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DEBTOR PROTECTION AT THE CLOSE OF THE TWENTIETH CENTURY

DOUGLASS G. BOSHKOFF

INTRODUCTION

Article I of the United States Constitution authorizes Congress to enact uniform laws on the subject of bankruptcy. Congress infrequently exercised this constitutional authority during the Nineteenth Century. Eventually, the national economy grew to a point where it required the equitable distribution of assets and discharge of obligations which only a national bankruptcy statute could guarantee. The Bankruptcy Act of 1898 was our first permanent federal bankruptcy legislation. This statute remained in effect for 81 years until it was replaced by the Bankruptcy Code of 1978.

At various times, Congress has been receptive to suggested changes in our bankruptcy law. Sometimes, legislative attention has been captured by a specific issue or a troublesome judicial decision. At other times, the interest in reform has had a broader focus. The period preceding adoption of the 1978 Code was such a time. The result of this
broader focus was the most wide ranging debate on bankruptcy policy since adoption of the 1898 Act. The statute that emerged from this debate represented a radical break from tradition, especially with regard to many of the rehabilitative provisions applicable to individual debtors.\(^7\)

In retrospect, this break with the past may have been too pronounced to be sustained. Creditor interest groups immediately began demanding change, and a marked retreat from the debtor protection policy of the 1978 Code is evident in the amendments adopted in 1984\(^8\) and 1986.\(^9\) Further retrenchment will occur due to the recent passage of the Bankruptcy Reform Act of 1994.\(^10\)

This article, a revision of remarks presented at Capital University Law and Graduate Center on March 4, 1994, reviews the development of debtor protection policies during the past 96 years.

I. THE BANKRUPTCY DISCHARGE

The debtor protection provided by the Bankruptcy Code is often referred to as the *fresh start policy*. This fresh start has a number of components, the most important being an extensive discharge of the debtor's financial obligations. Debates concerning discharge policy tend to address four important issues: eligibility, exceptions, effect, and ability to pay.

A. Eligibility for Discharge

There is a presumption in favor of debt relief. Section 727 mandates that the debtor receive a discharge in a chapter 7 proceeding unless one of ten separate grounds for denial of discharge exists.\(^11\) There is no present sentiment favoring a change in these eligibility rules. Indeed, this is one of the most settled aspects of debtor protection policy. Almost all of the eligibility rules have been in effect for a long time. The most

recent changes involve the addition of one ground for denial of discharge in 1926\textsuperscript{12} and the deletion of another in 1960.\textsuperscript{13} Eight of the ten present objections to discharge involve either bankruptcy-related misconduct\textsuperscript{14} or repeated reliance on the protection of a bankruptcy discharge.\textsuperscript{15} The absence of legislative activity suggests that this is an area between their interests in which both debtors and creditors believe that an appropriate balance has been struck.

B. Exceptions to Discharge

The same tranquillity does not prevail with regard to the list of excepted debts. Section 523 lists twelve debts which cannot be discharged in a chapter 7 liquidation bankruptcy. Four of these exceptions are less than twenty years old\textsuperscript{16} and reflect the increased ability of special interest groups to influence bankruptcy policy. The Bankruptcy Reform Act of 1994 adds another exception.\textsuperscript{17}

The legislative struggle becomes even more intense when we consider the discharge of debt in chapter 13 proceedings. One of the most controversial actions taken in 1978 was the decision by Congress to

\textsuperscript{12} Act of May 27, 1926, ch. 406, 44 Stat. 662. Section 14 of the Bankruptcy Act of 1898, the predecessor of the current 11 U.S.C. § 727, was amended ten times between 1903 and 1970. The 1903 legislation added four grounds for objecting to discharge. \textit{See 1A COLLIER ON BANKRUPTCY} ¶ 14.01 (James W. Moore ed., 14th ed. 1978). After that, substantive law changes other than those noted in the text were relatively minor. \textit{Id.}

\textsuperscript{13} Act of July 12, 1960, Pub. L. No. 86-621, 74 Stat. 408, eliminated false financial statements by individuals as a basis for denial of discharge. Creditors were deliberately obtaining false financial statements so that they would be able to object to discharge. \textit{See 1A COLLIER ON BANKRUPTCY, supra note 12, ¶ 14.01[4.4].}

\textsuperscript{14} 11 U.S.C. § 727(a)(2)-(7) (dealing with misconduct).

