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ARTICLE: Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

NAME: by **Erwin Chemerinsky***

BIO:

***Erwin Chemerinsky** is the Alston & Bird Professor of Law, Duke University School of Law. The author thanks Kimberly Kisabeth for her excellent research assistance.

SUMMARY:
... The stated purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") is to "improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors. ... Specifically, this Article focuses on the following constitutional questions that might arise under BAPCPA: Do BAPCPA's requirements for the content of attorney advertising violate the First Amendment? Does its regulation of the advice attorneys may give their debtor clients violate the First Amendment? Does its regulation of attorney conduct violate the Tenth Amendment or separation of powers? Would an involuntary Chapter 11 case that required payments over a five-year period constitute impermissible peonage? Does the means test violate the uniformity requirement or equal protection? Do the debtor disclosure requirements violate the right to privacy? Do the limits imposed on certain judicial actions violate separation of powers? ... Within three business days of first offering to provide bankruptcy advice to an "assisted person," the debt relief agency must provide a clear and conspicuous written notice, some of which may be inaccurate and most of which would be irrelevant to a creditor client. ... Since the Supreme Court already has held that a bankruptcy law may be uniform even though it incorporates state law and leads to varying results in different states, it will be difficult to challenge the means test on uniformity grounds. ...

TEXT:
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The stated purpose of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") [1] is to "improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors." [2] Its legislative history stretches over almost a decade, but each iteration of it continued the same core features, the most predominant of which is a complex "means test" to determine whether a debtor may file a Chapter 7 case. [3]

This Article seeks to identify the constitutional issues most likely raised by BAPCPA. It cannot identify all that might possibly arise, as experience with the law will generate many questions that I cannot presently anticipate. Nor does it attempt to provide definitive answers to the constitutional questions it raises. Instead, the objective is to identify for judges and practitioners the constitutional questions they are likely to see, summarize the applic

constitutional law, and anticipate the arguments that will be made.

Specifically, this Article focuses on the following constitutional questions that might arise under BAPCPA: Do BAPCPA's requirements for the content of attorney advertising violate the First Amendment? Does its regulation of the advice attorneys may give their debtor clients violate the First Amendment? Does its regulation of attorney conduct violate the Tenth Amendment or separation of powers? Would an involuntary Chapter 11 case that required payments over a five-year period constitute impermissible peonage? Does the means test violate the uniformity requirement or equal protection? Do the debtor disclosure requirements violate the right to privacy? Do the limits imposed on certain judicial actions violate separation of powers?

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I. DO REQUIREMENTS FOR ATTORNEYS' ADVERTISEMENTS VIOLATE THE FIRST AMENDMENT?

BAPCPA requires consumer bankruptcy lawyers to identify themselves in advertisements as "debt relief agencies" and to state: "We help people file for bankruptcy relief under the Bankruptcy Code." [4] This content-based regulation of speech raises First Amendment issues.

A. Historical Overview of the Court's Perspective on Attorney Advertising

"Constitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage." [5] In Bates v. State Bar of Arizona, the Arizona Bar had disciplined two attorneys for advertising their legal clinic in a local newspaper in violation of the Arizona Bar's blanket rule prohibiting attorney advertisements. [6] The Supreme Court ruled that the disciplinary rule violated the First Amendment. [7]

Although the Court acknowledged that "the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts,'" [8] the Court demanded additional justification for the regulation, and eventually struck the ban on price advertising for what it deemed "routine" legal services: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." [9] "Expressing confidence that legal advertising would only be practicable for such simple, standardized services, the Court rejected the State's proffered justifications for regulation." [10] Although the Court acknowledged that there could be reasonable restrictions on the time, place and manner of advertising, [11] it held that advertising by attorneys could not be subjected to blanket **[*573]** suppression. The Court noted that it was in the public interest to increase use of legal services, and viewed advertising as a legitimate vehicle to provide the public with information about the nature and cost of such services. [12]

Nearly two decades of cases built upon the Bates opinion have firmly established lawyer advertising as commercial speech entitled to First Amendment protection. [13]

The level of scrutiny with which the Court will evaluate any state restriction on attorney advertising against First Amendment protections depends on the nature or effect of the restriction. State restrictions that result in less than a complete prohibition of attorneys' non-misleading advertising [14] must serve a substantial state interest to avoid running afoul of the First Amendment. [15] Disclosure requirements imposed by the state on attorney advertising must be reasonably related to the state's interest in preventing consumer deception.

The Court noted in Bates that its holding - that advertising by attorneys is commercial speech protected by the First Amendment and may not be subjected to blanket suppression - did not foreclose regulation of advertising that was false, deceptive, or misleading. [16] The majority

did not believe regulation to assure truthfulness would discourage protected speech, and any concern regarding potential inhibition of spontaneity seemed inapplicable because commercial speech was generally of a calculated nature. In this context, the Court held misstatements that might be overlooked or deemed unimportant in other advertising might be especially harmful given the public's lack of sophistication regarding legal services. [17] Claims as to the quality of services are also not easily subject to measurement or verification, and therefore more likely to be so misleading as to warrant restriction. [18]

The Supreme Court stated in In re R.M.J. that Bates and subsequent cases made it clear that the imposition of appropriate restrictions on attorney advertising is permissible when the particular advertising in question is inherently likely to deceive or where the record indicated that a particular form or method of advertising had in fact been deceptive. [19] Furthermore, false and **[*574]** deceptive advertising could be prohibited entirely. [20] However, states may not place an absolute prohibition on certain types of potentially misleading information in attorney advertisements - such as the listing of an attorney's area of practice - if such information also may be presented in a way that is not deceptive. Any restriction on such information only may be as broad as reasonably necessary to prevent deception. [21]

Government regulation of non-misleading attorney advertising is analyzed under the commercial speech framework set forth by Central Hudson Gas & Electric Corporation v. Public Service Commission of New York. [22] In Central Hudson, the Court held that government may freely regulate commercial speech that is misleading or concerns unlawful activity. [23] Commercial speech outside of those two categories may be regulated if: (1) a substantial government interest exists in support of regulation; [24] (2) the restriction directly and materially advances that interest; and (3) the restriction is "narrowly drawn." [25]

In Zauderer v. Office of Disciplinary Counsel of Supreme Court, the Court rejected an attorney's contention that state disciplinary rules imposing certain disclosure requirements on attorney advertising must do so by the least **[*575]** restrictive means in order to conform with the First Amendment. [26] The Court held an attorney's rights as an advertiser are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing the deception of consumers. [27] Since the extension of First Amendment protection to commercial speech was justified principally by the value of the information provided to consumers by such speech, attorneys have a minimal interest in providing information that is not factual in nature. [28] The opinion emphasized, however, that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. [29]

