase in filings was an effect of a decline in stigma and shame traditionally associated with deterring those from using the system (Martin, 2005). By the end of the 20's the credit industry had come to question the generosity of the discharge provisions granted by the 1898 Act. To limit growing abuse of the system creditors wanted to change the basic premise of discharge by having debtors pay back some debts out of future income.

However, the Great Depression was deepening at the time creditors were advocating for a reform; interest rates rose and credit supply tightened, the financial strain increased (Zywicki, 2002). Concerns for debtor abuse went unsold to congress and their attempted were refuted. The Great Depression incentivized Congress to pass many pro-debtor amendments that promoted rehabilitation in Bankruptcy. Amendments included severe restrictions on creditors to collect from insolvent debtors.

The pro-debtor leniency of depression era bankruptcy reforms marks a significant the evolution of bankruptcy law. In polar contrast to the previous criminalization of debtors these new laws allowed for substantial discharge of debt. Debtor relief and protective discharge were one indication of the trend limiting the severity of the legal consequences attached to insolvency and financial failure. The nationalization of American economy enhanced the role of credit in economic development, creating a fundamental change in attitudes toward borrowing, and eventually toward insolvency. Being poor was previously regarded as living above one's means, but economic expansion proved indebtedness to be a vital aspect of successful commercial activity (Hallinan, 1987).

The Great Depression and the widespread business failures highlighted that bankruptcy following economic risks were not attributed to a debtors moral worth and not a function of dishonest or irresponsible behavior. The inclusion of discharge at all represents a deep departure from debtor's prison mentality, in that debtors deserve punishment or are in need of a moral lesson. With progression in bankruptcy, the stigma of bankruptcy had persisted to some extent for the next forty years. In recognition of the deterrent impact of the stigma on filing, in the late 1970s Congress aimed at crafting a more attractive bankruptcy code as a way of alleviating "many debtors' desire to avoid the shame attached to straight bankruptcy."

V- Another Fresh Start with the 1978 Bankruptcy Code

The 1898 Act reflected needs produced by economic and social conditions, including a depression that no longer existed in the second half of the century. Moreover, Congress had amended it several times within its eighty-year reign (Bruce, 2011). The impetus for an 1898 overhaul came from creditors who were frustrated with the rising number of personal bankruptcy filings from 25,040 in 1950 to 178,202 in 1970 (Zywicki, 2002). Familiar arguments resurfaced when attempting to explain the rise. Creditors argued that discharge contributed to debtors losing their sense of moral obligation, and stigma was no longer an effective means of discouragement (Sauer, 1994).

Growing dissatisfaction with the existing bankruptcy regime and rising numbers of bankruptcy filings prompted Congress to create a commission to study and report on the existing laws. Congress instructed the Commission on the Bankruptcy Laws of the United States to consider "the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system… [and] the applicability of advanced management techniques…in administration of the Act" (Act of Oct. 19, 1970).

The Commission provided its report in 1973 listing numerous complaints regarding the current bankruptcy system. The report included critiques of insufficiently generous fresh start policies for debtors, inadequate incentives for creditors to collect, and recommendations for lawmakers to cede authority to a bankruptcy administrator to improve bankruptcy administration (H.R. Doc. No. 93-137, 1973). The bankruptcy bar met the commission's suggestions with vehement opposition seizing the reform efforts, having creditors lose control of the process they initiated.

After an additional five years of research and debate regarding the issues proposed in the report, President Carter signed the Bankruptcy Reform Act of 1978 ("Reform Act" or "The Bankruptcy Code") into law on November 6th, 1978. It was the first in nation's history not to have been enacted in response to a major economic crisis (NBER, 2009). The Code profoundly changed the bankruptcy system by extending a variety of new benefits to consumers and enhanced their position in relation to creditors (Cohen and Klee, 1980).

