COULD-PAY DEBTORS

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ABSTRACT

The Bankruptcy Code provides a fresh start to honest but unfortunate debtors, long described as the bankruptcy system's principal purpose. The legal system has long grappled with how to limit access to this system to those truly honest and unfortunate—those lacking an ability to repay their debts. In pursuit of this goal, the Bankruptcy Code allows bankruptcy judges to dismiss cases "for cause" and for "abuse." It relies in part on a means test, which creates a presumption of abuse by the debtor based on the debtor's current, actual income. Many have argued that the means test is dispositive to determining a debtor's ability to repay. This Article first shows that the Bankruptcy Code's text does not support this interpretation.

This Article then critiques the predominant methodology of using current, actual income as ill-suited to achieve bankruptcy's principal purpose. What debtors have earned is not always the best evidence of whether they are able to repay their debts. Their earning capacity may actually be more, and they may be able to repay their debts if they reach their true earning potential. Their earning capacity may also change in the near future, rendering them able to repay later what they cannot now, or unable to repay later what they may seemingly be able to now. Using a metric of current, actual income allows abusive debtors to receive unwarranted relief while preventing relief for honest but unfortunate debtors. By shifting the focus in these cases from current, actual income to current and future earning capacity, courts can enforce the existing provisions of the Bankruptcy Code and achieve the system's principal purpose.

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I. INTRODUCTION

The bankruptcy system serves an essential role: to provide a "fresh start" to the "honest but unfortunate debtor."[1] A discharge of an individual's debts is a formidable power and an invaluable resource for the insolvent.[2] But such a power is ripe for abuse.[3] Case law is replete with examples of financially successful people attempting to skirt their contractual obligations through the Code.[4] The Code includes a set of restrictions that bankruptcy judges must follow to prevent individuals from taking advantage of the Code by using Chapter 7 to get a financial "head start."[5]

In one of the most substantial reforms of the Code in recent history, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[6] seeking to stem the tides of the can-pay debtors who were filing Chapter 7 petitions. That Act created a "means test," a detailed formula that measures an individual's current monthly income, as an average of the individual's previous six months of earnings, and compares it to the individual's monthly expenses.[7] If the debtor's net income is over a certain amount, then the bankruptcy judge must presume that the debtor is abusing the provisions of Chapter 7.[8] The bankruptcy judge may then dismiss the case or, with the consent of the debtor, convert the petition to Chapter 13, in which the debtors repay all or a portion of their debts with their disposable income for three to five years.[9]

Though the number of filings under Chapter 7 has decreased substantially since the 2005 Act,[10] changing circumstances and the Act's narrow scope have generated the potential for abusive practices to resurrect. As inflation soars, promises of student-debt relief go unfulfilled, and advocates, influencers, and experts seek to reduce the stigma of bankruptcy,

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1. Grogan v. Garner, 498 U.S. 279, 286–87 (1991).

2. *See Chapter 13-Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics (last visited Sep. 2, 2025).

3. *See, e.g.*, Schwartz v. Schwartz (*In re* Schwartz), 799 F.3d 760, 721–62 (7th Cir. 2015) (an executive at a large investment bank spent thousands of dollars on "inessential consumer goods and services" on the eve of filing for bankruptcy under Chapter 7); Huckfeldt v. Huckfeldt (*In re* Huckfeldt), 39 F.3d 829, 833 (8th Cir. 1994) (debtor finished his surgery residency and then quickly filed for Chapter 7); *In re* Rahim, 442 B.R. 578, 579 (Bankr. E.D. Mich. 2010), *aff'd*, 449 B.R. 527 (E.D. Mich. 2011) (married doctors earning over $500,000 filing for bankruptcy under Chapter 7 held to have abused the bankruptcy system).

4. *See, e.g.*, *Schwartz*, 799 F.3d. at 721–62 (creditor successfully won an award against its former employee); *Huckfeldt*, 39 F.3d at 829; *Rahim*, 442 B.R. at 579.

5. *See* 151 CONG. REC. 3022–26 (2005) (statement of Sen. Hatch).

6. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. This Act is hereinafter referred to as the "2005 Act" or "2005 Amendments."

7. *See* discussion *infra* Section II.C (discussing the Bankruptcy Code and the 2005 Act).

8. 11 U.S.C. § 707(b)(2).

9. *Id.* § 707(a)–(b).

10. Tal Gross, Raymond Kluender, Feng Lui et al., *The Economic Consequences of Bankruptcy Reform*, 111 AM. ECON. REV. 2309, 2310 (2021).

individuals are likely to feel too financially burdened and turn to bankruptcy for a head start on life.[11] While these concerns are real and something must be done, bankruptcy is not the answer—or at least not Chapter 7.[12]

Scholars and policymakers have for decades debated whether the ability of individuals to repay their debts can or should prevent bankruptcy relief.[13] When Congress explicitly decided that the ability of debtors to repay their debts should preclude bankruptcy relief, scholars debated whether bankruptcy judges should enjoy discretion to evaluate such ability, or whether a (per se) formula should apply.[14] When Congress implemented the means test, scholars began debating whether the means test was the sole method of determining debtors' ability to repay.[15] This debate continues today.[16] This Article asserts that it is not.[17] But one debate that the scholarly and legislative debates have largely missed is how best to determine the debtors' ability to repay their debts.[18] This Article fills that gap by rejecting

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11. *See Just the Facts: Consumer Bankruptcy Trends, 2005-2021*, U.S. CTS. (Aug. 9, 2022), https://www.uscourts.gov/data-news/judiciary-news/2022/08/09/just-facts-consumer-bankruptcy-trends-2005-2021.

12. *See* discussion *infra* Part VI (discussing why Chapter 7 bankruptcy is not the only option for addressing financial difficulties).

13. *See, e.g.*, JOHN M. BARRON & MICHAEL E. STATEN, PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS' ABILITY-TO-PAY in NATIONAL BANKRUPTCY REVIEW COMMISSION 1 (1997) ("[B]ankruptcy policymakers have debated the issue of whether debtors' capacity to repay out of future income should constrain the options available to them under the U.S. Bankruptcy Code."); Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087, 1090 (1984) (arguing that the imposition of an ability-to-pay test is "perverse" because "[i]t penalizes the fiscally conservative debtor who seeks relief before debt levels are overwhelming while it rewards the profligate debtor who runs up a high debt level"); Cecelia H. Goetz, *Consumer Bankruptcies*: *Should Ability-to-Pay Condition Bankruptcy Relief?*, 27 N.Y.U. L. REV. 705 *passim* (1982) (reflecting on the 1978 Act and arguing that debtors' ability to repay their debts is not relevant to whether they are entitled to a general discharge).

14. *See* J. Kaz Espy, *Chapter 7 Bankruptcy and Section 707(b): Should the Subjective "Substantial Abuse" Standard Be Replaced by an Objective "Means-Testing" Formula?*, 56 MERCER L. REV. 1385, 1394–96 (2005) (describing the subjective approach under the 1984 Act and describing efforts to instill a means test that eventually came to pass in the 2005 Act); Edith J. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177 *passim* (1999) (advocating a means test).

15. *Compare* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L.J. 665, 667–682 (2005) (arguing that the means test was the sole method), *with* Robert J. Landry III, *Abuse Under Chapter 7 of the Bankruptcy Code: A Rational Approach to Weighing Ability to Pay*, 1 BUS. & BANKR. L.J. 1, 22–26 (2014) (arguing that the means test was just one means of testing debtors' ability to repay their debts), *and* Ned. W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing Is Presumptive, but "Totality" Is Determinative*, 45 HOUS. L. REV. 901, 924–36 (2008) (same), *and* Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035 *passim* (2006) (judges should use the means test to analyze the debtor's financial situation).

16. *See, e.g.*, Landry, *supra* note 15 (providing an example of the ongoing debate over the means test).

17. *See* discussion *infra* Part III (discussing why the means test is not the only option for determining a debtor's ability to repay).

18. *See* Tamara O. Mitchell, *Dismissal of Cases Via 11 U.S.C. § 707: Bad Faith and Substantial Abuse*, 102 COM. L.J. 355, 368 (1997) (describing the practice of creating a hypothetical Chapter 13 plan using the debtor's current income to evaluate a debtor's ability to repay their debts).

the tradition of looking at a debtor's actual, current income[19] in favor of debtors' current and future earning capacity.

The means test is insufficient to stem the tide of abusive filings in the near future.[20] The test restricts only can-pay debtors.[21] An individual's previous six months of income may not be what an individual will earn in the future or what an individual could be earning to pay off debts.[22] Individuals could earn more in the future and still not be the honest but unfortunate debtors entitled to relief.[23] Or individuals could earn less in the future, entitling them to relief despite what the means test suggests.[24] A can-pay debtor is not insolvent and is not "unfortunate."[25] If the can-pay debtor nevertheless chooses to file for bankruptcy, the can-pay debtor is also not "honest."[26] Based on the Code's principal purpose, the debtor should not receive the benefit of a discharge.[27]

The problem is not with just can-pay debtors. Courts and scholars have largely ignored another group of filers—could-pay debtors.[28] This Article shows how courts can, and why they should, prevent the abusive filings of what this Article terms could-pay debtors.[29] Part I of this Article provides a background of the bankruptcy system, the particular provisions of the Code, and why the abuse of could-pay debtors ought to be of special concern today.[30] Part II explains why the means test is not the exclusive means of determining debtors' ability to repay their debts.[31] Part III explains why the bankruptcy system should focus on the debtor's current and future earning capacity, how to do so, and the practical limits of the approach.[32] Part IV then explains that other provisions of the Code, namely § 707(a) and § 707(b)(3), allow courts to consider current and future earning capacity.[33] This Article concludes that debtors' ability to repay their debts through actualizing their potential earning capacity or increasing their earnings in the near future

19. *See infra* Part V (discussing why analyzing a debtor's current and future earning capacity is superior to the means test).

