

# REGULATING BANKRUPTCY: PUBLIC CHOICE, IDEOLOGY, & BEYOND

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## I. INTRODUCTION

For almost a decade, members of Congress fiercely debated legislation that would make it harder for people to discharge their debts in bankruptcy. The legislation was finally enacted on April 20, 2005, when the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”)<sup>1</sup> was signed into law.<sup>2</sup> BAPCPA became fully effective for cases filed on or after October 17, 2005. At one of the earliest hearings on the proposed bankruptcy legislation, one of the bill’s sponsors suggested that “it is probably incorrect to suggest this is a credit card versus consumer problem.”<sup>3</sup> Yet throughout Congressional debates on the legislation, and even after BAPCPA was enacted, many argued that BAPCPA was written by, bought, and paid for by the consumer credit industry, especially the credit card industry.<sup>4</sup> Given the vast sums the consumer credit industry contributed both to individual members and political action committees,<sup>5</sup> it is understandable that many used public choice theory—i.e., the application of microeconomic assumptions to help explain how public officials make decisions<sup>6</sup>—to critique the BAPCPA legislative process.

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1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

2. *Id.*

3. See *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 66 (1997) (statement of Sen. Jeff Sessions). For statements that suggest that the bill pits people versus the credit card industry, see 149 CONG. REC. H1983, H1986 (daily ed. Mar. 19, 2003) (statement of Rep. Jackson-Lee); 146 CONG. REC. 26347, 26348–49 (2000) (statement of Rep. Wellstone); 144 CONG. REC. 22615, 22622 (1998) (statement of Rep. Kennedy); 144 CONG. REC. 24926, 24926, 24928 (1998) (statement of Rep. Nadler).

4. See, e.g., 151 CONG. REC. S2216 (daily ed. Mar. 8, 2005) (statement of Sen. Durbin); 151 CONG. REC. H2084 (daily ed. Apr. 14, 2005) (statement of Rep. McDermott).

5. See Alexander, *infra* note 78.

6. See *infra* note 70 and accompanying text.

As BAPCPA has been fully effective for over two years, it is now appropriate to consider whether the storyline of the consumer credit industry singlehandedly capturing Congress and buying a bill—i.e., the single industry capture story—is valid and, if not, how best to tell the BAPCPA “story.” Telling the BAPCPA story as a single industry’s ability to buy votes is appealing and largely justifiable, although ultimately unsatisfactory given the provisions in BAPCPA that protect other special interest groups—notably women, retirees, and members of the armed services—but are adverse to the interests of the consumer credit industry. Also, using only a public choice perspective does not explain why it took almost a decade to get the legislation passed, nor does it adequately consider how certain ideological issues appear to have affected the legislative process.

Of course, suggesting that bankruptcy laws are ideological may strike some as nonsensical. Indeed, during the Senate confirmation hearings for Justice Samuel A. Alito, Jr., the *Washington Post* examined a number of judicial opinions in which he took part but excluded all bankruptcy cases from that examination based on its conclusion that bankruptcy cases are “non-ideological.”<sup>7</sup> Even if the Federal Bankruptcy Code<sup>8</sup> itself is non-ideological (an assertion that this Article will not directly challenge), describing BAPCPA’s legislative process without discussing the role that hot button ideological issues—like states’ rights, abortion, and the concept of “personal responsibility”—played in the legislative process would eliminate at least several mini-plots from the story.

This Article presents a fuller, more nuanced BAPCPA story that is designed to debunk the notion that the BAPCPA legislative process is simply the triumph of one powerful interest group—the credit card lobby—over a weaker group—consumer debtors. Part I of the Article describes BAPCPA’s history and the role that the consumer credit lobby played in getting, then keeping, bankruptcy bills before Congress. In generally describing the legislative process, this Part notes that, notwithstanding fierce debates, opponents and supporters of the legislation agreed on a number of key factual matters relating to the bankruptcy “crisis.” This Part notes, though, that legislators disagreed over other core issues, including what people should do to avoid becoming overindebted and what they should do once they are too far in debt.

Part II briefly describes public choice theory and explains the appeal of using this theory to explain the bankruptcy reform legislative process. This

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7. *About the Analysis*, WASH. POST, Jan. 1, 2006, at A14.

8. 11 U.S.C. §§ 101–1532 (2000).

Part suggests that public choice theory was most often used to explain why Congress passed BAPCPA because the consumer credit industry made such significant campaign and political action committee contributions while past, current, and future individual debtors failed to organize and lobby against the bankruptcy legislation.

Part III shows how, over the course of the legislative process, legislators considered the interests of other powerful groups, notably women, retirees, and veterans. This Part stresses that members of Congress agreed on a number of amendments to the bankruptcy legislation to protect these constituents' interests. Ultimately, this caused Congress to amend BAPCPA in ways that harmed the interests of the consumer credit lobby.

While conceding the difficulties in defining the word "ideology" and the additional difficulty of precisely measuring whether a legislator's ideology influenced a vote on any given bill, Part IV briefly discusses the role that ideology appeared to play in the legislative process. This Part argues that some relevant ideological issues (such as how people reasonably should be expected to govern their personal finances) and other ideological issues that were raised but were at best only tangentially relevant (such as abortion and minimum wage) played crucial roles in shaping the text of the bankruptcy legislation.

Part V argues that the single industry capture story is incomplete and that BAPCPA's legislative process can best be understood as one that required legislators to balance several interests. On one side is legislators' desire to continue to receive financial support from the consumer credit lobby; this is balanced against their individual worldviews and philosophy toward "personal responsibility" and their desire to avoid alienating large blocs of politically influential voters.

## II. HISTORY OF BAPCPA

### A. *National Bankruptcy Review Commission*

BAPCPA's origins generally can be traced to the activities of the National Bankruptcy Review Commission (the "Commission").<sup>9</sup> In enacting bipartisan legislation to create the nine-member Commission in 1994, Congress stressed that it was essentially satisfied with the Bankruptcy Code's (the "Code") framework for consumer cases.<sup>10</sup> At that

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9. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 601-10, 1994 U.S.C.C.A.N. (108 Stat.) 4106, 4147-50.

10. H.R. REP. NO. 103-835, at 59 (1994).

time, consumers who sought bankruptcy relief had an almost unfettered right to choose whether to discharge some debts and relinquish all but exempt assets in Chapter 7, or to discharge significantly more debts, keep almost all assets—including assets they could not claim as exempt—and attempt to repay at least some debts in Chapter 13. When Congress created the Commission it did not indicate that it felt consumers were abusing the bankruptcy system or that the Code needed to be radically restructured to respond to increased credit card use. Indeed, the Commission's work was described as “reviewing, improving and updating the Code in ways which do not disturb the fundamental tenets and balance of current law.”<sup>11</sup>

The Commission ultimately conducted a comprehensive, often contentious, review of the consumer bankruptcy provisions of the Code. Despite the scope (not to mention length) of the Commission's 1997 Report (the “Report”),<sup>12</sup> the Commission decided not to recommend radical changes to the existing consumer bankruptcy laws. Four of the nine members of the Commission fundamentally disagreed with this decision, based on their view that consumer bankruptcy laws needed significant structural revisions. Specifically, these commissioners argued that higher income Chapter 7 debtors should be prevented from receiving a quick, i.e., Chapter 7, discharge unless they could prove that they did not have the ability to repay a certain portion of their debts over time.<sup>13</sup> Despite these minority views, and the extensive lobbying the Commission received from the consumer credit industry,<sup>14</sup> the Commission rejected the view that Chapter 7 should be “means tested”<sup>15</sup> or otherwise limited to debtors who prove they lacked the means to repay their debts.

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11. *Id.*

12. NAT'L BANKR. REVIEW COMM'N, 1 REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS (1997) [hereinafter REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION]. The Report was over 1,300 pages long and had over 791 pages of appendices.

13. See Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, in REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, Ch. 5, 36 (1997).

14. See Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 376 (noting the extensive benefits reaped by the credit industry as a result of its lobbying efforts); Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 9–10 (2002) (discussing industry's lobby efforts).

15. 11 U.S.C. § 707 (2000). Section 707(b) of the Code contains the means test, a long and complex formula used to determine whether a consumer debtor is eligible for Chapter 7 discharge. Generally speaking, consumer debtors with \$167 per month of disposable income are presumed to be ineligible for Chapter 7. Unless those debtors rebut that presumption, they must convert to Chapter 13 or 11, or have their cases dismissed. For a detailed description of the operation of the means test, see Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?* 13 AM. BANKR. INST. L. REV. 665 (2005).

The four dissenting members of the Commission wrote extensive reports expressing their disagreements with the Commission's consumer bankruptcy recommendations.<sup>16</sup> The dissenters urged Congress to implement the means test for bankruptcy relief because relief currently was "too easy to obtain," had "become a first resort rather than a last measure for people who cannot keep up with their bills," and because "the moral stigma once attached to bankruptcy has eroded."<sup>17</sup> Since bankruptcy filings had increased from 287,570 in 1980 to 1,350,118 when the Report was issued in 1997,<sup>18</sup> the consumer credit lobby embraced—and, perhaps, solicited—these dissenting views.<sup>19</sup> Having "lost" the battle to institute the means test for bankruptcy before the Commission, the consumer credit lobby then turned their sights on Congress.

### *B. Legislative Process*

Before the Commission's Report was even formally filed, the consumer credit lobby attacked the Commission's findings<sup>20</sup> and found supporters in the 105th Congress to introduce legislation that advanced the dissenting Commissioner's views. For example, a bipartisan House bill, which had 185 co-sponsors, substantially adopted the dissenting Commissioners' views.<sup>21</sup> The bill was designed to prevent debtors from receiving a Chapter 7 discharge unless they "passed" a formulaic test which proved that they did not have the means to repay a substantial portion of some of their debts.<sup>22</sup> Likewise, the day after the Commission issued its Report, the Senate introduced bipartisan consumer bankruptcy legislation that also included a means test, albeit a more liberal one than

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16. Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, in REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, Ch. 5, 3 (1997).

17. *Id.* at 2.

18. See American Bankruptcy Institute, *Annual Business and Non-Business Filings by Year* (1980–2006), available at <http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35631>.

19. See Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANK. L.J. 483, 496 (1997) (description by the Commission Reporter of the consumer credit industry lobbying efforts before the Commission); and Warren, *The Market for Data*, *supra* note 14, at 9–10.

20. See Rodney Ho, *Bankruptcy Panel's Ideas Anger Creditors*, WALL ST. J., Oct. 16, 1997, at A2.

21. Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. § 2 (1997).

22. *Id.* § 101(4). See generally Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1098 (2004) (tracking the progress of the proposed House and Senate bills which limited access to consumer bankruptcy and effectively preempted the findings of the Bankruptcy Commission).

the one contained in the House bill.<sup>23</sup> These early bipartisan bills, like those introduced in later sessions, all attempted to measure when a potential debtor should be deemed to have sufficient disposable income to repay some of his or her debts in the future.<sup>24</sup> In addition to including a Chapter 7 means test, various bills required Chapter 13 debtors to devote more of their income to debt repayment,<sup>25</sup> extended the length of time higher income debtors would have to repay their debts,<sup>26</sup> and increased the number of debts that would be non-dischargeable in Chapter 13.<sup>27</sup> The substance of the bills changed over time. The normative underpinning, that bankruptcy laws should discourage people from getting into debt and then attempting to discharge those debts in bankruptcy, did not.

When Congress first voted on the legislation, the bills passed by overwhelming margins in both the House and Senate.<sup>28</sup> Since the country was experiencing a period of strong economic growth, it was not terribly surprising that Congress would support the legislation. Yet, even in later sessions when economic growth slowed considerably, members in both the House and Senate—Democratic and Republican, liberal and conservative—still voted overwhelmingly in favor of the legislation.<sup>29</sup> As discussed in the next section, the reasons supporters gave for their support of the legislation are substantially similar to the reasons the dissenting Commissioners listed as problems with the Report's recommendations on consumer bankruptcy reform. Assuming at least some members of Congress genuinely believed those reasons, many in Congress appeared to

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23. Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 102 (1997). The Act was sponsored by a Democratic and Republican senator.

24. H.R. 2500, *supra* note 21, § 101(3); S. 1301, *supra* note 23, § 102.

25. See Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 102 (1998).

26. *Id.* § 410.

27. *Id.* §§ 141, 142, 145.

28. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 512–15 (2005) (tracing the progression of the bills during the multi-year process and noting that the first House and Senate bills passed by votes of 306–118, and 97–1, respectively).

29. *Id.* Although the bill garnered the support of a substantial number of Democrats and Republicans in Congress, virtually all bankruptcy and commercial law professors at all major U.S. law schools (including this author), all major non-partisan national bankruptcy organizations, and the national organization of bankruptcy judges argued that the bill was ill-conceived, poorly drafted, and appeared to benefit only the credit card lobby.

You are hard pressed to find a bankruptcy judge that supports this legislation. You are hard pressed to find a bankruptcy law professor, a bankruptcy expert of any kind, anywhere, any place in the U.S.A. that backs this bill. This bill was written for the lender. It is that simple.

147 CONG. REC. 13129, 13140 (2001) (statement of Sen. Wellstone). These groups had little influence during the legislative process, in sharp contrast to the role they played in debates over bankruptcy laws in the 1970s and 1980s. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 141 (2001).

support the legislation because they supported the philosophical underpinnings of the legislation, i.e., that people need to understand they have a moral obligation to do whatever it takes to repay their debts.<sup>30</sup>

### *1. Justifications for Legislation*

Throughout the time the bankruptcy legislation was pending before Congress, the bill's supporters argued that consumers were improperly using bankruptcy laws as a form of debt management and that too many people filed for bankruptcy as a first, not last, resort.<sup>31</sup> Members of Congress,<sup>32</sup> political organizations,<sup>33</sup> and industry witnesses who testified in support of the legislation<sup>34</sup> insisted that people who could afford to

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30. See 151 CONG. REC. S1820 (daily ed. Mar. 1, 2005) (statement of Sen. Sessions) ("When a person in America undertakes an obligation to pay someone, they ought pay them . . . We are drifting a bit far to suggest there is no real obligation to pay the debts we incur. If we get to that point, then we have eroded some very important fundamental moral principles about commerce in America."); G. Jeffrey MacDonald, *The Moral Burden of Bankruptcy*, CHRISTIAN SCIENCE MONITOR (Jul. 3, 2006), <http://www.csmonitor.com/2006/0703/p13s01-lire.html> (quoting Christian personal finance "guru" Mary Hunt who stated that "[bankruptcy is] absolutely legal, but it is not moral.").

31. See 151 CONG. REC. E737 (daily ed. Apr. 22, 2005) (statement of Rep. Tiahrt) ("[T]he United States cannot afford to continue down the path where high consumer debt is routinely directed toward bankruptcy as a first stop rather than a last resort."); 149 CONG. REC. H1991, H1998 (daily ed. Mar. 19, 2003) (statement of Rep. Davis) ("Rather than an action of last resort, [bankruptcy] had evolved into a convenient vehicle to discharge debts through irresponsible financial practices."); 147 CONG. REC. 2545, 2551 (2001) (statement of Rep. Boucher) ("Bankruptcy was never meant to be a financial planning tool, but it is increasingly becoming a first stop rather than a last resort . . ."); 146 CONG. REC. 22360, 22367 (2000) (statement of Rep. Bryant) ("In recent years, bankruptcy has truly become a first stop rather than a last resort."); 144 CONG. REC. 20650, 20662 (1998) (statement of Sen. Hatch) ("Bankruptcy has become a routine financial planning device used to unload inconvenient debts, rather than a last resort for people who truly need it.").

32. See 151 CONG. REC. S2199 (daily ed. Mar. 8, 2005) (statement of Sen. Frist) ("The bill before us establishes a means test based on a simple, fair principle: those who have the means should repay their debts."); 145 CONG. REC. 8509, 8580 (1999) (statement of Rep. DeLay) ("Mr. Chairman, the bankruptcy bill under consideration today is based on the premise that those debtors who can afford to repay their debt should do so, rather than have it forgiven. To accomplish this seemingly simple goal, an income-based means test is employed to determine if a debtor could do one of three things: have debt forgiven; reorganize and enter into a repayment plan; or refrain from filing for bankruptcy at all."); 144 CONG. REC. 21594, 21643 (1998) (statement of Sen. Grassley) ("The fact is that some people use bankruptcy as a convenient financial planning tool to skip out on debts they could repay.").