\textsuperscript{15} § 727(a)(8), (9) (setting forth the six year rule that prohibits discharge for debtors who were previously discharged within six years of the date of filing). The remaining two objections involve denial of discharge to non-individual debtors, § 727(a)(1), and waiver, § 727(a)(10).

\textsuperscript{16} 11 U.S.C. § 523(a)(8) (involving student loans), originated in 1976 as an amendment to the Education Act of 1965. This exception to discharge was incorporated into § 523 in 1978. \textit{See 3 COLLIER ON BANKRUPTCY, supra note 12, ¶ 523.18}. Section 523(a)(9) (discussing certain tort liabilities related to substance abuse), was added by the Bankruptcy Amendments and Federal Judgeship Act § 454. Sections 523(a)(11) and (12) (dealing with certain liabilities related to depository institution failure), were added by the Crime Control Act of 1990, Pub. L. No. 101-647, § 2522, 104 Stat. 4789, 4865-66. Section 523(a)(2)(c), added by the Bankruptcy Amendments and Federal Judgeship Act § 307, represents such a substantial change in the law that it could well be added to the four exceptions listed above.

\textsuperscript{17} § 221, 108 Stat. at 4129 (adding an exception for money borrowed to pay nondischargeable federal taxes).
create incentives for debtors to use chapter 13 instead of chapter 7. Congress wanted to increase the proportion of debtors electing chapter 13. The main incentive for debtors was a broader range of discharge provisions. Instead of trying to force debtors into chapter 13, Congress hoped to entice debtors into this type of proceeding by limiting the number of exceptions to discharge. Accordingly, only one of the eight excepted debts for a chapter 7 debtor appeared in the original chapter 13 discharge. Since 1978, this number has increased to four, and one more has been added by the Bankruptcy Reform Act of 1994. Congress has now decided that incentives do not work or, alternatively, that the cost of incentives is too great. Whatever the reason, the present law reduces reliance on enticement and places greater emphasis on coercing the use of chapter 13.

There is an interesting contrast in present attitudes toward eligibility and exception issues. While eligibility restrictions are not mentioned at all in current debates over discharge policy, additional exceptions to discharge are constantly being proposed. The current, intense interest in exceptions is understandable. Any tightening of eligibility standards would be helpful to all creditors. The benefits of any new exception to discharge are more narrowly focused on the protected class. Most classes of excepted claims are likely to be small, and the fruits of lobbying for a new exception need be shared with few other creditors.

C. Effect of Discharge

The bankruptcy discharge is neither self-executing nor completely effective. It must be invoked by the debtor in postbankruptcy litigation. Furthermore, while it discharges debt, it does not completely eradicate

20. Debts nondischargeable under sections 523(A)(8) and (9) and criminal restitution payments were added by The Crime Control Act § 3621 and § 3102(A). Section 302 of the Bankruptcy Reform Act adds an exception for criminal fines. § 302, 108 Stat. at 4132.
22. § 523(a)(1) (dealing with taxes); § 523(a)(5) (dealing with marital obligations); § 523(a)(7) (dealing with fines and penalties); § 523(a)(8) (dealing with educational loans); § 523(a)(9) (dealing with torts related to substance abuse); § 523(a)(11), (12) (dealing with misconduct related to depository institution failure).
23. See, e.g., Fed. R. Civ. P. 8(c) (allowing discharge in bankruptcy as an affirmative defense).
discharged obligations. Both of these characteristics of the discharge have created difficulties in implementing discharge policy.