20. *See* discussion *infra* Part III (discussing why the means test is insufficient).

21. *See Means Test*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/means_test (last visited Sep. 2, 2025).

22. *See id.*

23. *See id.*

24. *See id.*

25. *See infra* Section II.A (discussing when a debtor is an "honest and unfortunate debtor").

26. *See infra* Section II.A (evaluating debtors' financial situations to determine if they are "honest and unfortunate debtors").

27. Grogan v. Garner, 498 U.S. 279, 286–87 (1991).

28. *See* discussion *infra* Part IV (discussing how the legal community has ignored could-pay debtors).

29. *See* discussion *infra* Section II.C.2 (discussing the 2005 Act and how to prevent abusive filings).

30. *See* discussion *supra* Part II (providing background to the Bankruptcy Code).

31. *See* discussion *infra* Part III (discussing the shortcomings of the means test).

32. *See infra* Part IV (analyzing how enforcing the Bankruptcy Code could be improved).

33. *See infra* Part V (discussing how specific Bankruptcy Code sections use earning capacity to help courts make informed decisions). All sections refer to Title 11 of the United States Code unless otherwise stated.

should prevent them from receiving a general discharge under Chapter 7 of the Code.[34] Those who have the ability to earn more have a moral obligation to take reasonable steps to earn more, they may not eschew their promises through bankruptcy.[35]

II. BANKRUPTCY CONCERN, PURPOSE, AND EVOLUTION

This Article is directed toward those steeped in bankruptcy law as well as those who know little of the field. Thus, it is necessary to understand a bit about the structure of the Code. Part II will discuss key provisions in more depth.[36] Those who file for bankruptcy will file a petition under a certain chapter.[37] There are three narrow chapters that apply to municipalities, family farmers and fishermen, and foreign bankruptcy proceedings.[38] "The most common chapters for filing bankruptcy are Chapter 7, Chapter 11, and Chapter 13."[39] Chapter 7 is titled "Liquidation," and allows most persons and entities to liquidate their property, repay creditors with that property, and discharge the remaining debts.[40] Debtors get to keep some property that the Code and state law exempt in order to maintain a minimum standard of living.[41] A discharge makes the remaining qualified debts forever unenforceable against the debtor, though not all debts are dischargeable.[42] Chapter 7 bankruptcies are the most common for individuals.[43] Chapter 11 is titled "Reorganization," and allows the debtor and creditors to formulate a "plan" wherein debtors offload unprofitable assets, swap equity and debt, and arrange their financial affairs in any manner that the Code allows.[44] Chapter 11 is rare for individuals but the most common for businesses.[45] Chapter 13, titled "Adjustment of Debts of an Individual with Regular Income" allows debtors with regular income to repay all or a portion of their debts with their disposable income over three to five years and keep their assets.[46] Upon

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34. *See* discussion *infra* Section V.A (discussing how debtors abuse Chapter 7).

35. *See* discussion *infra* Section IV.C (discussing the moral obligation debtors have).

36. *See* discussion *infra* Part III (discussing § 707(a) and (b)).

37. *See Bankruptcy Basics*, U.S. Cts., https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics (last visited Sep. 2, 2025).

38. 11 U.S.C. §§ 901–46, 1201–32, 1501–32.

39. *See Types of Bankruptcies*, DEBT.ORG, https://www.debt.org/bankruptcy/types/ (last visited Sep. 2, 2025).

40. *See generally* 11 U.S.C. §§ 701–84 (outlining various rules for Chapter 7).

41. *Id.* § 522.

42. *Id.* §§ 523–24.

43. *Bankruptcy Statistics Data Visualizations*, U.S. CTS., https://www.uscourts.gov/statistics-reports/analysis-reports/bankruptcy-filings-statistics/bankruptcy-statistics-data (last visited Sep. 2, 2025) (providing data on bankruptcy cases for 2023).

44. 11 U.S.C. §§ 1101–95.

45. *See Table F-2: Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2023*, U.S. CTS. (Dec. 31, 2023), https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2023/12/31.

46. 11 U.S.C. §§ 1301–30.

completing their payments, they will usually receive a discharge of the remaining qualified debt.[47] As will be explained later, individual debtors will usually file under this chapter when their income is above a certain level that makes them presumptively ineligible to file under Chapter 7.[48]

The Code contains numerous provisions that qualify the workings of these chapters.[49] Case law also has a substantial impact over these provisions.[50] The courts themselves also have immense power to act within the Code using their broad discretionary power.[51] That power derives in part from § 105(a) of the Code, which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[52]

This Part of the Article explains the principal purpose of the Code, provides some reason to be concerned today more than ever about could-pay debtors taking advantage of the Code, and explains how the key provisions of the Code have evolved over time.[53]

A. The "Honest but Unfortunate Debtor"

The Supreme Court has in many instances expounded upon the purpose of the bankruptcy system.[54] In 1918, the Court explained:

> The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except [that] of a certain character, after the property he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.[55]

This notion of a "fresh start" is common parlance for those in the bankruptcy realm.[56] It provides invaluable insight into the bankruptcy system, helping us to recognize that debt can ruin the life of insolvent

47. *Id.* § 1328.

48. *See infra* Section IV.A (explaining that debtors usually file under Chapter 13 when their current earning capacity makes them presumptively ineligible under Chapter 7).

49. *See generally* 11 U.S.C. §§ 101–1532 (providing instructions for each type of bankruptcy).

50. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 375 (2007).

51. *Id.*

52. 11 U.S.C. § 105(a).

53. *See supra* Part II (explaining the "honest but unfortunate debtor," abuses of the Bankruptcy Code, and the evolution of it).

54. *See* Neal v. Clark, 95 U.S. 704, 709 (1877); Traer v. Clews, 115 U.S. 528, 541 (1885).

55. Stellwagen v. Clum, 245 U.S. 605, 617 (1918).

56. *See id.* (providing an example of a "fresh start" being used to describe the purpose of bankruptcy).

individuals.[57] Insolvent debtors have no alternative other than bankruptcy, and society benefits from giving those debtors fresh starts so that they may continue living and contributing to the national economy as consumers and producers.[58] It also has the effect of restoring dignity, with the hope that the debtors live up to their potential, unburdened by an impossible financial situation.[59] Another important phrase is the "unfortunate debtor."[60] The bankruptcy system has never been intended to be a routine measure that allows the ordinary debtor to eschew one's debts for personal gain.[61] The unfortunate debtor is one without an alternative recourse.[62] The notion of fortune or being fortunate also implies luck—or the lack thereof—meaning that the unfortunate debtors are, at least in part, the victims of factors outside of their control.[63] These factors may be large scale, such as the economic crises discussed above, that derive from policies and effects outside of the individual debtor's control.[64] These factors may be more personal but equally outside of the debtor's control, such as an unexpected death or illness.[65] But "unfortunate" is not the whole story. Courts and scholars, have for over a century, spoken of the "honest but unfortunate debtor" to describe those whom bankruptcy seeks to help.[66] The fresh start policy is thus limited to the honest but unfortunate debtor.[67] This sentiment is the "principal purpose of the Bankruptcy Code."[68] The following Parts of this Article will explain the significance of this principal purpose as it relates to could-pay debtors.[69]

B. Changing Perceptions of Bankruptcy

Of major concern is the changing perceptions of bankruptcy. One factor that traditionally keeps those whom the Code does not intend to provide the benefits of the Code are the moral (internal) and ethical (external) perceptions

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57. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

58. *See id.*

59. *Id.* at 245.

60. *Stellwagen*, 245 U.S. at 617.

61. *See* Grogan v. Garner, 498 U.S. 279, 286–87 (1991).

62. *See* United States v. Kras, 409 U.S. 434, 455–56 (1973).

63. *See Luck*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 739 (11th ed. 2014).

64. *See Grogan*, 498 U.S. at 286–87.

65. Such factors are not uncommon. One recent study concluded that "medical bills are the single largest causal factor in consumer bankruptcy," these bills being the "predominant causal factor in 18% to 26% of all consumer bankruptcies." Daniel A. Austin, *Medical Debt as a Cause of Consumer Bankruptcy*, 67 ME. L. REV. 1, 2 (2014).

66. *See* Donald L. Swanson, *The "Honest but Unfortunate Debtor": An Old and Still-Evolving Concept*, MEDIATBANKRY (May 7, 2020), https://mediatbankry.com/2020/05/07/the-honest-but-unfortunate-debtor-an-old-and-still-evolving-concept/ (last visited Sep. 2, 2025).

67. *See Grogan*, 498 U.S. at 286–87.

68. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007).

69. *See infra* Parts II–IV (discussing how the principle of "honest but unfortunate debtor" relates to could-pay debtors).

of bankruptcy.[70] Where bankruptcy is associated with some form of normative failure, such association acts as a deterrent for potential debtors.[71] When these bankruptcy stigmas are strong, filing rates will be lower.[72] Modern movements from various angles have sought to reduce the stigmatizing effects of bankruptcy.[73] To be sure, their work is to be largely applauded. Reducing the stigma surrounding bankruptcy reduces the pressure on those honest but unfortunate debtors, most of whom ought not to be excommunicated from social and economic society for circumstances outside of their control.[74] Long gone are the days when bankruptcy law required "bankrupts" to publicly shame themselves or be dismembered.[75] And so should they be. But an unintended consequence of the changing perception of bankruptcy is the risk that those who are neither unfortunate nor honest will use the lower adverse costs of bankruptcy to their advantage.[76] The goal of this Article is not to revive the bankruptcy systems of the past, where bankruptcy was never voluntary and always grueling.[77] The goal is instead to minimize the effects of this unintended consequence by fully enforcing the existing provisions of the Code.[78]

Social media and podcasts are important tools in shaping modern perceptions.[79] They spread information, promulgate fads, and bring people together.[80] This modern technological realm is currently a key medium for changing the perceptions of bankruptcy.[81] One influencer, a bankruptcy attorney in Ohio,[82] uses social media to bring about "debt relief with dignity."[83] She provides advice to users on TikTok and Instagram to those

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70. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 37–38 (1995).

71. Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 365, 377 (2006).

72. *See* F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 206 (1998) (explaining that economic predictors cannot fully explain filing rates but that changes in social norms, such as the stigma of bankruptcy, play a role in filing rates). To be sure, stigma is not determinative, and the effect of stigma is more limited in the face of necessity. *See* Yvana L. B. H. Mols, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEVS. J. 289, 308–09 (2012) (noting that individuals have limited autonomy in the face of financial hardship and thus may not be able to avoid bankruptcy due to social pressures).

73. *See* Efrat, *supra* note 71, at 380–84.

74. *Id.* at 390.

75. *See id.* at 367–74.

76. *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367–68 (2007).

77. Efrat, *supra* note 71, at 369.

78. *Id.*

79. *See* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUT.-MEDIATED COMM. 210, 211–13 (2008).

80. *Id.*

81. *See* Efrat, *supra* note 71, at 385–86.

82. Adrienne Hines (@theladylikelawyer), TIKTOK; Adrienne Hines, *Debt Relief: A Strategic Life-Saver and a Wise Financial Strategy*, THE LADY LIKE LAWYER, https://bankruptcy-solution.com/adriennehines/ (last visited Sep. 2, 2025).

83. *Id.*

who have filed or are considering filing bankruptcy and makes a conscious effort to fight negative stigmas surrounding bankruptcy.[84] Another TikTok user admitted that she was using credit cards and "living well beyond their means," then proceeded to assure the audience that the bankruptcy system was not overly burdensome and that she had a credit score of over 700 within two years of filing bankruptcy.[85] Her comments were filled with positive responses and individuals praising bankruptcy, even one user who planned on filing bankruptcy "once [they] graduate."[86]

Although generally informative and praiseworthy, some of these messages risk empowering could-pay debtors to abuse the bankruptcy system.[87] In one podcast, the bankruptcy attorney described credit-card companies and medical bills as "predatory, unsecured general" creditors.[88] In another TikTok, she alleges that "debt is predatory in America" and that "[c]onsumer lenders are, by definition, 'predatory' because there are no usury laws in place anymore."[89] Comments such as these are increasingly common in modern bankruptcy discourse.[90] These comments have the effect of shifting the stigma from debtors to creditors.[91] Much of the modern discourse on debt casts creditors, especially credit card companies, as the villains in today's financial realm.[92]

There are two problems with this shift. First, it is inaccurate.[93] Just as circumstances are individual to debtors, so are they for creditors.[94] Some creditors may act in bad faith, but credit cards can allow individuals to live.[95] Used correctly, credit cards can allow debtors to weather temporary gaps in cash flow.[96] Consider a person starting a new job. They are likely not to be paid immediately, or they may need immediate funds to purchase appropriate clothing, shoes, or transportation for the new job. If they lack savings or a support network, credit cards allow them to purchase the necessary items for the new position, and they can repay the credit card with the first paycheck from the new position. As credit becomes more widely available for

84. *See id.*

85. Video posted by Caitlyn Matheny (@cbmfit), TIKTOK (June 20, 2024), https://www.tiktok.com/t/ZP81ac46D/.

86. *Id.*

87. *See infra* Sections II.B, V.A (arguing that could-pay debtors take advantage of the bankruptcy system even though they are neither honest nor unfortunate).

88. *The Overcoming Overspending Podcast*, *139: Breaking Down Bankruptcy with Bankruptcy Attorney, Adrienne Hines*, at 11:20–40 (Spotify, Apr. 11, 2024) (available on Spotify and Apple Podcasts).

89. Video posted by Adrienne Hines (@theladylikelawyer), TIKTOK (May 17, 2024), https://www.tiktok.com/t/ZP81abX1C/.

90. *See* Efrat, *supra* note 71, at 385–86.

91. *Id.* at 393.

92. *See id.* at 391–92.

93. *See infra* Section V.B (explaining that creditors cannot collect debt from insolvent debtors).

94. *See infra* Section V.B (noting how insolvency prevents creditors from collecting from a debtor).

95. *See* Ronald J. Mann, *Credit Cards, Consumer Credit, and Bankruptcy*, U. OF TEX. L. & ECON., WORKING PAPER No. 44, 4–5 (2006).

96. *See id.*

individuals, individuals receive new opportunities to fulfill their potential.[97] To be sure, easily available credit comes at a risk, either because debtors do not think long term or unforeseen expenses disrupt their repayment obligations.[98] But it is inaccurate to say that this credit is by definition predatory.[99] Second, the shift in focus on the creditor and credit shifts the focus away from the individual circumstances to the debt and debtors.[100] Not all debtors are honest and not all are unfortunate.[101] When society treats consumer credit as inherently evil, it undermines the sense of duty to fulfill one's promises.[102] Villainizing creditors empowers could-pay debtors to skirt these obligations, seeing themselves as victims of a predatory lending system or simply taking advantage of a system without risk of stigmatization.[103] In light of these evolving norms, it is time to reconsider the primary means by which the Code limits Chapter 7 relief.[104]

C. Evolution of the Bankruptcy Code

Of central importance to this Article is § 707.[105] Section 707 provides for the dismissal of a Chapter 7 case when granting relief would be an abuse of the provisions of Chapter 7.[106] This Section of the Article explores the development of the Code over time, both its text and interpretation.[107] Though there have been numerous bankruptcy laws in our nation's history, this Article begins with The Bankruptcy Reform Act of 1978, which serves as the basis for the Code as we know it today.[108] Congress has amended the Code many times since 1978, but two acts are of central importance to the issues discussed in this Article.[109] The first Act is the Bankruptcy Amendments and Federal Judgeship Act of 1984.[110] The second is the

97. Omair Ansari & Monahil Javid, *Access to Credit: The Silent Issue Hampering Growth and Development in Emerging Economies*, WORLD ECON. F. (Aug. 6, 2024), https://www.weforum.org/stories/2024/08/access-to-credit-slowing-growth-and-development/.

98. *See generally* Michael D. Contino, CONG. RSCH. SERV., R45137, BANKRUPTCY BASICS: A PRIMER (2022) (stating that many types of debtors can encounter difficulty repaying their debts).

99. *See Credit*, NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005).

100. *See infra* Part IV (examining a debtor's ability to repay based on individual circumstances).

101. *See supra* Section II.B (acknowledging the motivations of debtors).

102. *See infra* Part IV (discussing debtors' avoidance of repayment).

103. *See infra* Part IV (discussing the normalization of default).

104. CHARLES JORDAN TABB, KARA J. BRUCE & LAURA N. CORDES, LAW OF BANKRUPTCY 166–67 (6th ed. 2025) ("Other than some eligibility rules, there are very few restrictions on a debtor's ability to commence a bankruptcy case on a voluntary basis. The debtor generally is free to file, . . . the real sorting of whether bankruptcy relief is warranted . . . comes not through the eligibility rules, but through dismissal.").

105. *See* 11 U.S.C. § 707.

106. *Id.*

107. *See infra* Section II.C (explaining the development of the Bankruptcy Code before and after 2005).

108. Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549.

109. *See infra* sources cited notes 110–11 (discussing major changes to the Code).

110. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[111]

1. The Bankruptcy Code Before the 2005 Act

In 1978, Congress enacted the Bankruptcy Reform Act of 1978, a systematic and wholesale rewriting of our bankruptcy law.[112] Under § 707, the court could dismiss the case "for cause."[113] The original version of § 707 was exceptionally broad.[114] The full text was as follows:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—
> (1) unreasonable delay by the debtor that is prejudicial to creditors; and
> (2) nonpayment of any fees and charges required under chapter 123 of title 28.[115]

The 1978 Act included a rule of construction that the term "including" was not limiting.[116] It did not define the word "cause."[117]

The Senate Report notably did state that the section did not "contemplate . . . that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal. To permit dismissal on that ground would be to enact a non-uniform mandatory Chapter 13, in lieu of the remedy of bankruptcy."[118] The House Report contained a similar statement.[119] Some courts treated the legislative history as dispositive and refused to allow dismissals of Chapter 7 cases because of a debtor's ability to repay one's debts.[120]

The Bankruptcy Amendments and Federal Judgeship Act of 1984 marked Congress's first substantial step in preventing debtors from receiving a head start.[121] "Although bankruptcy courts always had the option of dismissing petitions 'for cause,' the 1984 Act for the first time allowed courts specifically to dismiss Chapter 7 petitions if it found them 'substantially abusive.'"[122]

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

112. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

113. *Id.* § 101, 92 Stat. at 2606.

114. *See infra* note 115 (quoting the original text of § 707).

115. § 101, 92 Stat. at 2606.

116. *Id.* 92 Stat. at 2555.

117. *See id.*

118. S. REP. NO. 95-989, at 94 (1978).

119. H.R. REP. NO. 95-595, at 380 (1978).

120. *See, e.g.*, *In re* Green, 49 B.R. 7, 8 (Bankr. W.D. Ken. 1984) ("The legislative history of [§] 707 makes clear that the ability of the debtor to repay his debts does not constitute adequate cause for dismissal.").