State laws and rules restricting attorney advertisements concerning subject matter areas of legal practice have been held to violate the First Amendment. In In re R.M.J., [30] the Supreme Court held that a state's disciplinary rule that limited the includible areas of practice to one or more of a list of twenty-three and provided no flexibility in phrasing such practice areas was an invalid restriction upon speech. The advertisement in question appeared in a newspaper and telephone directory and (1) listed areas of practice using different phraseology than specified by the rule, and (2) advertised for services in several areas of law for which there was no analogous term in the rule's list. [31] The Court stated its conclusion was also based on the fact that (1) the listing published by the attorney had not been shown to be misleading, and (2) the committee of the state's highest court responsible for prosecuting attorney disciplinary proceedings had suggested no substantial state interest served by the rule's restriction. [32]

Similarly, in Zauderer v. Office of Disciplinary Counsel, the Court ruled that advertisements presenting truthful, non-deceptive information and advice regarding a potential client's legal rights were neither misleading nor deceptive. [33] In Zauderer, an Ohio attorney advertised legal services for women injured by the Dalkon Shield Intrauterine Device. [34] The Office of Disciplinary Counsel charged him with violating rules that prohibited self-recommendation

and the acceptance of employment based on unsolicited legal advice.

[*576] The Court held that the advertisement was not false or deceptive because the attorney never promised litigation would be successful or that he had any special expertise in handling lawsuits involving the Dalkon Shield, and it could not be prohibited on that basis. [35] The Court then applied the Central Hudson test and rejected the proffered state interests as insufficient to support the regulation. [36]

In the context of commercial speech, the Court has also found the following state interests substantial: (1) conserving energy, [37] (2) maintaining standards of licensed professionals, [38] (3) preventing solicitation that involves "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,'" [39] (4) protecting the privacy and tranquility of the home, [40] and (5) preserving the reputation of the legal profession. [41]

B. BAPCPA's Regulation of Attorney Advertising

BAPCPA adds new Code [42] 526, 527 and 528 which proscribe and prescribe certain activities of some bankruptcy lawyers. A lawyer who provides any bankruptcy assistance to an "assisted person" is defined to be a "debt relief agency." [43] While the principal target of this definition probably was consumer debtor lawyers and petition preparers, the definition of "assisted person" [44] is not limited to debtors or prospective debtors, so it could include creditors and landlords. And although the debts of an "assisted person" must be primarily consumer debts, the bankruptcy assistance need not **[*577]** be provided with respect to the person's debts. Therefore an individual landlord, most of whose debts are consumer debts, could be an "assisted person" even when the bankruptcy advice pertains to the landlord's rights in the bankruptcy case of a tenant. [45]

New Code 527 and 528 require certain disclosures and statements to be made by a "debt relief agency." Within three business days of first offering to provide bankruptcy advice to an "assisted person," the debt relief agency must provide a clear and conspicuous written notice, some of which may be inaccurate and most of which would be irrelevant to a creditor client. [46] New Code 528 requires that within five days of first providing bankruptcy assistance services to an assisted person, a debt relief agency must execute a written contract with the person that explains the services the agency will provide and the fees for such services. It also requires that any advertisement of bankruptcy assistance services, or assistance with respect to credit defaults, mortgage foreclosures, evictions, or debt problems, include the following or substantially similar statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."

These statements and disclosures are required regardless of whether the debt relief agency in fact represents consumer debtors in bankruptcy cases. They would seem to apply to a purely creditor's lawyer if one or more of the lawyer's clients has debts that are primarily consumer debts, even if the representation is not with respect to those debts but instead deals only with the creditor's claims in a bankruptcy case.

C. Constitutional Issues in Regulating the Content of Advertising

Those objecting to these provisions are likely to argue that they violate the First Amendment because they are not "narrowly drawn" [47] and, in fact, **[*578]** increase the likelihood of misleading speech. Those challenging the regulation will argue that the new "debt-relief agency" provisions are so overinclusive that they will actually create more confusion among debtors seeking assistance. Entities that represent creditors might be deemed debt-relief agencies under the broad language of the provisions.

Moreover, the provisions of BAPCPA fail to distinguish between attorneys and non-attorneys providing bankruptcy services. [48] Under current law, only attorneys are permitted to give

legal advice, file pleadings, or represent debtors in bankruptcy hearings. Also, unlike non-attorney bankruptcy petition preparers, only attorneys are licensed by the state in which they practice, bound by ethical requirements, and subject to discipline by the courts in which they practice. Further, only communications between the debtor and his attorney are protected by the attorney-client privilege. Therefore, the provisions are likely to confuse the public by requiring both attorneys and non-attorney bankruptcy petition preparers to advertise themselves as "debt relief agencies."

I believe that creditors' lawyers will have a strong argument that their First Amendment rights are violated when they have to make the false statement, "We are a debt relief agency. We help people file for bankruptcy." In light of the Supreme Court's decision in R.M.J., any compulsory disclosures are of questionable constitutionality, but especially when the government is requiring false statements. However, this is a challenge that creditors' lawyers will need to bring. The Supreme Court has been clear that the overbreadth doctrine does not apply to commercial speech [49] and thus a debtor's attorney cannot challenge the law on the ground that it is unconstitutional as applied to creditors' lawyers.

II. DOES BAPCPA'S PROHIBITION OF ATTORNEYS' ADVICE VIOLATE THE FIRST AMENDMENT?

A. BAPCPA's Prohibitions on Attorney Advice

New Code 526 imposes restrictions on the kind of advice such a "debt relief agency" can provide. Most of this prohibited advice would be inappropriate **[*579]** for other reasons, such as making misrepresentations, [50] but one of them might be entirely appropriate: Code 526(a)(4) forbids a debt relief agency to advise an assisted person or prospective assisted person to incur additional debt in contemplation of filing for bankruptcy relief or for the purpose of paying fees for services rendered by an attorney or petition preparer in connection with the bankruptcy case. [51]

This prohibition is particularly troubling when it might be completely legal and even desirable for the client to incur such debt. For example, there may be instances where it is advisable for a client to obtain a mortgage, to refinance an existing mortgage to obtain a lower interest rate, or to buy a new car on time. There would be no fraud in doing so if the client intended to pay such debt notwithstanding the filing of a contemplated bankruptcy case. For example, the client may intend to keep all payments fully current and to reaffirm such debt once the case is filed.