One of the more major points of contention for the bar were the creditor's effort to grant authority of bankruptcy administration back into the hands of administrators. It was easy to see why lawyers would oppose an administrator: mostly, it would pose serious threat to influence the bar had over the bankruptcy system. Lawyer's influence would be severely curtailed since "the administrator would reduce the scope of lawyers' involvement in any given case" (Skeel, 1998). Secondly, debtors facing scrutiny and discouragement from administrators could have an adverse effect on the rising number of filings. Lawyers and other forces central to the bar depend on bankruptcy this ride for their livelihood, meaning increasing use of the system can potentially increase profits.

Concern regarding new administrators initially appeared to veer in the direction of creditor advocates. One new governmental overseer was created with the adoption of the Bankruptcy Code of 1978, the United States Trustee. Upon further investigation into the role of the trustee, it is best seen as the continued influence of the bar rather than a defeat. A major concern in the process of the reformation proceedings regarded the role of the judge as both a overseer and participant during the bankruptcy procedures. A judge would participate in the initial creditors' meeting, which would expose them to information that could later influence their judicial rulings (Treister, 1966). The bankruptcy bar would greatly benefit from limiting the involvement of judges on cases and giving their administrative duties to another official. Though they would not favor a full-scale bankruptcy administrator, an official who took over some of the judge's tasks could improve bankruptcies reputation and attractiveness (Skeel, 1998)

The United States Trustee fit the wants of the debtors, while partially satisfying the creditors' push for new administration. The United States Trustee completely took over the important administrative tasks, especially that of overseeing meeting with creditors and appointing other trustees. The only additional authority given was the ability to bring up issues and questions the parties neglected to disclose in the filings (Alexander, 1996).

Like the Trustee, the Code centered on numerous other pro-debtor elements, but one aspect went above and beyond any other previous bankruptcy legislation. The ability to obtain a discharge was made substantially easier than its 1898 predecessor by eliminating the requirement for creditor approval of debt-repayment, deterrence of creditors from objecting to the discharge of debt, and the expansion of the types of debts that can be discharged in bankruptcy to include claims considered "malicious" (The Bankruptcy Reform Act of 1978, 1978). Even with changes these debtor-friendly discharge laws under the 1978 Code stayed consistent with the ideals of the 1898 Act. Bankrupt individuals were once again given the ability to obtain a fresh start to pursue new economic activities free from overwhelming debt (The Bankruptcy Reform Act of 1978, 1978), allowing individuals to be discharged from any obligation to repay the remaining unpaid portion of their debts.

The idea of a debtors' fresh start predates 1978 to many previous reforms, but is primarily seen in the times of the Bankruptcy Act of 1898 and subsequent years. In as early as the 1930's, there are records of the Supreme Court citing the principal goal of bankruptcy as rehabilitation. In *Local Loan Co v. Hunt*, the court declared, "one of the primary purposes of the

Bankruptcy Act 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" (1934). The Bankruptcy Commission even articulated the goals of the system to "rehabilitate debtors for continued and more value-productive participation [in economic life]" (1973), so that a fresh start could be granted "to an ordinary citizen who cannot meet his obligations" (Cong. Rec., 1999).

Notions of a fresh start are particularly notable because of bankruptcy's origins in debt collections and the stigmatized poor. However, twentieth century bankruptcy has affirmed the importance of a fresh start. For decades leading up to the 1978 Code the legislative history has shown the core of bankruptcy was intended to rehabilitate the "honest but unfortunate" (Efrat, 2005) debtor to return to economic productivity. Discharge has become synonymous with the fresh start policy, and regarded as the sole means for economic rehabilitation.

The court and commission went further to emphasize that bankruptcy's discharge abilities were a crucial aspect of a free-market, commercial economy (Grogan v. Garner, 1991). Successful borrowing that relies on consumer debt sustains the macro economy and allows for economic independence free from state aid. Bankruptcy in a free-market economy is an individualized risk alternative to government social insurance programs that collectivize the risk of financial failure (Sullivan et al., 2001). In other words, sustained economic viability prevents insolvent people from turning to welfare for support. The goals of bankruptcy are not to "simply to stop incurring debt . . . [but for] debtors to be able to continue borrowing if they put themselves in the position to be able to repay what they owe their creditors" (Gross, 1999).

