Berkeley La Raza Law Journal

Volume 18 Article 5

2007

Left Behind: The Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Economic, Social, and Racial Justice

Dariely Rodriguez

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38TM1J

Left Behind:

The Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Economic, Social, and Racial Justice*

Dariely Rodriguez**

INTRODUCTION

On April 20, 2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") into law.[1] BAPCPA is the biggest overhaul to the bankruptcy code in more than twenty-five years. The Act makes it harder for individuals to discharge all of their debt under Chapter 7 by increasing the cost of bankruptcy, mandating credit counseling as a prerequisite to relief, and requiring debtors to pass an income means test. Given the ever-increasing risks of homeownership, the outsourcing of jobs, and rising health care costs, the timing of this law's passage was in direct opposition to this country's long-standing policy of providing the neediest debtors with a fresh start.[2]

In order to secure the passage of this law, financial interests spent millions of dollars and lobbied extensively.[3] Proponents of BAPCPA cited the significant increase in bankruptcy filings over the last decade as evidence of consumers' abuse of the bankruptcy code.[4] Opponents argued that claims of fraud and abuse were

---

* This essay was prepared for the Lat Crit XI Conference held at UNLV William S. Boyd School of Law on October 5-8, 2006.

** Associate, Jackson Lewis LLP. B.A., New York University; J.D., Hofstra University School of Law.
The author would like to thank the organizers of the 2006 Lat Crit Conference, especially Angela Harris. The author also acknowledges the valuable feedback provided by Laura Appleman, Alisha Montoro, and the participants of the conference, where an earlier draft of this essay was discussed on a panel.

1. Press Release, Whitehouse, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act, Apr. 20, 2005, http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html; American Bar Association Fact Sheet, Bankruptcy Attorney Liability Legislation, Feb. 2008, *available at* http://www.abanet.org/poladv/priorities/bankruptcy/brattyliability_facts.pdf.

2. *See generally* Tamara Draut & Javier Silva, *Borrowing to Make Ends Meet: The Growth of Credit Card Debt in the '90s* (Sept. 2003), *available at* www.demos.org/pubs/borrowing_to_make_ends_meet.pdf.

3. Jennifer Emens-Butler, *Bankruptcy Reform: Gather 'Round Children, Yes, the Sky IS Falling*, 31 VT. B.J. 26, 26 (2005) (noting that credit card industry invested an initial $40 million and also spent additional money over eight years to ensure the bills passage).

4. *See* Harvey Miller, The Beginning of a New Bankruptcy Era in Law, Keynote Address at American College of Bankruptcy (Mar. 18, 2005), *available at* http://www.amercol.org/images/The%20Beginning%20of%20a%20new%20era.doc. *Contra* Charles J. Tabb & Alice Curtis Campbell, *Consumer Bankruptcy Filings: Trends and Indicators* 8 (Univ. of Illinois Law & Econ. Working Papers Series, Paper No. LE06-023, 2006), *available at* http://papers.ssrn.com/pape.tar?abstract_id=931172 (last visited Nov. 20, 2008) (arguing that BAPCPA was enacted ten years too late given the fact that bankruptcy filing rates have increased at very modest pace since 1997 [e.g. the increase in filings per 1,000 population has increased only three percent total from 1997 to 2006]).

overstated.[5] However, neither group predicted the impact BAPCPA would have in managing housing related risks, particularly among sub-prime borrowers who are disproportionately African-American and Latino.[6]

This article addresses how BAPCPA denies African-Americans and Latinos access to economic stability, wealth, and a permanent place in the American middle-class. Part I presents a general history of bankruptcy legislation in the United States. Part II illustrates how BAPCPA achieved support from Democrats, despite the party's traditional emphasis on consumer protection. Part III describes the most significant changes to the bankruptcy code. Part IV discusses the history of minorities' access to credit and bankruptcy relief. Part V addresses the effect of the subprime mortgage crisis on communities of color. Part VI proposes a holistic approach to bankruptcy reform as part of a larger agenda that advances economic opportunities for minorities and secures the future middle-class.

I. HISTORY OF BANKRUPTCY IN THE UNITED STATES

The right to bankruptcy relief has long been recognized in the United States.[7] Even before the enactment of a federal bankruptcy law in 1898, states passed laws that stayed the collection activities of creditors and provided for limited discharge of debts.[8] When the economy would suffer prior to the enactment of the Bankruptcy Act of 1898, the federal government would enact temporary bankruptcy laws allowing it to recover creditors' investments.[9]

Congress derives its authority to "establish uniform Laws on the subject of bankruptcies throughout the United States" from Article I, Section 8 of the United States Constitution. Under this grant of authority, Congress enacted the Bankruptcy Act of 1898, or the Nelson Act.[10] The enactment of the Bankruptcy Act of 1898 gave honest debtors oppressed by the burdens of excessive debt a clean slate.[11] At

---

5. *See* Draut, *supra* note 2, at 4 (explaining that while "materialistic pressures or desires are part of the story, major trends in wages, housing costs and health care costs strongly suggest that structural economic factors helped fuel the Decade of Debt").