33. The "New Democrats" strongly supported the bankruptcy legislation. See Press Release, New Democrat Coalition, New Democrats Provide Key Support for Bankruptcy Reform (Mar. 1, 2001), available at <http://www.dlc.org/print.cfm?contentid=3111> (last visited Jan. 5, 2007). The movement consisted of federal, state, and local elected officials—including Democratic members of the House and Senate. See Democrat Leadership Council, *About the New Democrat Movement* (June 1, 1998), <http://www.dlc.org/print.cfm?contentid=894> (last visited Jan. 5, 2007).

34. See *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit; Hearing before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 50 (1997) (statement of Michael F. McEnaney, on behalf of National Consumer Bankruptcy Coalition)

repay their bills (the “can-pays”) should not be allowed to discharge their debts without first attempting to repay at least some of them. Supporters frequently referenced the skyrocketing filing rates during times of economic prosperity to prove that people were using the bankruptcy system opportunistically.<sup>35</sup>

Legislative and industry supporters of the legislation also argued that lax bankruptcy laws had raised the cost of credit for hardworking Americans who were having financial difficulties but chose *not* to file for bankruptcy. The bill’s supporters, citing data initially presented to the Commission, contended that the increased bankruptcy filing rates imposed a \$300–\$400 tax on each American family.<sup>36</sup> Supporters routinely stated, in testimony provided before Congress and in advertisements placed in major news outlets,<sup>37</sup> that the dramatic increase in bankruptcy filings forced creditors to increase the cost of credit for everyone—including poor or working-class people who were diligently trying to pay their debts.<sup>38</sup>

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(“[T]he consumer bankruptcy system this year will provide billions of dollars of relief to debtors without ever asking the question whether those debtors even need the relief.”). According to the McEneny Prepared Statement, the National Consumer Bankruptcy Coalition “is comprised of the American Bankers Association, America’s Community Bankers, American Financial Services Association, Consumer Bankers Association, Credit Union National Association, Independent Bankers Association of America, MasterCard International Incorporated, National Retail Federation and VISA U.S.A. Inc.” *Id.* at 51 n.1.

35. See H.R. REP. NO. 109-31, at 5 (2005) [hereinafter *House Report*] (“[T]he present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse.”); H.R. REP. NO. 107-3(1), at 5 (2001); H.R. REP. NO. 105-540, at 54–55 (1998); 144 CONG. REC. 24926, 25937 (1998) (statement of Rep. Goodlatte) (“The loopholes in our bankruptcy laws have led to a 400 percent increase in personal bankruptcy filings since 1980 at a cost of \$40 billion per year. . . . Under the current system, some irresponsible people filing for bankruptcy run up their credit card debt immediately prior to filing knowing that their debts will soon be wiped away.”).

36. See, e.g., Jones & Shepard, *supra* note 13, at 10 (1997) (citing Report of SMR Research Corp., *The Personal Bankruptcy Crisis, 1997*, at 22). At times, the tax was reported to be even higher than \$400. See 151 CONG. REC. S2308 (daily ed. Mar. 9, 2005) (statement of Sen. Grassley) (“It has become an economic problem where the average person in America is paying an additional \$550 for goods and services because somebody else did not pay their bills.”); 151 CONG. REC. H1993, H2058 (daily ed. Apr. 14, 2005) (statement of Rep. Chabot) (arguing in the same speech that personal bankruptcies impose a \$500 per family annual tax and a \$600 per family tax); 149 CONG. REC. H1991, H1996 (daily ed. Mar. 19, 2003) (statement of Rep. Hart) (“The average American family pays more than \$500 a year in increased prices as a result of unpaid debt. It is unfair to force responsible Americans to pay that premium.”).

37. As part of its public relations/lobbying efforts, the consumer credit industry placed advertisements in *Roll Call*, *Congress Daily*, and national newspapers. See Lisa Fickenscher, *Bankruptcies Down; Enthusiasm for Reform Wanes*, 188 AM. BANKER 1 (1999).

38. See Richard Jones, *We All End Up Paying for Unfair Bankruptcy Laws*, WASH. TIMES, Oct. 6, 1997, at A16; *Lax Bankruptcy Laws Make Everyone Pay*, USA TODAY, June 12, 1997, at 14A; Aaron Zitner, *Battle Brews Over Laws on Bankruptcy; Consumers, Lenders Await Report*, BOSTON GLOBE, Oct. 17, 1997, at A1.

The existing bankruptcy laws needed to be revised to stem the dramatic increase in bankruptcy filings, to prevent financially solvent people from opportunistically abusing bankruptcy laws, and to “repeal” the \$400 tax that these debtors inadvertently imposed on honest, hardworking citizens.<sup>39</sup>

However, even the legislation’s most ardent supporters recognized that certain people were undeniably “deserving” of a quick discharge of their debts in Chapter 7. These presumptively deserving debtors were people who became indebted for reasons beyond their control, specifically those with catastrophic medical expenses, those on active duty military service, and veterans who became disabled while performing military (or homeland defense) duties.<sup>40</sup> All other debtors (presumptively non-deserving debtors) generally should be forced to prove that they *need* a fresh start. The proof, supporters urged, could be established only by utilizing a formulaic analysis of their income and expenses, i.e., a means test.<sup>41</sup>

Using a formulaic test to determine eligibility was justified in part because some supporters recoiled at the view that a bankruptcy discharge was just another governmental benefit or bailout.<sup>42</sup> In effect, just as Congress had previously concluded that people who receive other types of public assistance—such as food stamps or Temporary Assistance for

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39. *House Report, supra* note 35, at 4 (asserting the existence of a “bankruptcy tax”); 151 CONG. REC. S2199 (daily ed. Mar. 8, 2005) (statement of Sen. Frist); Democratic Leadership Council, *Modernizing Bankruptcy Law* (Mar. 20, 1998), <http://www.dlc.org/print.cfm?contentid=2647> (last visited Jan. 5, 2007) (arguing that opportunistic bankruptcies were skyrocketing while “the ‘little guy’ pays more at the cash register—an estimated \$400 per family each year—for retail goods to offset bankruptcy related losses, and also, ironically, gets reduced access to credit from bankruptcy-wary lenders.”).

40. *See* 151 CONG. REC. E704 (daily ed. Apr. 19, 2005) (statement of Rep. Moore) (noting that S. 256 properly allows “bankruptcy filers to challenge the means test by demonstrating ‘special circumstances,’ such as a serious medical condition, that justify additional expenses or adjustments to their income.”). *See also* 11 U.S.C. § 707(b)(2)(B)(i), (b)(2)(D) (2000) (codification of protections for deserving debtors).

41. *See* 151 CONG. REC. H1993, H2053 (daily ed. Apr. 15, 2005) (statement of Rep. Goodlatte) (“The means test applies clear and well-defined standards to determine whether a debtor has the financial capability to pay his or her debts. The application of such objective standards will help ensure that the fresh start provisions of Chapter VII will be granted to those who need them, while debtors that can afford to repay some of their debts are steered toward filing chapter 13 bankruptcies.”).

42. *See* 149 CONG. REC. H1961 (daily ed. Mar. 19, 2003) (statement of Rep. Miller) (“The Bankruptcy Abuse Prevention and Consumer Protection of 2003 holds people accountable for their personal spending habits. If a person has debts and dissolves under Chapter 7, but have [sic] sufficient funds to pay off their debt, then clearly they should be required to pay it off, not to have their debt whisked painlessly away by just filing bankruptcy. In my opinion, the Federal Government should not be in the business of bailing people out of their debt.”). *See also* SKEEL, *supra* note 29 (noting that bankruptcy laws that allowed corporate reorganizations were implemented during the New Deal process of creating social safety nets).

Needy Families (TANF)—must prove that they “deserve” to receive those forms of relief, Congress determined that people who seek a discharge of their debts also must prove their eligibility.<sup>43</sup>

## 2. *Opposition to Legislation*

Opponents of the reform legislation repeatedly stressed that the legislation was unnecessary and was being considered only at the behest of the credit card industry.<sup>44</sup> The opponents decried the powerful special interest group’s influence and asserted that Congress was captured by the credit card lobby. Moreover, opponents relied on a massive amount of empirical data to bolster their contention that a means test was unnecessary because the vast majority of people who filed for bankruptcy were in financial distress and simply lacked the means to repay their debts.<sup>45</sup>

Opponents of the legislation also disputed that existing bankruptcy laws imposed costs on people who were struggling to pay their debts but did *not* file for bankruptcy.<sup>46</sup> They characterized the \$400 bankruptcy tax as a phantom tax, often stressing the lack of data to support the claim and

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43. Moreover, just as it was easy to garner wide, bipartisan, and public support for welfare reform legislation that prevented the undeserving welfare queen from milking the system, it was easy for legislators to support the bankruptcy legislation once they characterized it as yet another bloated government program that was being abused by people with means. See A. Mechele Dickerson, *America’s Uneasy Relationship With the Working Poor*, 51 HASTINGS L.J. 17, 29, 65–66 (1999); Democratic Leadership Council, *Modernizing Bankruptcy Law*, *supra* note 39 (“Like ‘affluence tests’ for federal benefits, which New Democrats typically support, a needs-based bankruptcy system is a way to ensure that the protection of the federal ‘safety net’ extends only so far as it is actually needed.”). See generally, Elizabeth Warren, *What is a Women’s Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN’S L.J. 19, 52–53 (2002) (arguing that women may have failed to vigorously oppose the pending legislation because they viewed bankruptcy as part of the larger debate about the need to decrease the expanding economic role of the government).

44. 151 CONG. REC. S1818 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin) (noting that the reason the bill is being considered is because “the credit card industry and big banks want this bill . . .”); 145 CONG. REC. 28677, 28693 (1999) (statement of Sen. Feingold) (noting that the consumer credit industry “has pushed and pushed and pushed for this bill . . .”).

45. While BAPCPA supporters argued that at least ten percent of the debtors were can-pays, opponents contended that the number was (and is) lower. 151 CONG. REC. S1823 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin) (citing research of nonpartisan American Bankruptcy Institute that indicated three percent of people could afford to repay some of their bills). See generally, Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 238–39 n.75 (2006) (discussing ten percent figure estimation). See also Marianne M. 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 (2005) (estimating the figure at 3.6 percent).

46. See Elizabeth Warren, *The Phantom \$400*, 13 J. BANKR. L. & PRAC. 77 (2004) (tracking the credit industry’s strategic promotion of the idea that the current bankruptcy laws were expensive for all of society).

citing empirical studies that proved that no such tax existed.<sup>47</sup> They also cited data that challenged the argument that this tax increased the cost of credit to non-filing consumers, specifically noting that credit card issuers did not lower interest rates or otherwise pass on cost savings to customers in the years when bankruptcy filings decreased.<sup>48</sup> Likewise, opponents relied on data that indicated that even as the number of bankruptcies rose, credit card earnings remained high (and, at times, were higher than those of commercial banks).<sup>49</sup>

### 3. *Legislative Disconnect*

The legislative debates were dominated by arguments over how best to design a formula that determines who is a can-pay debtor and whether—based on that formula—there are many, or just a few, can-pays.<sup>50</sup> While supporters claimed that a means test was needed because people who could afford to pay their debts were choosing to discharge them in bankruptcy, opponents cited empirical data to prove that the vast majority of people who filed for bankruptcy were in financial distress and lacked the means to repay any meaningful part of their debts.<sup>51</sup> Unfortunately, throughout the legislative process, the legislation's supporters and opponents failed to agree on certain normative principles and, because of that, largely talked past each other.<sup>52</sup>

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47. See 151 CONG. REC. H1993, H2050 (daily ed. Apr. 14, 2005) (statement of Rep. Delahunt) (“The figure of \$400 is a mythical figure. It is inaccurate.”); Jensen, *supra* note 28, at 489 n.19 (quoting president of research group that provided the \$400 tax figure who conceded that the figure given for the overall consumer debt in the country, from which the \$400 number was calculated, was a rough estimate); Warren, *supra* note 46 (attacking credibility of the existence of the \$400 tax); Warren, *The Market for Data*, *supra* note 19, at 13–20 (same).

48. Board of Governors of the Federal Reserve System, *The Profitability of Credit Card Operations of Depository Institutions 2* (June 2005), <http://www.federalreserve.gov/boarddocs/rptcongress/creditcard/2005/ccprofit.pdf>; See Robert Lawless, Testimony before the Senate Committee on the Judiciary (Dec. 6, 2006), [http://judiciary.senate.gov/testimony.cfm?id=2442&wit\\_id=5936](http://judiciary.senate.gov/testimony.cfm?id=2442&wit_id=5936).

49. Warren, *The Market for Data*, *supra* note 14, at 12. Even though the number of bankruptcy filings has dropped significantly since BAPCPA's effective date, the credit card industry has not lowered interest rates on credit cards, the industry has increased credit card fees, and credit card defaults are at the same level they were in 2004 (though the filing rate is less than half the 2004 filing rate). See Robert Lawless, Testimony before the Senate Committee on the Judiciary, *supra* note 48; Posting of Elizabeth Warren to Credit Slips, *Bankruptcy Reform and Credit Card Losses*, [http://www.creditslips.org/creditslips/2006/12/bankruptcy\\_refo.html](http://www.creditslips.org/creditslips/2006/12/bankruptcy_refo.html) (Dec. 11, 2006, 9:03 p.m.).

50. 151 CONG. REC. S2459, 2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (“Most of our debate on this bill has focused around the means test.”).

51. Jensen, *supra* note 28, at 498–500 (describing witnesses and testimony presented at House bankruptcy hearings).

52. See 151 CONG. REC. S1819 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin) (“Supporters of this bill say you are either with them or with the bad guys, the chiselers, the cheaters, the grafters, the drifters, the people they say are trying to game the system of bankruptcy . . .”); Elizabeth Warren,

For example, the opponents relied on data that proved that the bankruptcy filing rate increased because of increased financial distress.<sup>53</sup> However, this data could not disprove the supporters' claim that relaxed bankruptcy laws facilitated the financial distress by encouraging people to become overindebted. Perhaps more importantly, the data could not prove whether debtors lacked the ability to alleviate that distress by taking a second or third job, shopping at secondhand or discount stores, moving in with friends/family, eliminating all recreational spending (like birthday or holiday gifts), pawning their electronic equipment, etc. Similarly, opponents argued that most debtors filed for bankruptcy because of expenses they incurred after they lost a job or got divorced.<sup>54</sup> Even assuming that this is true, the data was not convincing to legislators who did not make distinctions between the type of relief that should be given to presumptively deserving debtors—those who filed for medical reasons or other catastrophic factors—and those who filed because they chose to overspend—even if the “choice” was made after the debtor got divorced or lost his or her job.<sup>55</sup>

Supporters of the legislation frequently cited examples of profligate debtors who purchased luxurious items yet appeared to have no intention of repaying their creditors or who simply refused to curb their extravagant lifestyles and sell their expensive homes, boats, cars, etc.<sup>56</sup> However,

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*The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 201 (1999) (characterizing the debate as “little more than a caricature of a discussion about what was, and what was not, right about the existing consumer bankruptcy system. The complex and textured decisions needed to form the core of the bankruptcy system gave way to meaningless phrases and name-calling.”).

53. See generally Sullivan, Warren & Westbrook, *supra* note 45, at 233 (discussing data that refute the suggestion that the increase was fueled by “less-indebted people filing for bankruptcy”).

54. 151 CONG. REC. H1979 (daily ed. Apr. 14, 2005) (statement of Rep. Scott) (“While some who file bankruptcy have been financially irresponsible, the overwhelming majority of those who file do so as a result of divorce, major illness, or job loss. Half of those who go into bankruptcy do so because of illness, and most of them had health insurance but still could not pay their bills.”).