121. Bankruptcy Amendments and Federal Judgeship Act of 1984*,* Pub. L. No. 98-353, 98 Stat. 333.

122. Pollitzer v. Gehardt, 860 F.3d 1334, 1338 (11th Cir. 2017).

The Act amended § 707 of the Code to add as subsection (b):

> [a]fter notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.[123]

Consumer debts are those debts "incurred by an individual primarily for . . . personal, family, or household purpose[s]."[124] This broad definition would encompass the debts of most ordinary individuals, particularly young, could-pay debtors.[125] This limitation was most applicable where failed business ventures play a large role in the debtor's financial woes.[126] To determine whether granting relief would constitute substantial abuse of the provisions of the Code, Congress also amended the Code to allow bankruptcy judges to consider the debtor's income and expenditures, rather than just the debtor's assets and liabilities.[127]

Senators Kennedy and Metzenbaum claimed that "the future income test has been completely deleted."[128] In describing the legislative history of the 1984 Act, the Eighth Circuit noted that "[a]lthough the statute does not mandate a future income test, [the court was] satisfied that it [did] not preclude the consideration of future income in giving meaning to the 'substantial abuse' standard."[129]

2. The Bankruptcy Code After the 2005 Act

Congress later decided that further action was necessary to combat perceived abuses of the bankruptcy system.[130] To that end, it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[131] Congress's purported purpose was "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system

123. § 312, 98 Stat., at 355.

124. 11 U.S.C. § 101(8); *see* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 101, 92 Stat. 2549, 2550.

125. *See* 11 U.S.C. § 101(8); *see infra* Part IV (describing common sources of debt).

126. *See, e.g.*, *In re* Rahim, 442 B.R. 578, 579 (Bankr. E.D. Mich. 2010), *aff'd*, 449 B.R. 527 (E.D. Mich. 2011) (involving codebtors where debts were primarily the result of a failed business venture).

127. § 305, 98 Stat. at 352–53.

128. *In re* Walton, 866 F.2d 981, 984 (8th Cir. 1989) (quoting S. REP. NO. 65, 98th Cong., 1st Sess. 90 (1983)).

129. *Id.*

130. *See generally Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (discussing the necessity of legislation to combat abuse of the bankruptcy system).

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

and ensure that the system is fair to both debtors and creditors."[132] The "heart of the bill's consumer bankruptcy reforms" consisted of a new means-based test to "ensure that debtors repay creditors the maximum they can afford."[133] No notable changes to the key sections of the Code have occurred since 2005.[134] The changes that have occurred are mainly technical or of minimal relevance to could-pay debtors, such as specific rules in the means test for current and former members of the armed services.[135]

Section 707(b) of the Code now contains a means test that can establish a rebuttable presumption of abuse based on a detailed calculation of the debt-to-income ratio.[136] The bankruptcy judge must presume abuse if the debtor's current monthly income, minus various expenses,[137] multiplied by sixty is 25% "of the debtor's nonpriority unsecured claims in the case, or [$10,270], whichever is greater" or $17,150.[138] The debtor may rebut the presumption only by proving that "special circumstances" exist and only "to the extent such special circumstances . . . justify additional expenses or adjustments of currently monthly income for which there is no reasonable alternative."[139]

If the calculation above does not create a presumption of abuse, the Code instructs the bankruptcy judge to consider "whether the debtor filed the petition in bad faith"[140] or "the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse."[141] In order to further prevent abusive filings, the section allows the bankruptcy judge to order the debtor's attorney to pay the trustee reasonable attorney's fees if the trustee successfully moves to dismiss.[142]

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132. H.R. REP. NO. 109-31, pt. 1, at 2 (2005).

133. *Id.*

134. *Compare* 11 U.S.C. §§ 706–07 (2005), *with* 11 U.S.C. §§ 706–07 (2014) (showing the similarity of the text over time).

135. *See* National Guard and Reservists Debt Relief Act of 2008, Pub. L. No. 110-438, § 2, 122 Stat. 5000, 5000.

136. 11 U.S.C. § 707(b)(2)(A)(i).

137. *Id.* § 707(b)(2)(A)(ii)–(iv).

138. *Id.* § 707(b)(2)(A)(i) (originally $6,000, adjusted effective April 1, 2025). These dollar amounts are adjusted for inflation every three years. *Id.* § 104.

139. *Id.* § 707(b)(2)(B)(i). These exceptions are narrow, "such as a serious medical condition or a call or order to active duty in the Armed Forces." *Id.* Debtors seeking to establish "special circumstances" must "itemize each additional expense or adjustment of income" and provide documentation of the expense or adjustment and "a detailed explanation of the special circumstances that make such reasonable expenses or adjustments to income necessary and reasonable." *Id.* § 707(b)(2)(B)(ii). Only if the expenses or adjustments that constitute special circumstances place the debtor's currently monthly income below the thresholds of the means test will the presumption be rebutted. *Id.* § 707(b)(2)(B)(iii).

140. *Id.* § 707(b)(3)(A).

141. *Id.* § 707(b)(3)(B).

142. *Id.* § 707(b)(4)(A). The bankruptcy judge must find that the debtor's attorney violated the sanctions rule. *Id.* § 707(b)(4)(A)(ii)(II); *see* FED. R. BANKR. P. 9011.

Section 707(b) operates as a shield for the debtor as well.[143] If the current monthly income for a debtor is less than the relevant median monthly income, all parties in interest, the trustee, and the United States trustee cannot file a motion under § 707(b)(2).[144] This means that the means test does not apply to the debtor and there can be no presumption of abuse based on the means test.[145] The bankruptcy judge may still dismiss for abuse under § 707(b)(1) or (3) if they determine that the relief would still constitute an abuse of the Chapter 7 provisions, such as bad faith or the totality of the circumstances explained in § 707(b)(3).[146] But only the judge, United States trustee, or bankruptcy administrator may move to dismiss under those circumstances.[147]

One of the factors that Congress cited as reason for these reforms was that some debtors were able to repay a significant portion of their debts but that the Code at the time had "no clear mandate requiring [those] debtors to repay their debts."[148] The previous version of § 707(b) gave judges and the United States trustee some power to limit such abuses, but the ability to repay was arguably just a factor in determining whether there was substantial abuse.[149]

III. ABILITY TO REPAY BEYOND THE MEANS TEST

Since the introduction of the means test, scholars and courts have debated whether the means test is the exclusive means by which the Code examines debtors' ability to repay their debts.[150] If those such as Marianne B. Culhane and Michaela M. White are correct in their interpretation of the Code that the means test is indeed exclusive,[151] then this Article's assertion that debtors' current and future earning capacities are relevant measures of debtors' ability to repay their debts will be irrelevant absent legislative action.[152] This Part of the Article examines § 707 of the Code and answers this antecedent question to the Article's central matter.[153] This Part concludes

143. *See* 11 U.S.C. § 707(b)(1), (b)(3) (explaining there is no presumption of abuse of the means test by the debtor).

144. 11 U.S.C. § 707(b)(6). If there are more than four individuals in the family unit, then the Code provides a dollar amount to add to the limit for each additional individual. *Id.* § 707(b)(6)(C).

145. *See* 6 COLLIER ON BANKRUPTCY ¶ 707.04[3][b] (Richard Levin & Henry J. Sommer eds., 16th ed. 2013).

146. 11 U.S.C. § 707(b)(1), (b)(3).

147. 11 U.S.C. § 707(b)(6).

148. H.R. REP. NO. 109-31, at 5 (2005).

149. *Id.*

150. *See* articles cited *supra* note 15 (comparing different interpretations of the means test).

151. Culhane & White, *supra* note 15, at 667.

152. *Compare* Culhane & White, *supra* note 15, *passim* (arguing that the means test is exclusive), *with infra* Part IV (asserting that current and future earnings are relevant considerations for the debtor's situation).

153. *See infra* Sections III.B–C (interpreting the language of § 707).

that the means test is not exhaustive and that debtors' ability to repay their debts is otherwise relevant to § 707(a) and § 707(b)(3).[154] Section A explains the meaning of § 707(a) and how courts have interpreted the provision since 2005.[155] Section B examines the structure of § 707(b)(3).[156] Section C responds to assertions that the means test is the exclusive means of checking debtors' ability to repay their debts because the means test was intended to eliminate bankruptcy judges' discretion in the matter and that interpreting the Code otherwise would render the means test superfluous.[157] Section C concludes that the plain text of the Code does not support either contention.[158]

A. Section 707(a) "For Cause" Dismissal

Courts and scholars have differed on what constitutes "cause" under § 707(a).[159] A more expansive view comes from the Fifth Circuit.[160] In *In re Krueger*, that court explained that courts "have broad authority to determine what is cause for dismissal under § 707(a)."[161] The court stated that cause "is any reason cognizable to the equity power and conscience of the court as constituting an abuse of the bankruptcy process."[162] Cause can include, as the Fifth Circuit had previously recognized, "petitions that simply serve no legitimate bankruptcy purpose."[163] *Krueger* did, however, focus on acts and omissions as the basis of cause under the section.[164] The court referred to certain "acts or omissions" as qualifying under the section, stating that § 707(a) "allows the court to enforce its authority and prevent ongoing dishonest and vexatious conduct during the case."[165]

Similarly, in *In re Piazza,* the Eleventh Circuit held that "prepetition bad faith constitutes 'cause' to dismiss involuntarily a Chapter 7 petition under § 707(a)."[166] The court surveyed contemporaneous dictionaries and concluded that "the ordinary meaning of 'cause' is adequate or sufficient

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154. *See infra* Section III.C (concluding that the means test is not dispositive and broader discretion is needed).

155. *See infra* Section III.A (reviewing numerous interpretations of § 707(a)).

156. *See infra* Section III.B (interpreting § 707(b)(3)).

157. *See infra* Section III.C (responding to contrary assertions by various scholars).

158. *See infra* Section III.C (stating that the plain text does not support any such anti-discretion or surplusage arguments).

159. *See infra* notes 161–89 (expounding upon the various interpretations of § 707(a)).