6. *See* JENNIFER WHEARY ET AL., ECONOMIC (IN)SECURITY: THE EXPERIENCE OF THE AFRICAN-AMERICAN AND LATINO MIDDLE CLASSES 18 (2008) (stating that the "Department of Housing and Urban Development has found that subprime loans are three times more likely in low-income neighborhoods than in high-income neighborhoods and five times more likely in African American neighborhoods than in white neighborhoods").

7. *See* Charles Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy* 28 (Univ. of Illinois Law & Econ. Working Papers Series, Working Paper No. LE05-032, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=859725 (last visited Apr. 2, 2008) (stating that since the late 18th century, American society has viewed debtors as "inevitable losers in the game of commerce, the playing of which was good for the economic health of the nation"). *See also* Local Loan Co. v. Hunt, 292 U.S. 234 (1934):

> The new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.

8. DAVID SKEEL, A HISTORY OF BANKRUPTCY LAW IN AMERICA 25 (2001), *available at* http://press.princeton.edu/chapters/s7159.pdf ("In times of financial panic, states also responded by passing stay laws imposing moratoria on creditor collection.").

9. *Id.*

10. Nelson Act (Bankruptcy Act of 1898), 55 Cong. Ch. 541, 30 Stat. 544 (1898).

11. *Id. See also* Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J.

the time, surrendering one's property in exchange for a complete discharge of debt was thought to be beneficial to the individual as well as society because it enabled the individual to contribute to the economy once again.[12]

The essence of fresh start doctrine was captured in the Supreme Court case *Local Loan v. Hunt.* In *Local Loan,* Justice Sutherland wrote:

> When a person assigns future wages, he, in effect, pledges his future earning power. The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern.[13]

Justice Sutherland depicts the figurative imprisonment consumers face when overwhelmed by debt they are unable to pay. In his view, the assignment of future wages to creditors is equivalent to the relinquishment of personal liberty and a property right.[14]

In 1978, Congress enacted the Bankruptcy Code to replace the 1898 Act.[15] The 1978 Code increased the benefits for individual debtors and reaffirmed a debtor's right to a "fresh start."[16] BAPCPA, which makes it harder for debtors to obtain a fresh start by taking away a debtor's right to choose between a Chapter 7 liquidation and a Chapter 13 repayment plan, represents a shift in popular sentiment that views bankruptcy relief as a moral wrong and not a constitutional right.[17]

II. BIPARTISAN SUPPORT OF BACA

BAPCPA gained the mutual support of Democrats and Republicans who shared the belief that bankruptcy reform needed to embody the principles of personal responsibility.[18] While Republicans voted for the bill as expected, Democrats voted against the interests of their core constituency.[19] Despite the disproportionate effect

---

549, 550 (1995) ("The Bankruptcy Act of 1898 was the product of a prolonged legislative struggle between agrarian interests which wanted only voluntary (debtor-initiated) proceedings and banking interests which fought for a creditor-controlled involuntary system.").

12. *See* Miller, *supra* note 4, at 4.

13. Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934).

14. *Id.* at 241.

15. Bankruptcy Reform Act of 1978, Public L. No. 95-598, 92 Stat. 2549 (1978).

16. *See* Ian Domowitz & Robert L. Sartain, *Incentives and Bankruptcy Chapter Choice; Evidence from the Reform Act of 1978*, 28 J. LEGAL STUD. 461, 467 (1999) (expanding the list of dischargeable debts, regardless of amount paid).

17. Draut, *supra* note 2, at 23 (stating that before BAPCPA, American policy has been to "encourage debtors to maximize the fruits of their human capital through the immediate chapter 7 discharge").

18. *See* Elizabeth Warren & Amelia Warren Tyagi, *What's Hurting the Middle Class: The Myth of Overspending Obscures the Real Problem*, B. REV., Sept./Oct. 2005, *available at* http://bostonreview.net/BR30.5/warrentyagi.html (presenting various examples of overspending on consumer goods).

19. *See* Steven Nunez & Howard Rosenthal, *Bankruptcy Reform in Congress: Creditors, Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J. L. ECON. & ORG. 527 (2004) (explaining that there was a strong correlation between campaign contributions and certain votes).

of BAPCPA on the bottom half of the income distribution, the bill elicited substantial Democratic support.[20] Democratic support of bankruptcy reform dates back to 1999, when the New Democrat Coalition provided the key Democratic voting bloc to pass bankruptcy reform legislation.[21]

Creditors' strategic use of political contributions must be noted in an analysis of bankruptcy reform. Studies show that campaign contributions were significantly correlated with voting for a bill, evidence that "money distorts voting from its normal pattern."[22] The power of credit companies to sway politicians to enact legislation against their constituents' interests confirms the unfavorable trend in politics to favor the interests of the wealthy and forgo the interests of lower- and middle-classes.

In 2006, Democrats regained control of Congress and the legislative agenda. Several committees headed by BAPCPA critics have held hearings on credit card industry practices, predatory subprime home mortgage lending, and oversight of BAPCPA implementation.[23] The agenda of the new Congress should provide an incentive for voters and consumer advocacy organizations to push for increased liability and penalties for lenders who extended risky credit to low-income and vulnerable debtors.

