n27. Id.

n28. Id.

n29. Id. at 673.

n30. 455 U.S. 191 (1982).

n31. The attorney advertised using the terms "personal injury" and "real estate" instead of "tort law" and "property law," respectively, and listed unanalogous areas such as "contract," "zoning & land use," "communication," and "pension & profit sharing plans." Id. at 205.

n32. Id.

n33. 471 U.S. 626, 639 (1985).

n34. Id. at 630-31.

n35. Id. at 640-41.

n36. Id. at 642 ("Although some sensitive souls may have found the appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it.").

n37. Central Hudson, 447 U.S. at 568.

n38. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 460 (1978); Florida Bar v. Went For It, 515 U.S. 618, 624 (1995).

n39. Ohralik, 436 U.S. at 462.

n40. Florida Bar, 515 U.S. at 625.

n41. Id. But see Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (noting that the state has a substantial interest in ensuring dignified behavior in the courtroom, but that the state's interest in the protection of the dignity of the legal profession was not substantial enough to justify restricting free speech rights under the First Amendment).

n42. Unless otherwise indicated, citations to the Bankruptcy Code (the "Code") are to 11 U.S.C. 101 et seq., as amended by BAPCPA.

n43. Code 101(12A), added by BAPCPA, defines a "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110," subject to certain exclusions. This definition could include attorneys, document preparers and for-profit credit counselors (501(c)(3) nonprofit entities being specifically excluded from the definition), but this Article will focus solely on BAPCPA's application to attorneys. For a more detailed analysis of BAPCPA's regulation of debt relief agencies, see Henry J. Sommer, Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," 79 Am. Bankr. L.J. 191, 206-11 (2005) (hereafter "Sommer").

n44. "The term 'assisted person' means any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $ 150,000." Code 101(3).

n45. Accord, Sommer, supra note 43, at 211.

n46. The debt relief agency must provide the assisted person with the notice the clerk must provide upon filing a case pursuant to Code 342(b)(1), and a clear and conspicuous written notice that all information required to be provided by the assisted person during a bankruptcy case must be complete, accurate and truthful, that all assets and liabilities must be completely disclosed, that "the replacement value of each asset as defined in section 506 must be stated in those documents where requested after reasonable inquiry to establish such value," that current monthly income and disposable income are required to be disclosed after reasonable inquiry, that information an assisted person provides during a case may be audited, and that failure to provide such information may result in dismissal of the case or criminal sanctions. Code 527(a)(2). Code 506 does not require replacement value for any assets except collateral for secured debts in certain cases, replacement value may not be the basis for valuing exempt assets, and none of the required schedules and statements of affairs specifically requests replacement value. Accord, Sommer, supra note 43, at 210.

n47. See In re R.M.J. 455 U.S. 191, 203 (1982) (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 v. Office of Disciplinary Counsel of Supreme Court, 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).

n48. Under BAPCPA, any "person," including both attorneys and "bankruptcy petition preparers," who assists debtors with their bankruptcies in return for compensation, is deemed to be a "debt-relief agency."

n49. Village of Hoffman Estates v. Flipsides Hoffman Estates, Inc., 455 U.S. 489, 496-97 (1982) (overbreadth does not apply in commercial speech cases).

n50. Code 526(a)(1) prohibits a debt relief agency from failing to perform any service that it had informed the assisted person that it would provide in connection with a case or proceeding under Title 11. Section 526(a)(2) prohibits a debt relief agency from making any untrue or misleading statement, or advising any assisted person to make any such untrue or misleading statement. Section 526(a)(3) prohibits a debt relief agency from misrepresenting to any assisted person the services that the agency will provide or the benefits and risks from being a debtor in a bankruptcy case.

n51. Code 526(a)(4) (a debt relief agency shall not "advise an assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title").

n52. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548-49 (2001).

n53. 512 U.S. 622 (1994).

n54. Id. at 641.

n55. Id.

n56. Sabri v. United States, 541 U.S. 600, 124 S. Ct. 1941, 1948-49 (2004).

n57. United States v. Salerno, 481 U.S. 739 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. ... We have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.") (due process challenge to the Bail Reform Act).