Moreover, most of an attorney's fee for handling a Chapter 13 case is paid over time through the Chapter 13 plan. But that means that at the time the case is filed, the client has incurred additional debt in contemplation of filing a bankruptcy case. Indeed, such debt was specifically incurred for the purpose of paying the fees of the attorney filing the case.

But 526(a)(4) appears to prohibit any attorney from advising a client to incur any such debt, regardless of how appropriate or advisable. The clause directly regulates the content of speech of lawyers to their clients, even when it is accurate, legal, and desirable. In addition to First Amendment considerations on this issue, there are strong public policy considerations implicated when the government restricts the type of advice attorneys can give their clients.

B. Government Regulation of Attorney Speech

The Supreme Court has been very protective of the First Amendment rights of attorneys to advise and zealously represent their clients. [52] Also, the Supreme Court has explained that a central principle of the First Amendment is that content-based restrictions on speech must meet strict scrutiny, **[*580]** while content-neutral regulation only need meet intermediate scrutiny. In Turner Broadcasting System v. FCC, [53] Justice Kennedy, writing for the majority,

noted that "government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right." [54] Justice Kennedy explained, "For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." [55]

I think that this is likely the strongest basis for a constitutional challenge to BAPCPA. Preventing lawyers from giving important, lawful information to their clients cannot be reconciled with the First Amendment. However, the Court is likely to declare this provision unconstitutional as applied, rather than on its face. In recent years, the Court has stressed its strong preference for as-applied challenges, rather than facial challenges, to the constitutionality of federal laws. [56] The Court has said that a facial challenge requires demonstrating that all applications of the law would be unconstitutional. [57] That is not likely with regard to these provisions of BAPCPA. Instead, courts are likely to hold that it is unconstitutional to prohibit lawyers from giving truthful, lawful information to their clients, and that it is unconstitutional to require attorneys to put false information in their advertisements.

III. DOES FEDERAL REGULATION OF ATTORNEYS VIOLATE THE TENTH AMENDMENT OR SEPARATION OF POWERS?

A. The States' Role in Regulating Attorneys

The regulation of attorneys is an important governmental function in the administration of justice and the responsibility has historically been reserved to and performed by the states. [58] Throughout American history, the licensing and regulation of lawyers has been left exclusively to the states. The **[*581]** states prescribe the qualifications for admission to practice and the standards of professional conduct. [59]

As summarized in Hoover v. Ronwin:

The regulation of the activities of the bar is at the core of the State's power to protect the public. ... The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." ... Few other professions are as close to the "core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice." [60]

The Supreme Court has long recognized that the states' interest in disciplining lawyers is "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." [61] The states' interests implicated in BAPCPA are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the states bears a special responsibility for maintaining standards among members of the licensed professions.

In addition, under the doctrine of separation of powers, the courts are afforded the inherent power to regulate admission to the practice of law by prescribing minimum levels of competency, to set standards for continuing legal practice, to oversee the conduct of attorneys as officers of the court, and to control and supervise the practice of law both in and out of court. [62]

Therefore, the power to regulate the actual practice of law, including the power to discipline

attorneys, appears to be among the inherent powers of the courts. [63] In fact, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. [64] "This is necessarily so. An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question." [65]

In addition to its general interest in protecting consumers and regulating commercial transactions, states bear a special responsibility for maintaining **[*582]** standards among members of the licensed professions. [66] The important difference between regulation of the legal profession and regulation of other professions is that admission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, the states and the courts appear to share the power to regulate attorneys.

B. BAPCPA Prescribes Penalties for Violations of Debt Relief Agency Provisions

BAPCPA imposes various penalties for violations of 526, 527 or 528. First, any contract between a debt relief agency and an assisted person that does not comply with these provisions is void and may not be enforced by any state or federal court or by any person, except an assisted person. [67] Second, a debt relief agency is liable to an assisted person for any fees or charges paid by such person to the agency, plus actual damages and reasonable attorneys' fees and costs, for any intentional or negligent failure to comply with 526, 527 and 528. [68] Third, a state official may seek to enjoin violations of these provisions or to recover actual damages on behalf of assisted persons arising from such violations, including recovery of their fees, plus reasonable attorneys' fees and costs. [69] Fourth, the bankruptcy court, on its own motion or on motion of the U.S. Trustee or the debtor, may enjoin violations of these provisions or "impose an appropriate civil penalty" for intentional violations or a clear and consistent pattern of violations of these provisions. [70] Finally, these provisions do not preempt state bar associations and federal courts from enforcing qualifications to practice. [71]

C. Tenth Amendment Analysis of BAPCPA's Attorney Regulation

Undoubtedly, lawyers will argue that these provisions are unconstitutional in regulating attorneys and assuming control over a matter traditionally left to the states. The Supreme Court's decisions in New York v. United States, [72] and Printz v. United States, [73] revived the Tenth Amendment as a limit on federal power. Specifically, they held that Congress may not "commandeer" states and coerce the states into implementing federal policy. Thus, **[*583]** the claim will be that BAPCPA violates the Tenth Amendment in shifting responsibility over this aspect of regulating lawyers from states to the federal government.

But the problem with this argument is that the Supreme Court has not held that the Tenth Amendment reserves a zone of activities for exclusive state control. Rather, the Tenth Amendment decisions of the last fifteen years have had a narrower focus: they establish that Congress cannot compel state legislative or regulatory activity. In New York v. United States, the Court declared unconstitutional a federal law requiring that state governments clean up their nuclear wastes. The Court explained that Congress was commandeering the states and forcing them to adopt laws and regulations. In Printz v. United States, the Court held unconstitutional a provision of the Brady Handgun Control Act that required state and local law enforcement personnel to do background checks before issuing permits for firearms. Again, the Court found that Congress was impermissibly coercing states into enforcing a federal mandate.

A challenge to BAPCPA on Tenth Amendment grounds must, under these decisions, show that the federal government is compelling states to enact laws or regulations or implement a federal mandate. It is not enough to argue that regulating lawyers is a traditional responsibility of state governments. The federal government's assumption of functions traditionally performed by the states is not a violation of the Tenth Amendment under any of the recent Supreme Court decisions. Moreover, it must be remembered that federal courts

long have regulated the conduct of attorneys who appear before them.

Nor is the separation of powers argument likely to succeed. State legislatures long have regulated attorney conduct; there is no reason why Congress cannot do so in federal courts. Bankruptcy courts are created by Congress and it is difficult to see why they cannot regulate who is eligible to practice there and how they must behave so long as Congress is not preventing bankruptcy courts, as adjuncts of federal district courts, from carrying out their judicial functions.