55. *Id.* (“If the purpose of the legislation is to try to deal with those who abuse credit, we ought to be able to distinguish them from the hard-working Americans who unfortunately become ill, those who have an unforeseen loss of job, or whose spouses desert them after a business failure.”). I realize that the concept of choice or free will is controversial in this context. Most would understand why a recently unemployed or divorced debtor, or one who had an unexpected short-term illness, would use a credit card to make ends meet. It is unclear, however, whether such a debtor wanted to become overindebted or, instead, that the debtor chose overindebtedness over an unacceptable alternative like homelessness, starvation, prostituting themselves, selling internal organs, and the like. See generally YVES R. SIMON, FREEDOM OF CHOICE 17–21 (Peter Wolff ed., 1969).

56. 151 CONG. REC. S1818 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin) (citing examples of Bowie Kuhn and Burt Reynolds as high-income debtors who gamed the system). See Lucile P. Beckwith, President/CEO, Palmetto Trust Federal Credit Union, Testimony Before the House Judiciary Comm., Subcomm. On Commercial and Administrative Law (Mar. 4, 2003), 2003 WL 876584 (F.D.C.H.); John J. Gleason, Vice President of Credit, The Bon-Ton Department Stores (on

supporters failed to clearly explain whether any distinction should be made between debtors who became overindebted because of abusive (i.e., extravagant, illegal, or fraudulent) conduct and those who chose to overspend because they became unemployed, had higher living expenses after they got divorced, or found themselves saddled with a former (or deceased) spouse's debts.<sup>57</sup> Finally, supporters of the legislation never discussed the level of personal sacrifice overindebted people should make to get out of debt—for instance, move in with family, switch to unlicensed and cheaper day care arrangements, remove children from parochial schools, etc.—or how much human capital financially strapped people should be expected to devote to digging themselves out of debt.

#### 4. Areas of Agreement

Despite bitter disputes, there was remarkable agreement among supporters and opponents of the bankruptcy legislation over key factual matters. Significantly, they agreed that at least some debtors tried to game the system or otherwise abused bankruptcy laws by intentionally incurring debts which they then refused to attempt to repay even though they had the means to do so.<sup>58</sup> They agreed that these clearly undeserving debtors should be denied relief in Chapter 7. They further agreed that there were some problems with the consumer bankruptcy system specifically, and with consumer credit decisions generally.<sup>59</sup> In addition, no one disputed

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behalf of the National Retail Federation), Testimony Before the H. Judiciary Comm. Subcomm. of Commercial and Admin. Law (Mar. 10, 1998), 1998 WL 879900 (F.D.C.H.).

57. See *House Report*, *supra* note 35, at 597 (additional dissenting views) (“If the purpose of this legislation is to try to deal with spendthrifts and those who are abusers of credit, we ought to be able to distinguish them from hard-working Americans who unfortunately became ill, those who have had an unforeseen change in their employment, and those whose spouses experienced business failures. Unfortunately, this legislation does not make those distinctions.”); 151 CONG. REC. H1974, H1976 (daily ed. Apr. 14, 2005) (listing proposed, and rejected, amendment by Rep. Scott that would exempt debtors who have business losses incurred by a spouse who has died or deserted the debtor from the bill’s means test provisions).

58. For a statement made by a supporter of the legislation, see 147 CONG. REC. 2545, 2627 (2001) (statement of Rep. Goodlatte) (“Under the current system, some irresponsible people filing for bankruptcy run up their credit card debt immediately prior to filing, knowing that their debts will soon be wiped away.”). For statements made by an opponent of the legislation, see 151 CONG. REC. S1818 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin) (citing examples of Bowie Kuhn and Burt Reynolds as high income debtors who gamed the system); 146 CONG. REC. 26447, 26492 (2000) (statement of Sen. Kerry) (“I am among those who believe that, too often, bankruptcy is used as an economic tool to avoid responsibility for unsound decisions and reckless spending.”).

59. For statements by supporters of the bill, see 150 CONG. REC. H148, H149 (daily ed. Jan. 28, 2004) (statement of Rep. Sensenbrenner) (“The Justice Department reports that debtors 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 to discharge their massive liabilities.”); 145 CONG. REC.

that bankruptcy filings increased (by more than sixty percent) from 1987 to 1997 and that a significant number of consumers had taken on too much debt.<sup>60</sup>

Opponents and supporters also agreed that opportunistic debtor conduct *alone* could not explain all consumer bankruptcy filings. Thus, all agreed that medical debts or other catastrophes force some people into bankruptcy and that those people deserve to discharge their debts.<sup>61</sup> Opponents and supporters likewise agreed that most consumers lacked the ability to understand the disclosures they received from their credit card companies and that this inability may account for some unwise credit card decisions.<sup>62</sup> Indeed, although the legislative process was protracted and controversial, the large areas of agreement may explain why the legislation always enjoyed bipartisan support<sup>63</sup> and why, from 1998<sup>64</sup> to 2005 (the

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28957, 28990 (1999) (statement of Sen. Kyl) (“Bankruptcy relief should be available to people who work hard and play by rules, yet fall unexpectedly upon hard times. Perpetrators of fraud should not be allowed to find safe haven in the bankruptcy code.”). For a statement made by an opponent of the bill, see 149 CONG. REC. H1991, H1996 (daily ed. Mar. 19, 2003) (statement of Rep. Watt) (“I was among the people who was the first to concede that there was a problem in the bankruptcy system.”).

60. For a comment made by one of the bill’s opponents, see 144 CONG. REC. 8445, 8448 (1998) (statement of Rep. Jackson-Lee) (“[A]bout 1.4 million families will file for consumer bankruptcy, a rise of about 400 percent since 1980. Virtually all independent academic study and all government studies of the increase in bankruptcy demonstrate that the rise in bankruptcy filings follows equally sharp rises in the amount of consumer debt per household.”). For a similar statement made by one of the bill’s strongest supporters, see 151 CONG. REC. S1834, S1842 (daily ed. Mar. 1, 2005) (statement of Sen. Hatch) (“Bankruptcies doubled in the 1980s. They doubled again from 1990 to 2003. In 2004 alone, there were 1.6 million more bankruptcies than during the entire Great Depression . . . . Certainly, one of the critical reasons behind the rising tide of filings under the Bankruptcy Code, as years of study document, are the actions of those who flagrantly abuse our generous bankruptcy laws.”).

61. For comments made by one of the bill’s strongest supporters, see 144 CONG. REC. 19500, 19501 (1998) (statement of Sen. Grassley) (“Let me start out by saying there is some justification for bankruptcy. People hurt by natural disasters, catastrophic illness, divorce, etc., are entitled to a new start.”). For similar remarks made by an opponent of the bill, see 147 CONG. REC. 3737, 3758 (2001) (statement of Sen. Kerry) (“At the same time, we must not forget that a fresh start in bankruptcy serves a valuable purpose for many individuals who truly need its protections. When an individual gets into financial trouble because, for example, she has catastrophic, unforeseen medical expenses, it is better for her, for her creditors and even for society as a whole if she is given the opportunity to have her debts discharged and is given a fresh start.”).

62. For a comment made by a supporter, see 151 CONG. REC. S1726, 1781 (daily ed. Feb. 28, 2005) (statement of Sen. Leahy) (“Currently, credit card statements fail to include all of the information necessary to allow individuals to make fully informed financial decisions. Additional disclosure is needed to ensure that individuals completely understand the implications of their credit card use.”). For a comment made by an opponent, see 146 CONG. REC. S11626 (daily ed. Dec. 6, 2000) (statement of Sen. Durbin) (“The number of people who end up overextending on credit cards and finding they cannot meet their obligations include quite a few who never understood the terms and conditions of their credit card arrangement.”).

63. See *House Report*, *supra* note 35, at 6. See generally Jacoby, *supra* note 22, at 1098–1106 (discussing bills before the 105th through 107th Congresses). At one point, members of the New Democrat Coalition co-sponsored the legislation. Press Release, New Democrat Coalition, New

year BAPCPA finally was enacted), it almost passed one or both chambers each year by veto-proof margins.<sup>65</sup>

### III. PUBLIC CHOICE THEORY

Given the consumer credit industry's influence during the bankruptcy reform legislative process, it is understandable that many view the BAPCPA story as a classic example of vote-buying by the consumer credit industry. Yet, if this is true, one is left to wonder why it took almost a decade for the legislation to pass. Further, if BAPCPA was bought and paid for by the credit card industry, then one reasonably could assume that the bill would be narrowly tailored to protect that industry's financial interests. As the next Part explains in more detail, telling the BAPCPA story as one that involves multiple special interest groups and their intergroup conflicts provides a fuller explanation of the legislative process and also explains why the credit card industry might not have received the bill some argue it "bought."

#### A. *Public Choice Theory Generally*

The BAPCPA story of vote-buying by the consumer credit lobby is told from the perspective of public choice theory. Public choice theory generally posits that political actors will behave in a self-interested fashion

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Democrats Provide Key Support for Bankruptcy Reform (Mar. 1, 2003), *available at* <http://www.dlc.org/print.cfm?contentid=3111> (last visited Jan. 5, 2007).

64. The Senate passed the Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998), which included means testing, by a vote of 97–1. 144 CONG. REC. 21594, 21623 (1998). The only senator who voted against the bill was Senator Paul Wellstone. The House passed the Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998) by a vote of 306–118. 144 CONG. REC. 11918, 11960 (1998). Many view the Bankruptcy Reform Act of 1998 as the foundation for BAPCPA. *See* Jensen, *supra* note 28, at 496.

65. Both the Senate and House passed legislation in 1998, 1999, 2001, and 2005. The House passed legislation by veto-proof margins in 2003 and 2004. For example, the Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. (2000) and the Bankruptcy Reform Act of 1999, S. 625, 106th Cong. (1999) produced a conference report that became H.R. 2415. Both the House (by a voice vote), 146 CONG. REC. H9840 (2000), and the Senate (by a vote of 70–28), 146 CONG. REC. S11730 (2000), passed this bill, but then-President Clinton pocket vetoed the legislation citing concerns of the omission of a homestead cap and the abortion clinic language. Similarly, the House passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001), by a vote of 306 (which included all Republicans) to 108 (with 93 Democrats voting in favor of the bill). 147 CONG. REC. H600–01 (2001). The Senate passed the Bankruptcy Reform Act of 2001, S. 220, 107th Cong. (2001) by an 82–16 vote (with all Republicans except 1, and 35 Democrats supporting the bill). 147 CONG. REC. S7742 (2001). A conference report was prepared, but it ultimately was rejected by the House because of language relating to a provision involving the discharge of abortion protest debts.

and that their decisions will be influenced by small, organized, single-issue special interest groups.<sup>66</sup> Specifically, politicians are said to sell their votes to special interest groups in return for votes, campaign contributions, promises for future favors, or illegal bribes.<sup>67</sup> This theory predicts that rational, self-interested politicians will listen to constituents because they need their votes and to wealthy lobbying groups because they need their campaign contributions. Public choice theory has most often been used to explain political decisions: that are narrow, technical and do not have high public visibility; where the cost to transfer wealth to the interest group is widely disbursed among a larger group; where the politician does not believe that his constituency will care about the law in question; and where the law is consistent with the legislator's own ideology.<sup>68</sup>

The research of some social scientists and legal scholars (especially their empirical research) refutes many of the early presumptions underlying public choice theory. These scholars dispute that politicians routinely "sell" their votes and that a single interest group can influence a legislative decision.<sup>69</sup> Although these critics concede that interest groups play a central role in legislative decisionmaking, they suggest that politicians are motivated by three main factors: their desire to be reelected, their personal beliefs, and the short-term influence of special interest groups.<sup>70</sup> Thus, even where special interest groups contribute significantly to legislators' campaigns, critics of public choice theory posit that the outcome of the legislation will be influenced by the legislators' desire not to alienate constituents who may oppose the bill.<sup>71</sup> Because of these potentially conflicting constituent group interests, public choice critics argue that it is simply incorrect to suggest that one interest group is capable of controlling legislator conduct since legislators (as agents) have multiple interest groups (their principals) to consider when deciding whether to support legislation.<sup>72</sup>

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66. Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 86 (1990) (tracing the history of public choice theory). See also Warren, *supra* note 43, at 44 (arguing that the consumer credit lobby was effective because it spent "more money on fewer issues" than other organized groups).

67. See Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 879 (1987) (citing William A. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975)).

68. Hovenkamp, *supra* note 66, at 88.

69. Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990).

70. See *id.*

71. Farber & Frickey, *supra* note 67, at 889-90; Hovenkamp, *supra* note 66, at 89.

72. See generally Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 144-45 (1989).

### B. BAPCPA and Public Choice Theory

The popular media,<sup>73</sup> academic commentators,<sup>74</sup> current and former bankruptcy judges,<sup>75</sup> administrators in the bankruptcy system,<sup>76</sup> and lawyers<sup>77</sup> consistently painted the bankruptcy bills in narrow public choice terms that pitted the powerful credit card industry against poor, largely defenseless debtors. In addition to direct campaign contributions and contributions to political action committees,<sup>78</sup> the industry was said to influence legislators indirectly through an orchestrated public relations

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73. See Jacoby, *supra* note 22, at 1120–25 (chronicling news reports of the credit industry's influence); Donald L. Bartlett & James B. Steele, *Soaked by Congress*, TIME, May 15, 2000, at 64.

74. See Jean Braucher, *Consumer Bankruptcy As Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1076–77 (2004) (remarking that the reform lobbied for by the credit card industry would likely make it unaffordable for debtors “who are the worst off”); Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 224 (2004) (commenting that legislators may be “more receptive to the views of larger monetary contributors” than to the views expressed by academics, bankruptcy judges, or other bankruptcy experts); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States*, 18 BANKR. DEV. J. 1, 45 (2001) (noting that the bill was motivated by “huge campaign contributions to key congressmen by the consumer credit industry and intensive lobbying efforts by very influential lobbyists”).

75. William T. Bodoh & Lawrence P. Dempsey, *Bankruptcy Reform: An Orderly Development of Public Policy?*, 49 CLEV. ST. L. REV. 191, 203 (2001) (noting the significant financial contributions made by the credit industry to those members of Congress with influence over bankruptcy reform); Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., Sept. 2005, at 1, 1 (“[T]he coalition of consumer lenders driving this legislation won the public relations war for bankruptcy reform.”). The judicial criticisms of the bill have perhaps grown even louder since BAPCPA's enactment. For instance, in *In re Sosa*, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005), the court stated that Congress

did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda . . . to make more money off the backs of the consumers in this country. It is not surprising, therefore, that the Act has been highly criticized across the country. In this writer's opinion, to call the Act a “consumer protection” Act is the grossest of misnomers.

76. Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509, 510 (2003) (“The half-decade of heavy lobbying for reform was about to pay off.”).

77. Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 43 (1998) (stating that the bankruptcy reform story is one “of money, power, and politics”); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 367–68 (2003) (“[B]ankruptcy reform has been driven by a myopic focus on the banking industry's story of the state of consumer bankruptcies and the millions of dollars that this same industry poured into politicians' coffers.”).

78. For discussions of the campaign contributions the consumer credit lobby made during the multi-year legislative process, see generally Peter C. Alexander, “Herstory” Repeats: *The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L. REV. 571, 581 n.39 (2005); Edward J. Janger, *The Locus of Lawmaking: Uniform State Law, Federal Law, and Bankruptcy Reform*, 74 AM. BANKR. L. J. 97 (2000); Tabb, *supra* note 74, at 45–46.

campaign.<sup>79</sup> Using public choice theory to tell the BAPCPA story is quite consistent with the ways in which the theory has been used to describe other narrow or technical laws.<sup>80</sup> And, at least until the BAPCPA legislative process, bankruptcy laws did not have high public visibility, and most people probably never thought (or really cared) about bankruptcy laws. Perhaps the main reason, though, that many have critiqued the bankruptcy legislative process using public choice theory is because the process seemed so one-sided given the lack of organized opposition from the people most harmed by the legislation, i.e., “future” debtors.<sup>81</sup>

There are a number of reasons why future debtors did not organize to aggressively lobby against the bill. Perhaps the largest impediment to organizing future debtors is that they are unidentifiable. Although past and present debtors can be identified by public court filings, there simply is no way to predict which consumer in financial distress will choose to file for bankruptcy and which will try to find another way to handle his financial situation.<sup>82</sup> Further, organizing potential debtors is challenging because overindebted consumers will discount the likelihood that they might need to file for bankruptcy and would benefit from organizing to oppose the

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79. Warren, *supra* note 43, at 45 (discussing consumer credit industry’s lobbying efforts); *Roundtable Discussion, Bankruptcy Reform: Then and Now*, 12 AM. BANKR. INST. L. REV. 299, 325 (2004) [hereinafter *Roundtable Discussion*] (comments of Richard Levin, one of the principal authors of the 1978 Bankruptcy Code and former counsel to the Subcommittee of the House Judiciary Committee from 1975–1978, disputing that industry bought votes and suggesting that industry bought “sound bites”).