Postbankruptcy litigation to collect a discharged obligation violates the statutory injunction now provided in § 524(a)(2). However, the protection of the discharge is lost unless the debtor appears and asserts that the debt has been discharged.24 At one time, creditors exploited this characteristic of the discharge by falsely alleging a nondischargeable obligation. The debtor, incorrectly believing that the discharge was self-executing, failed to appear in the postbankruptcy litigation. Default judgments were common and difficult to set aside.25

In 1970, Congress responded to this problem by requiring that certain claims of nondischargeability be heard only by the bankruptcy court.26 Since hearings on such claims ordinarily will occur while the bankruptcy proceeding is still in progress and the debtor is represented by an attorney, the likelihood of default judgments has been drastically reduced. This reform has been effective.

The Bankruptcy Code’s treatment of reaffirmation agreements has been less successful. For many years, there was no federal regulation of reaffirmation agreements. State law generally permitted enforcement of a promise to pay a debt discharged in bankruptcy, notwithstanding the fact that there was no new consideration for the promise.27 Many debtors, giddy with the freedom provided by the discharge, made ill-considered promises to pay their old debts.

The 1978 legislation provided an adequate remedy for this problem. Most reaffirmation agreements were subject to several protective requirements, including court approval. This approval was conditioned upon a finding that the agreement did not impose "an undue hardship" and was "in the best interest of the debtor."28 This demanding standard made it difficult to get court approval and is appropriate in most cases. Most reaffirmations make absolutely no sense because they saddle the

debtor with postbankruptcy obligations that are the very obligations that led to the bankruptcy filing in the first instance. The statute was so effective that creditor interests soon began a campaign to repeal it.

By 1984, these creditor interest groups had succeeded. Court approval is no longer required, except in a few instances. Instead, the debtor's attorney must file an affidavit with the court stating that the reaffirmation (1) "represents a fully informed and voluntary agreement . . . " and (2) "does not impose an undue hardship . . . ." This change in the statute puts a debtor's counsel in a difficult position. The possibility of malpractice liability exists if an attorney unwisely supplies the necessary affidavit. Nevertheless, one who refuses to supply the affidavit may well end up with an unhappy client. Creditors opted for this new arrangement because they believed that an attorney would not be as effective in preventing unwise reaffirmation agreements as the completely independent bankruptcy judge.

D. Ability to Pay

Prior to 1976, a debtor's financial condition was irrelevant in determining either eligibility for discharge or the dischargeability of a particular obligation. This began to change in 1976, and by 1984, ability to pay had become a significant component of discharge policy.

The beginning of this change can be seen in the historical treatment of educational debt. At one time fully dischargeable, educational loans attracted legislative attention in the mid-seventies due to the rapidly rising default rate for student borrowers. There was substantial sentiment in Congress favoring complete nondischargeability. The final legislative
product, however, represented a compromise between Congress and those who had opposed disparate treatment of educational loans. Such loans were nondischargeable for five years. Within that period, however, discharge was available if "payment from future income or other wealth will impose an undue hardship on the debtor or his dependents." Thus, ability to pay initially became relevant to discharge policy only as an additional protection for debtors. Financial condition was irrelevant to dischargability after five years had passed and, within that initial period, any truly unfortunate student was entitled to an immediate discharge.

Soon the thinking about ability to pay changed. By the mid-eighties, some debtors discovered that they were expected to earn their bankruptcy discharge. Two circumstances combined to provide this new emphasis in discharge policy: a dispute over the minimum level of payments in chapter 13 proceedings and a dispute over the number of chapter 7 debtors who could make significant payments to creditors out of postpetition earnings.

Recall that Congress created a set of incentives to encourage the use of chapter 13 proceedings. As originally enacted, the Bankruptcy Code of 1978 did not spell out exactly what was required of debtors who filed under that chapter. The only relevant confirmation standards were requirements of "good faith" and payments to creditors "not less" than what would be received under chapter 7. Many debtors in no-asset cases sought the broader discharge benefits of chapter 13 while not making significant payments to creditors. Some courts confirmed "zero payment" plans while others invoked the "good faith" requirement to demand significant payments to creditors. The disposable income requirement of § 1325(b)(1)(B) was added in 1984 to resolve the split in authority. It establishes a minimum level of contribution from chapter 13