There were numerous arguments against the allowance of discharge but most notably concerned the notion of rehabilitation and discharge's effect on consumer credit. Over the course of the 1978 Act, creditor interest advocated issues with discharge and rehabilitation. Mainly, that it does not ensure future economic success; it only relieves the burdened debtor of their current situation (Posner, 1998). If bankruptcy's objective were to provide economic rehabilitation, it would seem appropriate to provide the debtor with tools to generate higher incomes, spend money wisely, and responsibly utilize the sources of available credit.

The second argument rested on the argument that discharge infringed on both the creditors and debtors goal of minimizing the cost of credit (Posner, 1998). While discharge of consumer credit enables individual debtors to relinquish debts, it ultimately increases the cost of future credit. By preventing creditors from even collecting partial debts, the costs get passed on to other consumers through higher interest rates. Reflective of creditor lobbying before the Great Depression, Creditor's influence in the Reform Act succeeded in the creation of a rehabilitative bankruptcy. Instead of automatically obtaining a straight discharge an individual could also enter a lengthy repayment plan to pay back either a portion or all existing debt out of future income (The Bankruptcy Reform Act 1978, 1978). Even partial debt was more in line with social norms and keeping ones promises in America (Mols, 2012). Having some of the pressure to repay full debts relieved, debtors were supposed to still be able to pursue economic activities while the paying back debts in increments. The rehabilitative procedure was expected to be more beneficial to creditors than a complete discharge because debtors would eventually pay back debts through future earnings.

In addition to the 1978 debtor-friendly Code, the Supreme Court decided *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation* changing available credit to consumers. The court decision effectively eliminated usury limits on consumer credit providers; thus, it was not surprising that lenders had increased the supply of consumer credit

(Block-Lieb and Janger, 2006). With increased supply of credit and attractiveness of lenient discharge availability personal bankruptcies rose drastically. The credit industry was unhappy with the increased number of filings and mounting debt losses and advocated to amend the code in ways that would make bankruptcy more costly and less beneficial to debtors (Domowitz and Eovaldi, 1993). Also, the exponential growth of consumer bankruptcy filings prevented the effective administration of many cases and clogged the bankruptcy courts (Skeel, 2003). Creditors, as well as other interest groups, continued to persuade congress to change the Code to favor their interests. This persuasion convinced Congress to continue to amend the Act during its twenty-seven year jurisdiction, but never too much away from its pro-debtor nature.

Changes in the 1978 Reform caused concern that lower cost and increased benefits of nonbusiness bankruptcy would lead to further increases in the number of bankruptcy cases filed and would have an adverse effect on the market for consumer credit. Bankruptcy Statistics compiled by the Administrative Office of the United States Courts give backing to these concerns, as they show that the number of filings were higher in the six years following the code than in any other time in history. Critics mostly attributed the increase in filings to an alleged decline in both morals and in the shame associated with filing bankruptcy. Those this stigma has existed since the beginning of bankruptcy, the fading stigma from the 1900's has intensified with the adoption of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. This new reform further exemplifies the legislative cycling to serve either the debtor or creditor, and furthermore, the returning prevalence of stigma to deter use of the bankruptcy system; a substantial change from the proponents of the 1978 Bankruptcy Act.

VI- The Bankruptcy Abuse Prevention and Consumer Protection Act

The 1978 Bankruptcy Reform Act's principal objective was to provide a fresh start to consumers by enabling debtors to either relinquish all commitments to debt through discharge or to repay borrowed money at a manageable pace. 1978 to 1984 saw a decrease in regulation of interest rates and an increase of available consumer credit, leading to indebtedness and higher bankruptcy filings. Despite clear evidence that deregulation of debt was a principal cause of the increase in filings, creditors viciously fought that only the 1978 Act was to blame (Ellis, 1998). One of their primary claims concerned the new benefit of discharge to bankruptcy filers had caused an increase in the number of cases and in turn had an adverse effect on the market for consumer credit.