80. See, e.g., Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 142–43 (1998) (noting that when rules become technical and are developed over multiple rounds, the meaningful participation of generally interested parties is effectively barred); Linda Sugin, *Tax Expenditure Analysis and Constitutional Decisions*, 50 HASTINGS L.J. 407, 443–44 (1999) (noting that tax lobbyists capitalize on the reality that legislators are unable to learn the complex details of the tax code). Examples in the Bankruptcy Code include the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-9, § 1102, 119 Stat. 23, 189–90 (2005) (codified at 11 U.S.C. § 351) (describing procedure to dispose of patient records in health care bankruptcy); 11 U.S.C. §§ 781–784 (2000) (describing procedures in clearing bank liquidations).

81. *Roundtable Discussion*, *supra* note 79, at 312 (comment by USA Today reporter Christine Dugas, that “the bipartisan nature of the support, it seems to me, has more to do with the fact that the financial services industry has contributed so much to members, I don’t think debtors have anybody on their side making contributions to Congress”).

82. See *Examining the Increase of Personal Bankruptcies and the Crisis in Consumer Credit: Hearing before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 65 (1998) (statement of Michael F. McEneny, on behalf of National Consumer Bankruptcy Coalition) (stating that “many, many people who go bankrupt look just like those who never default . . .”). See generally RONALD J. MANN, CHARGING AHEAD 200 (2006) (discussing whether borrowers or lenders are better situated to avoid financial distress and bankruptcy).

bankruptcy legislation.<sup>83</sup> Moreover, it is difficult to organize future debtors because, unlike the consumer credit industry, their connection to bankruptcy and the reasons they filed for bankruptcy (reckless spending, military deployment, divorce, medical expenses, etc.) are diverse. Organizing the past, present, and future debtors of America also was not likely because of the stigma or shame associated with filing (or needing to file) for bankruptcy.<sup>84</sup> Finally, as a practical matter, organizing people who are overindebted is virtually impossible because they do not have enough money to fund a successful lobbying effort.

Even if there had been organized opposition from past, current, or future debtors, given the modern realities of the legislative process, the consumer credit industry still would have played a significant role in the legislative strategy involving bankruptcy reform. Stated more bluntly, that the bankruptcy bills initially were drafted (in part, if not wholly) by lobbyists may be unfortunate, but it is not unusual. Most businesses and industries directly influence the modern legislative process. They also exert less transparent forms of political influence by providing employees to testify before Congress, by employing former elected or appointed officials (or legislative staffers) once they leave office, and by providing corporate philanthropy.<sup>85</sup> Indeed, it is commonly understood that private industry lobbyists have an active role in *all* substantive legislative areas, except perhaps those involving criminal laws.<sup>86</sup> The significant role

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83. See Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 269 (1997), stating:

Just as many consumers may systematically underestimate the extent of their current and future credit card borrowing, it should be expected that many consumers may systematically underestimate (at the time they borrow) the probability with which they will eventually fall into bankruptcy. Many or most consumers will underestimate the likelihood that the technical rules of bankruptcy will apply to them, and hence they will underreact to changes in the bankruptcy law.

See also Charles J. Tabb, *Of Contractarians and Bankruptcy Reform: A Skeptical View*, 12 AM. BANKR. INST. L. REV. 259, 264 (2004) (noting that “[i]ndividual debtors are systematically biased to underestimate the chance that they will become insolvent”).

84. 151 CONG. REC. S2421 (daily ed. Mar. 10, 2005) (statement of Sen. Durbin) (“People I have known who have gone through bankruptcy are not proudly announcing to their friends: Well, I had a great day in bankruptcy court. These are people who are a little embarrassed, a little ashamed of what they had to go through.”); Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 485–87 & nn.21–27 (2006).

85. See Scott H. Ainsworth, *The Role of Legislators in the Determination of Interest Group Influence*, 22 LEGIS. STUD. Q. 517, 521 (1997) (describing how lobbyists form long-term relationships with legislatures which enable the lobbyists to influence legislative strategy on many levels); Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495 (2005) (discussing FedEx’s participation in the political process).

86. See Jensen, *supra* note 28, at 499 & n.84 (discussing reports that an attorney hired by a lobby for secured and unsecured creditors initially drafted legislation that ultimately served as the framework

lobbyists played during the multi-year process to enact the bankruptcy legislation may have been unusual because of the limited input from past, current, or future debtors<sup>87</sup> and because some members of Congress appeared to take directions from the credit card lobby.<sup>88</sup> Yet, legislative staffers<sup>89</sup> and commentators on the legislative process alike agree that lobbyists have a strong influence on the text of bills introduced in Congress and that having lobbyists draft legislation is “a normal part of the drafting process.”<sup>90</sup>

#### IV. BAPCPA AND MULTIPLE CONFLICTING INTERESTS

During the bankruptcy legislation’s arduous multi-year march through Congress, critics of the legislation raised concerns about the effect that it would have on other politically influential (i.e., special interest) groups, notably women, retirees, and members of the armed forces.<sup>91</sup> As discussed in the next section, although the first bankruptcy reform bills appear to have pitted the organized consumer credit lobby against unorganized consumers, concerns about the potential harm the bills would have on other interest groups forced congressional supporters of the bankruptcy bills to balance their desire to please the consumer credit industry against their desire not to alienate constituents who likely would be harmed by a completely pro-consumer-credit-industry bill. In the process, Congress amended earlier versions of the bankruptcy legislation in ways that ultimately harmed the consumer credit industry’s financial interests.<sup>92</sup>

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for bills introduced in Congress, including BAPCPA); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 591 (2002) (reporting comments by legislative staffers of the Senate Judiciary Committee that suggested that the House bill was “negotiated and drafted by lobbyists and introduced with only ‘minor changes’”).

87. See Nourse & Schacter, *supra* note 86, at 613 (“The bankruptcy bill is a poster child for what should not happen in Congress. Maybe when there are two opposing powerful [interest groups], you get a wash, but in the bankruptcy bill, there is a real imbalance [in money and firepower].”).

88. *Id.* (comment by legislative staffer of Senate Judiciary Committee that one member of Congress consulted with credit card lobby before making any decisions). See also H.R. REP. NO. 109-31, at 386 (statement of Rep. Nadler) (“Yet here in Congress, the demands of the special interests who have a stake in some provision in this bill are generally viewed as a great idea that requires no further consideration.”).

89. See Nourse & Schacter, *supra* note 86, at 583, 587 (noting uniform responses of legislative staffers indicating that lobbyists draft the text of bills in the Senate Judiciary Committee).

90. *Id.* at 610 (indicating belief of legislative staffers that lobbyists have expertise and can provide valuable information and practical experience concerning proposed legislation). See also Fisch, *supra* note 85, at 1508.

91. See, e.g., H.R. REP. NO. 107-3, at 180–98 (2001) (statement of Prof. Karen Gross, New York Law School).

92. For example, from 1997 to 2005, the means test itself was progressively weakened. See Ronald J. Mann, *supra* note 14, at 383 (Table One).

Moreover, anecdotal evidence suggests that BAPCPA—as enacted—is not the bill the consumer credit industry lobbied for so strenuously for almost a decade.<sup>93</sup>

#### A. Women

Early in the legislative process, concerns were raised about the effect the legislation might have on women generally and ex-spouses specifically.<sup>94</sup> Opponents of the legislation correctly surmised that the legislation's supporters would be hesitant to support legislation that appeared to harm women or that helped deadbeat dads avoid paying their obligations to their former spouses or children.<sup>95</sup> Of course, both men *and* women receive alimony, have custody of minor children, and can be the victims of domestic violence. The legislation's opponents, however, almost always used gendered language when discussing the potentially harsh consequences the bill would have on support recipients and victims of domestic violence. In response, supporters went to great lengths to argue that the pending legislation helped women and children and they routinely sought to discredit opponents' contentions that the bill harmed women.<sup>96</sup>

Critics also charged that, even though most family support obligations already were nondischargeable and received priority payment,<sup>97</sup> a law

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93. *Id.* at 382–83 (relating discussions with executives at credit card issuers).

94. See, e.g., Elizabeth Warren, *A Quiet Attack on Women*, AM. BANKR. INST. J., June 2002, at 6 (“Regardless of one’s views of the amendment, the bill itself is unconscionable. If it becomes law, the economic effects on more than 1.2 million women each year will be devastating.”); Elizabeth Warren, Editorial, *Bankrupt? Pay Your Child Support First*, N.Y. TIMES, Apr. 27, 1998, at A15.

95. See 151 CONG. REC. S1820, S1856 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley) (arguing that organizations charged with tracking down “deadbeat dads” supported BAPCPA).

96. Compare 146 CONG. REC. 26447, 26490 (2000) (statement of Sen. Dodd) (“The impact that this legislation would have on single-parent households is particularly disturbing to me. . . . [T]his change will inevitably lead to conflicts between commercial creditors and single parents who are owed support and alimony payments.”), and 147 CONG. REC. 2749, 2756 (2001) (statement of Sen. Kennedy) (“We all know what happens when women and children are forced to compete for these scarce resources with these sophisticated lenders—they lose!”), with 151 CONG. REC. S2459, 2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (noting how the bill helps women), 151 CONG. REC. S2462, S2463 (daily ed. Mar. 10, 2005) (statement of Sen. Biden) (indicating that the bill “puts women and children first” and suggesting that opponents who contend the bill harms women and children “are fabricating wild claims”), and 147 CONG. REC. 3456, 3462 (2001) (statement of Sen. Sessions) (explaining how the bill “place[d] women and children at the highest possible level of protection”).

97. 150 CONG. REC. H148, 154 (daily ed. Jan. 28, 2004) (statement of Rep. Watt) (“Let me just correct a couple of things that have been put out here that seem to me to need correction. First of all, child support and alimony are already nondischargeable and all of the women’s and children’s advocacy groups oppose this bill. So do not be misled by this claim that somehow or another this bill is going to do something to help women’s and children’s advocacy groups with child support.”).

making it harder for debtors to get a quick Chapter 7 discharge would harm women. The harm, opponents maintained, was that women would be forced to compete with large financial creditors to collect payments from debtors who (1) failed the means test and (2) remained saddled with debts that would have been discharged under the pre-BAPCPA Code.<sup>98</sup> Because women would lose in a head-to-head competition with credit card companies, making it harder for men to discharge other debts would result in them having fewer funds post discharge to make child or spousal support payments.<sup>99</sup> Likewise, opponents argued that forcing more debtors into Chapter 13 repayment plans, making them devote more of their income to debt repayment, and forcing more debtors into five (rather than three) year plans would harm women who had nondischargeable, priority support claims because debtors would have fewer funds available to make support payments post-discharge.<sup>100</sup>

The legislation's opponents succeeded in forcing its supporters to accept amendments that protected women even though these changes clearly did not benefit the consumer credit industry. For example, the bankruptcy legislation was amended in 2001 to exclude child support payments debtors received when calculating the funds debtors were required to devote to Chapter 13 plan payments.<sup>101</sup> Decreasing a debtor's disposable income necessarily would harm unsecured creditors who had dischargeable claims (like credit card issuers) because debtors would repay a smaller percentage of their debts in a Chapter 13 plan. Likewise, both sponsors and supporters of the legislation offered amendments that gave spousal and child support debts the highest priority payment in Chapter 7 and otherwise enhanced custodial parents' ability to receive child support from debtors.<sup>102</sup> An unrelated, though still largely gendered,

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98. See Tabb, *supra* note 78, at 38 (noting that the proposed bill expanded the group of creditors who may pursue payments post-bankruptcy, thus forcing mothers collecting support to compete with the credit industry over the resources of bankrupt "deadbeat dads").

99. 151 CONG. REC. H1974, 1982-83 (daily ed. Apr. 14, 2005) (letter from National Women's Law Center) (arguing that the proposed bill increases competition between mothers owed child support and credit issuers for the scarce resources of bankrupt men); *id.* at 1983 (letter from Leadership Conference on Civil Rights) (asserting that the proposed bill would divert support payments away from mothers to credit card issuers); 147 CONG. REC. 2749, 2756 (2001) (statement of Sen. Kennedy).

100. 151 CONG. REC. S2216, 2225 (daily ed. Mar. 8, 2005) (statement of Sen. Dodd).

101. Bankruptcy Reform Act of 2001, S. 220, 107th Cong. § 218(b) (2001). BAPCPA codified this exclusion at 11 U.S.C. § 1325(b)(2)(A). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(h), 119 Stat. 23, 33-34 (2005).

102. See, e.g., 144 CONG. REC. H11852, 11915 (statement of Rep. Boucher). In addition to making domestic support obligations the highest priority debt, creditors (either ex-spouses or the government) can continue to garnish a debtor's wages for support payments. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 214 (codified at 11 U.S.C. § 362(b)(2)(c)).

provision in BAPCPA allows debtors who incurred expenses to protect themselves against an abusive partner to include those expenses when performing the means test, even if those additional expenses caused them to have living expenses that exceeded the amounts specified in the means test.<sup>103</sup>

### *B. Other Interest Groups*

Congress considered the interests of other politically influential groups while the bankruptcy legislation was pending. For example, both supporters and opponents of the legislation stressed that their position best protected seniors.<sup>104</sup> To decrease the harm the proposed legislation would have on seniors, amendments were offered to exclude social security payments from the means test's definition of income.<sup>105</sup> Similarly, the legislation was revised to allow debtors to deduct their reasonable expenses for their continued care and support of elderly or disabled members of their household.<sup>106</sup> The legislation also revised existing law and increased protections for retirement income by letting debtors exempt all types of tax-favored qualified pension plan assets from their estates, protect IRAs valued at one million dollars, and keep retirement funds that were in the process of being rolled over into a new qualified plan.<sup>107</sup> In

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Further, debtors cannot confirm a Chapter 13 plan unless they have paid all domestic support debts that are in arrears, BAPCPA § 213(10) (codified at 11 U.S.C. § 1325(a)(8)), nor can they receive a Chapter 13 discharge unless all support payments have been paid in full, BAPCPA § 213(11) (codified at 11 U.S.C. § 1328(a)).

103. BAPCPA § 102(a) (codified at 11 U.S.C. § 707(b)(2)(A)(ii)(I)).

104. *Compare, e.g.*, 146 CONG. REC. 11364, 11365–66 (2000) (statement of Sen. Biden) (“My mother living on Social Security pays more at the department store to purchase something . . . because someone else does not pay.”), *with* 151 CONG. REC. S1892, S1906 (daily ed. Mar. 2, 2005) (statement of Sen. Kennedy) (“We have three times the number of bankruptcies now for our senior citizens. These are not the spendthrifts. Are those the people we are trying to catch with punitive measures in this bankruptcy legislation? I don’t think so.”), 145 CONG. REC. 22970, 22971 (1999) (statement of Sen. Kyl) (noting support for legislation because it was not “fair” to force “seniors on fixed incomes to pay more so that someone can walk away from his or her debts as a matter of convenience or financial planning.”), *and* 150 CONG. REC. H143, H146 (daily ed. Jan. 28, 2004) (statement of Rep. Lofgren) (arguing that the legislation hurts seniors).