IV. WHETHER THE INVOLUNTARY CHAPTER 11 PLAN REQUIRING FIVE YEARS OF PAYMENTS VIOLATES THE THIRTEENTH AMENDMENT

Although a principal purpose of BAPCPA is to cause more debtors to file Chapter 13 cases, it does so solely by imposing new limits on the filing of Chapter 7 cases while leaving the filing of a Chapter 13 case purely voluntary. BAPCPA does not permit the filing of an involuntary Chapter 13 **[*584]** case. [74]

But BAPCPA for the first time makes all of an individual Chapter 11 debtor's postpetition earnings property of the estate. [75] And it requires, upon objection by an unsecured creditor, that all of the debtor's projected disposable income be devoted to the plan for five years unless all unsecured claims are paid in full. [76] Because an involuntary individual Chapter 11 case remains permissible except against a family farmer, [77] the required devotion of five years' disposable earnings to a Chapter 11 plan may raise Thirteenth Amendment peonage issues.

A. Historical Treatment of Peonage

The Thirteenth Amendment prohibits slavery and involuntary servitude. In 1867, Congress abolished peonage, declared state laws sanctioning it void, and made it a crime to hold anyone in "a condition of peonage." [78] In sustaining and enforcing these constitutional enactments, the Supreme Court defined peonage as:

a status or condition of compulsory service based upon the indebtedness of the peon to the master. The basal fact is indebtedness ... [whether] the debtor voluntarily contracts to enter the service of his creditor ... [or the servitude] is forced upon the debtor by some provision of law. ... Peonage, however created, is compulsory service, involuntary servitude. [79]

In addition, there must also be compulsory service so that, for example, a taxpayer's allegation that the Internal Revenue Service (IRS) officer demanded repayment of a nonexistent tax debt and levied on the taxpayer's **[*585]** property to collect the debt is not "peonage" where the taxpayer failed to allege that the officer held him against his will or forced him to perform labor to satisfy the debt. [80] The "essence [of peonage] is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid." [81] Peonage is a form of involuntary servitude. [82]

Several courts have contended that the elimination of peonage was one of the goals of the Thirteenth Amendment, [83] and the Amendment has regularly been invoked in decisions condemning peonage. [84] In fact, peonage had been forbidden at common law by the time the Amendment was ratified. [85] "The relevance of the Thirteenth Amendment to peonage cases, besides providing a convenient basis for congressional and judicial rulemaking power, is that it provides a standard by which to determine the voluntariness of labor performed pursuant to a debt." [86]

B. May Debtors be Compelled to Pay Creditors From Future Wages?

The question whether debtors may be compelled to pay creditors from future wages is not a new one, although it is central to the new provision of the Code. The issue was raised long before the current Code was enacted.

In 1934, the U.S. Supreme Court, in Local Loan Co. v. Hunt, [87] had occasion to consider whether a bankruptcy debtor's assignment of future wages under state law created a lien that was nondischargeable under the federal bankruptcy law. Creditors argued that Illinois case law held that an assignment of future wages created a lien that could not be discharged in bankruptcy. [88] Without reaching the issue of whether such a lien would **[*586]** constitute unconstitutional peonage, the Supreme Court held that such state law was so subversive of the fundamental policy of the Bankruptcy Act that it need not be followed by a federal court of bankruptcy:

One of the primary purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." ...

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 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. From the viewpoint of the wage-earner there is little difference between not earning at all and earning wholly for a creditor. Pauperism may be the necessary result of either. The amount of the indebtedness, or the proportion of wages assigned, may here be small, but the principle, once established, will equally apply where both are very great. 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. Confining our determination to the case in hand, and leaving prospective liens upon other forms of acquisitions to be dealt with as they may arise, we reject the Illinois decisions as to the effect of an assignment of wages earned after bankruptcy as being destructive of the purpose and spirit of the Bankruptcy Act. [89]

Chapter XIII wage earner reorganization was formally introduced into the Bankruptcy Act of 1898 by the 1938 amendments effected by the Chandler **[*587]** Act. [90] It was purely voluntary, and no provision of the Bankruptcy Act would disqualify an individual debtor for "straight" bankruptcy relief (the equivalent of the Code's Chapter 7) simply because the debtor could qualify for Chapter XIII relief. Nonetheless, in some communities where Chapter XIII relief was used extensively, "referees are not only hospitable, but counsel and the credit community generally encourage, if indeed they do not insist, that wage-earner debtors in financial distress petition for relief under Chapter XIII." [91]

During the 90th Congress in 1967 an attempt was made, but shot down, to deny straight bankruptcy relief for any debtor who would qualify for a Chapter XIII case. [92] Several arguments were made against the proposal, including the contention that forcing an individual to work for creditors would likely violate the Thirteenth Amendment of the United States Constitution, which prohibits involuntary servitude. [93] In addition, lawmakers believed

that an involuntary wage-earner plan was unworkable since "an unwilling debtor is less likely to retain his job or to cooperate in the repayment plan, and more often than not, the plan would be pre-ordained to fail." [94]

The 1970 Bankruptcy Commission also considered and rejected the notion of requiring consumer debtors to devote future income to debt satisfaction as a condition of obtaining relief in bankruptcy. [95]

The resilient efforts of creditor lobbyists in this regard [96] yielded some success in 1984 when Congress added 707(b) to the Bankruptcy Code, authorizing a court to dismiss a case filed by an individual with primarily consumer debts if granting relief would constitute "a substantial abuse" of the **[*588]** provisions of Chapter 7 of the Code. [97] This section has been widely interpreted by bankruptcy judges to provide for the dismissal of a consumer debtor's Chapter 7 case when the debtor has the financial ability to make meaningful repayments to creditors. [98]

The 1997 Commission Report considered numerous proposals for "means testing" and other methods to compel or encourage debtors to file Chapter 13 cases rather than Chapter 7. After "intensive review," the Commission concluded that "access to Chapter 7 and to Chapter 13, the central feature of the consumer bankruptcy system for nearly 60 years, should be preserved." [99] The 1997 Commission Report did not address the peonage issue, either with respect to means testing for Chapter 7 or involuntary Chapter 11 cases. [100]

Several commentators have considered whether the ordering of a divorced spouse to pay for the future living expenses of the other by way of alimony constituted peonage or involuntary servitude. [101] This seems the closest analogue to the provisions of the Bankruptcy Code. The Supreme Court has not yet had occasion to directly address this issue. [102] But the practice of requiring alimony, which necessitates employment, occurs all over the country on a regular basis.