35. For a brief history of the status of education obligations, see 3 COLLIER ON BANKRUPTCY, supra note 12, ¶ 523.17.
37. For the current treatment of education obligations, see 11 U.S.C. § 523(a)(8).
The initial period of nondischargeability was increased from five to seven years by the Crime Control Act § 3621. A separate provision controls the dischargeability of HEAL loans. See 42 U.S.C. § 294F(g) (1988).
38. See supra text accompanying note 18.
41. For a good discussion of the pre-1984 "good faith" decisions, see 5 COLLIER ON BANKRUPTCY, supra note 12, ¶ 1325.04(2).
The debtor who wants the more effective chapter 13 discharge must pay for it with a commitment of "disposable income" over a full three-year period. Debt relief, at least in chapter 13, must be earned. It is not available as a matter of right.

During the same period (1978-1984), debtor and creditor interests hotly debated the wisdom of a needs test for chapter 7 liquidations. Creditors postulated that a substantial number of chapter 7 debtors could make significant payments to creditors out of future income. In many respects, this debate was a rehash of the earlier argument over whether students could afford to repay educational loans out of future income. This time, however, creditors were able to cite an empirical study published by the Credit Research Center at Purdue University. This study concluded that a needs threshold for chapter 7 bankruptcy would result in a $1.1 billion annual payback to creditors out of future income. Although its methodology was sharply criticized, the Purdue study influenced the course of the debate which eventually resulted in the adoption of § 707(b). This provision creates an indirect needs test for liquidation bankruptcy by mandating dismissal of a chapter 7 petition whenever the debtor's future income will support significant repayments to creditors.

Taken together, §§ 523(a)(8), 1325(b), and 707(b) represent a very substantial shift in discharge policy. Although the language used is not identical, each section requires consideration of the debtor's financial condition. Administration of any ability to pay test often involves judicial control of debtor conduct. Those who resort to bankruptcy are forced to conform future activity to a bankruptcy judge's concept of need rather than having eligibility for debt relief ordinarily determined by past conduct or by the circumstances of debt creation.

42. 1 CREDIT RESEARCH CTR., KRANNERT GRADUATE SCH. OF MANAGEMENT, PURDUE UNIV., CONSUMER BANKRUPTCY STUDY 90 (1982).
44. The statute requires dismissal of a liquidation proceeding if "the granting of relief would be a substantial abuse of" chapter 7. 11 U.S.C. § 707(b). While "ability to pay" is not the only component of substantial abuse, it is the most important one. See United States Trustee v. Harris, 960 F.2d 74 (8th Cir. 1992) (holding ability to pay warrants finding of substantial abuse); In re Green, 934 F.2d 568 (4th Cir. 1991) (holding ability to pay included in "totality of circumstances" test).
46. See 11 U.S.C. § 523(a)(1)-(4), (6), (9), (10)-(12).
II. EXEMPTIONS

Exemptions complement the bankruptcy discharge and provide additional relief against collection activity. While the Bankruptcy Act of 1898 was in force, state law, primarily nonbankruptcy law, was the sole source of exemption protection.\(^7\) States were free to grant or deny exemptions subject only to state constitutional limitations.\(^8\) States could also fine tune exemption policy by allowing certain types of creditors to reach otherwise exempt assets through liens and promissory waivers.\(^9\)

The Bankruptcy Code changes many aspects of exemption law. Nonbankruptcy law is modified in the following respects:

1. Debtors have the option of choosing federal bankruptcy exemptions unless the state has vetoed this choice through legislation.\(^10\) Thirty-six states have exercised this veto power by opting to provide an exclusive list of state exemptions.\(^11\)
2. Contractual waivers of exemption are invalid.\(^12\)
3. Certain judicial and consensual liens on otherwise exempt assets can be avoided.\(^13\)
4. Each debtor in a joint case is entitled to his/her exempt assets.\(^14\)
5. Property exempted during bankruptcy is generally protected against postbankruptcy collection activity by creditors with claims that have not been discharged.\(^15\)
6. Immune property interests arising out of joint asset ownership are also protected in certain circumstances.\(^16\)