105. 145 CONG. REC. 8498, 8504 (1999) (statement of Rep. Jackson-Lee) (discussing proposed amendment to exclude social security benefits from means test definition of income). Though the amendment was defeated that year, a later amendment was codified at 11 U.S.C. § 101(10A)(B). *See* Bankruptcy Abuse Protection and Consumer Protection Act of 2005 § 102(b).

106. Bankruptcy Reform Act of 2000, H.R. 833, 107th Cong. Sec. 707 (2000). This provision is codified at 11 U.S.C. § 707(b)(2)(A)(ii)(II). *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(a).

107. 144 CONG. REC. 20721, 20728 (1998) (Hatch Amendment No. 3600). BAPCPA clarifies that debtors can continue to contribute to employer-provided retirement plans, that any payroll deduction to repay a pension loan is not stayed by the filing, and that Chapter 13 debtors may continue to repay

arguing in favor of protecting retirement savings, one of the amendment's sponsors stressed that the amendment was needed to protect "[t]he retirement savings of hundreds of thousands of elderly Americans" and further noted that the amendment "has the full support of the AARP."<sup>108</sup>

The legislation's supporters and opponents also argued that their side's views best protected the interests of members of the armed forces.<sup>109</sup> To avoid potentially alienating veterans or active duty or retired military personnel, amendments were offered to protect veterans and active duty service people by excluding veterans benefits from the means test's definition of income,<sup>110</sup> by exempting certain active duty service members from BAPCPA's credit counseling requirements,<sup>111</sup> and by otherwise easing the generally inflexible requirements contained in the means test for debtors who had served in the military.<sup>112</sup> Similarly, to appeal to the public's (then) support of the War on Terrorism, BAPCPA was amended in 2002 to exclude payments received by victims of international or domestic terrorism from the Code's definition of income that must be considered when determining whether a debtor "flunks" the means test and cannot remain in Chapter 7.<sup>113</sup>

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loans they took out against their pension funds. Bankruptcy Abuse Protevention and Consumer Protection Act of 2005 § 224(b), (d)–(e) (codified at 11 U.S.C. §§ 362(b)(19), 1322(f), 522(n)).

108. 144 CONG. REC. 20701, 20701 (1998) (statement of Sen. Hatch).

109. 151 CONG. REC. S1842 (daily ed. Mar. 1, 2005) (statement of Sen. Sessions) ("I just want to say how strongly I value the contribution of our men and women in uniform."). Indeed, in discussing a failed amendment that would have provided protections for members of the armed services, one senator stated that the senators who opposed the amendment

are the first ones waving the flag in the Fourth of July parade: How much we love our soldiers.

Where were they yesterday? These great lovers of the American military were nowhere to be found when they had a chance to do something for them when they serve their country and face bankruptcy at home.

151 CONG. REC. S1982, 1907 (daily ed. Mar. 2, 2005) (statement of Sen. Durbin).

110. H.R. REP. NO. 106-123, at 106–107 (1999). See also 151 CONG. REC. S2424, S2427 (daily ed. Mar. 10, 2005) (statement of Sen. Durbin) ("Mr. President, this amendment will exempt from the bankruptcy bill's means test those disabled veterans whose indebtedness occurred primarily during a period of military service. They have given us their arms, their legs, their very important parts of their lives. . . . We need to honor these veterans who have given so much to America.").

111. 151 CONG. REC. S2306, 2314–16 (daily ed. Mar. 9, 2005) (statement of Sen. Feingold).

112. Bankruptcy Abuse Prevention and Consumer Protection Act § 102(a) (codified at 11 U.S.C. § 707(b)(2)(B)). The Code permits active duty military personnel who have income above the applicable state median to cite their military duties as special circumstances that warrant avoiding the statutory presumption of abuse. The Code also creates an exception from having to satisfy many aspects of the means test for disabled veterans who prove that they incurred their debts while on active duty or performing homeland defense activity. *Id.* (codified at 11 U.S.C. § 707(b)(2)(d)).

113. Bankruptcy Abuse Prevention and Consumer Protection Act of 2002, H.R. 5745, § 102, 107th Cong. § 102(b) (2002), codified at 11 U.S.C. § 101 (10A). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(b).

## V. IDEOLOGY

### A. *Ideology Generally*

In addition to ignoring conflicting special interest group concerns, explaining the BAPCPA legislative process using a single industry capture story is incomplete because it fails to account for the possibility that the members of Congress who supported it did so because of their ideological objections to the values inherent in the pre-BAPCPA Code. A big impediment to determining whether BAPCPA's legislative process (or, indeed, any legislative process) was ideological—and, if so, the precise ideological disputes that are at issue—is that there is no single agreed upon definition for the term ideology.<sup>114</sup> Commentators who have examined judicial decisionmaking appear to have reached a rough consensus on the definition of ideology. In that context, ideology typically is defined as the views a judge or judicial candidate holds that influence how he or she makes (or likely will make) decisions or the extent to which those views affect the judicial decisionmaking process.<sup>115</sup> The most widely accepted method to measure a judge's ideology is to determine the political party affiliation of the President that appointed the judge, and then examine how the judge's votes on certain issues coincide with the votes of judges appointed by the opposite party.<sup>116</sup> Although commentators recognize the limitations of this method of measuring ideology, and although this measure has been criticized and refined in

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114. See John M. Conley, *The Social Science of Ideology and the Ideology of Social Science*, 72 N.C. L. REV. 1249, 1249–50 (1994) (defining ideology as “a system of shared beliefs by which a group of people interpret and impart meaning to events”); Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353, 369 (2005) (defining ideology in the constitutional context as a “pre-commitment” to particular constitutional values); Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 468 (2005) (defining ideology as either the mode of thinking that characterizes a collection of people or as the set of doctrines that forms the basis for various societal systems).

115. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE*, at xii (1998); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 621 (2003). See generally John Cornyn, *Originalism & Judicial Confirmation Hearings*, 10 TEX. REV. L. & POL. 1, 2 (2005) (discussing a definition of ideology as one that affects how judicial nominees “expect to rule on a list of hot-button political issues”).

116. EPSTEIN & KNIGHT, *supra* note 115, at xii n.b. See, e.g., ASHLYN K. KUERSTEN & DONALD R. SONGER, *DECISIONS ON THE U.S. COURTS OF APPEALS* (2001); DONALD SONGER ET AL., *CONTINUITY AND CHANGE ON THE UNITED STATES COURT OF APPEALS* (2000); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates about Statistical Measures*, 99 NW. U. L. REV. 743, 747–48 (2005); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

recent sociological works,<sup>117</sup> it remains the most widely used measure for whether a judge's conduct is based on ideology.<sup>118</sup>

Outside the judicial decisionmaking context, ideology generally is defined as a set of doctrines, beliefs, or ideas that form the basis of a political system or economic theory and policy.<sup>119</sup> Likewise, ideology typically is thought to mean a common and coherent philosophy, outlook, or shared body of ideas or beliefs<sup>120</sup> or a worldview or cultural belief system that helps individuals (or groups) generate and inform their decisionmaking process.<sup>121</sup> In this context, commentators suggest that people or groups use ideology to help them “make sense of events, build consensus, and distinguish themselves from others.”<sup>122</sup> At times, though, ideology is used pejoratively to imply that a person (the “ideologue”) holds views that make the person “an inflexible and uncritical true believer.”<sup>123</sup> An even more negative connotation of ideology suggests that it is simply a defensive tool used by the powerful elite to legitimize the status quo and maintain economic inequality.<sup>124</sup>

Political and academic commentators often define ideology relative to the term “political.”<sup>125</sup> Of course, ideological must mean more than just

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117. Sisk & Heise, *supra* note 116, at 779–87 (discussing “common space” score measure of ideology that is designed to rate “each legislative vote cast by members of the Senate along a conservative-liberal dichotomy”); Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH U. L. REV. 1797 (2006) (discussing Segal-Cover methodology for measuring judicial ideology, but noting limitations of that measure to predict votes in business cases).

118. See Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. OF POL. 812, 812 (1995) (explaining that the attitudinal model, which posits that a judge's political ideology is the best predictor of how that judge will vote, is “[a] predominant, if not *the* predominant” model for analyzing Supreme Court decisionmaking).

119. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 871 (4th ed. 2000); RANDOM HOUSE UNABRIDGED DICTIONARY 950 (2d ed. 1993).

120. JOHN M. CONLEY & WILLIAM M. O'BARR, *JUST WORDS: LAW LANGUAGE, AND POWER* 141 (2d ed. 2005); Conley, *supra* note 114, at 1249.

121. See David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L.J. 651, 653, 662 (1991) (noting that ideology is used to inform thought); Conley, *supra* note 114, at 1249 (noting that ideology helps people “make sense of events, build consensus, and distinguish themselves from others”).

122. See Conley, *supra* note 114, at 1249.

123. CONLEY & O'BARR, *supra* note 120, at 141.

124. Edward L. Rubin, *Rational Choice and Rat Choice: Some Thoughts on the Relationship Among Rationality, Markets, and Human Beings*, 80 CHI.-KENT L. REV. 1091, 1117 (2005).

125. SKEEL, *supra* note 29, at 199–201 (discussing the “sharply ideological political landscape” that existed when the Bankruptcy Commission initially considered means testing); Johnsen, *supra* note 114, at 469 (noting Sen. Schumer's use of the term political ideology). See also Stephen B. Presser, *The Original Misunderstanding: The English, The Americans, and The Dialectic of Federalist Constitutional Jurisprudence*, 84 NW. L. REV. 106, 110 n.16 (1990).

political or else *all* U.S. laws would be ideological since they are enacted in a political process. Other commentators deem an issue to be ideological if it is partisan<sup>126</sup> or likely to draw support from either conservatives or liberals, but not both.<sup>127</sup> Similarly, laws or issues are often categorized as ideological if they involve constitutional interpretations or issues that easily can be placed on a conservative-liberal, left-right axis.<sup>128</sup> Although in many respects this approach might be the most satisfying, this approach is itself problematic due to the difficulties in delineating “conservative” or “liberal” views.<sup>129</sup>

Ideology also has different meanings in the context of public choice analyses. In analyzing the role ideology plays in the political process, the term has been defined as a legislator’s “individual beliefs about the public interest.”<sup>130</sup> Some suggest that legislators’ ideological views play little role in the legislative process because they are motivated primarily by a desire to please their constituents. Given this desire, they would be willing to

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126. See SKEEL, *supra* note 29, at 199 (discussing “ideological tone” of the Bankruptcy Commission’s work and arguing that there were no ideological division in votes on the 1978 Code because both Democrats and Republicans voted for those reforms by large majorities); *id.* at 201 (suggesting that the Commission’s work was ideological because the reporter for the commission—Harvard Law Professor Elizabeth Warren—was “famously partisan”).

127. Joanne Conaghan, *Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy’s Critique of Adjudication*, 22 CARDOZO L. REV. 721, 726 (2001) (referring to conflicts generated by conservative or liberal ideologies); Conley, *supra* note 114, at 1249 (referring to “feminism, conservatism, and environmentalism” as ideological belief systems); Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 114 (1997) (modeling “Sally Conservative’s” views on ideological issues).

128. See Sunstein, Schkade & Ellman, *supra* note 116, at 304 (discussing “controversial issues” like abortion, affirmative action, campaign finance, capital punishment, disability, race, and sex discrimination). While recognizing that any list of ideological issues can be attacked as being either over- or under-inclusive, the following topics *typically* are viewed as ideological: affirmative action, civil rights (including discrimination and harassment), death penalty, due process, federalism, feminism, privacy (including abortion), gun control, immigration, unions, social security, tort reform, and first amendment matters (including free speech, pornography, and separation of church and state). See Chemerinsky, *supra* note 115, at 621; DONALD R. SONGER, THE UNITED STATES COURTS OF APPEALS DATA BASE DOCUMENTATION FOR PHASE I, at 6 (1997), [http://www.as.uky.edu/polisci/ulmerproject/cta\\_codebook.pdf](http://www.as.uky.edu/polisci/ulmerproject/cta_codebook.pdf) (coding the various issues presented in cases decided by appellate courts along a conservative-liberal axis).

129. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002) (noting ambiguity of the term conservative); Christopher H. Schroeder, Foreword, *Conservative and Progressive Legal Orders*, 67 LAW & CONTEMP. PROBS. 1, 5 (2004) (questioning whether it is possible to create a consensus definition of “conservative” or “progressive” judicial approaches); J. Harvie Wilkinson III, *Why Conservative Jurisprudence is Compassionate*, 89 VA. L. REV. 753, 754 (2003) (describing the difficulty of capturing the “essence” of conservative and liberal ideologies).

130. See Farber & Frickey, *supra* note 67, at 893.

support bills that serve their constituents' interests even if the bill is inconsistent with their personal ideological beliefs or views.<sup>131</sup>

It is, of course, possible that any given legislator's stated ideological views concerning the bankruptcy legislation were colored by the economic interests of the consumer credit lobby. It is also possible, however, that some legislators were true believers, i.e., they supported BAPCPA not just because of the economic stakes involved but because its normative principles are consistent with their world views and philosophy concerning the importance of paying your bills.<sup>132</sup>

### *B. Ideology and the Bankruptcy Reform Legislative Debates*

Even if the credit card lobby wrote BAPCPA and then made substantial contributions to members of certain important congressional committees to ensure its passage,<sup>133</sup> the fact that so many members of Congress consistently and overwhelmingly supported bankruptcy reform for almost a decade is consistent with the "story" that some of them might actually have agreed with the legislation's implicit ideological views. The legislative process for the bankruptcy reform bills was always bitterly partisan,<sup>134</sup> and many viewed it as advancing "conservative" anti-consumer beliefs.<sup>135</sup> However, as noted earlier, the legislation consistently had bipartisan support, and earlier attempts to enact the legislation failed for reasons having little to do with the ideological outlook or worldviews that permeate the legislation (e.g., that people should sacrifice to pay their bills).<sup>136</sup> Reasons earlier versions of BAPCPA (and, indeed other bills)

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131. *Id.*

132. See Kathleen Bawn, *Constructing "Us": Ideology, Coalition Politics, and False Consciousness*, 43 AM. J. POL. SCI. 303, 304 (1999) (defining ideology as those beliefs and preferences that do not stem from self-interest).

133. See Stephen Nunez & Howard Rosenthal, *Bankruptcy "Reform" in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527 (2004) (arguing that campaign contributions to select members of Congress made a statistically significant impact).

134. Of course, this also should not have been surprising since the House committee that dealt with the legislation was the Judiciary Committee—the same Committee that was tasked to handle the Clinton impeachment process and that handles the judicial nomination process.

135. For example, Henry J. Hyde—an admitted conservative and then chair of the House Judiciary Committee—proposed amendments to the means test that would allow courts to use more flexible standards to calculate a debtor's living expenses. 145 CONG. REC. H2718–19 (1999). After fellow Republicans rejected that amendment, he commented that he was "as conservative as anybody" and that his desire to create more flexible living expense standards should not be viewed as "a violation of one's credentials as a conservative." 145 CONG. REC. 8509, 8579 (1999).

136. For example, all Republican members of the House, and more than forty percent of the Democrats, voted in favor of means testing legislation that did not contain a homestead cap. See

were pushed to the rear of the legislative agenda during the nine-year period include the Congressional preoccupation with the Clinton impeachment proceeding, a midyear change of control in the Senate, the September 11 terrorist attacks, and the anthrax scare.<sup>137</sup>

Because issues that tend to be viewed as ideological (abortion, gun control, the U.S. flag, religion, cloning, etc.) are also highly controversial,<sup>138</sup> characterizing an issue as “ideological” tends to dramatically change the tenor of discussions about the issue and may in fact serve as an “all-purpose trump card that can end any game.”<sup>139</sup> Although the word “ideology” appears numerous times in the legislative debates on bills that all would agree are ideological,<sup>140</sup> the term “ideology” in any form appears only six times in the Congressional Record during testimony concerning the bankruptcy bills that were considered from 1997–2005.<sup>141</sup> Thus, although the debates may have been tinged with ideological concerns about the ways people should approach their personal

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Jensen, *supra* note 28, at 512–13. Likewise, ninety-seven members of the Senate voted in favor of legislation that would change existing laws by, for example, imposing a homestead cap; it did not, however, include means testing. *Id.* at 512–15. Because the House and Senate passed different versions of the bill, a conference was convened to attempt to reconcile the two bills. *Id.* at 516. The Senate never considered the conference report. *Id.* at 518. The House passed it by a veto-proof vote of 300 to 125. 144 CONG. REC. 24926, 24943 (1998).