160. *See infra* notes 162–67 and accompanying text (discussing the Fifth Circuit's interpretation of "cause" under § 707(a)).

161. Krueger v. Torres (*In re* Kruger), 812 F.3d 365, 370 (5th Cir. 2016).

162. *Id.* (quoting Little Creek Dev. Co. v. Commonwealth Mortg. Co. (*In re* Little Creek Dev. Co.), 779 F.2d 1069, 1072 (5th Cir. 1986)).

163. *Id.*

164. *Id.* at 372.

165. *See id.* at 372; *see also id.* at 373 ("In sum, a debtor's bad faith conduct can constitute 'cause' for dismissal under § 707(a).").

166. Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1260 (11th Cir. 2013).

reason."[167] Thus, the court concluded, § 707(a) cause authorizes dismissal "when adequate or sufficient reason exists for such an action."[168] The court also referenced the bankruptcy judge's broad power to issue orders and judgments appropriate to "prevent an abuse of process."[169]

The Seventh Circuit has also recognized an "unjustified refusal to pay one's debts [as] a valid ground" to dismiss a case under § 707(a).[170] In that case, the codebtors spent frivolously, making no effort to reduce their spending.[171] Had the codebtors modified their spending habits, they could have paid off their debts.[172] The court read § 707(a) similarly to the *Piazza* and *Krueger* courts but saw such unjustified refusal as cause in and of itself, rather than determining that bad faith constituted cause or that the unjustified refusal constituted bad faith.[173] It was enough that the codebtors "failed to . . . pay as much of their indebtedness as they could without undue hardship"; their "deliberate and selfish" actions alone constituted cause.[174]

In another case, a bankruptcy judge in the Eastern District of Michigan dismissed, under § 707(a), the petition of two doctors who earned over $509,000 per year.[175] Their schedules listed over $6.6 million in unsecured debts—mostly as the result of failed ventures in Florida real estate—and over $3.4 million in secured debts.[176] The judge described their listed expenses as "extraordinary."[177] Based on the schedules, the debtors spent more than their combined salaries.[178] The court stated that the legislative history supported denying relief to "the dishonest or non-needy debtor."[179] The court concluded that the debtors did "not need Chapter 7 relief" and that it would unfair to the creditors to allow the debtors to continue their "lavish" lifestyles.[180]

Other courts have interpreted § 707(a) more narrowly.[181] In *In re Lusane*, the debtor was a professor at American University whom a creditor alleged earned at least $100,000 the previous year.[182] The bankruptcy judge emphatically stated that "a debtor's ability to pay creditors cannot be cause

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167. *Id.* at 1261–62.
168. *Id.* at 1262.
169. *Id.* (citing 11 U.S.C. § 105(a)).
170. *In re* Schwartz, 799 F.3d 760, 764 (7th Cir. 2015).
171. *Id.* at 761.
172. *Id.* at 764.
173. *Compare id.* at 763–64 (interpreting bad faith in § 707(a)), *with Piazza*, 719 F.3d at 1262 (reading § 707(a) to create discretion), *and* Krueger v. Torres (*In re* Krueger), 812 F.3d 365, 373 (5th Cir. 2016) (explaining § 707(a) allows for the court to enforce its authority through discretion).
174. *Schwartz*, 799 F.3d at 763–64.
175. *In re* Rahim, 442 B.R. 578, 579 (Bankr. E.D. Mich. 2010), *aff'd*, 449 B.R. 527 (E.D. Mich. 2011).
176. *Id.* at 580.
177. *Id.*
178. *Id.*
179. *Id.* (citing *In re* Krohn, 886 F.2d 123, 127–28 (6th Cir. 1989)).
180. *Id.* at 581.
181. *See In re* Lusane, No. 11-00889, 2012 WL 3018050, at *1 (Bankr. D.D.C. July 24, 2012).
182. *Id.*

for a § 707(a) dismissal."[183] The judge stated that treating § 707(a) otherwise would not make sense in light of § 707(b).[184] The District Court for the Northern District of Oklahoma described the "general consensus among courts that the standard for finding cause under § 707(a) is stringent and requires evidence of conduct that may be described as egregious, extreme, or an abuse of the provisions of the Code."[185]

Bankruptcy case law outside of the § 707 context is also helpful to interpreting § 707(a).[186] In *Marrama v. Citizens Bank of Massachusetts*, the Supreme Court considered whether debtors had an absolute right in their first case to convert a Chapter 7 case to Chapter 13.[187] Answering the question in the negative, the Court took to interpreting "cause" in § 1307(c).[188] Section 1307(c) states that the court "may convert a case under this chapter to a case under chapter 7 . . . or may dismiss a case under this chapter . . . for cause" and then provides eleven examples.[189] Though noting that the examples did not mention prepetition bad-faith conduct, the Court concluded that a debtor who engages in such conduct "is not a member of the class of 'honest but unfortunate debtors' that the bankruptcy laws were enacted to protect."[190] Thus, the Court concluded that there was no absolute right to convert because such a debtor may not be a debtor under Chapter 13.[191]

The *Marrama* Court determined that neither § 706 nor § 1307(c) "limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor."[192] Rather, the Court asserted, the bankruptcy judges' broad powers under § 105(a) of the Code "authorize an immediate denial of a motion to convert filed under § 706."[193] The Court also stated that "the inherent power of every federal court to sanction 'abusive litigation practices' might well provide an adequate justification for" the same.[194]

To be sure, "[the] Bankruptcy Code contains no explicit good faith filing requirement."[195] The Supreme Court has refused to take the lack of such requirement to mean that the courts cannot exercise their powers to refuse a conversion from Chapter 13 to Chapter 7, or to dismiss a case under Chapter

183. *Id.*
184. *Id.* at *2.
185. Bushyhead v. Bushyhead (*In re* Bushyhead), No. 15-CV-89-JED-PJC, 2017 WL 1549467, at *5 (N.D. Okla. Apr. 28, 2017) (internal quotation marks omitted).
186. *See infra* notes 191–208 (applying *Marrama* to assist in understanding § 707(a)).
187. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007).
188. *Id.*
189. 11 U.S.C. § 1307(c).
190. *Marrama*, 549 U.S. at 365 (quoting Grogan v. Garner, 498 U.S. 279, 287 (1991)).
191. *Id.* at 376.
192. *Id.* at 374–75.
193. *Id.* at 375.
194. *Id.* at 375–76 (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980)).
195. Tamecki v. Frank (*In re* Tamecki), 229 F.3d 205, 208 (3d Cir. 2000) (Rendell, J., dissenting).

13 "for cause" based on a voluntary filer's bad faith.[196] Multiple courts of appeals have extended the reasoning in *Marrama* to conclude that "bad faith is pertinent in all Chapters of the Bankruptcy Code, regardless of whether a provision contains a good-faith filing requirement."[197] But the *Marrama* decision was not without its dissenters.[198] Justice Alito dissented in *Marrama*, stating that the Code gave debtors an unqualified right to convert their case under Chapter 13.[199] The text of § 706(a) was plain: "[A] debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time."[200] The *Marrama* dissenters reasoned that the conditions for conversion under § 706 were exclusive and that the Code lacked an overarching requirement for "good faith" in filing.[201] The dissenters also rejected the majority's statement that the broad power of the bankruptcy judges in § 105 may alternatively justify the court's holding.[202] They correctly recognized that the bankruptcy judge's broad powers under § 105 could not justify an action inconsistent with the text of the Code.[203]

B. Section 707(b) Conversion or Dismissal for Abuse

The term "abuse" is broad and undefined in the Code.[204] Black's Law Dictionary defines abuse as "[a] departure from legal or reasonable use; misuse."[205] Merriam Webster's dictionary defines abuse as "improper or excessive use or treatment."[206] To determine whether the use of something is abusive, one must necessarily look at the intended use of the thing.[207] And its use that is intended or proper depends on its purpose. For example, a hammer's purpose is to hammer a nail into something. Its purpose is not to hold open a door. The purpose of a screwdriver is to insert screws, not to use the handle to hammer a nail. As Aristotle explained, everything has its *telos*,

196. *Marrama*, 549 U.S. at 374–75.

197. Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1265 (11th Cir. 2013); *see also* Rosson v. Fitzgerald (*In re* Rosson), 545 F.3d 764, 773 n.12 (9th Cir. 2008) ("[R]ejection of the 'absolute right' theory as to § 706(a) applies equally to § 1307(b).").

198. *Marrama*, 549 U.S. at 376–83 (Alito, J., dissenting).

199. *Id.* at 378–79. The only express qualifications of this right in the Code are that the right does not apply to debtors whose case had been converted under §§ 1112, 1208, or 1307 of the Code, and that the debtor must meet the qualifications for § 706(a).

200. 11 U.S.C. § 706(a).

201. *Marrama*, 549 U.S. at 376–78 (Alito, J., dissenting).

202. *Id.* at 382–83.

203. *Id.* at 382 (citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988)).

204. *See, e.g.*, 11 U.S.C. § 101 (lacking a definition for the term "abuse").

205. *Abuse*, BLACK'S LAW DICTIONARY (8th ed. 1999) [hereinafter *Legal Definition of Abuse*].

206. *Abuse*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 6 (11th ed. 2004) [hereinafter *Webster's Definition of Abuse*] .