\(^{48}\) Recently, a constitutional requirement of "wholesome laws, exempting a reasonable amount of property from seizure or sale" has been invoked to invalidate an unlimited exemption of retirement benefits. In re Zumbrun, 626 N.E.2d 452 (Ind. 1993); see also In re Netz, 91 B.R. 503 (Bankr. D. Minn. 1988).
\(^{49}\) JAMES A. MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY §§ 166-167 (1956).
\(^{51}\) SOMMER & KLEIN, supra note 32, § 10.2.1 n.15.
\(^{52}\) 11 U.S.C. § 522(e).
\(^{54}\) 11 U.S.C. § 522(m).
\(^{55}\) 11 U.S.C. § 522(c).
It is arguable that the 1978 changes in exemption policy were even more radical than the changes in discharge policy. The legitimacy of some type of federal preemption of state law has long been accepted with regard to discharge policy. Federal intervention in exemption disputes, however, was an innovation of the 1978 legislation. Nevertheless, the new exemption policy attracted less attention and generated less controversy than the changes in discharge policy. Perhaps this is because discharge rules provide the primary protection against creditor collection activity in most states and thus receive the most attention. It is also likely that conservative judicial constructions of the exemption provisions have contributed to the relative lack of controversy. Federal control of exemption policy has been held to a minimum by restrictive interpretations of the Code's exemption provisions.

The impact of this conservative approach can be seen in decisions interpreting § 522(m) which allows both husband and wife to claim exempt assets. In some states, there is only one homestead exemption per household. Section 522(m) seems to override state law and allow both husband and wife to claim a complete homestead exemption. Nonetheless, most cases reach the opposite result, reasoning that a state which vetoes the use of the federal exemption list also opts out of the special protective provisions such as § 522(m). Similar reasoning appears in cases interpreting § 522(f). The analysis in all these decisions, however, was repudiated by the Supreme Court in Owen v. Owen. In Owen, the Court decided that North Carolina's veto of the federal exemption list was not controlling in determining whether the debtor had the right under § 522(f) to avoid a judicial lien on his otherwise exempt homestead. Courts have been slow to recognize the

57. SOMMER & KLEIN, supra note 32, § 10.2.3.1.
58. See, e.g., Stevens v. Pike County Bank, 829 F.2d 693 (8th Cir. 1987); In re Granger, 754 F.2d 1490 (9th Cir. 1985); First Nat'l Bank v. Norris, 701 F.2d 902 (8th Cir. 1983); see also In re Pruitt, 829 F.2d 1002 (10th Cir. 1987) (holding only one-half of homestead exemption available in a single bankruptcy).
59. See, e.g., In re McManus, 681 F.2d 353 (5th Cir. 1982).
61. As the Court in Owen explained, Just as it is not inconsistent with the policy of permitting state-defined exemptions to have another policy disfavoring waiver of exemptions, whether federal- or state-created; so also it is not inconsistent to have a policy disfavoring the impingement of certain types of liens upon exemptions, whether federal- or state-created. We have no basis for pronouncing the opt-out policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains.

(continued)
impact of Owen on exemption policy.62 As the significance of that decision becomes more widely understood and accepted, § 522 will provide greater protection for debtors. Once this occurs, Owen will become as much a target of creditor lobbying activity as the original 1978 legislation applicable to reaffirmation agreements.

One aspect of exemption policy has been controversial for some time. The courts are sharply divided63 on the issue of whether the pre-bankruptcy purchase of exempt property (often immediately before the petition) is a fraudulent conveyance either because the transaction was intended to hinder collection activity64 or because the consideration received (the exempt asset) was not adequate.65 The Bankruptcy Code does nothing to resolve the controversy. According to both the House and Senate Reports, "[A]s under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law."66

There are two ways to read this fragment of legislative history. One interpretation is that debtors have always had an absolute right to acquire exempt property on the eve of bankruptcy, and adoption of the Bankruptcy Code does not change this right. Another interpretation is that the law is unchanged concerning the extent to which exempt property can be purchased on the eve of bankruptcy. Courts have chosen the second view, sometimes condemning and sometimes condoning purchases of exempt assets. Decisions tend to be very fact sensitive and there are

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62. See, e.g., In re Moreland, 21 F.3d 102 (6th Cir. 1994). But cf. In re Maddox, 15 F.3d 1347 (5th Cir. 1994) (holding debtor could use § 522(f) to avoid nonpossessory, nonpurchase-money security interest in property exempt from seizure under Mississippi law, even though that lien fell within state law exception to such exemption).