III. CHANGES AND EFFECTS

Under the former bankruptcy law, a debtor could choose whether they wanted to file under a Chapter 7 liquidation plan or a Chapter 13 repayment plan. Chapter 7 of the Bankruptcy Code provides for the liquidation or sale of a debtor's nonexempt property so that the proceeds can be distributed to creditors.[24] Chapter 13 allows debtors to keep their property, but forces them to repay all or parts of their debts over time.[25] Debtors who have equity in a home may choose to file Chapter 13 in order to preserve their home, whereas a debtor with little to no equity may prefer to file for Chapter 7.

20. *Id.*

21. Press Release, Democratic Coalition, New Democrats Key to Bankruptcy Reform Package (May 5, 1999), *available at* http://www.house.gov/apps/list/press/ca10_tauscher/050599_bankruptcy.html. This legislation was eventually vetoed by President Bill Clinton. *See* John McMickle, *Living Expenses in Chapter 13: A Fresh Look at the Legislative History of Bankruptcy Reform*, AM. BANKR. INST. J. (Feb 2008), *available at* http://findarticles.com/p/articles/mi_qa5370/is_200802/ai_n24394405.

22. *See* Nunez, *supra* note 19, at 533.

23. *See Hearing on The Credit Cardholders' Bill of Rights: Providing New Protections for Consumers Before the H. Subcomm, on Financial Institutions and Consumer Credit*, 110th Cong. (Apr. 26, 2007); *Hearing on Credit Card Practices: Fees, Interest, and Grace Period Before S. Permanent Subcomm. on Investigations*, 110th Cong. (Mar. 7, 2007); *Hearing on Examining the Marketing, Billing and Disclosure Practices of the Credit Industry, and Impact on Consumers Before S. Banking Comm.*, 110th Cong. (Jan. 25, 2007); *Hearing on Subprime and Predatory Mortgage Lending: New Regulatory Guidance, Current Market Conditions and Effects on Regulated Financial Institutions Before H. Subcomm. on Financial Institutions and Consumer Credit*, 110th Cong. (Mar. 27, 2007); *Hearing on Preserving the American Dream: Predatory Lending Practices and Home Foreclosures Before S. Comm. on Banking, Housing and Urban Affairs*, 110th Cong. (Feb. 7, 2007).

24. Exempt property refers to property owned by an individual debtor that the Bankruptcy Code or applicable state law permits the debtor to keep from unsecured creditors. U.S. Courts' Glossary, Bankruptcy Basics, *available at* http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/glossary.html (last visited Apr. 2, 2008).

25. *Id.*

Under section 707(b) of the former bankruptcy legislation, federal court judges had the power to dismiss Chapter 7 cases for substantial abuse when the debtor had the ability to propose and carry out a workable Chapter 13 plan.[26] Under BAPCPA, debtors no longer have a choice between Chapter 7 and Chapter 13. In order to file under Chapter 7, a debtor's income must pass a "means test" that is designed to single out abusers of the bankruptcy system.[27] According to the means test, if a person's household income is higher than their state's median income and they are able to pay $6,000 over five years (about $100 a month), they must file for Chapter 13 and pay their debt in accordance with a court-imposed repayment plan.[28] BAPCPA also increases the cost of bankruptcy filings, imposes extensive documentation requirements, and requires debtors to submit to credit counseling within six months of filing.[29]

The costs associated with filing any form of bankruptcy have soared under BAPCPA. Filing fees that debtors must pay have risen from $209 to $299 for Chapter 7 and from $150 to $274 for Chapter 13.[30] BAPCA provides a filing fee waiver for debtors who are unable to pay the Chapter 7 filing fees and whose income is less than 150 percent of the poverty level.[31] Since BAPCPA increases the potential for unprecedented liability for bankruptcy attorneys, attorney costs have gone up by $150 to $500 per case.[32] Debtors also have to pay fees for credit counseling and financial management courses. Since BAPCPA provides a fee waiver for indigent debtors, and Chapter 7 liquidations are generally simple proceedings, the increased costs associated with consumer bankruptcy will have the most impact on middle-class families seeking relief under Chapter 13.[33]

Many homeowners turn to Chapter 13 because it gives them an opportunity to save their homes from foreclosure.[34] Unlike Chapter 7, Chapter 13 permits a

---

26. The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), 11 U.S.C. § 707(b) (2005).

27. BAPCPA, 11 U.S.C. § 707(b)(2)(a) (2005).

28. *Id.*

29. *See* BAPCPA, 11 U.S.C. § 109(h)(1) (2005) (stating that no individual may be a debtor under any Chapter of the Bankruptcy Code unless he or she has, within 180 days before the filing, received credit counseling from an approved credit counseling agency). *See also* Eric Dash & Jennifer Bayot, *Creditors' Role in Counseling Draws Critics*, N.Y. TIMES, Oct. 14, 2005, at A1 (explaining that consumer advocates have criticized the credit counseling requirement because debtors may be improperly swayed into debt management plans instead of seeking recourse from bankruptcy courts. Since counseling agencies often receive part of any debts repaid, consumer advocates predict a potential conflict of interest.).

30. *See* Douglas W. Kassebaum, *BAPCPA's Effects on Consumer Bankruptcy Filings*, NORTHWESTERN FIN. R., June 15-30, 2007, *available at* http://findarticles.com/p/articles/mi_qa3799/is_20070615/ai_n19338580. *See also* BAPCPA, 28 U.S.C. § 1930(a) (2005).