137. See Jensen, *supra* note 28, at 514, 545–46, 548–49.

138. Former Speaker of the House Dennis Hastert issued a statement on June 27, 2006, that listed the House Republican “American Values Agenda.” See Press Release, J. Dennis Hastert, Speaker of the House, Speaker Hastert Statement on the House Republican American Values Agenda (Jun. 27, 2006), <http://speakersnews.house.gov/library/misc/060627americanvalues.shtml> (last visited Jan. 5, 2007). Included on the agenda are the bills that are designed to do the following: protect the pledge of allegiance “from the attacks by activist federal judges”; protect the right to display the flag; enact a constitutional amendment “declaring marriage to be between a man and a woman”; require medical professionals to tell women that an unborn child feels pain if she has a late-term abortion; ban the use of stem cells; restrict internet gambling; and prevent the government from using federal funds to seize guns from “law-abiding citizens.” *Id.* Cf. Thomas E. Nelson, Zoe M. Oxley & Rosalee A. Clawson, *Toward a Psychology of Framing Effects*, 19 POL. BEHAV. 221 (1997) (examining how communicators—typically the mass media—use framing, the construction and definition of a particular issue, to influence public opinion).

139. John D. Ayer, *So Near to Cleveland, So Far From God: An Essay on the Ethnography of Bankruptcy*, 61 U. CIN. L. REV. 407, 439 (1992).

140. For example, the word “ideology” or “ideological” appears more than ten times (either as used by senators or in essay submitted in the record) during a May 24, 2005 debate on “The Stem Cell Research Enhancement Act of 2005.” 151 CONG. REC. H3809–H3852 (daily ed. May 24, 2005); H.R. 810, 109th Cong. (2005). Likewise, those terms appear eight times during the May 16, 2002 debate on the “Personal Responsibility, Work, and Family Promotion Act of 2002.” 148 CONG. REC. 7917–7993 (2002). Finally, on one of the days (over the course of the two-year debate) that the Senate considered the Nomination of Miguel Estrada to the DC Circuit Court of Appeals, those terms were used thirteen times. 149 CONG. REC. S2307–S2334 (daily ed. Feb. 12, 2003).

141. Westlaw search conducted by author on April 13, 2007, on the “Bankruptcy Reform Act Congressional Record” database (BKRA-CR), using the search term “ideolog!”.

financial decisions, individual members did not appear to think that they—or those who held opposing views—were making ideological decisions, as “ideology” is traditionally conceptualized on a left-right, liberal-conservative, Democrat-Republican axis. Of course, it is not surprising that the legislators did not perceive that they were debating an ideological issue given the *Washington Post*’s characterization of bankruptcy opinions.<sup>142</sup>

Since legislators so rarely used the term ideology (and its variants) during the nine-year legislative debates on the bankruptcy legislation and because liberal and conservative members of both parties supported the legislation, it is hard to view the legislation as ideological in a liberal-conservative sense of that term. Legislators may have concluded that the legislative debates and disagreements were not ideological because of the perception that bankruptcy laws are neutral and non-ideological<sup>143</sup> and lack the emotional baggage of many hot button public-law issues like abortion, flag burning, gay marriage, or gun control. Even those who view bankruptcy laws as ideological, or who attempt to determine whether bankruptcy laws might be ideological, tend to define the dispute as either pro-debtor or pro-creditor.<sup>144</sup> Commentators often conclude that a pro-debtor ideological view is liberal (or progressive), while a pro-creditor bias is conservative.<sup>145</sup>

Although many legislators referenced the Enron and WorldCom scandals during the legislative debates,<sup>146</sup> defining “ideology” in the

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142. See *About the Analysis*, *supra* note 7, and accompanying text.

143. Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court’s Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 4 & n.7 (1996) (suggesting that bankruptcy is non-ideological, but noting that lawyers might not agree with such a conclusion); Nourse & Schacter, *supra* note 86, at 587 (characterizing gun control, abortion, and pornography as “hot button issues” as compared to intellectual property and bankruptcy); Sunstein, Schkade & Ellman, *supra* note 116, at 310 (characterizing bankruptcy cases as nonideological). *But cf.* SKEEL, *supra* note 29, at 191 (discussing the ideologically driven debates over the bankruptcy legislative debate and the “credit morality”).

144. See John T. Scott, James F. Spriggs II & James R. Zink, *Courtin’ the Public: Judicial Behavior and Public Views of Court Decisions* 16, 34 (2006) (unpublished manuscript prepared for 2006 Annual Meetings of the Midwest Political Science Association, available at <http://www.utexas.edu/law/academics/centers/clbe/assets/spriggs/pdf>) (describing empirical study that controlled for ideology in bankruptcy cases using pro-debtor and pro-creditor as relevant factors to determine whether respondent has liberal or conservative views).

145. Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 566 (1988) (examining Supreme Court bankruptcy cases from 1978 to 1986 and concluding that the generally conservative Court tends to favor creditors over debtors); SKEEL, *supra* note 29, at 16, 194.

146. 151 CONG. REC. S2406 (daily ed. Mar. 10, 2005) (statement of Sen. Kennedy) (“After these individuals, the Ebberts, the Skillings, Enron, and the rest, robbed those companies, they are sitting in their mansions now in Houston; but these other individuals will be dragged into bankruptcy court if

bankruptcy context in ways that are used in public-law disputes (liberal v. conservative, rich v. poor) mischaracterizes the nature of disputes that arise in consumer and business bankruptcy cases. Debtors can be large corporations that have not engaged in fraudulent conduct (like Texaco, US Airways, or Kmart). Conversely, creditors are not always businesses as they can be individuals (like ex-spouses or former employees) in both consumer and business cases. Given the wide range of people and entities who serve as debtors and creditors in bankruptcy cases, it is just too simplistic to conclude that a pro-debtor view is necessarily a “liberal” view since the debtor may be a large multinational corporation that, in more lucrative days, may have made campaign contributions to members of Congress.<sup>147</sup>

Although legislators rarely used the term “ideology,” the debates were framed using language that fairly could be viewed as ideological in the sense that the legislation advances a particular philosophy, worldview, or belief system that would force debtors to make better financial decisions. For example, supporters argued that the process should be a stigmatizing one.<sup>148</sup> Likewise, as was true during legislative debates on human cloning,<sup>149</sup> stem cell,<sup>150</sup> and abortion,<sup>151</sup> the BAPCPA legislative history is replete with statements—made by Democrats and Republicans, liberals and conservatives—involving morality (“moral principle[s];” the “time-honored principle of moral responsibility”) and consumers’ lack of shame when filing for bankruptcy.<sup>152</sup> Supporters focused on the culture of

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they get a serious illness or sickness, or if they run into family problems.”); 151 CONG. REC. S1822 (daily ed. Mar. 1, 2005) (statement of Sen. Durbin) (discussing the moral responsibilities of former Enron and WorldCom executives); 148 CONG. REC. 5087 (daily ed. Apr. 18, 2002) (statement of Sen. Kohl) (discussing bankruptcy planning of former Enron executives who retained multi-million dollar homes by taking advantage of homestead exemptions).

147. For example, in 1996, Enron contributed over \$1.2 million to candidates or political parties in federal elections, over \$1.1 million in 1998, and over \$2.5 million in 2000. See *OpenSecrets.org*. Donor Profiles: Enron Corp., <http://www.opensecrets.org/orgs/summary.asp?ID=D000000137&Name=Enron+Corp> (last visited Mar. 3, 2007).

148. 151 CONG. REC. S1813 (daily ed. Mar. 1, 2005) (statement of Sen. Frist) (“Bankruptcy has become so common that it has lost the stigma it had even a short generation ago.”); 146 CONG. REC. 11364, 11366 (2000) (statement of Sen. Biden) (“Although this may seem like a quaint notion these days, it was intended to preserve some of the debtor’s dignity at a time when bankruptcy carried more of a stigma for some people than it does today.”).

149. See, e.g., 147 CONG. REC. H4767 (daily ed. July 27, 2001) (statement of Rep. Weldon); 147 CONG. REC. H7858 (daily ed. Nov. 7, 2001) (statement of Rep. Pence).

150. See Human Cloning Prohibition Act of 2001, H.R. 1644, 107th Cong., 1st Sess. § 2 (2001); Respect for Life Pluripotent Stem Cell Act of 2005, H.R. 3144, 109th Cong., 1st Sess. § 2 (2005).

151. See, e.g., 149 CONG. REC. S11552 (daily ed. Sept. 16, 2003) (statement of Sen. Santorum); 149 CONG. REC. S3457 (daily ed. Mar. 11, 2003) (statement of Sen. Frist).

152. *Bankruptcy Reform Act of 1998: Hearing on H.R. 3150 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 11 (1998) (statement of Rep. Moran)

bankruptcy and the importance of “personal responsibility,” and they suggested that debtors lacked integrity because they no longer felt any personal obligation to pay debts they could afford to repay.<sup>153</sup> Moreover, supporters argued that the bankruptcy system—aided and abetted by bankruptcy attorneys, judges, and professors—encouraged debtor abuse, and that the system did not stress that bankruptcy should be a difficult process.<sup>154</sup>

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[hereinafter *Hearing on H.R. 3150*]. Moran supported the bill though his overall voting record indicates that he is a liberal Democrat, thus indicating that BAPCPA cannot be cast simply in left-right terms ideologically. Biography of Rep. Moran, GovTrack, <http://www.govtrack.us/congress/person.xpd?id=400283> (last visited Apr. 11, 2007). For example, he has sponsored legislation that would extend stem cell research. Conservative and Republic members of Congress have routinely (though not uniformly) opposed the expansion of stem cell research. *See, e.g.,* Sheryl Gay Stolberg, *House Approves a Stem Cell Research Bill Opposed by Bush*, N.Y. TIMES, May 25, 2005, at A1. In arguing in favor of that legislation, Rep. Moran implicitly noted the left-right ideological divide on this matter in urging other members of Congress to “[l]et public interest triumph over ideological special interests.” 152 CONG. REC. H5435, H5448 (daily ed. Jul. 19, 2006). Likewise, he urged House Republicans to increase the minimum wage, noting that “over the last 9 years gas prices have doubled; college prices are up 38 percent; food prices, up 20 percent; housing, up 25 percent; and health care costs, up a whopping 75 percent. But the minimum wage hasn’t budged over that period of time.” 152 CONG. REC. H4965 (daily ed. Jul. 11, 2006). Given his support for BAPCPA, Rep. Moran appeared unwilling to believe that low wages combined with higher food, housing, and health care costs contributed to the increased bankruptcy filing rates during the first part of that same nine year period. Instead, his consistent support of the bankruptcy legislation and of amendments to increase the minimum wage suggests that he believed that other factors—perhaps a lack of personal responsibility—also caused the increase in individual bankruptcy filings.

153. *See* 151 CONG. REC. S1856 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley) (“I think the system needs to be reformed because it is fundamentally unfair. This bill will promote personal responsibility among borrowers and create a deterrence for those hoping to cheat the system.”). *See also* *Hearing on H.R. 3150*, *supra* note 152, at 11 (statement of Rep. Moran) (suggesting that “moral principal has been eviscerated” because bankruptcy is now the “option of first resort” for some debtors who are capable of repaying their debts). Indeed, Rep. Moran and other members of the New Democrat Coalition routinely stated that bankruptcy laws needed to be reformed and that the pending legislation “promotes personal responsibility.” *See* Press Release, New Democrat Coalition, *supra* note 33 (quoting Rep. Roemer).

154. *See* *Hearing on H.R. 3150*, *supra* note 164, at 11 (statement of Rep. Moran) (characterizing pre-BAPCPA bankruptcy as “a convenient financial management tool” and highlighting its “convenience” and “ease”); *id.* at 12–14 (prepared statement of Rep. Moran); 151 CONG. REC. S1834, S1843 (daily ed. Mar. 1, 2005) (statement of Sen. Hatch) (stating that debtors’ abusive “misconduct is all too often encouraged by a bankruptcy bar that ushers people into Chapter 7 without ever fully considering the client’s ability to repay”); 147 CONG. REC. 3737, 3737 (Mar. 15, 2001) (statement of Sen. Sessions) (“[T]his is fundamentally what the lawyer tells them. He says: Now, when you get your paycheck, you save that money, and you bring it straight to me—all that money—and maybe your second check. As soon as I have \$1,500 or \$1,000, I will file your bankruptcy. Don’t pay any of your other debts. . . . Use your credit card. Run up everything you want to on your credit card. . . . They are told this is the right thing to do.”). Indeed, one critic went so far as to say that bankruptcy judges (who he branded as not “real judges”) were part of the problem because they failed to exercise discretion in the ways that favored creditors. *See* Peter G. Gosselin, *Judges Say Overhaul Would Weaken Bankruptcy System*, L.A. TIMES (Mar 29, 2005), at 1 (quoting Jeff Tassey, a “Washington lobbyist who heads the coalition of credit card companies, banks and others who spearheaded the overhaul drive”).

BAPCPA critics also relied on the concept of morality to bolster their opposition to the legislation. Opponents disputed claims that there has been a decline in the stigma associated with *filing* for bankruptcy and instead argued that credit card issuers lacked shame when mailing billions of pre-approved credit card applications to people who appeared to be bad credit risks.<sup>155</sup> Thus, they maintained that creditors behaved immorally by recklessly extending credit to debtors who were already hopelessly in debt.<sup>156</sup> Indeed, opponents (including some financial institutions)<sup>157</sup> suggested that the credit card industry could have prevented most of the perceived abuses if they had engaged in better screening processes and had stopped issuing credit cards to debtors who were not creditworthy (or were children, pets, moose, inmates, or corpses).<sup>158</sup>

Though legislators avoided using the term “ideology,” statements in the legislative history suggest that BAPCPA’s primary goal of making it harder to avoid paying your debts was consistent with a philosophy or worldview that every able-bodied person in this country can succeed financially if they handle their personal finances responsibly and avoid incurring too much debt.<sup>159</sup> These legislators appear to conclude that, if

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155. See *Hearing on H.R. 3150, supra* note 152, at 4 (statement of Rep. Nadler) (“I do not think . . . that a creditor, who makes a subprime loan to a debtor who is already clearly in over his head, should necessarily be allowed to have the taxpayers bail out his reckless business activities.”).

156. See *Examining the Increase of Personal Bankruptcies and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 63 (1997) (statement of Sen. Durbin); 151 CONG. REC. H1979, H1979–80 (daily ed. Apr. 14, 2005) (statement of Rep. Delahunt) (arguing that BAPCPA “imposes no responsibility whatsoever on the credit card industry . . .”).

157. See 151 CONG. REC. S1840 (daily ed. Mar. 1, 2005) (February 28, 2005 Letter from Responsible Lenders in Opposition to S. 256, The Bankruptcy Abuse Prevention and Consumer Protection Act).

158. 147 CONG. REC. 2749, 2752 (2001) (statement of Sen. Leahy) (“Billions of credit card solicitations made to American consumers in the past few years have contributed to the rise in consumer debt and bankruptcies, including a 7 or 8 year old receiving a credit card with a long line of credit, or a dog gets a credit card. Somebody puts their dog’s name on an answer to a letter, and suddenly the dog is getting a credit card with an approval letter: Dear Mr. Rover Leahy: We are so impressed with your past credit card we are now giving you a \$2,000 credit line.”); 144 CONG. REC. 21594, 21599–21601 (1998) (statement of Sen. Feinstein); *Credit Cards at 50: The Problems of Ubiquity*, N.Y. TIMES, Mar. 12, 2000, at C11 (reporting that former Federal Reserve Chair Alan Greenspan told the Senate Banking Committee that “[c]hildren, dogs, cats and moose are getting credit cards”).