65. 11 U.S.C. § 548(a)(2)(A)-(B)(i). Even if the purchase price is fair, the consideration received is not adequate from a creditor's perspective. An asset subject to creditor claims has been exchanged for an asset which is not subject to creditor claims.

few clear cut rules governing this area of bankruptcy jurisprudence. As one bankruptcy judge has wearily observed:

After practicing 40 years with these holdings, I humbly suggest that when the conduct of the debtor so offends the sensibility of a court that it cannot accept the exemption, that court presumes an exception to the constitutional provision that is completely contrary to its plain language. Because the factual permutations are infinite and the sensibility levels of courts nearly so, I do not see the emergence of a definitive rule anytime soon.67

A second fact pattern that may also be controversial involves intra-family rearrangement of assets to maximize exemption protection. The most likely scenario features a husband and wife planning to file a joint bankruptcy case. Each spouse is entitled to a separate exemption claim in jointly owned assets.68 If an automobile is titled only in the name of one spouse, it may be possible to double the motor vehicle exemption by converting the title to joint ownership.69 Although no reported decisions deal with this maneuver, it would seem to be no less controversial than purchases of exemptible property from third parties on the eve of bankruptcy.

Finally, debtor migration in search of better exemption laws is now beginning to come under judicial scrutiny. For the debtor who chooses nonbankruptcy exemptions, whether by choice or compulsion, the controlling state law is that of his or her domicile in the 180 days immediately preceding bankruptcy.70 Debtors possessing the ability to move have an incentive to migrate from stingy states to generous jurisdictions. Florida, for example, places an acreage but no dollar limit on its homestead exemption71 and is a popular destination for bankrupts-to-be.72 These migration cases raise new questions that include whether a

68. 11 U.S.C. § 522(m).
69. SOMMER & KLEIN, supra note 32, § 10.2.2.2. The text uses the example of a jointly owned automobile to illustrate the interaction between § 522(m) and § 522(d)(2). The latter allows exemption of "the debtor's interest . . . in one motor vehicle." § 522(d)(2). The same result would occur if the debtor were restricted to the exemptions provided by state law. E.g., OHIO REV. CODE ANN. § 2329.66(A)(2)(b) (Anderson 1993) (allowing the exemption of the person's interest in one motor vehicle).
71. FLA. CONST. art. X, § 4.
72. There are only a few reported exemption migration decisions. All involve an attempt to take advantage of the generous Florida homestead provision. See, e.g., In re (continued)
change of domicile actually occurred\textsuperscript{73} and whether the relocation was part of a fraudulent scheme.\textsuperscript{74}

All of the exemption acquisition decisions provide little guidance for bankruptcy planners because the fundamental concepts involved in these cases cannot be reconciled. Exemption law permits what fraudulent conveyance law condemns. In order for a coherent body of doctrine to exist, one concept must prevail. Neither the courts nor Congress have yet shown any interest in either unqualified approval or consistent condemnation of exempt property acquisition on the eve of bankruptcy. Therefore, the debate in this particular area of exemption policy is likely to continue.

\section*{III. BANKRUPTCY-BASED DISCRIMINATION}

The prohibition against bankruptcy-based discrimination is the third important component of the fresh start policy. It is also the newest and least developed aspect of this policy.

In 1971, the Supreme Court struck down an Arizona statute which permitted denial of driving privileges to debtors who failed to satisfy claims which had been discharged in a bankruptcy proceeding. The Court in \textit{Perez v. Campbell}\textsuperscript{75} announced a rule that today protects debtors against discriminatory acts\textsuperscript{76} by both public and private entities.