31. BAPCPA, 28 U.S.C. § 1930(f) (2005).

32. *See* Andrew Blackman, *Bankruptcy Filings Soar as Tougher Law Nears*, WALL ST. J., Oct. 4, 2005 (explaining that under certain circumstances, a debtor's attorney can be liable for fees, costs, and a civil penalty if the debtor's schedules are inaccurate. Bankruptcy attorneys have to be more diligent in keeping accurate records in order to minimize the possibility of being sued for malpractice.).

33. *See* Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP & FIN. L. 407, 411 (2002) (stating that means testing will make Chapter 7 "more expensive and inaccessible" and Chapter 13 "more burdensome and unworkable"). *See also* United States v. Kras, 409 U.S. 434 (1973) (holding that the "absolute fee requirement to file a bankruptcy petition does not violate a debtor's constitutional due process rights to the courts").

34. *See* Henry E. Hildebrand III, *The Sad State of Mortgage Service Providers*, AM. BANKR.

defaulting mortgage borrower to propose a plan to cure the mortgage arrearage over time while the homeowner continues with regular mortgage payments in accordance with their contract.[35] When a defaulting mortgage borrower files for any kind of bankruptcy, an injunction known as the "automatic stay" almost always will stop a foreclosure.[36] The automatic stay protects the borrower until the plan is completed or until the plan fails and is dismissed.[37] However, in addition to the high filing and counseling fees, Chapter 13 costs include repayment of unsecured debt, mortgage arrearage, interest, and ongoing mortgage payments. Thus, fewer borrowers are benefiting from the Chapter 13 automatic stay because they are unable to bring current their mortgage payments through repayment plans.[38] Instead, many homeowners use Chapter 13 to delay an inevitable foreclosure.[39] Of the many Chapter 13 cases that are filed, many fail and convert to Chapter 7, which results in the debtor having his or her home foreclosed.[40] Increasingly, borrowers who have negative home equity are choosing to have their homes foreclosed by banks in order to free up their income to pay credit card debt and other current living expenses.[41]

Prior to the enactment of BAPCPA, consumer filings reached an all-time high as filers rushed to avoid the harsher bankruptcy legislation.[42] As expected, individual bankruptcy filings reached historic lows in 2006, resulting in credit card companies writing off less debt.[43] However, the gains received by the credit industry have been offset by property foreclosures and the subprime mortgage crisis.[44] Furthermore, borrowers continue to face mounting levels of debt as evidenced by data released by the National Bankruptcy Research Center, which shows that U.S. consumer bankruptcy filings increased 40 percent nationwide in 2007 from the

---

INST. J., Sept. 2003, at 10 n.3 (stating that Chapter 13 trustees report that home saving are the principal reason they see debtors filing Chapter 13).

35. 11 U.S.C. §§ 1322, 1325 (2005).

36. 11 U.S.C. § 362(a) (2005).

37. 11 U.S.C. § 362 (2005).

38. *See* Lingling Wei, *Bankruptcy May Not Save Homes*, WALL ST. J., Apr. 11, 2007, *available at* http://www.marketwatch.com/News/Story/bankruptcy-may-not-save-homes/story.aspx?guid=%7B9DAC2084%2DE4E4%2D46EA%2DB20B%2DF312AB02B14C%7D.

39. *See* Jane Birnbaum, *Law Makes Debt Relief Harder for Homeowners*, N.Y. TIMES, Jan. 12, 2008, at C1, *available at* http://www.nytimes.com/2008/01/12/business/yourmoney/12money.html?scp=2&sq=bankruptcy+law+and+foreclosures&st=nyt (citing an increasing number of "placeholder" Chapter 13 filings by debtors who cannot afford their mortgages' resetting interest rates that can stay a foreclosure for two or three months if creditors are not diligent).

40. *See* Rod Dubitsky et al., *Subprime HEAT Update: More Repay Plans Fail in Subprimes Under 2005 Bankruptcy Law*, CREDIT SUISSE, Mar. 8, 2007, *available at* http://bluwiki.com/images/6/64/Credit_Suisse_HEAT_bk_report.pdf.

41. John Leland, *Facing Default Some Walk Out on New Homes*, N.Y. TIMES, Feb. 29, 2008, at A1, *available at* http://www.nytimes.com/2008/02/29/us/29walks.html.

42. *See generally* Karen Redmond, *Bankruptcy Filings Surge in Calendar Year 2005*, Mar. 24, 2006, *available at* http://www.uscourts.gov/Press_Releases/bankruptcyfilings032406.html.

43. *See* Samuel J. Gerdano, New Congress Lacks Votes to Overhaul; Focuses on Lender Practices and Compensation, http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48041 (last visited Apr. 15, 2008).

44. *See* Kathleen M. Howley, Bankruptcy Law Backfires as Foreclosures Offset Gains, Nov. 8, 2007, http://www.bloomberg.com/apps/news?pid=20601109&refer=home&sid=ar909uO1CqHw (explaining that "[p]eople are putting their credit card payments ahead of their mortgages" and that "of customers who are at least three months late on their mortgage payments, 70 percent are current on their credit cards").

previous year.[45] The continued instability encountered by middle-class families who face decreasing home equity and increasing mortgage and consumer debt calls for comprehensive bankruptcy reform. Minorities in particular have an urgent need for bankruptcy reform as they are disproportionately affected by unfair lending practices.