Ultimately, opponents proposed a series of amendments (most of which failed) that were designed to curb what opponents viewed as immoral or abusive creditor conduct. See 144 CONG. REC. 20650 (1998) (Senate amendment proposing to prohibit creditors from terminating credit simply because the consumer did not incur finance charges); 144 CONG. REC. 20650, 20651 (1998) (Senate amendment proposing to limit fees banks charge for using ATMs); 144 CONG. REC. 20650, 20657–58 (1998) (Senate amendment proposing to place restrictions on credit offered to consumers under age twenty-one).

159. Cf. 145 CONG. REC. 8509, 8517 (1999) (statement of Rep. Kelly) (“If one assumes a debt,

you chose to borrow too much, then the solution is to devote a significant amount of your human capital to digging yourself out of debt—filing for bankruptcy should not be the solution.<sup>160</sup> All people, BAPCPA supporters argued, must understand that they have an obligation to accept “personal responsibility” for their spending decisions.<sup>161</sup>

The phrase “personal responsibility” was used almost seventy times during debates concerning the proposed bills.<sup>162</sup> Unfortunately, supporters never explained whether personal responsibility meant a duty to avoid excessive extravagant spending, a duty to repay debts (whether frivolous or not) that you can afford to pay, or a heightened duty to do whatever it takes to repay all your debts if you made a conscious decision to become overindebted for reasons other than military service or unexpected medical expenses. Although legislators rarely explained what they meant by “personal responsibility,” the congressional debates and the eventual text of BAPCPA suggests that Congress deemed only a small subset of people truly “deserving” of bankruptcy relief and that this subset includes only those who were rendered unable to pay their debts through no fault of their own.<sup>163</sup> This might explain why legislators generally were sympathetic to people who got sick and incurred medical debts they were unable to pay, but were generally unsympathetic to people who experienced financial distress because they overextended themselves after losing a job or getting a divorce.<sup>164</sup> Moreover, consistent with the philosophy or worldview that

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they should do everything in their power to pay if off.”); 145 CONG. REC. H2655 (statement of Rep. Tauscher) (“Those who buy on credit should be required to pay their bills. Our current bankruptcy system does not hold people to that standard.”). *But cf. id.* at H2663 (statement of Rep. Nadler) (“So this is a myth . . . that the American middle class are deadbeats and that we have to crack down and squeeze a little bit more money out of them when they go bankrupt . . .”).

160. The view that people should keep their commitments, or face sanctions if they fail to, is of course not a new one. Indeed, earlier efforts to reform bankruptcy laws were marked by tensions between norms that required people to keep their commitments and concerns that imposing overly harsh bankruptcy laws might threaten the stability of the middle-class. *See generally* BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 180, 255–256 (2002).

161. 151 CONG. REC. H2047 (daily ed. Apr. 14, 2005) (statement of Rep. Sensenbrenner); 151 Cong. Rec. S2474 (daily ed. Mar. 10, 2005) (statement of Sen. Frist).

162. Westlaw search conducted by author on April 13, 2007, on the “Bankruptcy Reform Act Congressional Record” database (BKRA-CR), using the search terms “personal responsibility” and finding 68 documents that contained term (sometimes multiple occurrences within a document).

163. Again, this narrow conceptualization of the deserving debtor is not new. *See* WILLIAM BLACKSTONE, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* 473 (1771), available at <http://infoweb.newsbank.com> (follow hyperlink for “Early American Imprints, Series 1: Evans, 1639–1800”; search “Commentaries on the Laws of England”) (stating that traders were the only “set of men [that] are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own”).

164. *See supra* note 40.

bankruptcy should be readily available only for people who are facing financial crises though no fault of their own, even politically liberal legislators used class-based (and potentially racially veiled) arguments when discussing the need to protect the innocent, “vulnerable” victims harmed by allowing debtors to discharge their debts.<sup>165</sup>

### *C. Ideological Amendments During the Legislative Debates*

In addition to the ideological discussions concerning what it takes to become a deserving debtor, BAPCPA also forced legislators to reconcile their views concerning financial personal responsibility with their views about other ideological issues that were not important to the consumer credit lobby. For example, the means test partially subsidizes the educational expenses debtors incurred to send their children to private schools,<sup>166</sup> though this ultimately was expanded to include public school costs as well.<sup>167</sup> One of the most pointed and prolonged ideological conflicts involved the homestead exemption, which forced the legislation’s supporters to reconcile their positions on states’ rights (clearly viewed as ideological on a liberal-conservative, Democrat-Republican axis) with their desire to advance the interests of the consumer credit industry.

Pre-BAPCPA, the Code gave states a virtually unfettered right to decide whether their residents could use state or federal exemption laws to shield property from creditor collection attempts.<sup>168</sup> Some states—most notably, Texas and Florida—let their residents claim an unlimited, or virtually unlimited, homestead exemption.<sup>169</sup> Because of this, both supporters and critics of the legislation introduced amendments creating a cap on the value of homes a debtor would be allowed to keep and to

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165. For example, Senator Edward Kennedy—who spearheaded many of the amendments that protected women who received child support—argued that the legislation would harm “vulnerable women” whose “only problem is that their husbands have failed to provide alimony and child support.” 151 CONG. REC. S2306, S2323 (daily ed. Mar. 9, 2005) (statement of Sen. Kennedy). The suggestion that the only “vulnerable” women are those who are divorced and do not receive child support from a deadbeat dad separates those “deserving” women from never-married mothers who would not necessarily be deserving.

166. Bankruptcy Reform Act of 2000, H.R. REP. 106-970, at 8 (2000).

167. H.R. Res. 71, 107th Cong. (2001); H.R. REP. NO. 107-4 (2001) (codified at 11 U.S.C. § 707(b)2)(A)(ii)(IV)).

168. Congress generally permits state legislators to decide whether their residents can choose between federal or state exemption laws or whether they must use the state exemptions. 11 U.S.C. § 522(b) (2000).

169. FLA. CONST. art. 10, § 4; TEX. CONST. art. 16, § 50.

otherwise restrict the availability of generous state exemption laws.<sup>170</sup> Indeed, throughout the legislation's multi-year march through Congress, opponents and supporters of the legislation proposed to amend the legislation to place absolute dollar caps on the homestead exemption.<sup>171</sup>

Because of concerns that an absolute exemption cap would not respect states' decision to craft the exemption laws that were most suitable for their residents, some senators, who otherwise supported the legislation initially, opposed amending it to add a homestead cap on federalism grounds.<sup>172</sup> Similarly, House supporters of the legislation consistently voted against amendments that capped the homestead exemption,<sup>173</sup> even though doing so created the perception that the legislation let wealthy debtors avoid paying their creditors yet keep mansions. Ultimately, the Code was amended to prevent clearly abusive conduct—for example, moving to a state and purchasing a mansion on the eve of a bankruptcy

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170. For example, the Senate passed H.R. 3150 by a vote of 97–1 (with two senators not voting) even though it contained a \$100,000 exemption cap. 144 CONG. REC. 21594, 21623 (1998). *See, e.g.*, S. REP. NO. 105-253, at 31 (1998); 144 CONG. REC. 21594, 21597 (1998) (proposing a Senate finding that “meaningful bankruptcy reform cannot be achieved without capping the homestead exemption” at \$100,000 dollars).

171. H.R. REP. NO. 106-123, pt. 1 at 102 (1999). Rep. Jackson–Lee introduced legislation that would preserve state law prohibitions against the forced sale of a debtor's homestead. She consistently opposed the bankruptcy bills. Because, however, she represents a Congressional district in Texas, she also consistently opposed modifications to the Code's existing treatment of homestead laws despite the appearance that allowing unlimited exemptions arguably benefited wealthier debtors. In one debate, Rep. Jackson–Lee stated,

“I was pleased that the homestead exemption capital [sic], \$100,000 that was in the Senate version of the bill, is not in the conference report. However, I was not pleased to learn that a residency requirement was added into the conference report that require people in my home State of Texas to live in Texas for at least 2 years or own a home for at least 2 years before getting a homestead exemption. This is contrary to our Texas State Constitution, and it would not serve our State well. Any suggestions that people rove into the State of Texas and buy big expensive homes . . . is an outrage on the citizens of Texas, and we should be left to our own ways under our own Constitution on this issue.

144 CONG. REC. 24926, 25929 (1998). *See also* 145 CONG. REC. 8498, 8500 (1999) (statement of Rep. Delahunt) (discussing amendment capping homestead exemption).

172. 147 CONG. REC. 3716, 3724 (2001) (statement of Sen. Hutchison) (“Mr. President, I rise today in opposition to the Kohl–Feinstein amendment . . . because it is unwarranted and unwise—it is an intrusion upon well-established State constitutions and laws . . .”); 145 CONG. REC. S14481, S14481 (1999) (statement of Sen. Hutchison) (“The Kohl–Sessions amendment would overturn the 130 years of precedence and have a national standard, a one-size-fits-all approach . . . . We do not need one size fits all. For 130 years, we have not had it. In this country the States have done very well in setting their own homestead exemptions . . .”).

173. *See* 144 CONG. REC. 11918, 11921 (1998) (statement of Rep. McCollum) (striking homestead exemption cap and replacing it with cap limited to people who fraudulently converted assets to obtain the exemption).

filing.<sup>174</sup> BAPCPA does not, however, have an absolute cap and, as a result, does not prevent all opportunistic exemption planning.<sup>175</sup>

In the clash between federalism concerns (a clear ideological issue on a left-right axis) and the desire to please a powerful special interest group, ideology prevailed. Rather than force debtors to be responsible and downsize their lifestyles by selling their homes to repay their debts, Congress stripped homestead caps from the legislation even though these caps would have benefited all unsecured creditors, including credit card companies.

#### D. “Poison Pill” Ideological Amendments

Some amendments that generally are viewed as ideological on the liberal-conservative, Democrat-Republican axis (i.e., the military, homestead exemptions, and private school tuition subsidies) appear to have been offered to protect the concerns of other special interest groups or to protect or advance certain ideological views. In contrast, other amendments were introduced solely, many would argue, to derail the bill.

For example, members offered a series of amendments involving tobacco.<sup>176</sup> Though none of these amendments made it into BAPCPA, members attempted to amend the bankruptcy legislation to make debts arising from tobacco-related debts non-dischargeable.<sup>177</sup> Likewise, during several of the years the bankruptcy legislation was pending, the Senate considered amendments that would have prevented debtors from discharging debts created by orders or settlements involving the obstruction of access to medical facilities that provided abortions.<sup>178</sup> Supporters of the bankruptcy bills viewed these clinic access amendments as “poison pill” amendments<sup>179</sup> that were unnecessary because the Code

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174. Although the House was unwilling to place a homestead cap for all debtors who filed, members were willing to deny the exemption to any debtor who converted non-exempt assets into a homestead within a year of filing. See 144 CONG. REC. 11918, 11921 (1998) (Gekas Amendment). This amendment is similar to the restrictions contained in 11 U.S.C. § 522(p)(1) (2000).

175. See generally Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 398 at n.7 (2005).

176. Bankruptcy Reform Act of 1998 (Engrossed as Agreed to or Passed by House), H.R. 3150, 105th Cong., 2d Sess. (1998); 144 CONG. REC. 20068 (1998) (Leahy Amendment No. 3564).

177. Bankruptcy Reform Act of 1998 (Engrossed as Agreed to or Passed by House), H.R. 3150, 105th Cong., 2d Sess. (1998); 144 CONG. REC. 20068 (1998) (Leahy Amendment No. 3564).

178. H.R. REP. NO. 108-40, pt. 1, at 142 (2003); H.R. REP. NO. 106-123, pt. 1 at 99 (1997); 148 CONG. REC. H6132, H6132-33 (daily ed. Sept. 10, 2002) (statement of Rep. Pitts); 145 CONG. REC. 28822 (Nov. 5, 1999).

179. 151 CONG. REC. S2200, S2207 (daily ed. Mar. 8, 2005) (statement of Sen. Hatch) (“I have been around here long enough to know a poison pill when I see one. And make no mistake about it,

already contained provisions that arguably made these debts non-dischargeable.<sup>180</sup> Most assumed that these amendments were being offered for the sole purpose of preventing the legislation from being enacted<sup>181</sup> and, in fact, the opponents at one point achieved their objective. In 2002, conservative Republican representatives (who generally supported the bankruptcy legislation) rejected the House Republican leadership's request to consider a Senate Report. Instead, they passed a version of the bill without the abortion provisions because they refused to support any legislation that could be viewed as supporting a woman's right to choose to have an abortion.<sup>182</sup>

Senate opponents of the legislation also offered amendments that would increase the minimum wage.<sup>183</sup> Though the federal minimum wage law ostensibly is unrelated to bankruptcy reform, critics of the bankruptcy legislation argued that it would be unfair to impose a rigorous means test on debtors since the debtors' low wages may have caused their financial distress. To balance the harm caused by the means test, critics argued that Congress should also increase the minimum wage.<sup>184</sup> Like the clinic access amendments, though, the minimum wage amendments were consistently defeated and generally were viewed as non-germane poison pills.<sup>185</sup>

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this has become a classic poison pill amendment.”); 145 CONG. REC. 21995 (1999) (statement of Sen. Hatch) (“It is apparent, however, that efforts are underway to defeat this important legislation by attaching irrelevant, extraneous ‘political agenda’ items to it, such as minimum wage, guns, abortion, and tobacco, to name a few.”).

180. For example, 11 U.S.C. § 523(a)(6) (2000) makes debts that result from the debtor's willful and malicious injury non-dischargeable.

181. See *Roundtable Discussion*, *supra* note 79, at 299 (comments of Sam Gerdano, Executive Director of the American Bankruptcy Institute, noting that the amendment's proponent's goal was “to design a killer amendment that brings to bear opponents in the pro-life movement . . . to kill an economic bill on bankruptcy reform . . .”).

182. See H.R. RES. 606, 107th Cong. (2002 House Roll Call Vote #478), 148 CONG. REC. H8756–57 (daily ed. Nov. 14, 2002); *Agree to Senate Amendment with an Amendment, Bankruptcy Abuse Prevention and Consumer Protection Act*, House Roll Call Vote #484, 148 CONG. REC. H8876–77 (daily ed. Nov. 14, 2002). See also Philip Shenon, *Vote on Bankruptcy Bill Is Stalled by Abortion Provision*, N.Y. TIMES, Jul. 30, 2002, at C2. See also *Roundtable Discussion*, *supra* note 79, at 311 (2005) (comments of Philip Corwin, discussing the “bizarre incident” involving “a small group of dissident far right members” who revolted over the abortion amendment).

183. 151 CONG. REC. S1979, S1980 (daily ed. Mar. 3, 2005); Bankruptcy Reform Act of 1999, 146 CONG. REC. 697, 731 (2000).

184. 146 CONG. REC. 501, 509 (2000) (statement of Sen. Kennedy).

185. See 146 CONG. REC. 3155 (2000) (statement of Sen. Lott) (noting that an approved minimum wage amendment would stall passage of the bill “because it could be subject to, and would be subject to, the so-called blue slip rules of the House”); 145 CONG. REC. 29075, 29086–87 (1999) (motion to table minimum wage amendment passed by a vote of 50–48).

### *E. Pre-Enactment Racial Politics*

Given the often polarizing nature of racial group politics in this country, it was somewhat surprising that race played so little role in the BAPCPA legislative debates. The House report that accompanied BAPCPA makes only one direct reference to a racial minority group<sup>186</sup> and mentions the phrases “minorities” and “civil rights” (or any variation) in only two speeches.<sup>187</sup> A search of the Congressional Record of the legislative debates for the bankruptcy bills reveals that the phrases “African-American,” “black,” “Latino,” or “Hispanic” appear in less than twenty-five speeches during the debate,<sup>188</sup> and the vast majority of these references relate to minority homeowners who the speakers contended likely would have benefited from the failed predatory lending amendments or wage earners who would have benefited from the failed minimum wage amendments.<sup>189</sup> Although opponents argued that the bankruptcy legislation would harm minorities and noted that civil rights organizations opposed the legislation,<sup>190</sup> none of the amendments that arguably would have helped minorities—such as those concerning predatory lending or raising the minimum wage—passed.<sup>191</sup> Moreover, the minimum wage bill largely was viewed as another poison pill.<sup>192</sup> Of course, that these amendments failed—and that most references to racial minorities involved minority homeowners—could be the result of this country’s lingering

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186. H.R. REP. NO. 109-31, pt. 1, at 398 (2005) (mentioning African-Americans).