But the argument is not a frivolous one. Courts have held that forced labor, with the threat of a criminal punishment is peonage and violates the Thirteenth Amendment. This also applies to labor forced after receiving an advance payment. [103] The Court's rationale in Bailey v. Alabama was that "the state could not avail itself of the sanction of the criminal law to supply the compulsion (to enforce labor) any more than it could use or authorize the use of physical force." [104] One state supreme court said of alimony: "The question facing the Court is whether a judicially imposed system of involuntary **[*589]** servitude is to be continued wherein one human being is placed in bondage to another for what is effectively the remainder of his natural life." [105]

C. BAPCPA's Chapter 11 Plan Requirement for Five Years' Wages

Although BAPCPA has no direct effect on the eligibility of individual debtors to file Chapter 11 cases, [106] the new means test for filing a Chapter 7 case [107] coupled with the unchanged eligibility requirements for Chapter 13 [108] may result in many more individual Chapter 11 cases being filed. But Chapter 11 has been significantly changed for individual debtors.

New Code 1115 provides that for an individual debtor, property of the estate includes, in addition to all of the property identified in 541: (1) all property of the kind described in 541 that the debtor acquires after commencement of the case and before the case is closed, dismissed or converted, and (2) earnings from services performed by the debtor after commencement of the case and before the case is closed, dismissed or converted. New Code 1141(d)(5) provides that absent a hardship discharge, [109] an individual Chapter 11 debtor shall not receive a discharge until "completion of all payments under the plan." Because the property acquired postpetition and the earnings from postpetition services are property of the estate until the case is closed, and because the discharge will not be granted until completion

of all plan payments, all postpetition earnings will continue to be property of the estate for the duration of the plan.

New 1129(a)(15) requires that, unless unsecured creditors are paid in full or do not object, the value of property to be distributed under the plan must at least equal the debtor's projected disposable income (as defined in 1325(b)(2)) to be received during the five-year period beginning on the date that the first payment is due under the plan or during the plan's term, whichever is longer.

And two new provisions increase the possibility of creditors' plans. New Code 1121(d)(2) provides that the debtor's exclusive right to file a plan **[*590]** may not be extended beyond eighteen months after the filing of the case. And even if an individual debtor's plan is confirmed and substantially consummated, new Code 1127(e) permits an unsecured creditor or the U.S. Trustee to seek modification of the plan to change the amount of payments or to extend or reduce the time period for payments under the plan.

As the essence of peonage is compulsory service in payment of a debt, [110] it is certain that it will be argued that an involuntary individual Chapter 11 case coupled with the commitment of five years' disposable income to the plan constitutes impermissible peonage. A debtor in this instance seems to be compelled to work for five years after having pledged his future earnings to his creditors. Ultimately, the Supreme Court will have to decide the issue that it has avoided in the alimony context as to the meaning of peonage.

However, there may be an important distinction between an involuntary Chapter 11 case and alimony. The sanction for failure to make alimony or child support payments may include contempt and jail. [111] But the failure to make Chapter 11 plan payments would result only in denial of the discharge and dismissal of the case. Perhaps the payments could be compelled by a wage assignment, but there is no sanction other than loss of the discharge if the debtor quits the job.

The peonage challenge to involuntary Chapter 11 proceedings will present a fascinating issue to the bankruptcy courts and ultimately to the Supreme Court. But it has to be remembered that rarely have the courts found practices to be unconstitutional peonage in violation of the Thirteenth Amendment. The challenge is made especially difficult because there is no possibility of contempt or imprisonment for those who fail to make the required payments.

V. CONSTITUTIONAL ISSUES IN THE MEANS TEST

A. The Means Test

America is a country that believes in second chances. [112] Consistent with this belief, bankruptcy laws historically have been used to give financially beleaguered debtors a second chance, a clean economic slate. [113] Whether, and when, this second chance continues to be warranted has been the subject of intense debate for the past several years. Under intense pressure by well-funded creditor lobbying groups, [114] Congress has considered and eventually **[*591]** enacted legislation that imposes a "means test" for bankruptcy relief. Making potential debtors satisfy a means test, critics argue, will ensure that bankruptcy relief is available only to people who can document a quantifiable need for this economic relief.

Under the new means test contained in Code 707(b), an "abuse" of the bankruptcy law is presumed if the amount of the debtor's income remaining after deduction of certain expenses and other specified amounts exceeds the specified thresholds. Unless the debtor could demonstrate "special circumstances" that cause the expected disposable income to fall below the threshold, the Chapter 7 case would be dismissed or converted to a Chapter 13 or Chapter 11 case. [115]

Application of the means test will vary to some extent throughout the nation. The "safe harbor" hinges on the median family income for the state of the debtor's residence, [116] and therefore application of the means test will vary significantly from state to state. When the means test does apply, the expenses that are deducted from the debtor's income are not the debtor's actual expenses but rather are amounts established by the IRS based on family size. [117] Many of the expense categories, such as transportation, are uniform throughout the nation, [118] while housing expenses vary greatly depending on location. The housing expense deduction will not even be uniform throughout a state, because it is governed by the county where the debtor resides. [119]

Eligibility for Chapter 7 relief will now vary depending on the state and county where the debtor resides. This lack of uniformity raises the question whether the means test violates the constitutional requirement that bankruptcy laws be "uniform."

[*592]

B. Whether the Means Test Violates the Bankruptcy Uniformity Clause

The Bankruptcy Clause of the Constitution grants Congress the power "to establish ... uniform laws on the subject of bankruptcies throughout the United States." [120] The Supreme Court has interpreted this uniformity language in several contexts. Chief Justice Marshall observed in the first interpretation of the Bankruptcy Clause that "the peculiar terms of the grant [of bankruptcy power] certainly deserve notice" because "Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States." [121]

The only element distinguishing the Bankruptcy Clause from the other Article I powers is the concept of "uniformity": Congress is granted the power "to establish ... uniform laws on the subject of bankruptcies throughout the United States." [122] Indeed, the Supreme Court has recognized that the uniformity provision was intended to authorize a national law enforceable in whatever state the debtor might be found, as well as to prohibit private bankruptcy laws benefiting individual debtors. [123] In addition, "the uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts." [124] Just as "the uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors," there is no reason to suppose that uniformity requires that all creditors must be identically subject to suit. [125]