\textit{Perez} was decided while the Bankruptcy Commission was preparing its report. The Commission recommended that any new statute contain a very broad prohibition of discrimination by all entities.\textsuperscript{77} The final legislative product, however, is much narrower than the Commission's proposal. As originally enacted, § 525 applied only to governmental units.\textsuperscript{78} A 1984 amendment\textsuperscript{79} added a prohibition against employment discrimination by private entities.

\textsuperscript{73} See, e.g., \textit{In re Ring}, 144 B.R. 446 (Bankr. E.D. Mo. 1992).
\textsuperscript{74} See, e.g., \textit{In re Coplan}, 156 B.R. 88 (Bankr. M.D. Fla. 1993).
\textsuperscript{75} 402 U.S. 637 (1971).
\textsuperscript{76} \textit{Perez} is not a routine debt collection case. The state was not a creditor and was not acting as an agent for a creditor.
\textsuperscript{78} This part of the statute is now 11 U.S.C. § 525(a) (1988).  
\textsuperscript{79} 11 U.S.C. § 525(b).
Section 525 has only been moderately effective in preventing and redressing intentional discriminatory activity that undercuts the value of a bankruptcy discharge. There is disagreement concerning the exact content of the anti-discrimination rules. This disagreement is reflected in an on-going debate over the most desirable technique of statutory interpretation.

Because the original version of § 525 only prohibited discrimination by public entities, some courts, including the Seventh Circuit,\(^8^0\) have refused to apply § 525 to discriminatory activity by private entities. Furthermore, although the addition of § 525(b) expands the statutory protection by prohibiting employment discrimination by private actors, the statutory interpretation controversy continues because many forms of bankruptcy-based discrimination are not explicitly condemned under the current language. Courts follow one of two views concerning the proper approach to interpret this provision. Some courts are willing to prohibit discrimination not explicitly condemned as long as the prohibition is consistent with statutory policy.\(^8^1\) Other courts refuse to condemn the activity unless it is explicitly mentioned in § 525.\(^8^2\) For example, one court recently refused to find a cause of action under § 525(b) when the plaintiff alleged a termination of employment in anticipation of a bankruptcy filing. The court noted that the statute protected only past and present debtors and not individuals who have yet to file a bankruptcy petition.\(^8^3\)

This divergence\(^8^4\) in the application of § 525 is probably permanent. The federal judiciary, like the general public, has differing opinions concerning the desirability of debt relief. Judges less sympathetic to the concept of a bankruptcy discharge are likely to continue to adopt a conservative approach to interpreting § 525.

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84. See Douglass G. Boshkoff, Bankruptcy-Based Discrimination, 66 AM. BANKR. L.J. 387, 393-97 (1992) (discussing these competing approaches to statutory interpretation).
DEBTOR PROTECTION

CONCLUSION

At least with regard to the provisions applicable to consumer bankruptcies, the Bankruptcy Reform Act of 1978 is an anachronism. Although the Act was drafted during the presidency of Richard Nixon and signed into law by Jimmy Carter, its aggressive protection of consumer debtors seems more in harmony with the sentiments of Lyndon Johnson's "Great Society." The anachronistic aspect of this legislation explains why attempts to roll back some of the debtor protection provisions closely followed its enactment. On September 28, 1980, less than a year after the statute's effective date, The New York Times reported that there were creditor complaints about the ease of obtaining debt relief. 85 Twelve months later, the campaign to reduce debtor protection was in full swing. 86 The result was the enactment of pro-creditor legislation in 1984, 87 1986, 88 and 1990. 89

The struggle continues. The Bankruptcy Reform Act of 1994 90 was passed by Congress on October 6, 1994. This legislation contains provisions applicable to consumer debtors, some of which are helpful and others which are harmful. While the Act is a mixed bag, its most significant provisions would impair or eliminate important debtor protections. 91

91. See id. § 302 (adding criminal fines as a nondischargeable debt under § 1328(a)(3).