207. *See id.*; *Legal Definition of Abuse*, *supra* note 205.

a purpose or goal.[208] To use something inconsistent with its *telos* is abusive.[209] The *telos* of the Code is its principal purpose—to give financial relief to the honest but unfortunate debtor.[210] Could-pay debtors, being neither honest nor unfortunate, thus violate the principal purpose of the Code—inconsistent with its *telos*.[211] These definitions show that the debtor need not violate a provision of the bankruptcy code to abuse it, for something may be improper or unreasonable without being a technical violation.[212]

There may be some concern that the meaning of abuse under § 707(b)(1) is limited to abuse of the bankruptcy's procedures, such as filing requirements.[213] But the Code uses the phrase "abuse of process" elsewhere to refer to abuse of the procedures within the Code.[214] If the Code has the phrase "abuse of process," it is inconsistent with the Code's text to interpret the phrase abuse to be limited to the abuse of the procedure within bankruptcy, rather than abusing the Code as a whole or a non-procedural provision.[215] The Code does not limit abuse to active abuse by the debtor of the provisions of the Code during the pendency of the case.[216] After all, § 707(b)(1) does not apply when debtors abuse the provisions of the Code, but when "the granting of relief would be an abuse of the provisions of" Chapter 7.[217] The provision contains no restriction as to the cause of the resulting abuse.[218] Any reason that accrued at any time would still apply under the plain text if the factors, situation, causes, actions, or the like left a court with the conclusion that the relief itself would constitute an abuse.[219] Because the provision's application turns on results rather than causes, the provision is not limited to causes and factors that have their genesis in the proceedings.[220]

Despite § 707(b)(2)'s exceptional detail, § 707(b) still gives courts substantial discretion, especially when it comes to protecting the debtor.[221] The section states that the court "may" dismiss or convert a case that

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208. *See* ARISTOTLE, PHYSICS (R.P. Hardie & R.K. Gaye trans.), https://classics.mit.edu/Aristotle/physics.2.ii.html (last visited Sep. 2, 2025); ARISTOTLE, METAPHYSICS (W.D. Ross trans.), https://classics.mit.edu/Aristotle/metaphysics.1.i.html (last visited Sep. 2, 2025).

209. *See* sources cited *supra* note 208 (explaining all things have a purpose); *Legal Definition of Abuse*, *supra* note 205 (defining abuse, in part, as misuse); *Webster's Definition of Abuse*, *supra* note 206 (defining abuse, in part, as improper use).

210. *See* Grogan v. Garner, 498 U.S. 279, 286–87 (1991).

211. *See id.*

212. *See supra* text accompanying notes 205–10 (showing different definitions of "abuse").

213. *See id.*

214. *See, e.g.*, 11 U.S.C. § 105(a) (showing broad application of the Code's use of the term "abuse").

215. *See, e.g.*, *id.* (reflecting on the Code's use of the term "abuse of process").

216. *See* Krueger v. Torres (*In re* Krueger), 812 F.3d 365, 370 (5th Cir. 2016) (noting that cause can include prepetition bad-faith conduct).

217. 11 U.S.C. § 707 (b)(1).

218. *See id.*

219. *See id.*

220. *See id.*

221. *See id.*

qualifies.[222] "May" is discretionary, so bankruptcy judges retain the power of independent judgment and may refuse to dismiss or convert the case, even if they conclude that "the granting of relief would be an abuse of the provisions of this chapter."[223]

The language of § 707(b)(1) also affects the breadth of § 707(b).[224] The section requires more than abuse in the abstract.[225] It is the granting of relief that could be abusive that is relevant, and the abuse must be "of the provisions of [Chapter 7]."[226] Whether the granting of relief would be abusive is important because it stands in contrast to many other tests in the Code that ask whether the petition or filing of the petition is abusive or was done in bad faith.[227] When analyzing any motion under § 707(b), therefore, the Code directs courts to look not at—or perhaps not *only* at—the intentions of the debtor at the time of filing.[228] The inquiry is also not limited to the facts as they existed at the time of the filing of the petition.[229] When the court learns more about the debtor's financial circumstances and earning capacity throughout the case, it may consider such information.[230]

The phrase "of the provisions of" Chapter 7 in § 707(b) is perplexing and unclear at first glance.[231] It's plain meaning is limiting; the inquiry is not whether the relief would abuse the bankruptcy system or bankruptcy system writ large.[232] Instead, the inquiry would seem to be whether the relief would abuse one or more sections under Chapter 7 of the Code.[233] The particular provisions of Chapter 7 are mostly narrow in scope, covering disposition of property, the duties of the trustee, and narrow classes of debtors.[234] It is difficult to think of a scenario where a general discharge would "abuse" the election or successor of the trustee, for example. Treating the word "abuse" as distinct from "violation" raises further concerns when hypothesizing about qualifying abuses.

Reading "abuse of the provisions of" Chapter 7 in context with § 707(b)(2) adds even more complexity.[235] Section 707(b)(2) explains that abuse "of the provisions of" Chapter 7 shall be presumed if the debtor fails

222. *Id.*
223. *Id.*
224. *See id.* § 707(b).
225. *See id.*
226. *Id.* § 707(b)(1).
227. *See, e.g.*, *id.* §§ 303(i)(2), 362(c)(3)(B)–(C), 707(b)(3)(A), 921(c) (reflecting varying tests used in different provisions of the Code).
228. *See id.* § 707(b).
229. *See id.*
230. *See id.*
231. *See id.*
232. *See id.*
233. *See id.*
234. *Id.* §§ 704, 725, 741–53, 761–67, 781–84.
235. *See id.* § 707(b)(2)(A)(i).

the means test.[236] The means test seemingly has no relation to the narrow scope of almost every provision of Chapter 7.[237] Outside of the means test—and barely even there—there is no explicit requirement that the debtor be insolvent.[238] It is thus odd that § 707(b)(2), being immediately after § 707(b)(1), would provide a mandatory presumption for abuse of the provisions of Chapter 7 where there may be no clear relationship between the debtor's current ability to repay and the provisions of Chapter 7.[239] To be sure, this concern is not to cast any doubt on the means test or the mandatory presumption.[240] Congress spoke clearly: making one's current ability to repay a central inquiry in determining whether relief would be abusive.[241] But, Congress is nevertheless not immediately clear why the phrase "of the provisions of [Chapter 7]" is in the provision.[242]

Reading the section in context,[243] the use of the means test to create a mandatory presumption makes sense for two reasons. The first reason is that the phrase "of the provisions of [Chapter 7]" does not mean that the relief must abuse a discrete provision of Chapter 7.[244] Instead, these provisions are more than the sum of their parts.[245] The provisions of the Code make up Chapter 7 as an institution unto itself.[246] The definition of abuse as well as the focus on the relief rather than the petition or actions of the debtor, confirm that § 707(b)(1) abuse is not about abuse of a particular provision, but of Chapter 7 as an institution.[247]

The second reason is that the discharge provision itself is the provision of Chapter 7 that those deemed abusive under the means test are abusing.[248] Considering that the principal purpose of the Code is to grant relief "to the 'honest but unfortunate debtor'"[249] and to abuse is to use something inconsistent with its purpose, it makes sense that Congress saw debtors with sufficient current, actual income to repay their debts as being abusive of the provision granting relief—the discharge provision.[250] The relationship

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236. *Id.*
237. *See id.* § 707.
238. *Id.*
239. *Id.* § 707(b)(1)–(2).
240. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8 119 Stat. 23.
241. *See* 11 U.S.C. § 707.
242. *Id.*
243. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, [courts] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").
244. *See* 11 U.S.C. § 707(b)(1).
245. *See K Mart Corp.*, 486 U.S. at 291.
246. *See* 11 U.S.C. §§ 701–27.
247. *See id.* § 707(b)(1).
248. *See id.* § 727.
249. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Gorgan v. Garner, 498 U.S. 279, 287 (1934)).
250. *See* 11 U.S.C. § 727.

between the phrase "of the provisions of [Chapter 7]" and the means test thus bolster the conclusions that filing Chapter 7 bankruptcy despite one's ability of debtors to repay one's debts is abusive, that an abusive action need not be of the bankruptcy process, and that an abusive act is not necessarily a violation of a provision of the Code.[251]

Nevertheless, the means test is not the end of the story in § 707(b).[252] Where the presumption of abuse from the means test does not apply, or the debtor has rebutted it, the Code tells courts that they must consider "whether the debtor filed the petition in bad faith" or whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."[253]

"Bad faith does not lend itself to a strict formula."[254] Generally speaking, bad faith means "[d]ishonesty of belief or purpose."[255] Bankruptcy judges have wide latitude in determining whether bad faith exists, and must look at the totality of the circumstances.[256] Bad faith is typically "atypical conduct."[257] Ultimately, bad faith is "evidenced by the debtor's deliberate acts or omissions that constitute a misuse or abuse of the provisions, purpose, or spirit of the Bankruptcy Code."[258]

Courts have examined numerous factors in determining whether bad faith exists.[259] One court listed fifteen different factors:

(1) the debtor reduced his creditors to a single creditor shortly before the petition date;
(ii) the debtor made no life-style adjustments or continued living a lavish life-style;
(iii) the debtor filed the case in response to a judgment, pending litigation, or collection action;
(iv) there is an intent to avoid a large, single debt;
(v) the debtor made no effort to repay his debts;
(vi) the unfairness of the use of Chapter 7;
(vii) the debtor has sufficient resources to pay his debts;
(viii) the debtor is paying debts of insiders;
(ix) the schedules inflate expenses to disguise financial well-being;
(x) the debtor transferred assets;

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251. *See id.* § 707.
252. *See id.*
253. *Id.* § 707(b)(3)(A)–(B).
254. Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1271 (11th Cir. 2013).
255. *Bad Faith*, BLACK'S LAW DICTIONARY (8th ed. 1999).
256. *Piazza*, 719 F.3d at 1271.
257. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 375 (2007).
258. *Piazza*, 719 F.3d at 1271 (quoting McDow v. Smith, 295 B.R. 69, 74 (Bankr. E.D. Va. 2003)).
259. *Id.* at 1259.