The loose restrictions of personal bankruptcy maintained by the 1978 Code were never accepted by the credit industry, who lobbied to place numerous constraints on the ability to obtain a fresh start (Vukowich, 1983). The 1990's yet again saw numerous reform initiatives by creditor interests to restrict access to consumer bankruptcy (Skeel, 2003). During this period the most notable response to creditor complaints was a 1994 amendment to the Code that created the National Bankruptcy Review Commission (NBRC). The Commission was assigned to study the national bankruptcy system and recommend modest improvements, Congress further instructed the NBRC, "not [to] disturb the fundamental tenets of current law [with which they were] generally satisfied" (NBRC Report, 1994).

In between the time Congress enacted the NBRC in 1994 and the time the Commission filed their report in 1997, the ideological environment concerning debt had changed away from the 1898 and 1978 leniency on debtors (Skeel, 2003). The 1994 congressional elections put the

House of Representatives under Republican leadership for the first time in thirty years. The creditors had been pushing for a reform in their favor since 1898, but it was not until the Republican Party regained control of Senate that attempts for reform could finally happen. With this change, the credit industry secretly prepared legislation that would sway the NBRC in their favor and displayed it before the Commission published their official report in 1997 (Baraucher, 2006). Aspects of Creditor legislation are clear when reading the NBRC Report; even more apparent is the shift away from Congress favoring lax bankruptcy laws. The Report stated:

> First, the system lacks effective oversight or control over its integrity.... Second, there is growing perception that bankruptcy has become a first resort rather than a last mea- sure for people who cannot keep up with their bills**....** Third, apart from the urgent issues raised by increased filings, the law itself has proven unclear, leading to uncertain results and inconsistencies among and within circuits and even individual debtors. Fourth, the Bankruptcy Code offers opportunities for unjustifiable debtor manipulation by various means, including abuses of the automatic stay to fend off eviction, repetitious filings, and over-generous exemptions. Fifth, some creditor abuses have been re- ported, particularly with respect to reaffirmations and dischargeability claims ... (1994).

Effectively, the credit industry's legislation pushed the NBRC to suggest major changes to prevent abuse, contradicting Congress's wish for modest revisions (Skeel, 2003).

In the years directly leading up to the 2005 Reform, claims made by the NBRC Report instigated a disagreement from both sides of Congress regarding the relationship between consumer debt and bankruptcy filings. Opponents of the reform believed that debt and bankruptcy were just a correlation, while supporters described consumer's abuse of the credit as causing high rates of bankruptcy (Mols, 2012). Legislator's statements in the 2001 House of Representatives Report took the causal relationship further by claiming abuse of the bankruptcy system being an outcome of a "lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system."

Senator John Kerry sided with the supporters and on a PBS NewsHour broadcast suggested, "that appropriate changes are necessary in order to ensure bankruptcy was not a lifestyle choice" (2001). The notion of bankruptcy being a lifestyle choice blames consumers who accumulate more debt to have a decreased sense of stigma for bankruptcy, and filing numbers increase as more people choose to be insolvent. To confirm Senator Kerry's statement, Representative James Sensenbrenner distinguished the lifestyle of debtors as those who are "obtaining credit cards despite having little or no income, incurring huge debts, paying those debts with worthless checks, and then filing for bankruptcy relief... people were gaming the bankruptcy system" (H.R. Rep. No. 150-H149 2004).

When the new reform was finally drafted and proposed, it was hard for Congress and the NBRC to oppose a piece of legislation that purported it could prevent abuse in the bankruptcy and protect consumers. Accusations of rampant fraud and abuse made it possible for secured, unsecured, and involuntary creditors to overcome their collective action problem and to support reforms to increase accountability (Skeel, 2003). The political influence of the bankruptcy bar has been weakened by Republican control of Congress, as lawyers' groups have tended to be tied more closely to Democrats in recent years. The Bankruptcy Bar pushed against the reform but because of the circumstances Congress rejected input from bankruptcy professionals (Bruce, 2011) For the first time since 1867 consumer lenders were able to convince Congress of abuse and decreased stigma as the sole reasons for the filing increase from 288,000 in 1980 to 1.5 million in 2004 (White, 2007).