"'Uniformity' is problematic in the bankruptcy context because: (i) most laws governing the substance of relationships between debtor and creditors are state laws; (ii) these state laws are incorporated into and applied in the federal Bankruptcy Code; and (iii) these state laws are not necessarily uniform." [126] Since debtors and creditors in similar factual situations will often receive different treatment in bankruptcy from state to state, one might conclude that constitutional uniformity is not achieved by the bankruptcy law. This type of uniformity (or lack thereof) has been described by the Supreme Court as "personal" uniformity. [127] For example, a debtor in California might be liable in bankruptcy on a claim for breach of a cohabitation agreement, while a Vermont debtor might not be liable on such a claim on identical facts. **[*593]** A debtor in Florida may be able to exempt a palatial homestead, while a Pennsylvania debtor may be entitled to almost no homestead exemption. [128]

According to Hanover National Bank v. Moyses, a landmark 1902 Supreme Court decision, all the Constitution requires is "geographical" uniformity, rather than personal uniformity. [129] In Moyses, the Court upheld the incorporation of state exemption laws in the 1898 Bankruptcy Act. Geographical uniformity in this context, the Court observed, was satisfied "when the trustee takes in each state whatever would have been available to the creditor if the bankruptcy law had not been passed." [130] The purpose of the Uniformity Clause and its requirement of strict geographic uniformity was to prevent discrimination by Congress among

the states. [131]

Thus, a bankruptcy law is "uniform" when (i) the substantive law applied in a bankruptcy case conforms to that applied outside of bankruptcy under state law; (ii) the same law is applied to all debtors within a state and to their creditors; and (iii) Congress uniformly delegates to the states the power to fix those laws. The fact that debtors and creditors in different states may receive different treatment does not render the law unconstitutional. [132]

In 1918, the Court reaffirmed the Moyses principle in a case involving the use of state fraudulent conveyance laws in bankruptcy. [133] More recently, lower courts have followed Moyses in upholding the exemption provisions of the 1978 Bankruptcy Code against uniformity challenges. [134] The Supreme Court has not addressed the issue. Still, the Supreme Court continues to support the proposition that "the uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner." [135]

A uniformity issue is also presented when Congress passes a bankruptcy law that is not available to all debtors across the country. The Court has ruled that private bankruptcy laws for particular debtors are not permitted. In recent years the Supreme Court has twice confronted this problem with regard to special railroad legislation. In Blanchette v. Connecticut General Insurance Corp. (The Regional Rail Reorganization Act Cases), [136] the Court upheld the Regional Rail Reorganization Act although the law was restricted in its application to the railroads of a single geographic region. The saving **[*594]** grace in the law stemmed from the reality that all of the railroads then operating under the bankruptcy laws were in that region; even if the statute had been drafted to be of general applicability, its operation and effect would have been unchanged. [137] "The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." [138] The Court explained that "the problem dealt with (under the Bankruptcy Clause) may present significant variations in different parts of the country." [139] According to the Court in Railway Labor Executives' Association v. Gibbons, [140] however, Congress did overreach its authority in passing a private bankruptcy law that affected only the employees of the Rock Island Railroad. [141]

In conclusion, a bankruptcy law may be "uniform" even though it incorporates state law so that there are different results in different States. [142] In order to show that the means test violates the "uniformity" requirement, it would be necessary to demonstrate how it is violative of "geographic" uniformity, as opposed to "personal" uniformity.

Perhaps the strongest argument that can be made against the means test is that its lack of uniformity within a state - due to the housing expense that varies by county - violates the Moyses holding that arguably requires uniform application within each state. Since the Supreme Court already has held that a bankruptcy law may be uniform even though it incorporates state law and leads to varying results in different states, it will be difficult to challenge the means test on uniformity grounds.

C. Whether the Means Test Violates Equal Protection Principles

In addition, the uniformity provision does not forbid Congress to distinguish between different classes of debtors, different industries, or different creditors. [143] Certain entities, such as insurance companies and most banks, are not permitted to file for bankruptcy protection. [144] There are special **[*595]** chapters for family farmers [145] and municipalities, [146] and railroads are not permitted to file under Chapter 7 but may file under Chapter 11. [147]

However, the equal protection clause of the Fourteenth Amendment, which is applied to the

federal government through the Fifth Amendment, provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." [148] This provision forbids the government from treating individuals in like situations differently, which might be the case under the means test where two individuals with exactly the same income receive different treatment depending upon the state or county of their residence.

Because bankruptcy legislation is a form of economic regulation, only the rational basis test is used. In other words, the law will be upheld so long as it is rationally related to a legitimate government purpose. This standard is very deferential to the government and rarely have any laws been found to fail the rational basis test.

The legislative history of BAPCPA states:

[The Act is] a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases. The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.

With respect to the interests of creditors, the proposed reforms respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system. The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ("needs-based bankruptcy relief" or "means testing"), which is intended to ensure that debtors repay creditors the maximum they can afford. [149]

Therefore, in considering equal protection challenges to the means test, courts will need to consider (1) whether this reflects a legitimate interest and **[*596]** (2) whether the means test is rationally related to the achievement of this goal. [150]

VI. WHETHER COMPELLED DISCLOSURE OF TAX RETURNS VIOLATES CONSTITUTIONAL PROTECTIONS FOR PRIVACY

A. Whalen, the Fourth Amendment, and Control Over Private Information

BAPCPA imposes on debtors many new filing and disclosure requirements. These include 521 (e) & (f), which require debtors to file tax returns that must be made available to creditors upon request. Do such requirements violate constitutional rights of privacy?

"The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." [151] The new provisions of 521 implicate the interest "in avoiding disclosure of personal matters."

The right of privacy has evolved to provide some protection for the ability of individuals to determine what sort of information about themselves is collected and how that information is used. But privacy in the sense of freedom to withhold personal financial information from the government or the public has received little constitutional protection. [152]

In Whalen v. Roe, the Supreme Court extended substantive due process privacy protection to informational privacy, holding that the "zone of privacy" protected by the Constitution

encompasses the "individual interest in avoiding disclosure of personal matters." [153] The Whalen Court considered a New York law requiring physicians to disclose reports identifying patients receiving prescription drugs that have a potential for abuse. [154] The state maintained a centralized data file that listed the names and contact information of the patients and the prescribing doctors. The challengers of the law argued that this database infringed the right to privacy because individuals have a right to avoid disclosure of personal matters. [155] Although the Court **[*597]** did not explicitly reject the idea that the right of privacy might be recognized at some point in the future, the majority decided that the right was not infringed by the New York law.