n58. Leis v. Flynt, 439 U.S. 438, 442 (1979) (per curiam) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."); Fred C. Zacharias, The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation, 44 Ariz. L. Rev. 829, 858 (2002) (noting that the states have traditionally exercised the power left to them in this area).

n59. Leis, 439 U.S. at 442.

n60. 466 U.S. 555, 568 n.18 (1984), quoting Bates v. State Bar of Arizona, 433 U.S. 350, 361-62 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975), and In re Griffiths, 413 U.S. 717, 722-23 (1973).

n61. Cohen v. Hurley, 366 U.S. 117, 123-24 (1961).

n62. In re Attorney Discipline System, 19 Cal. 4th 582, 967 P.2d 49, 54 (Cal. 1998).

n63. Id.

n64. Id.

n65. Id.

n66. See Williamson v. Lee Optical, 348 U.S. 483 (1955); Semler v. Oregon State Bd. of Dental Exam'rs, 294 U.S. 608 (1935).

n67. Code 526(c)(1).

n68. Code 526(c)(2)(A).

n69. Code 526(c)(3). The federal district courts are given concurrent jurisdiction over such state enforcement actions. Code 526(c)(4).

n70. Code 526(c)(5).

n71. Code 526(d).

n72. 505 U.S. 144 (1992).

n73. 521 U.S. 898 (1997).

n74. Code 303(a), which provides that an "involuntary case may be commenced only under chapter 7 or 11 of this title," remains unchanged by BAPCPA.

n75. Code 1115.

n76. Code 1129(a)(15).

n77. Code 303(a), unchanged by BAPCPA.

n78. 14 Stat. 546 (1967) (codified in 18 U.S.C. 1581 (1976 & Supp. V 1981) & U.S.C. 1994 (1976 & Supp. IV 1980)). For a history of peonage statutes, see Pollock v. Williams, 322 U.S. 4, 7-13 (1944).

n79. Clyatt v. United States, 197 U.S. 207, 215 (1905); See also Bailey v. Alabama, 219 U.S. 219 (1911) (distinguished by Wilson v. State, 138 Ga. 489, 75 S.E. 619 (1912) and by State v. Mobile & O.R. Co., 190 Ala. 409, 67 So. 286 (1914)). Under the peonage system a laborer is absolutely bound to his employer. He is absolutely compelled to stay and labor until he has paid his indebtedness. If he attempts to leave, or leaves, he can be restrained or forced to return. The employer can sell his unexpired term to anyone who will pay the amount due and assume the obligations of the master. State v. Murray, 116 La. 655, 40 So. 930 (1906) (overruled in part on other grounds by State v. Oliva, 144 La. 51, 80 So. 195 (1918)). Peonage is involuntary servitude that involves the additional element of being tied to the discharge of an indebtedness. U.S. v. Shackney, 333 F.2d 475 (2d Cir. 1964) (distinguished by U.S. v. Kozminski, 821 F.2d 1186 (6th Cir. 1987) and disagreement on other grounds recognized by Sharp v. State, 245 Kan. 749, 783 P.2d 343 (1989)).

n80. Del Elmer v. Metzger, 967 F. Supp. 398 (S.D. Cal. 1997).

n81. Bailey, 219 U.S. at 242.

n82. Taylor v. Georgia, 315 U.S. 25, 29 (1942). "Involuntary servitude" is the coerced service of one person for another through use, or threatened use, of law, physical force, or some other method that causes the laborer to believe that the laborer has no alternative to performing the service. Blair v. Checker Cab Co., 558 N.W.2d 439 (Mich. Ct. App. 1996). It is an action by a master causing a servant to have, or to believe he has, no way to avoid continued service or confinement. Brooks v. George County, Miss., 84 F.3d 157 (5th Cir. 1996).

n83. Lauren Kares, Note, The Unlucky Thirteenth: A Constitutional Amendment In Search of a Doctrine, 80 Cornell L. Rev. 372, 385, n. 57 (1995) (citing Plessy v. Ferguson, 163 U.S. 537, 542 (1896)) ("This infamous case that sanctioned 'separate but equal' accommodations for African-Americans counted among the Amendment's targets 'Mexican peonage [and] the Chinese coolie trade.'")