In 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) with the primary purpose of responding to the upward trend in consumer bankruptcy filings (House of Representatives, 2005). The President accompanied the signing reinforcing the presumption of fraud by saying "America is a nation of personal responsibility where people are expected to meet their obligations (White House Press Release, 2005). The report, legislators, and advocates adopted the view that bankruptcy was not an economic act needing rehabilitation, but rather it was a moral act needing redemption. With moral implications at the core of the 2005 Bankruptcy Reform, the stated goals outlined in the legislation were to restore "personal financial responsibility and integrity in the bankruptcy system" (BAPCPA, 2005).

Critics pointed out that the BAPCPA did not go without controversy. Credit card companies lobbied more intensely than any other credit source, but their practices are argued as one of the main reasons a larger number of people needed bankruptcy (White, 2007). To clarify, credit card debt was the easiest to exonerate in a bankruptcy, because they were considered claims unsecured by a mortgage or lien (Chemerinsky, 2005). These companies placed significant hidden costs associated with their cards in the form of usurious interest rates that consumers were forced to pay. Many disapproved of Congress for listening to these interests instead of looking deeper into what economically was causing the rise in filings (Currie, 2009).

Others were willing to believe that stated goals of the BAPCPA- to protect honest debtors form abuse- were legitimate (Braucher, 2006). However, the BAPCPA's negative provisions are aimed at a different goal. Instead of preventing abuse, every aspect of the BAPCPA is marked at deterring people from using the bankruptcy system altogether. Amendments have limited, regulated, and curtailed debtors' access to consumer bankruptcy determined by a calculation of their income and expenditures to objectively determine if someone is intending on abusing the system. The BAPCPA also requires credit counseling based on the theory that individuals should be taught personal finance management (BAPCPA, 2005).

The calculation of income and expenditures, or the means test, was arguably the most drastic change that came from the bankruptcy reform. The 1978 Code did not define what was considered substantial abuse; instead the term was received as allowing a debtor discharge despite the ability to pay back their bills (The Bankruptcy Reform Act of 1978, 1978). The consumer credit companies became dissatisfied with this ambiguity and believed that debtors required a strict test to keep solvent debtors from obtaining relief (Braucher, 2006). Congress adopted the means test into the Act to restore integrity to bankruptcy by having an objective method to determine abuse.

Complexities of the test itself make it difficult to navigate for debtors and for courts to apply to bankruptcy cases. A simplified version of the means test formula is calculating a debtor's income over a six-month period, while accounting for deductions, and comparing it to the state's median (Currie, 2009). In particular, a consumer would be forced into a five-year repayment plan of all their non-exempt income if a homeowner had income above their state's median (BAPCPA, 2005). It presumes over-the-median debtors are abusing the system, while debtors below it are able to continue with partial or whole discharge. The means test does not always serve its purpose; many who are not meant to be eligible pass through it, while others desperate for relief are denied (Mols, 2012). Debtors must rely on this unpredictable formula as an administrative barrier to relief that ultimately increases their burden for filing.

The means test changed the bankruptcy from a standards-based approach to a rule-based framework. A standards-based approach requires discretion from a judge who must discover facts of a particular case and assess to inspect if they meet a pre-determined standard (Duncan, 1976). Whereas in a rules-based framework the role of the judge is to is to focus on facts and apply the law in a standardized method, with the objective of having no values-based judgments

(Bruce, 2011). Judges were previously able to take into account the circumstances that had lead a debtor to their current situation and asses if the debtor was deserving of relief. The means test eliminates broad judicial discretion giving full judgment to the test. It was used to prove eligibility to file bankruptcy for people seeking a discharge of their debts, and the ability to do so was now directly determined by income.