Several commentators have observed that if a system of debt relief utilizes extensive information about the consumer's financial condition to determine if the consumer should repay her debts, there is a strong argument for gathering all of this information only once in a proceeding that binds all creditors, thereby avoiding duplicative litigation. [156] The justification is even less compelling in a system that sets exemptions of income and assets so large that the vast majority of consumers repay nothing. [157]

B. BAPCPA's Personal Information Disclosure Requirements

Section 521(a)(1), as amended by BAPCPA, requires all debtors to file: (1) copies of all payment advices or other evidence of payment, if any, from any employer within sixty days preceding the bankruptcy filing; (2) a statement of the amount of monthly net income, itemized to show how such amount is calculated; and (3) a statement disclosing any reasonably anticipated increase in income or expenditures in the twelve-month period following the date of filing. [158] Failure to file all this information within forty-five days of the petition may result in automatic dismissal of the case effective on the forty-sixth day, [159] or dismissal within five days of a request by a party in interest. [160] The only exceptions are that a debtor may obtain a forty-five day extension upon motion filed within the initial forty-five days, [161] or a trustee may move within the initial forty-five days for the case not to be dismissed because the debtor attempted in good faith to file all the required information and the best interests of creditors would be served by the administration of the case. [162]

In addition, new 521(e)(2)(A) requires a Chapter 7 or 13 individual debtor to provide the trustee, not later than seven days before the date first set for the meeting of creditors, a copy of his or her federal income tax return or transcript (at the election of the debtor) for the latest taxable period ending prior to the filing of the bankruptcy case for which a tax return was filed. [163] Should the debtor fail to comply with this requirement, the case must be dismissed unless the debtor demonstrates that such failure was due **[*598]** to circumstances beyond the debtor's control. [164] Section 521(e)(2)(C) also requires the debtor to simultaneously provide a copy of that tax return or transcript to any creditor who requests it, enforced by the same remedy of dismissal unless the debtor demonstrates the failure was due to circumstances beyond the debtor's control.

During the pendency of an individual Chapter 7, 11, or 13 case, the debtor must file with the court, at the request of the judge, United States trustee, or any party in interest, at the time filed with the taxing authority, copies of any federal income tax returns (or transcripts thereof) that are required to be filed during the pendency of the case. [165] In addition, the debtor must file copies of any tax returns filed postpetition for any tax year within three years prepetition. [166]

Section 521(g)(2) mandates that the tax returns and any amendments be made available to the United States trustee or bankruptcy administrator, the trustee, and any party in interest for inspection and copying, subject to procedures to be established by the Director of the Administrative Office for United States Courts within 180 days from the date of enactment of BAPCPA. The procedures must "safeguard[] the confidentiality of any tax information that is required to be provided" by 521, and "shall include restrictions on creditor access" to such

information. [167] In addition, the Director must, within 540 days from BAPCPA's enactment date, prepare and submit to Congress a report that assesses the effectiveness of such procedures and, if appropriate, include proposed legislation to further protect the confidentiality of such tax information and to impose penalties for its improper use. [168]

The issue will be whether these provisions violate the right to informational privacy. It should be noted that regulations are being promulgated to address the privacy issue and may be crucial as courts assess whether there are any privacy problems posed by BAPCPA. But it does seem clear that creditors in a case will be entitled to copies of tax returns, even if the regulations prohibit the creditors from publicizing them further. Does that compelled disclosure itself violate the right of privacy as recognized by Whalen? Although the Supreme Court has not yet provided great protection for informational privacy, this provision of BAPCPA likely will be vulnerable unless regulations are adopted to restrict access to such personal information. The broad access to tax information accorded to creditors by BAPCPA, without meaningful limits or safeguards, provides a strong basis for constitutional **[*599]** challenge. Such a challenge might also be made on First Amendment grounds if the particular debtor's tax information revealed donations to churches, political groups, and charities, [169] or income derived from government disability payments.

VII. WHETHER THE TIME LIMITS FOR JUDICIAL DECISIONS VIOLATE THE SEPARATION OF POWERS PRINCIPLE AND DUE PROCESS RIGHTS IN CASES WHERE THEY PREVENT A JUDGE FROM GIVING DUE DELIBERATION BEFORE RENDERING A DECISION, OR WHERE THEY DO NOT GIVE THE PARTIES ENOUGH TIME TO COLLECT THEIR EVIDENCE AND BRIEF THE COURT BEFORE A HEARING MUST COMMENCE (AND A DECISION MUST BE ISSUED)

A. Judicial Time Limits and Separation-of-Powers Principles

Congress has broad power to prescribe substantive and procedural rules for the judiciary, but separation-of-powers principles place important limits on that power when its exercise affects the way in which cases are decided. [170] "Congress clearly has the power to affect the process of judicial decision-making in many ways. Courts, for example, must apply valid congressional statutes as substantive law in cases to which they apply and even give them preference over many other sources of substantive law with which they may conflict." [171] Thus, whenever it enacts a substantive statute, Congress controls to some extent - and possibly to a dispositive extent - how courts will decide cases. [172]

In addition, a specific proposal to permit Congress to regulate the manner in which federal courts decide cases was rejected by the Constitutional Convention. By a 6-2 vote, the Convention defeated a provision that would have provided that, in all cases outside the Supreme Court's original jurisdiction, "the judicial power shall be exercised in such manner as the Legislature shall **[*600]** direct." [173] The rejection of this proposal, which preserved "the otherwise constitutionally sacrosanct quality of federal judging," [174] supports the principle of decisional independence.

Moreover, Congress may not restrict the role of the judiciary in such a way as to deny due process of law. On numerous occasions, the Supreme Court explicitly construed statutes narrowly in order to avoid preclusion of judicial review altogether. [175]

B. BAPCPA Imposes Time Limits for Judicial Decisions

BAPCPA amends 1112(b) to mandate that the court convert or dismiss a Chapter 11 case, whichever is in the best interests of creditors and the estate, if the movant establishes cause, absent unusual circumstances. In this regard, the court must specify the circumstances that support the court's finding that conversion or dismissal is not in the best interests of creditors and the estate.

In addition, an exception to the provision's mandatory requirement applies if: (1) the debtor or a party in interest objects and establishes that there is a reasonable likelihood that a plan will be confirmed within the time periods set forth in 1121(e) and 1129(e), or if these provisions are inapplicable, within a reasonable period of time; (2) the grounds for granting such relief include an act or omission of the debtor for which there exists a reasonable justification for such act or omission; and (3) such act or omission will be cured within a reasonable period of time.