187. H.R. REP. NO. 109-31, pt. 1, at 386, 398 (2005).

188. Westlaw search conducted by author on April 13, 2007, on the “Bankruptcy Reform Act Congressional Record” database (BKRA-CR), using the search terms “African-American,” “black,” “Latino,” and “Hispanic.” In contrast, in that same database, the phrase “personal responsibility” appears more than sixty times.

189. See 151 CONG. REC. H1993, H2064 (daily ed. Apr. 14, 2005) (statement of Rep. Jackson-Lee) (arguing that African-American homeowners often fall prey to predatory lending practices).

190. 151 CONG. REC. H1974, H1983 (daily ed. Apr. 14, 2005) (letter of Leadership Conference on Civil Rights); 147 CONG. REC. S2361 (daily ed. Mar. 15, 2001) (statement of Sen. Kennedy).

191. Sen. Kennedy urged fellow senators to support an amendment (which failed) that allowed debtors an unlimited exemption for their retirement savings because of the low rate of minority pension participation. 147 CONG. REC. (2001) (statement of Sen. Kennedy). Although this amendment theoretically helps minorities, the benefits would have been relatively minimal since minorities have a significantly lower pension participation rate than whites. That is, given the disparity between white and minority pension participation rates and the value of those pensions, this amendment disproportionately benefits white debtors since they are more likely than minority debtors to have any type of pensions or to have a large pension that they would want to protect in bankruptcy. See generally A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 932 (2006).

192. 146 CONG. REC. 3155 (2000) (statement of Sen. Lott); 145 CONG. REC. 29075, 29086–87 (1999).

ambivalence toward, and occasional hostility to, the economic conditions facing blacks, especially poor blacks.<sup>193</sup>

## VI. RE-TELLING THE BAPCPA STORY

### *A. Interest Groups and Ideology before BAPCPA's Effective Date*

By February 2005, when the Senate again began to consider bankruptcy legislation, Congress appeared to conclude that it had reached appropriate compromises to protect the interests of all relevant groups and all concerns (ideological and other).<sup>194</sup> To ensure quick passage of BAPCPA and to ensure that the clinic access, homestead exemption, minimum wage, or any other poison pill amendment did not derail the legislation, few amendments passed or were even allowed to be considered.<sup>195</sup> Not surprisingly, of the amendments that passed, one was related to provisions that would allow a debtor to include health or disability insurance payments as expenses for the purposes of the means test<sup>196</sup> and three were anti-Enron amendments.<sup>197</sup> Amendments that would have *raised* the homestead exemption level for seniors, that would have exempted consumers victimized by identify theft from the means test, and that would have required credit counseling agencies to provide free

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193. A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 29–31 (1999). This country's unease with the notion that we may well have a permanent underclass may also explain why opponents of the legislation consistently referred to bankruptcy as a safety net for the "middle class" that helps hard-working individuals maintain a typical—but not lavish—American lifestyle. See Warren, *supra* note 43, at 29 (describing the bankruptcy system as a "safety net for the financial health of American women" and noting that bankruptcy lets these middle class debtors "discharge certain debts . . . so that they can pay the mortgage or rent, utility bills, tuition, and car payments . . ."). See also Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2131 (2003) ("Insulating mostly middle-class debtors from the experience of long-term poverty, the bankruptcy process protects the political power of the middle class . . .").

194. See 151 CONG. REC. S1855 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley) ("We have all cooperated and compromised at great length in order to enact this legislation . . . I do not believe there is any need to reopen this bill and to disrupt the many compromises we have already reached . . .").

195. 151 CONG. REC. H1974, H1976 (daily ed. Apr. 14, 2005) (listing amendments the House Rules committee refused to consider).

196. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2000).

197. These amendments limited corporate executives' bonuses and pay, made certain securities fraud debts non-dischargeable, and made it easier to appoint a trustee in a Chapter 11 case if fraud is suspected. These amendments are codified at 11 U.S.C. §§ 503(c), 523(a)(19), 1104 (2000).

services to recent veterans who served in combat zones were defeated by a party-line vote.<sup>198</sup>

On March 10, 2005, the Senate voted in favor of BAPCPA by a vote of 74–25 (which included all Republicans and 18 Democrats).<sup>199</sup> Then, on April 14, 2005, the House voted by a vote of 302–126 (which included all Republicans and 73 Democrats).<sup>200</sup> In signing the bill into law, President Bush stated that the bill was needed to prevent fraud and to reinforce the principle that this country “is a nation of personal responsibility where people are expected to meet their obligations.”<sup>201</sup>

Although, as noted earlier, racial group politics were largely absent during BAPCPA’s pre-enactment debates, race became a clear factor after BAPCPA was enacted but before it became fully effective. On August 29, 2005, Hurricane Katrina devastated the Louisiana and Mississippi Gulf Coast region. Opponents attempted to use the racially charged atmosphere surrounding the federal government’s abysmal response to this disaster to derail BAPCPA.<sup>202</sup> Although the full extent of Katrina’s overall economic harm to the residents of the Gulf Coast has yet to be determined, when Katrina struck, sixty-seven percent (or roughly 307,000) of the approximately 454,800 residents in Orleans Parish were black.<sup>203</sup> Given this demographic profile and the likelihood that blacks would suffer disproportionately greater economic losses than whites,<sup>204</sup> the Congressional Black Caucus (“CBC”) and other members of Congress proposed legislation that would have protected the families and small

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198. A few amendments that were designed to protect veterans and active duty members of the military did pass, though amendments that would have protected service members from debts related to payday loans were rejected. H.R. REP. NO. 109-31, pt. 1, at 376–91, 418–22, 476–74 (2005).

199. 151 CONG. REC. S2474 (daily ed. Mar. 10, 2005).

200. 151 CONG. REC. H2075–76 (daily ed. Apr. 14, 2005).

201. Press Release, White House, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html>.

202. See Press Release, Rep. Jerrold Nadler, Nadler, Conyers, Watt, Jackson Lee to Introduce Bill to Relieve Debt Burden on Katrina Survivors (Sept. 1, 2005), [http://www.house.gov/list/press/ny08\\_nadler/debtreliefkatrina090105.html](http://www.house.gov/list/press/ny08_nadler/debtreliefkatrina090105.html) (“Our common sense bill will insure that we do not compound a natural disaster with a man made financial disaster.”).

203. See U.S. Census Bureau, State & Count Quick Facts, Orleans Parish, Louisiana, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited Feb. 9, 2007).

204. Although Katrina’s impact by race was not clear in the first few days after the hurricane, a recent study indicates that Katrina’s impact (in both Louisiana and Mississippi) was disproportionately borne by blacks, renters, the poor, and those who were unemployed. See John R. Logan, *The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods*, <http://www.s4.brown.edu/Katrina/report.pdf> (last visited Mar. 3, 2007) (stating that 45.8 percent of the heavily damaged areas were in predominately black neighborhoods while only 26.4 percent of the undamaged areas were in black neighborhoods).

businesses who were financially devastated by the hurricane.<sup>205</sup> Although only twenty-five percent of the members of the CBC voted for BAPCPA,<sup>206</sup> and the CBC did not attempt to block the legislation, the CBC membership supported these post-enactment amendments.

The Katrina amendments were designed to allow hurricane victims to file for bankruptcy under pre-BAPCPA law,<sup>207</sup> to avoid most effects of the means test,<sup>208</sup> or to generally delay BAPCPA's effective date.<sup>209</sup> As was true of most attempts to derail the legislation by introducing clearly ideological amendments (like the ones involving abortion or the minimum wage), and of virtually all efforts in 2005 to amend BAPCPA to accommodate the concerns of other interest groups, BAPCPA's supporters opposed and ultimately defeated all legislative attempts to provide bankruptcy relief to people harmed by natural disasters, including those devastated by Hurricanes Katrina or Rita.

### *B. BAPCPA's Multiple Story Lines*

Opponents of the legislation argued that BAPCPA was written, bought, and paid for by the consumer credit lobby, and news reports frequently cited the millions of dollars this lobby contributed to individual members or to political action groups. No one suggested, however, that the BAPCPA story should be told as one that involved Congress being captured by women, custodial parents, retirees, or service members. Perhaps that is because those groups influence Congress by their potential votes, not their potential campaign contributions. Yet, a public choice

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205. See Press Release, Rep. Jerrold Nadler, *supra* note 202 (expressing desire to prevent Hurricane Katrina survivors from harm, or an "unintended financial whammy," that might be caused by BAPCPA).

206. Twenty-five percent of the members of the CBC in 2005 voted for BAPCPA. There were forty-three African-Americans in Congress. See Mildred L. Amer, *Black Members of the United States Congress: 1870–2005*, CRS Report for Congress at 2, <http://www.senate.gov/reference/resources/pdf/RL30378.pdf>. Of the forty-one that voted, ten (or twenty-five percent) voted in favor of BAPCPA. See Final Vote Results for Roll Call 108, <http://clerk.house.gov/evs/2005/roll108.xml>.

207. Financial Safeguards for Hurricane Survivors Act of 2005, H.R. 3662, 109th Cong. § 2 (2005).

208. Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, S. 1647, 109th Cong. § 6 (2005); Katrina Emergency Relief Act of 2005, S. 1637, 109th Cong. § 451 (2005).

209. Financial Safeguards for Hurricane Survivors Act of 2005, H.R. 3662, 109th Cong. § 2 (2005); Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. § 9 (2005). Ironically, when Congress originally considered BAPCPA in 2005, one member of Congress offered an amendment to protect the victims of natural disasters. That amendment, like virtually all others that would have made it easier for people to avoid the effects of BAPCPA, was defeated without debate. H.R. REP. NO. 109-31, pt. 1 at 502 (amendment offered by Rep. Jackson-Lee).

analysis properly would consider whether legislators were motivated by the self-interests of *all* relevant constituents—both campaign contributors and voters.

The single industry capture theory may explain why liberal and conservative, Democratic and Republican members of Congress consistently supported BAPCPA. And, it seems likely that at least some members' support for the bankruptcy legislation was influenced by their desire to continue to receive the support of the financial services industry. Equally plausible, though, is the story that members of Congress supported a bill that most conceded was drafted by representatives for the consumer credit lobby because they concluded that it was safe to vote for the significantly revised and diluted BAPCPA which, once reformed, adequately protected the interests of all relevant groups.<sup>210</sup> Although those constituent interests were not strong enough to prevent Congress from enacting BAPCPA, the desire not to alienate women, members of the armed forces, veterans, and seniors clearly influenced BAPCPA's final contents. Thus, even if members of Congress may have been inclined to support the bill because of the financial support they received—and hoped to receive in the future—from the consumer credit industry, they appeared reluctant to vote for a bill that might offend a large number of their constituents.

In addition, that BAPCPA primarily benefited the consumer credit lobby does not mean that the legislators who supported the bill disagreed with the bill's normative view of personal responsibility. Of course, it is difficult to determine with certainty whether a legislator supported a bill because of her personal ideological views or because of her constituents' interests.<sup>211</sup> However, to fully tell the BAPCPA story, it is important to acknowledge that some members may have been willing to vote for a bill that had harsh consequences for some people because of the legislators' ideological view that bankruptcy laws need to impose a rigid sense of personal responsibility—incur only those debts you can repay and repay all debts you incur.

Because so much of the debate revolved around finding the best formula to calculate who is a can-pay, the legislation appeared to be just a technical, non-politicized amendment to a technical federal statute. It is likely, though, that this would have changed if bankruptcy had instead

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210. An undefined group of potential debtors, or generally of people, who seek to avoid paying their debts, would not of course be viewed as an important interest group.

211. See Farber & Frickey, *supra* note 67, at 897 n.149 (citing studies which sought to determine how great a role ideology plays on legislators' votes).

been labeled “ideological.” The mere label likely would have generated a different type of public and media attention during the legislative process<sup>212</sup> and likely would have altered the behavior of members of Congress. In any decisionmaking process—whether political or not—labels and stereotypes matter.<sup>213</sup> Indeed, by not explicitly characterizing the bill as ideological, moderate and liberal members of Congress received political cover and were allowed to vote for a bill that potentially harms all but the upper class and that punishes even those financially distressed Americans who did not engage in illegal or immoral activities.

That Congress avoided having a full discussion of what personal responsibility means is unfortunate because such a discussion likely would have forced the legislation’s supporters to explain their views of personal responsibility and to disclose just how much of a person’s human capital they think should be devoted to repaying his/her debts. Had the bill been viewed as ideological, legislators would have been forced to clearly explain which debtors they felt deserved to discharge their debts—e.g., those who had unexpected medical expenses—and which were undeserving debtors—e.g., those who ran up their credit cards after they got a divorce. Because the bill was never viewed and characterized as ideological, legislators could avoid admitting that they believed that debtors who were in financial distress because of over-spending should be forced to suffer the consequences of their financial choices, *even if* they chose to overspend because they lost a job or got a divorce. Had the bill been cast as an ideological one, legislators perhaps would have explained whether they felt people should repay their bills using any means necessary, even if it took a long time and required them, and their dependents or family members, to make significant personal sacrifices.

Finally, since most of the public criticisms of the legislative process involved the vote-buying story and the empirical debate over how to define a can-pay, members of Congress could avoid examining whether the American Dream remains a possibility to most families. As so many debtors file for bankruptcy because of their desire to “cling to homes that are weighted down with debt,”<sup>214</sup> Congress may at some point be forced to revisit all federal policies that encourage and subsidize homeownership

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212. Cf. Lee Epstein, Nancy Staudt & Peter Wiedenbeck, *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL’Y, 305, 311 (2003) (noting that “civil rights cases generate a great deal more public and media attention than . . . tax suits”).

213. See *id.* at 312 (2003) (citing studies that show that Supreme Court justices’ behavior varies depending on whether they think they are “resolving an especially salient case”).

214. Sullivan, Warren & Westbrook, *supra* note 45, at 227.

and may need to consider whether certain members of society should rent a home rather than borrow lavishly or foolishly to try to become and remain a homeowner.<sup>215</sup> It is possible that a large segment of the United States population may no longer be able to attain and retain the traditional middle class lifestyle of owning a home or car, subsidizing their children's education, or of having a secure financial future. Likewise, it is possible that it is no longer plausible for people to avoid financial distress simply by working hard and assuming that that hard work is enough.

## VII. CONCLUSION

Legislative opponents' one-line explanation for BAPCPA is that it was bought and paid for by the consumer credit lobby. Legislative supporters' one-line explanation is that it was needed to prevent abuse and ensure that consumers learned the importance of personal responsibility. Certainly, the financial services creditors generally, and the credit card industry specifically, were instrumental in forcing Congress to consider—and ultimately enact—legislation that forces most debtors to “pass” a means test before they are allowed to proceed in Chapter 7. The role that special interest groups—other than the consumer credit industry—and ideology played during the legislative process remains, however, largely an untold story.

Treating BAPCPA as a story of simple credit card industry capture fails to take into account the compromises members of Congress made in their attempt not to alienate monied constituents *or* potentially powerful voting constituent interest groups (like women, retirees, or military members). And, although bankruptcy is viewed by many as being non-ideological and the legislative debates were not framed in pure ideological terms, using a single storyline to explain BAPCPA does not adequately account for the importance of individual legislators' ideological views that people should not incur more debts than they can pay and should repay all their debts if they choose to incur them.

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215. See Eduardo Porter & Vikas Bajaj, *Mortgage Trouble Clouds Homeownership Dream*, N.Y. TIMES, Mar. 17, 2007, at A1 (questioning whether this country's drive to increase homeownership has crossed boundaries of “demographic and economic sense”).