The means test was implemented to serve the BAPCPA's main goal, to rid the bankruptcy system of advantageous filers, but educating debtors on finance management was a close second. The 1978 Reform Act equated discharge with economic rehabilitation, but critics argued that it left debtors without knowledge to avoid bankruptcy in the future. Legislators recognized the deficiency of rehabilitation outlined in the Code and attempted to correct it with credit counseling requirements. The counseling requirement takes on average from sixty to ninety minutes and "consists of a discussion of the client's financial goals and potential opportunities for reducing and paying off debt" (Government Accountability Office, 2007). Congress suggested financial education with 180 days ahead of filing would help debtors recognize the cause of their financial distress and prevent its reoccurrence (BAPCPA, 2005). Credit counseling was meant to be valuable tool that enabled debtors to capitalize on potentially being granted a fresh start.

Preventing debt reoccurrence presumes the debtor has a choice to avoid current financial difficulties and manage their budget, meaning that it believes options other than bankruptcy would suffice. Debtor's insolvency can then be explained by poor financial choices and failure to plan for the future. In light of recent studies, it has been shown uncontrollable factors rather than faulty financial management cause most debt. Major reasons outlined in the studies for individual bankruptcy include high medical costs, job loss, high interest rates, national economic crisis, and divorce (Sullivan et al., 2001). Since the most common causes of bankruptcy are both unpredictable and unpreventable to the individual consumer, they are not in a position to benefit from credit counseling.

Understanding the cause of debt and its uncontrollability is significant in shaping public perception and stigma (Mols, 2012). The BAPCPA shapes society's perception as antipathy towards poor people who should be able to fix their deviant behavior. A society is more inclined to be compassionate towards debtors when it is made known their situation arose out of disadvantage and inability to control the stigmatized behavior (Katz, 1986). The enactment of the BAPCPA signals a change for how Congress wants the American public to view those seeking bankruptcy relief.

The 2005 Reform reflects the struggle bankruptcy has faced in trying to balance punitive deterrence and a socially responsible means of aid. Discharge in previous codes partially functioned as a form of social insurance and gave the potential for rehabilitation (Currie, 2009). Social insurance functions carry no stigma, and parallel social programs in welfare relief have drastically reduced poverty (Katz, 1986). Bankruptcy served an important social insurance function for debtors who desperately needed to be relieved of financial distress. But a number of specific provisions in the BAPCPA penalize individuals seeking relief and ignore this important function of bankruptcy by restricting access. Such amendments as the means test have shifted bankruptcy to be considered public assistance, a term usually synonymous with welfare. Being a program of public assistance, it restricts access to bankruptcy for the very needy and has worked to recreate a nineteenth century stigma of the unworthy poor (Katz, 1986).

The broad availability of discharge in the 1898 and 1978 Bankruptcy Acts "represents a major departure from the [nineteenth century] view that defaulters are, simply because of debt, deserving of punishment…and that the experience of bankruptcy should be a punitive moral lesson" (Howard, 2004). But the BAPCPA regresses back into a pro-creditor ideology, to the extent that bankruptcy professionals refer it to as the "leave no creditor behind" act (Coco, 2012). BAPCPA focuses on serving these interests by deterring use of the bankruptcy system through overwhelming stigmatization and confusing barriers. Reinstating the nineteenth century debt collection function of bankruptcy penalizes debtors in a similar manner as debtor's prisons signifying that insolvency is not just a misfortunate, but also a moral failure (Katz, 1986).

Poorhouses of the nineteenth century believed they could rehabilitate, educate, and reform individuals personalities because the means by which they acting poor could be eradicated (Katz, 1986). The BAPCPA shared in this vision by claiming it could restore integrity and personal responsibility to the debtor by means of credit counseling education to inform them on how to eradicate issues that caused their inability to pay back debts. Reformers believed poorhouses would curb the demand for relief (Wagner, 2005), and believed dense provision in the BAPCPA would do the same.