> (xi) the debtor is over-utilizing the protections of the Bankruptcy Code to the unconscionable detriment of creditors;
> (xii) the debtor failed to make candid and full disclosure;
> (xiii) the debtor's debts are modest in relation to his assets and income; and
> (xiv) there are multiple bankruptcy filings or other procedural "gymnastics."[260]

Many of these factors do not require a directly intentional act of the debtor or outright fraudulent activity.[261] Some of these factors require deception, such as factor (ix) in that list.[262] But many of these, notably factors (vi)–(vii), (xiii), depend on nothing more than an objective review of the debtor's financial circumstances.[263] It is important to note, however, that this list of factors was imposed in the context of determining bad faith as "cause" to dismiss a Chapter 7 case under § 707.[264] Section 707(b)(3) requires that the debtor file the petition in bad faith, so any post-filing information would be irrelevant under § 707(b)(3).[265]

The totality of the circumstances are neither listed nor defined, and courts have given bankruptcy judges "considerable discretion in determining whether dismissal for abuse is appropriate under this provision."[266] "[B]y its very nature, [this test] is an open-ended and discretionary inquiry" that is not designed to yield bright-line rules.[267] The Eleventh Circuit has explained that "[§] 707(b) focuses on the purpose of Chapter 7 relief under the . . . Code, primarily the issue of whether the petitioner is the honest and needy consumer debtor the Code was intended to protect."[268] In assessing the totality of the circumstances surrounding the debtor's financial status, the court explains that debtors' ability to repay their debts "implicates abuse."[269]

Professor Ned Waxman and Justin Rucki have suggested that the totality-of-the-circumstances test in § 707(b)(3)(B) is determinative and that courts are not bound by the mean test's presumption and formulas.[270] Strictly speaking, it is necessary to recall the prefatory language of § 707(b)(3), which states that courts must consider any bad faith of the debtor in filing the

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260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 1267.
265. *Id.* at 1265.
266. Kulakowski v. Walton (*In re* Kulakowski), 735 F.3d 1296, 1299 (11th Cir. 2013).
267. COLLIER, *supra* note 145, at ¶ 707.04[4][Bb].
268. *In re* Mottilla, 306 B.R. 782, 788 (Bankr. M.D. Pa. 2006) (emphasis removed) (ellipsis in original).
269. *See id.*
270. *See* Waxman & Rucki, *supra* note 15, at 907–08.

petition or the totality of the circumstances of the debtor's financial situation "in a case in which the [means-test] presumption . . . does not arise or is rebutted."[271] When the presumption applies, the text of § 707(b)(3) simply does not apply.[272] Yet the structure of § 707(b)(2) gives courts the ability to consider anything relevant to abuse, including the debtor's financial circumstances, when evaluating whether abuse exists, even when the means test applies.[273] So, Waxman and Rucki are correct that the means test is not dispositive.[274] Even where the presumption applies, the Code merely provides that the court "may" dismiss or convert the case.[275] To be sure, the presumption tilts the scales in favor of dismissal or conversion, but the "may" allows courts to consider the myriad other factors that the concept of "abuse" encompasses.[276]

The article from Waxman and Rucki also asserts that determining abuse under the totality-of-the-circumstances test requires consideration of "all significant changes relating to the debtor's financial situation, pre-petition [and] post-petition, up until the time of the hearing on the motion to dismiss under the totality of the circumstances."[277] While this approach recognizes that the means test is not dispositive and broadens a court's review, it still seems to limit the scope of the court's analysis to the debtor's actual income, rather than imputed income or reasonably anticipated future earnings.[278]

C. The Canon Against Surplusage, Discretion, and § 707 in Context

Conventional wisdom in leading treatises and scholarship is that the 2005 amendments placed consideration of the debtor's faith and financial circumstances into § 707(b) to limit the discretion of the bankruptcy judges and make such considerations no longer relevant in the § 707(a) analysis or in applying § 707(b).[279]

Professors Culhane and White, for example, assert that Congress intended for the means test to be the only test in place to test debtors' ability to repay their debts, and that the totality-of-the-circumstances test is "limited to serious debtor misconduct."[280] In support of their view, they detail the legislative history of the 2005 Act, noting that multiple members of Congress sought to curb judicial discretion and end the practice of judges using their own measurements of debtors' ability to repay their debts with clear and

271. *Id.* at 908 (quoting 11 U.S.C. § 707(b)(3)).
272. *See* 11 U.S.C. § 707(b)(3).
273. *Id.* § 707(b)(3)(B).
274. *See* Waxman & Rucki, *supra* note 15.
275. 11 U.S.C. § 707(b)(1).
276. *See id.* § 707(b).
277. Waxman & Rucki, *supra* note 15, at 909.
278. *See id.*
279. COLLIER, *supra* note 145, at ¶ 707.03[2], 707.
280. Culhane & White, *supra* note 15, at 666.

precise numerical rules.[281] They also examine the text of § 707(b) and its relationship with other provisions of the Code, asserting that allowing the totality-of-the-circumstances test to include debtors' ability to repay their debts would render the means test superfluous.[282]

Further, *Collier on Bankruptcy*, one of the leading bankruptcy treatises, argues that "[t]he issue of whether bad faith is grounds for dismissal under § 707(a) was resolved by Congress in the 2005 amendments to the Bankruptcy Code, at least for debtors with primarily consumer debt."[283] "By placing the bad faith language in § 707(b), Congress afforded protection to lower income debtors against abusive bad faith dismissal motions by creditors that they might not be able to defend due to lack of financial resources . . . ."[284] *Collier* further elaborates that "[§] 707(b)(2) was designed to provide an objective methodology to limit courts' widely varying results with respect to ability to pay."[285] The argument is that applying (b) considerations in (a) makes (b) superfluous.[286]

The surplusage argument is inconsistent with the Code's text.[287] "[R]edundancy is not the same as surplusage."[288] The Code often spells out in detail what the Code otherwise allows generally.[289] Specific powers to dismiss or convert cases, to deny a discharge, or otherwise penalize debtors engaging in specific acts of bad faith buttress the bankruptcy judges' broad powers outlined in § 105(a).[290] The argument against a broad reading of § 707(a) because of § 707(b) takes the anti-surplusage canon to a new extreme; this reading would prevent Congress from ever bring more specific

281. *Id.* at 677–81.

282. *Id.* at 680.

283. COLLIER, *supra* note 145, at ¶ 707.03[2], 707.21.

284. *Id.*

285. *Id.* at ¶ 707.04[4][b], 707-48. The *Norton* treatise similarly notes that "[t]he debtor's ability to repay his debts in whole or in part does not constitute adequate cause for dismissal" under § 707(a).3 NORTON BANKRUPTCY LAW AND PRACTICE 3D § 79.4 (2025). Though *Norton* contends that a debtor's ability to repay is not adequate cause, the treatise does not go as far to say that it is irrelevant. *Id.* The *Tabb* treatise acknowledges that there is some controversy on this matter. That treatise notes that Congress's decision to place considerations in bad faith in § 707(b)(3) rather than § 707(a) "may restrain courts from treating 'bad faith' as an unstated species of 'cause.'" CHARLES JORDAN TABB, KARA J. BRUCE, & LAURA N. COORDES, LAW OF BANKRUPTCY 175 (6th ed. 2025). Like *Collier*, the *Tabb* treatise asserts that "the debtor's ability to pay some portion of his debts out of future income should no longer be treated as cause for dismissal under § 707(a)," but noted that the circuits disagree on this matter. *Id.*

286. *See* COLLIER, *supra* note 145, at ¶ 707.03[2], 707.21.

287. *See* 11 U.S.C. § 105(a) (specific power of the court); 11 U.S.C. § 108 (providing filing extensions for the trustee in accordance with non-bankruptcy proceedings or law).

288. Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1268 (11th Cir. 2013) (citing KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 20 (2008)); *see also* Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004) (explaining that the surplusage canon is not absolute); Marx v. Gen. Revenue Corp., 568 U.S 371, 385 (2013) (same).

289. *See* 11 U.S.C. § 105(a) (laying out the specific powers of the court); *id.* § 108 (providing specific rules of extending time for the trustee in accordance with non-bankruptcy proceedings or law).

290. 11 U.S.C. § 105(a).

than the broadest statement on a particular matter.[291] Though it is true that a specific provision governs a general one, that rule applies only when the two are in conflict.[292] It is illogical to suggest that a specific provision such as § 707(b), which sets forth the means test in aid of determining abuse by those with primarily consumer debts, generally curtails the broad discretion to dismiss or convert a case for "cause" under § 707(a) despite courts' historically broad powers and the plain text of the Code, even on matters not covered or in conflict with § 707(b).[293]

After the 2005 Amendments, the Third Circuit rejected the argument that the test in § 707(b) precluded courts from considering a debtor's ability to repay under § 707(a).[294] The court recounted the legislative history of the two provisions, noting that Congress adopted the two provisions at "different times and for different [purposes]."[295] Considering the different purposes, as well as the fact that § 707(a) applies to all bankruptcy proceedings, whereas § 707(b) is limited to bankruptcy filings where the debts are primarily consumer debts, the court concluded that Congress did not intend to limit the scope of § 707(a) when amending § 707(b) in 2005.[296] Then, believing that the text of § 707(a) was ambiguous, the court turned to the legislative history of that provision to determine whether the provision, unaffected by § 707(b), allowed courts to consider a debtor's ability to repay one's debts.[297] The court noted the clear statement from the l997 House Report that stated that a debtor's ability to repay did not "constitute[] adequate cause for dismissal,"[298] but concluded that the legislative history did not evince Congress's intent to prevent courts from considering the debtor's ability to repay as part of an analysis of the good faith of the debtor.[299] In its analysis, the court relied on its previous decision in *In re Tamecki*,[300] in which it stated that bankruptcy judges can consider whether the debtor violated the

291. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 183–88 (2012).