The court must commence the hearing on a 1112(b) motion within thirty days of its filing and must decide the motion not later than fifteen days after commencement of the hearing unless the movant expressly consents to a continuance for a specified period of time or compelling circumstances prevent the court from meeting these time limits. [176]

An even tighter time frame is imposed by 521(i)(2). It provides that if a party in interest moves for dismissal on account of the debtor's failure to file all documents required by 521 (a)(1) within forty-five days of the petition, "the court shall enter an order of dismissal not later than 5 days after such request." While it may be a simple matter of judicial notice to determine whether the debtor has filed all schedules and statements required by **[*601]** 521(a)(1), it may require an evidentiary hearing to determine whether a debtor has filed all payment advices received within sixty days prepetition from any employer, as required by 521(a)(1)(B)(iv). This cannot be determined simply by the absence of any such payment advices in the court's file, because the debtor may have lost the job more than sixty days prepetition, or may be paid in cash without any accompanying payment advices, and nothing else in the file will necessarily reveal those facts. Because due process will undoubtedly require notice to the debtor of the setting of such an evidentiary hearing, probably by mail, it seems impossible to notice the hearing, conduct the hearing and decide it within five days of the filing of the creditor's motion.

The claim will be made that these time limits infringe separation of powers. This, though, will be a difficult argument because in other contexts the Supreme Court has upheld time limits for decisions imposed by Congress on the federal courts. For example, in Miller v. French, [177] the Supreme Court upheld a provision of the Prison Litigation Reform Act that requires federal courts to rule within thirty days on a government motion to end an injunction concerning prison conditions. [178] If the court does not act within thirty days, its earlier injunction must be stayed. The argument was that this provision, imposing a strict time limit on the federal judiciary, violates separation of powers. The Court rejected the separation of powers challenge, but it did declare that there may be a "serious question" whether Congress has violated separation of powers principles if its rules provide insufficient time for fact-finding "before the statute invalidates an extant remedial order":

If its legislation gives courts adequate time to determine the applicability of a new rule to an old order and to take the action necessary to apply it or to vacate the order, there seems little basis for claiming that Congress has crossed the constitutional line to interfere with the performance of any judicial function. But if determining whether a new rule applies requires time (say, for new factfinding) and if the statute provides insufficient time for a court to make that determination before the statute invalidates an extant remedial order, the application of the statute raises a serious question whether Congress has in practical terms assumed the judicial function. [179]

[*602]

That will be the issue when the time periods imposed by BAPCPA are considered.

Although the Supreme Court has deferred to congressionally imposed time limits in other

contexts, there is a strong basis for challenge if it can be shown that the limits imposed by BPCPA will prevent bankruptcy courts from providing the careful consideration that due process requires. In other cases, like Miller v. French, there was no claim that the time limits interfered with courts performing their judicial duties. But that is exactly the argument that can be made to some of the time limits imposed by BAPCPA.

CONCLUSION

As mentioned at the outset, other constitutional issues will undoubtedly arise as BAPCPA is implemented and its provisions are litigated. The goal of this Article was merely to highlight some of the issues that are likely to arise and to identify the relevant precedents and analysis for these questions. The only sure conclusion is that bankruptcy courts will face more constitutional litigation than ever before.

FOOTNOTES:

n1. S. 256, Pub. L. No. 109-8, 119 Stat. 23 (2005).

n2. H.R. Rep. No. 109-31, pt. 1 (2005).

n3. Failure to satisfy the means test is presumptive abuse of Chapter 7, and the disqualified debtor either must file for reorganization under Chapter 11 or 13 or refrain from filing.

n4. 11. U.S.C. 528(a)(4) & (b)(2)(B); see infra text accompanying notes 42-46.

n5. Florida Bar v. Went For It, Inc., 515 U.S. 618, 622 (1995).

n6. Bates v. State Bar of Arizona, 433 U.S. 350, 356 (1977).

n7. Id. at 382. The Court stated that its conclusion was consistent with Virginia Pharmacy in that the disciplinary rule at hand also served to inhibit the free flow of commercial information and promote public ignorance. Id. at 365, citing Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that the First Amendment protected from state regulation the right of pharmacists to engage in "commercial speech" by advertising prescription drug prices); see also In re R.M.J. 455 U.S. 191 (1982); Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626 (1985).

n8. Bates, 433 U.S. at 361-62, quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792

(1975).

n9. Id. at 372.

n10. Florida Bar, 515 U.S. at 623. In Bates, the Supreme Court applied the three-prong test and stated that it was not persuaded by any of the state's proffered justifications for its restriction of price advertising by attorneys, including: (1) the adverse effect on professionalism; (2) the inherently misleading nature of attorney advertising; (3) the adverse effect on the administration of justice; (4) the undesirable economic effects of advertising; (5) the adverse effect of advertising on the quality of service; and (6) the difficulties of enforcement absent wholesale restriction. Bates, 433 U.S. at 368-79.

n11. Id. at 384.

n12. Id. at 376. See Daniel Callender, Attorney Advertising and the Use of Dramatization in Television Advertisements, 9 UCLA Ent. L. Rev. (Special Section) 89, 97 (2001).

n13. See, e.g., Florida Bar, 515 U.S. at 623; Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988); Zauderer, 471 U.S. at 637; In re R.M.J., 455 U.S. 191, 199 (1982).

n14. Regulation of misleading advertising is discussed below, infra text accompanying notes 16-18.

n15. Bates, 433 U.S. at 383 ("Advertising that is false, deceptive, or misleading of course is subject to restraint. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech.") (citation omitted).

n16. Id. at 372.

n17. Id. at 375.

n18. Id. at 384.

n19. 455 U.S. 191, 200-01 (1982).

n20. "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive." In re R.M.J., 455 U.S. 191, 202 (1982) (citing Bates, 433 U.S. at 375). See also Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626 (1985).

n21. R.M.J., 455 U.S. at 203.

n22. 447 U.S. 557 (1980).

n23. Id. at 563-64.

n24. With respect to attorneys' advertisements, the intermediate standard of review for analyzing commercial speech restrictions under the free speech guarantee of the Constitution's First Amendment does not permit the reviewing court to supplant the precise interests put forward by a state with other suppositions; however, one substantial state interest is sufficient to satisfy the first prong of the intermediate standard's three-prong test. Florida Bar v. Went For It, Inc., 515 U.S. 515 U.S. 618, 624-25 (1995); see also Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995) (deeming only one of the government's proffered interests "substantial").

n25. See R.M.J., 455 U.S. at 203 (holding that in order for a state to regulate non-misleading attorney advertising, the state must assert a substantial interest and the interference with speech must be in proportion to the interest served). The Court also noted that "although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." Id. See also Zauderer, 471 U.S. 626 (1985) (indicating that attorney advertising was covered by the doctrine that commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (observing that state regulation of lawyer advertising may extend only as far as the interest such regulation serves).

n26. Zauderer, 471 U.S. at 651.