IV. HISTORY OF MINORITIES' ACCESS TO CREDIT AND BANKRUPTCY

Minorities' experiences with bankruptcy and credit have been shaped by a history of discrimination and, subsequently, the Civil Rights Movement.[46] After World War II, banks routinely "redlined" certain neighborhoods, denying African-Americans access to conventional forms of credit.[47] As a result, African-Americans resorted to alternative forms of credit such as pawnshops and check-cashing outlets.[48] Since these institutions relied on non-legal methods of collecting their debt, bankruptcy was of little importance to African-Americans during this period.[49]

Although the Civil Rights Movement peaked in the 1960s, several of the most important efforts to counteract discrimination in the credit market were enacted in the 1970s.[50] In 1974, Congress enacted the Equal Credit Opportunity Act ("ECOA"), which prohibits lenders from asking questions related to sex, race, or marital status.[51] Congress also enacted the Community Reinvestment Act ("CRA") in 1977, which increases banks' accountability towards low-income communities.[52]

The CRA was enacted to prevent banks from redlining[53] and is "intended to encourage depository institutions to help meet the credit needs of the communities in

---

45. Consumer Bankruptcy Filings Up Nearly 40 Percent In 2007, American Bankruptcy Institute, Jan 3, 2008, http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=50271&TEMPLATE=/CM/ContentDisplay.cfm.

46. *See* generally David Skeel, *Racial Dimensions of Credit and Bankruptcy*, 61 WASH & LEE L. REV. 1695 (2004) (examining the "connections among race, credit markets, and bankruptcy").

47. *See* Jonathan Brown, Racial Redlining: A Study of Racial Discrimination By Banks and Mortgage Companies in the United States, http://public-gis.org/reports/redindex.html (last visited June 8, 2008) ("Racial redlining is the practice whereby mortgage lenders figuratively draw a red line around minority neighborhoods and refuse to make mortgage loans available inside the red lined area"). *See also* Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Law*, 26 U. MICH. J.L. REFORM 527, 533 (1993) (noting that in the 1920s and 1930s "economic theorists and appraisers espoused that economic value and loan risk were related to race").

48. Skeel, *supra* note 46, at 1702. *See also* JOHN P. CASKEY, FRINGE BANKING: CHECK-CASHING OUTLETS, PAWNSHOPS, AND THE POOR 70 (1994) (noting that according to pawnshop owners, most of their customers are borrowers who are "excluded from bank or finance company loans," generally because they would not qualify).

49. Skeel, *supra* note 46, at 1702.

50. *Id.* at 1706-11 (explaining the impact of the Community Reinvestment Act, the Equal Credit Opportunity Act, the *Marquette* decision, and the 1978 Bankruptcy Reform Act on African-Americans' access to credit).

51. *Id.* at 1707. *See also* Dane, *supra* note 47, at 546-49; Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: A Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts: 1950-1995*, 33 SAN DIEGO L. REV. 583, 637-46 (1996) (discussing the enactment of, and post-enactment experience with, the ECOA).

52. Skeel, *supra* note 46, at 1707.

53. Comptroller of the Currency Administrator of National Banks, Community Reinvestment Act Information, http://www.occ.treas.gov/crainfo.htm (last visited Apr. 6, 2008).

which they operate," including low and moderate-income communities.[54] While CRA obliges banks to "demonstrate their commitment" to disadvantaged communities, it does not specify how this should be done. CRA simply instructs banks to meet "the credit needs of their entire communities, including low and moderate-income neighborhoods, consistent with safe and sound operation."[55] Similarly, CRA does not specify what is considered to meet the "needs" of these communities. This law, however, does provide an agenda for banks and community organizations to work together to increase access to credit and other banking services to underserved communities.

While ECOA and CRA represented significant gains for minority communities, the Supreme Court's 1978 decision in *Marquette National Bank v. First of Omaha Service Corp.* represented a setback. In *Marquette*, the Supreme Court held that the relevant rules for interest rates on consumer debt would be determined by the law of the bank's state of incorporation, rather than by the state where the credit card customer lived or used the card.[56] The Court ruled in favor of the national bank, stating that the interest rates it charged were not in violation of the state's usury laws because "The National Bank Act, 12 U.S.C.S. § 85 plainly provides that a national bank may charge interest on 'any loan' at the rate allowed by the laws of the State in which the bank is 'located.'"[57] *Marquette* allowed banks to pick the state with the weakest interest rate regulations, which led to the deregulation of interest rates.

Deregulation increased minorities' access to credit at a very high cost. Credit card companies were now able to extend credit to lower and moderate-income consumers. Profits gained from high interest rates would more than offset losses, even if borrowers defaulted.[58] Banks immediately began to incorporate in South Dakota, which permitted interest rates of up to 24 percent.[59] The advent of technology also strengthened the credit revolution. Technological advancements in underwriting enabled creditors to price the risk of debtors and quickly decide if they qualified for credit.[60] This allowed consumers to easily obtain credit through the mail.[61]

The Bankruptcy Act of 1978 impacted the credit revolution as well, contributing to the evolvement of subprime lending. While the Bankruptcy Act of 1978 is known for its debtor-friendly provisions, it also includes basic protections for creditors as well as special treatment for home mortgage lenders.[62] Congress

---

54. Federal Financial Institutions Examination Council (FFIEC), CRA, http://www.ffiec.gov/CRA (last visited Apr. 6, 2008).