n84. See, e.g., Pollock v. Williams, 322 U.S. 4 (1944); Bailey, 219 U.S. 219; Clyatt, 197 U.S. 207.

n85. Kares, supra note 83, at 385 n.59 ("Debtors' prisons were already a thing of the past when the Thirteenth Amendment was ratified, and specific performance was not allowed as a remedy for breach of a personal service contract."). See generally American Broadcasting Co. v. Wolf, 420 N.E.2d 363, 366 (N.Y. 1981) (discussing courts' longstanding refusal to compel labor in fulfillment of a legal obligation).

n86. Kares, supra note 83, at 385.

n87. 292 U.S. 234 (1934).

n88. The underlying issue was not whether the lien was dischargeable but whether there was a lien on future wages at all. At the time, authorities were split on the question of whether a lien could exist prior to the debtor's acquisition of the property that served as collateral, i.e., a "floating lien." That issue was not finally resolved until adoption of 9-204 of the Uniform Commercial Code. See, e.g., DuBay v. Williams, 417 F.2d 1277, 1287 n.7 (9th Cir. 1969). But in Local Loan v. Hunt, the creditor argued that Illinois law recognized the validity of such floating liens, which could therefore apply to future wages. 292 U.S. at 243. The Supreme Court did not decide that issue.

n89. Local Loan, 292 U.S. at 244-45 (citations omitted).

n90. 52 Stat. 840 (June 22, 1938).

n91. Report of the Commission on the Bankruptcy Laws of the United States, Part I at 158, H. Doc. 93-137, 93d Cong. 1st Sess. (1973) (hereafter "1970 Commission Report").

n92. See Hearings on H.R. 1057 and H.R. 5771 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong. (1967).

n93. "To force unwilling wage earners to devote their future earnings to payment of past debts smacked to some of debt peonage, particularly when business debtors could not be subjected to the same kind of regimen under the Bankruptcy Act." 1970 Commission Report, supra note 91, at 159.

n94. H.R. Rep. No. 95-595, at 120 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6081.

n95. The Commission has considered the arguments made for conditioning the availability of bankruptcy relief, including discharge, on a showing by the debtor that he cannot obtain adequate relief from his condition of financial distress by proposing a plan for payment of his debts out of his future earnings. The Commission has concluded that forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system.

1970 Commission Report, supra note 91, at 159.

n96. "The credit industry has sought means testing consistently for at least 30 years, but Congress has consistently refused to change the basic structure of the consumer bankruptcy laws." Report of the Nat'l Bankr. Review Comm'n 90-91 (October 1997) (hereafter "1997 Commission Report").

n97. See Bankruptcy Amendments of 1984, Pub. L. No. 98-353 312, 98 Stat. 355.

n98. E.g., Zolg v. Kelly (In re Kelly), 841 F.2d 908, 914 (9th Cir. 1988) ("We hold that the debtor's ability to pay his debts when due, as determined by his ability to fund a chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse.").

n99. 1997 Commission Report, supra note 96, at 91.

n100. Two Commissioners filed a dissent that objected that the majority in support of the 1997 Commission Report was only 5-4, proposed various "means test" limits on the availability of Chapter 7 relief, and "dismissed this odd notion" that compulsory payment of debts out of future wages might constitute unconstitutional peonage by an extensive quotation from In re Higginbotham, 111 B.R. 955, 966-67 (Bankr. N.D. Okla. 1990). Edith H. Jones and James I. Shepard, Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law 3, 16-23, 1997 Commission Report, supra note 96.

n101. See e.g., Alfred J. Sciarrino & Susan K. Duke, Alimony: Peonage or Involuntary Servitude?, 27 Am. J. Trial Advoc. 67 (2003).

n102. "It appears that in most instances the right case has not presented itself, as appellants who might have been aggrieved have generally voluntarily settled for a specific maintenance amount, thereby failing to trigger Thirteenth Amendment involuntary servitude restrictions." Id. at 94.

n103. Id. at 74.

n104. Id. at 74-75 (citing Bailey v. Alabama, 219 U.S. 219, 244 (1911) and United States v. Kozminski, 487 U.S. 931, 943 (1988)).