BAPCPA represents a divergence from the lenient pro-debtor 1978 Code from which it evolved, and closely parallels many aspects of poor relief in the early to mid nineteenth century. The official report of the House of Representatives (HOR) commented on the necessity for reform by claiming debtors had a "lack of personal financial accountability" leading to an overuse of the system because debtors' petitions were "bankruptcy filings of convenience" (2005). Within this report Senator Chuck Grassley stated harshly:

> "[Bankruptcy] was not intended to be a convenient financial planning tool where deadbeats can get out of paying their debt scott-free while honest Americans who play by the rules have to foot the bill…. bankruptcy has become a first stop rather than a last resort" (2005).

Similarly, The Quincy Report of 1821 heavily blamed the poor for their financial distress and claimed they were morally reprehensible for their condition. Like the BAPCPA, it aimed at ridding the welfare system of the able poor who were able to fend for themselves. The report spoke at length regarding centering welfare reforms on getting rid of those who fraud the system (The Quincy Report, 1821). Twenty years later, The Yates Report articulated concerns of both the Quincy Report and the BAPCPA noting the charitable aspects of relief encouraged financially secure people to advantageously abuse the system (1844). This is seen tremendously throughout bankruptcy reforms and current ideology. The dominant purpose of the BAPCPA and other reforms has been to rid the bankruptcy of those who file for convenience and abuse the system.

Both the Quincy Report and the BAPCPA sought to distinguish between those who were able to pay back their debts and those who desperately needed the financial relief. The Quincy Report tackled this issue through distinguishing between the worthy poor who were incapable of work, and the able poor who could labor to help support them. While the BAPCPA implemented several provisions to distinguish who had been worthy of accessing consumer bankruptcy, including the formulaic means test to objectively determine fraud. This has shown that the core of American bankruptcy system since the early 19th century it has been in part a war on the able-bodied: an attempt to define, locate, and purge them from the roles of relief (Katz, 1986).

Time and time again welfare and bankruptcy have been redesigned, but it is unfortunate it has regressed into promoting social order by disciplining the poor (Katz, 1986). While the principal objective of consumer bankruptcy was once to provide debtors with a promise that life after filing bankruptcy will be free of financial hardship, the BAPCPA keeps families in desperate need of financial freedom tied down to hefty repayment plans and inability to discharge debts. The BAPCPA's increased procedural requirements force debtors to jump through hoops to resolve their unfortunate situation, severely limiting bankruptcy from helping those desperate for its sanctuary (Currie, 2009).

VII- Conclusion

Focusing on larger societal implications and perceptions of those filing for relief has given greater insight in the bankruptcy system today. The enactment of BAPCPA and previous laws provide an excellent case study in legislative cycling throughout bankruptcy legislation. As seen with the BAPCPA and previous reforms, the notion of creditor versus debtor often poses conflicting interests for bankruptcy. Creditors have generally favored more-restrictive bankruptcy laws, while bankruptcy lawyers have advocated for debtor-friendly provisions. But serving to satisfy either side has been a somewhat temporary decision, embedded in the period's bankruptcy laws that change with fluxes in economic climate and attitudes towards debtors pursuing financial relief. As the American economy cycled[9], and societal attitudes regarding distressed debtors have changed, bankruptcy laws have reformed to reflect those attitudes.

The BAPCPA represents a fundamental shift in legal and policy structures of the 1978 code and mimic many aspects of early bankruptcy laws. In the early nineteenth century, legislation was driven by financial crisis and quickly repealed. Those who filed at this time were seen as criminals and morally inept. Unlike its predecessors, the 1898 Bankruptcy Act was a permanent law and had provisions intended to help debtors relinquish debt. The 1978 Code followed with generous discharge and lax debtor laws. Consumer credit companies disapproved of the Acts generosity and advocated for Congress to enact the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act.

Based on the history of Bankruptcy with policy cycling, it is likely that BAPCPA's harsh amendments will not remain in effect. Economic conditions and social climate have always shaped American Bankruptcy, especially regarding the functions bankruptcy had set out to serve. As each continues to evolve, bankruptcy will also.

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