55. *See generally* Community Reinvestment Act ("CRA"), 12 U.S.C. § 2903(a)(1) (2000) (noting that federal regulatory agencies shall "assess the institution's record of meeting the credit needs of its entire community").

56. Marquette Nat'l. Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 301 (1978).

57. *Id.*

58. For evidence that lending has moved down the economic ladder to encompass low-income households, see David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 332-46 (1999).

59. *See* ROBERT D. MANNING, CREDIT CARD NATION: THE CONSEQUENCES OF AMERICA'S ADDICTION TO CREDIT 36 (2000) (explaining the effect of *Marquette* on the credit industry).

60. *Id.*

61. *Id.*

62. *See* WILLIAM D. WARREN & DANIEL J. BUSSELL, BANKRUPTCY 570 (6th ed. 2002) (noting that mortgage industry lobbyists figured prominently in the bankruptcy reform legislation of

included provisions that gave mortgage companies almost complete protection from the risks associated with lending to lower-income borrowers.[63]

In the 1970s, minorities had unprecedented access to credit. But while Congress took steps to try to end discrimination in credit markets, credit discrimination took on a more covert guise. Explicit discriminatory practices, such as redlining of minority neighborhood by banks, became overshadowed by more discrete forms of credit discrimination, such as predatory lending—a practice used by financial institutions to charge higher interest rates and fees than warranted by the risk.[64]

V. MIDDLE-CLASS STATUS, HOMEOWNERSHIP, AND THE SUBPRIME MORTGAGE CRISIS

Today, although minority borrowers have access to a much wider range of credit than ever before, they continue to borrow on worse terms than whites.[65] Research shows that not only are African-Americans and Latinos more likely to be denied for a loan than whites, they are also more susceptible to high interest rates from subprime lenders.[66] Although homeownership rates are at historically high levels, persistent gaps remain between minorities and whites.[67] Moreover, African-American and Latino families are more likely to be indebted than white families.[68]

These economic disparities have been magnified by the subprime mortgage crisis, which is disproportionately affecting communities of color.[69] The subprime

---

1978).

63. *Id.*

64. *See generally* Gregory D. Squires, Predatory Lending: Redlining in Reverse, Shelterforce Online, Issue 139, Jan./Feb. 2005, http://www.nhi.org/online/issues/139/redlining.html.

65. JENNIFER WHEARY, AFRICAN AMERICANS, LATINOS AND ECONOMIC OPPORTUNITY IN THE 21ST CENTURY 5 (2006) (explaining the persistence of discriminatory lending practices today, e.g., in 2002, qualified African Americans were more than twice as likely to be rejected for mortgage and refinance loans, while Latinos were nearly three times as likely).

66. *See* Skeel, *supra* note 46, at 1713 (discussing the Federal Reserve Bank's study showing that 28 percent of minorities were denied for a loan while only 10 percent of whites were denied). *See also* Raymond Hernandez, *High-Cost Lenders Dominate in Black Areas, Study Finds*, N.Y. TIMES, Apr. 3, 2002, at B6, *available at* http://query.nytimes.com/gst/fullpage.html?res=9404E1D8133AF930A35757C0A9649C8B63.

67. *See* Donald R. Haurin et al., *Homeownership Gaps Among Low-Income and Minority Households*, CITYSCAPE: A J. OF POL'Y DEV. & RES, Vol. 9 No. 2, 2007, *available at* http://ssrn.com/abstract=1032187 (analyzing gaps in homeownership rates by income, race, and ethnicity). *See also* U.S. CENSUS BUREAU, ANNUAL STATISTICS: 2007, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER: 1994 TO 2007, *available at* http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t20.html (last visited Apr. 6, 2008) (showing that homeownership rates for Hispanics and African-Americans in 2007 were 49.7 percent, and 47.2 percent, respectively. The white homeownership rate for 2007 was 72 percent.).

68. Draut, *supra* note 2, at 3 (claiming that "[Blacks and Hispanics] may be less likely to have credit cards, [but those] who do . . . are more likely to have credit card debt than white families").

69. *See* PAYING MORE FOR THE AMERICAN DREAM: THE SUBPRIME SHAKEOUT AND ITS IMPACT ON LOWER-INCOME AND MINORITY COMMUNITIES, joint report by California Reinvestment Coalition, Community Reinvestment Association of North Carolina, Empire Justice Center, Massachusetts Affordable Housing Alliance, Neighborhood Economic Development Advocacy Project, Ohio Fair Lending Coalition, and Woodstock Institute i (Mar. 2008), *available at* http://www.woodstockinst.org/publications/research-reports/ (showing that "[h]igh-risk lenders made a substantially higher proportion of their loans and captured a much greater percentage of the market in predominantly minority neighborhoods than in predominantly white neighborhoods."). *See also* Roberto

mortgage crisis has been caused, in part, by increasingly lenient underwriting standards in the mortgage market.[70] The subprime mortgage crisis has stripped many minority households of their home equity and threatens to undermine minorities' access to permanent wealth and stability.[71]