n105. Olsen v. Olsen, 557 P.2d 604, 606 (1976) (Shepard, J., dissenting).

n106. Code 109(d), unchanged by BAPCPA.

n107. Code 707(b), substantially amended by BAPCPA.

n108. Code 109(d), unchanged by BAPCPA, limits Chapter 13 to individuals with regular income whose noncontingent, liquidated unsecured and secured debts do not exceed $ 307,673 and $ 922,975, respectively, subject to consumer price adjustments every three years.

n109. Code 1141(d)(5)(B) provides that the court may grant a discharge prior to completion of all plan payments if the value of property actually distributed under the plan is not less than the amount that would have been available for distribution if the debtor had been liquidated under Chapter 7, and modification of the plan is not practicable. The provision does not identify this as a hardship discharge nor require the debtor to prove that the failure to make plan payments is due to circumstances for which the debtor should not be held accountable, as does the comparable provision for Chapter 13 cases, 1328(b)(1).

n110. Bailey v. Alabama, 219 U.S. 219, 242 (1911).

n111. See, e.g., Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1077 (9th Cir. 2000) (360-day jail sentence for failing to pay child support).

n112. A. Mechele Dickerson, Bankruptcy Reform: Does the End Justify the Means?, 75 Am. Bankr. L.J. 243, 243 (2001).

n113. Id.

n114. Id. (citing Philip Shenon, Hard Lobbying on Debtor Bill Pays Dividend, N.Y. Times, Mar. 12, 2001; Christopher H. Schmitt, Tougher Bankruptcy Laws - Compliments of MBNA?, Bus. Wk., Feb. 26, 2001, at 43; Donald L. Barlett and James B. Steele, Big Money and Politics/Who Gets Hurt, Time, May 15, 2000 at 64 (reporting lobbying costs of more than $ 5 million); Editorial, Bad Ideas on Bankruptcy, Wash. Post, Feb. 18, 2000, at A22 (noting that bankruptcy is in "the spotlight" due to "some pricey lobbying by financial firms"); Russ Feingold, Lobbyists' Rush for Bankruptcy Reform, Wash. Post., June 7, 1999, at A19 ("Credit card companies have spent tens of millions of dollars to push a bill that legal experts and

judges say won't work."); Dan Morgan, Creditors' Money Talks Louder in Bankruptcy Debate: Consumer Groups Fight New Curbs on Insolvent Debtors, Wash. Post, Jun. 1, 1999 at A04 (reporting critics' concern that the drive to overhaul bankruptcy laws presents "a case study of the impact of money on the political process"); Jacob M. Schlesinger, Card Games: As Bankruptcies Surge, Creditors Lobby Hard to Get Harder Laws, Wall St. J., June 17, 1998, at A1 (reporting that credit trade group held a $ 1000-a-head fundraiser for a chief proponent of bankruptcy reform).

n115. For a more detailed analysis of the means test, see Sommer, supra note 43, at 193-203.

n116. Id. at 195.

n117. Id. at 197.

n118. Id. at 198 (noting that the National Standards for transportation fail to "take into account large disparities in car insurance costs that exist within some metropolitan areas").

n119. Id. at 198.

n120. U.S. Const. art. I, 8, cl. 4.

n121. Sturges v. Crowninshield, 17 U.S. 122, 193-94 (1819).

n122. U.S. Const. art. I, 8, cl. 4.

n123. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 471-72 (1982).

n124. Id. at 471 n.11.

n125. Id. at 469.

n126. Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr Inst. L. Rev. 5, 46 (1995).

n127. Id. (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902)).

n128. Id.

n129. Moyses, 186 U.S. at 188-90.

n130. Id. at 190.

n131. Tabb, supra note 126, at 46-47; Downes v. Bidwell, 182 U.S. 244 (1901).

n132. Tabb, supra note 126, at 47.

n133. Stellwagen v. Clum, 245 U.S. 605, 613 (1918).

n134. See, e.g., In re Sullivan, 680 F.2d 1131 (7th Cir. 1982).

n135. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 469 (1982).

n136. 419 U.S. 102 (1974).