Middle-class families of all races are most likely to file for bankruptcy.[72] Middle-class families, despite having modestly higher incomes, struggle financially due to the increased cost of homeownership.[73] Over the past generation, mortgage expenses have increased almost 70 percent.[74] Furthermore, the percentage of families who spend more than 35 percent of their income on housing has quadrupled in a single generation.[75] Blue collar employees earning an average salary can no longer afford the mortgage of a median priced home in the majority of the nation's metropolitan areas. Due to the increased cost of living, and despite having two income-earners, families are having trouble keeping up with their expenses. The economic situation is even more alarming for African-American and Hispanic middle-class families.[76] Compared to white middle-class families, Hispanic middle-class families are nearly twice as likely to file for bankruptcy, and African-American middle-class families are three times more likely to file.[77]

White families have much higher rates of homeownership than African-American and Hispanic families. In 2007, white homeownership rates were at 72 percent while that of African-Americans and Hispanics were 47.2 and 49.7 percent, respectively.[78] Moreover, whites have more net equity than minorities. In 2004, white homeowners had a median net equity of $80,000, compared to $52,882 and $60,000 for African-American and Latino homeowners, respectively.[79] Despite differences in income, Hispanic homeowners are almost three times more likely to file for bankruptcy than whites, while African-American homeowners more than five times more likely to file.[80]

While one would expect minority homeowners to be more financially secure than minority renters, the opposite is true. Homeownership does not carry the

---

G. Quercia et al., The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments 4-5, Jan. 25, 2005, http://www.ccc.unc.edu/documents/foreclosurepaper.pdf (stating that data suggest that low-income, elderly, and minority borrowers may be especially vulnerable to predatory lending, a subset of subprime lending, because of their "greater susceptibility to 'push marketing,' high-pressure sales pitches, lack of experience with mortgage lending, and urgent need for credit").

70. Quercia, *supra* note 69, at 3.

71. *See* Vikas Bajaj, *Equity Loans as Next Round in Credit Crisis*, N.Y. TIMES, March 27, 2008, at A1, *available at* http://www.nytimes.com/2008/03/27/business/27loan.html.

72. *See* Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1779 (2004) (explaining that bankruptcy is a middle-class phenomena. When measured by education, occupation, and homeownership, middle-class families are by in large the most frequent users of the bankruptcy system.).

73. *Id.* at 1780.

74. Warren, *What's Hurting the Middle Class, supra* note 19.

75. Warren, *The Economics of Race, supra* note 72, at 1782.

76. *Id.* at 1779, 1782, 1786.

77. *Id.* at 1786.

78. U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP (CPA/HVS), HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER: 1994 TO 2007, *available at* http://www.census.gov/hhes/www/housing/hvs/annual07/ann07t20.html (last visited Apr. 6, 2008).

79. WHEARY, *supra* note 65, at 12.

80. Warren, *The Economics of Race, supra* note 72.

same security for minorities as it does for whites. Although white renters are more likely to file for bankruptcy than white homeowners, Hispanic renters are just about as likely to file for bankruptcy as Hispanic homeowners, and African-American homeowners are actually more likely to file for bankruptcy than African-American renters.[81]

Recent unprecedented home loan defaults and foreclosures prove that even though subprime mortgage products gives minorities access to mortgage financing, it may not provide long-term equity and stability.[82] Many families depended on their home equity to pay off unsecured consumer debt between 2001 and 2005.[83] Lenders engaged in aggressive practices, such as offering adjustable rate mortgages with low initial teaser rates, in order to attract debtors to purchase subprime products.[84] Recent studies show that lenders who are no longer in business because of the subprime mortgage crisis concentrated a significant share of their business in metropolitan minority neighborhoods.[85] Unfortunately, for minorities, homeownership and mortgage debt "can as easily be a route to poverty and debt as a guarantor of financial gain."[86]

VI. SOLUTIONS

BAPCPA fails to close the racial wealth gap by providing long-term economic relief to all debt laden individuals. Politicians, community activists, and legal professionals must focus on an agenda that prioritizes economic racial justice as part of a larger, holistic approach to social equality. This can be accomplished through three initiatives: financial literacy programs, voter education, and coalition building.

A. Financial Literacy Programs

As discussed in Section V, homeownership is not providing minority families with long-term economic stability. Research shows that many middle-class families that would have qualified for a traditional mortgage bought into subprime

---

81. *Id.*

82. ELLEN SCHLOEMER ET AL., LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS, CENTER FOR RESPONSIBLE LENDING, Dec. 2006, *available at* http://www.responsiblelending.org/pdfs/FC-paper-12-19-new-cover-1.pdf (explaining that "it is estimated that 2.2 million homeowners with subprime loans will lose their homes through foreclosure, resulting in a loss of $164 million in wealth to these households").

83. *See* JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING: 2006, *available at* http://www.jchs.harvard.edu/publications/markets/son2006/son2006.pdf (last visited Mar. 6, 2008). *See also* Javier Silva, *A House of Cards: Refinancing the American Dream*, Borrowing to Make Ends Meet Briefing Paper 3, Jan. 2005, *available at* http://www.demos.org/pubs/AHouseofCards.pdf (stating that between 2001 and 2002, homeowners used majority of their extracted home equity to cover living expenses and other consumer debt).

84. PAYING MORE FOR THE AMERICAN DREAM: THE SUBPRIME SHAKEOUT AND ITS IMPACT ON LOWER-INCOME AND MINORITY COMMUNITIES, *supra* note 69, at 2.

85. *Id.* at 6 ("At the national level, the high-risk lender market share in neighborhoods where at least 80 percent of the residents are people of color was 3.6 times higher than the high-risk lender market share in neighborhoods where less than 10 percent of the residents are people of color.").

86. *See* Donna Easterlow et al., *Housing for Health: The Role of Owner Occupation*, 15 HOUSING STUD. 367, 378 (2000).

mortgages.[87] The subprime mortgage crisis has uncovered how banks target vulnerable, low-income communities when soliciting loans.[88] In addition to focusing on traditional civil rights issues, such as employment discrimination and affirmative action, progressive organizations should create financial literacy campaigns that shed light on the deceptive tactics utilized by lenders. Financial literacy can prepare traditionally underserved populations to make informed decisions when faced with aggressive lending practices and also encourage underserved populations to use their negotiation skills to obtain better loans.

B. Voter Education

Racial minorities comprise at least 23 percent of the population,[89] which translates into immense voting power. Minority and civil rights legal advocacy organizations[90] should closely follow the voting patterns of Democratic politicians and inform their constituents of how they vote on critical socio-economic legislation. For example, there currently are several bills pending in the legislature that aim to strengthen consumer protection, such as Representative Bradley Miller's Home Ownership and Mortgage Equity Protection Act of 2008,[91] and Senator Christopher Dodd's Home Ownership Preservation and Protection Act of 2007.[92] Representative Miller's bill would permit bankruptcy courts to restructure home mortgage debt by setting interest rates at commercially reasonable rates and extending repayment periods.[93] Senator Dodd's bill would increase accountability for mortgage brokers and lenders.[94] Initiatives, such as themiddleclass.org, which analyze the voting patterns of legislators and the impact of potential legislation on the middle class, should be supported to increase transparency in the voting process and hold politicians accountable to their constituents.[95]

C. Coalition Building and Lobbying Efforts

Legal professionals and community activists should support legislative reforms that would expand existing legislation to provide stronger consumer

87. *See* Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy: As Housing Boomed, Industry Pushed Loans To a Broader Market*, WALL ST. J., Dec. 3, 2007, at A1.

88. Warren, *What's Hurting the Middle Class, supra* note 19 ("Minority families are far more likely than white families to get stuck with subprime mortgages, even when the data are controlled for income and credit rating.").

89. U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS 2000: CENSUS OF POPULATION AND HOUSING, May 2001, *available at* http://www.census.gov/prod/cen2000/dp1/2kh00.pdf.

90. The Puerto Rican Legal Defense and Education Fund (http://www.prldef.org/), Mexican American Legal Defense and Education Fund (http://www.maldef.org/), and National Association for the Advancement of Colored People Legal Defense and Education Fund (http://www.naacp.org) are just a few organizations that have a vested interest in securing economic justice for minorities.

91. *See* Emergency Home Ownership and Mortgage Equity Protection Act of 2007, H.R. Res. 3609, 110th Cong, *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h110-3609 (last visited Apr. 19, 2008).

92. Home Ownership Preservation and Protection Act of 2007, S.2452, *available at* http://www.opencongress.org/bill/110-s2452/show (last visited June 28, 2008).

93. *Supra* note 91.

94. *Supra* note 92.

95. *See* www.themiddleclass.org (last visited June 28, 2008).

protections, such as the Community Reinvestment Act ("CRA"). While many lending institutions took advantage of the increased flexibility in mortgage lending terms, deposit-taking banks obligated to provide loans by the Community Reinvestment Act of 1978 were "more likely to hold on to loans to meet their CRA compliance and more carefully underwrite them."[96] Thus, "banks with branches in low-income and minority neighborhoods also were less likely to foreclose on properties."[97] Legislators should expand CRA to make all financial institutions accountable for their lending practices. This will prevent discriminatory lending and ensure equal access to reasonable credit.

CONCLUSION

Retrogressive legislation, such as BAPCPA, that further exacerbates racial economic gaps must be reformed so that minorities have the opportunity to obtain long-term wealth and security. Potential long-term economic effects should serve as impetus for the incorporation of African-American and Latino families into America's middle-class. Studies suggest that within fifteen years the gap in opportunity experienced by African-Americans and Latinos today will result in "declining education and income levels that will affect the overall productivity and economy of the country."[98] Our country's future economic prosperity depends on integrating African-Americans and Latinos into its social fiber.

96. *See* Peter Gerardo, *Subprime Fiasco Turns 'American Dream' into a Nightmare*, N.Y. State Bar News 20, March/Apr. 2008 (explaining that the primary victims of the subprime mortgage crisis have been low-income and minority borrowers).

97. *Id.*

98. Patrick J. Kelly, As America Becomes More Diverse: The Impact of State Higher Education Inequality, Nov. 2005, http://www.higheredinfo.org/raceethnicity/InequalityPaperNov2005.pdf.