n137. Tabb, supra note 126, at 46.

n138. Blanchette, 419 U.S. at 159.

n139. Id. (citing Wright v. Vinton Branch, 300 U.S. 440, 463 n.7 (1937)).

n140. 455 U.S. 457 (1982).

n141. Id. at 470-71.

n142. Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 469 (1982); Stellwagen v. Clum, 245 U.S. 605, 613 (1918); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190 (1902) (bankruptcy trustee may "uniformly" take whatever property is available to creditors under relevant state law, even though this may have vastly different results in different states).

n143. Gibbons, 455 U.S. at 469 ("The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts." Id. at 471 n.11).

n144. Code 109(b)(2).

n145. Code 1201 et seq.

n146. Code 901 et seq.

n147. Code 109(b)(1) and (d).

n148. U.S. Const. amend. XIV, 1. On its face, this amendment applies only to the states; however, the Court has found that the federal government, although not bound by the Fourteenth Amendment, has the same restriction placed upon them by the Due Process Clause of the Fifth Amendment. Therefore, neither the states nor the federal government can deny any person equal protection of the laws.

n149. H.R. Rep. No. 109-31, pt. 1 at (2005) (footnote omitted).

n150. See, e.g., New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

n151. Whalen v. Roe, 429 U.S. 589, 598-600 (1977) (footnotes omitted).

n152. See, e.g., O'Brien v. DiGrazia, 544 F.2d 543, 546 (1st Cir. 1976); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974) (rejecting an elected official's attack on forced financial disclosure). But cf. California Bankers Ass'n v. Shultz, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring); City of Carmel-by-the-Sea v. Young, 85 Cal. Rptr. 1, 466 P.2d 225 (1970).

n153. 429 U.S. 589 (1977).

n154. Id.

n155. Id. at 598-99.

n156. Richard M. Hynes, Why (Consumer) Bankruptcy?, 56 Ala. L. Rev. 121 (2004).

n157. Id.

n158. Sommer, supra note 43, at 212.

n159. Code 521(i)(1).

n160. Code 521(i)(2).

n161. Code 521(i)(3).

n162. Code 521(i)(4).

n163. Sommer, supra note 43, at 213-14.

n164. Code 521(e)(2)(B).

n165. Code 521(f)(1).

n166. Code 521(f)(2).

n167. BAPCPA 315(c)(1) & (2).

n168. Id. 315(c)(3).

n169. See, e.g., Heyward C. Hosch III, The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis, 36 Vand. L. Rev. 139, 151 n.56 (1983) ("In Alabama ex rel. Patterson, [357 U.S. 449 (1958)], the Court denied effect to a state court order compelling disclosure by the NAACP of its membership lists and declared that disclosure of affiliation with groups engaged in controversial advocacy could constitute an effective restraint upon the first amendment freedom of association [citation omitted]. The Court emphasized that past revelation of NAACP affiliation had subjected rank and file members to loss of employment, threats of physical harm, and other displays of public hostility. The Court found it foreseeable that disclosure would affect adversely petitioners' ability to pursue their beliefs and would induce some members to leave the organization and discourage others from joining [citation omitted].").

n170. Martin H. Redish, Federal Judicial Independence: Constitutional and Political Perspectives, 46 Mercer L. Rev. 697 (1995).

n171. Gary Lawson, Controlling Precedent: Congressional Regulation of Judicial Decision-Making, 18 Const. Comment. 191, 201 (2001).

n172. Id.

n173. The Records of the Federal Convention of 1787 (Max Farrand ed., rev. ed. 1937).

n174. James S. Liebman and William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 754 n.271 (1998).

n175. See Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309 (1993) (noting that the Court considers the

underlying substantive law when it determines whether there is a constitutional right to judicial review); see also United States v. Mendoza-Lopez, 481 U.S. 828 (1987); McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991); Reno v. Catholic Soc. Servs., 509 U.S. 43 (1993); INS v. St. Cyr, 533 U.S. 289 (2001).

n176. Code 1112(b)(3).

n177. 530 U.S. 327 (2000).

n178. 18 U.S.C. 3626.

n179. Miller, 530 U.S. at 351-52.

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