292. *See id.*

293. Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1268 (11th Cir. 2013) (citing Kestell v. Kestell, 99 F.3d 146, 148–49) (4th Cir. 1996)) (stating "for cause" in § 707(a) is broad and will lead to misuse).

294. Perlin v. Hitachi Capital Am. Corp., 497 F.3d 364, 369–70 (3d Cir. 2007).

295. *Id.* at 370–71.

296. *Id.*

297. *Id.* at 371–72.

298. *Id.* at 372 (quoting H.R. REP. NO. 95-595, at 380 (1977)).

299. *Id.* at 372–73.

300. 229 F.3d 205 (3d Cir. 2000).

"provisions, purpose, or spirit of bankruptcy law."[301] The Fifth and Eleventh Circuits similarly rejected this surplusage argument.[302]

Similar textual structures exist outside of the Code.[303] Federal Rule of Civil Procedure 37(b), for example, sets forth detailed provisions for district courts to sanction litigants for certain actions, such as for not obeying a court order or for failing to comply with certain discovery rules.[304] District courts have always had the inherent power to sanction litigants for certain conduct, including those listed in this Rule.[305] Yet it has not been seriously contended that the enactment of Rule 37 eliminated the broad, inherent powers of the district courts to regulate conduct in their courts via sanction.[306] The Rule does have some limiting power. It is binding on district courts,[307] so a particular provision in the Rule will prevent the court from attempting to utilize its inherent power, but only when the Rule directly prevents the district court's action. Similarly, rules and statutes that are binding on courts may give rights to litigants, and they cannot be sanctioned for doing what the law explicitly allows.[308] Neither Rule 37 nor any other rule, however, automatically becomes exhaustive and eliminates the district court's inherent powers.[309] Neither the canon against surplusage nor the rule that specific provisions govern general ones support such a result.[310]

Waxman and Rucki contended that a debtor's ability to repay is relevant under the totality-of-the-circumstances test, but not bad faith in § 707(b)(3).[311] Their interpretation rests in large part on the canon against surplusage.[312] Again, the canon against surplusage is not so restrictive.[313]

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301. *Id.* at 207. The court warned, however, that "to avoid undercutting congressional intent, a bankruptcy court's ultimate finding of bad faith may not be based exclusively or primarily on a debtor's substantial financial means." *Perlin*, 497 F.3d at 374. Because the bankruptcy judge determined that the Perlins did not otherwise act in bad faith, such as by presenting inaccurate schedules or seeking to hide and protect a future, substantial source of income, their lavish lifestyle and substantial income was not sufficient to support dismissal under § 707(a). *Id.* at 373 (rejecting the argument that § 707(a) renders § 707(b) superfluous).

302. *See* Krueger v. Torres (*In re* Krueger), 812 F.3d 365, 372–73 (5th Cir. 2016); Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1265–67 (11th Cir. 2013); Witcher v. Early (*In re* Witcher), 702 F.3d 619, 621–23 (11th Cir. 2012).

303. *See generally* FED. R. CIV. P. 37(b)–(c) (allowing courts to sanction).

304. *Id.*

305. *See, e.g.*, Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1335 (11th Cir. 2002) (internal quotation marks omitted) ("Courts have the inherent authority to control the proceedings before them, which includes the authority to impose 'reasonable and appropriate' sanctions.").

306. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46–47 (1991).

307. Bank of N.S. v. United States, 487 U.S. 250, 255 (1988) (noting that the Federal Rules of Civil Procedure are "as binding as any statute duly enacted by Congress").

308. *See Chambers*, 501 U.S. 32, 44–45 ("[I]nherent power must be exercised with restraint and discretion.").

309. *See id.* at 46.

310. SCALIA & GARNER, *supra* note 291.

311. Waxman & Rucki, *supra* note 15, at 917–28.

312. *Id.*

313. *See* Lamie v. U.S. Tr., 540 U.S. 526, 536 (2004) (noting that surplusage canon is not absolute).

Allowing a debtor's ability to repay to constitute abuse under both provisions does not render either provision superfluous.[314] There will still be numerous other situations in which bad faith will constitute abuse but the totality of the debtor's financial situation does not and vice versa.[315] The only way that allowing a debtor's ability to repay to satisfy both (A) and (B) would render one superfluous would be if no other circumstance could independently satisfy (A) or (B).[316] Only then would (A) or (B) truly have no effect in the Code so as to be superfluous.[317] It is neither uncommon nor unwarranted that the law has multiple provisions that could cover the same action.[318] The canon against surplusage prevents words from having no meaning, not particular issues having concurrent application.[319] The plain text of (A) and (B) allows factors to apply to both situations.[320] If debtors exclude from the schedules and petition significant sources of income, that would be a key example of filing the petition in bad faith, especially if the exclusion has the effect of avoiding the application of the means test.[321] Those omissions would also lead the court to consider the totality of the circumstances of the debtors' financial situations and perhaps conclude that the debtors have an ability to repay their allowed, unsecured debts in full.[322] But there will still be other situations in which debtors file in bad faith in ways irrelevant to the debtors' financial situations, such as when debtors try to hide creditors or abusively force a settlement.[323] Another situation may occur where the totality of the circumstances of the debtor's financial situation demonstrates abuse, but bad faith is not present, such as when the debtor's financial situation changes after filing.[324] Debtors could not have filed the petition in bad faith if the debtor's financial circumstances changed post-filing.[325] Arguments that the enactment and revision of § 707(b) over time removed certain considerations from § 707(a), or that the relevance of debtor's ability to repay is irrelevant to either portion of § 707(b)(3)(B), thus get no support from the Code's text.[326]

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314. Witcher v. Early (*In re* Witcher), 702 F.3d 619, 621–22 (11th Cir. 2012) (holding no superfluity occurs when debtor has ability to repay).

315. *See* Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1271–72 (stating that bad faith is not a strict formula).

316. *See In re Witcher*, 702 F.3d at 621 (discussing the relationship between each subsection).

317. *Id.*

318. *See In re Piazza*, 719 F.3d at 1266 (noting that redundancies within the Code are not uncommon).

319. SCALIA & GARNER, *supra* note 291.

320. 11 U.S.C. § 707(b)(3)(A)–(B).

321. *See supra* text accompanying note 260 (listing acts that would constitute bad faith).

322. *See In re Piazza*, 719 F.3d at 1271–72.

323. *See* Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza, 451 B.R. 608, 614–15 (Bankr. S.D. Fla. 2011) (listing the fact that debtor reduced his creditors to a single creditor shortly before petition date as a factor for determining whether debtor acted in bad faith).

324. *See id.*

325. *See id.*

326. 11 U.S.C. § 707(b)(3)(B).

No context or canon restricts the plain language of § 707(a) and § 707(b)(3)(B).[327]

Many also argue that not treating the means test as exhaustive and considering a debtor's ability to repay in other provisions of § 707 undermines Congress's efforts to reduce judicial discretion.[328]

As for discretion, while § 707(b)(1) still uses the word "may," the means-test presumption is not toothless.[329] Some courts had considered a debtor's ability to repay to constitute cause or substantial abuse before the 2005 Act,[330] but Congress was not content with the varied approaches of the courts and decided to give the courts more guidance.[331] Part of the purpose of the 2005 Act was to give further guidance to courts.[332] As Senator Hatch explained, "the means test contained in the bill will provide a uniform standard to bankruptcy judges to evaluate the ability of bankruptcy filers to repay debts."[333] Guidance and discretion are not mutually exclusive. The Code elsewhere provides guidance that itself is not limiting.[334] All use of "includes" and "including" in the Code are "not limiting," so the list of provisions following that language have no independent power under the Code.[335] But it has not been seriously suggested that these lists in the Code, including in § 707(a), are superfluous.[336] These examples can give guidance to courts and practitioners of things that do apply to the broad language.[337] But, it would be in violation of the Code's explicit rules of construction to apply the canon of ejusdem generis[338] to limit language based on the illustrative examples in the Code.[339] Sections 707(a) and (b) operate in a similar fashion.[340] The means test provides a specific standard for a certain group of creditors.[341] But, it is merely a presumption.[342]

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327. *See In re Piazza*, 719 F.3d at 1271–72 (no strict formal test for bad faith).

328. *See* Culhane & White, *supra* note 15, at 666; Witcher v. Early (*In re* Witcher), 702 F.3d 619, 622 (11th Cir. 2012) (rejecting the debtors' argument that that allowing bankruptcy judges to consider debtors' ability to repay under § 707(b)(3)(B) would "defeat the purpose of the congressionally enacted means test" because that argument did "not dictate that any factors that are considered under § 707(b)(2) are by implication precluded from consideration under § 707(b)(3)").

329. *See* Gross, Kluender, Lui et al., *supra* note 10 (explaining that Chapter 7 filings fell substantially after the 2005 Amendments).

330. *See supra* Sections II.C.1–2 (discussing changes to the Code before and after 2005).

331. *See* 11 U.S.C. § 522(p).

332. 151 CONG. REC. 3022–26 (2005) (statement of Sen. Hatch).

333. *Id.*

334. 11 U.S.C. § 102(3).

335. *See id.*

336. *See id.* § 707(a).

337. *See id.*

338. *See* Fischer v. United States, 603 U.S. 480, 487 (2024) (quoting Sw. Airlines Co. v. Saxon, 596 U.S. 450, 458 (2022)) (references at the end of a list are controlled by those preceding them).

339. *See* 11 U.S.C. § 707.

340. *See id.* § (a)-(b).

341. *See id.* § 707(b)

342. *See id.*

There may be some concern that this broad interpretation of § 707 is too expansive and gives too much power to the courts.[343] Professor Jonathan M. Seymour recently published an important piece of scholarship discussing the interpretation of the Code and the division between the Supreme Court and bankruptcy judges.[344] In *Against Bankruptcy Exceptionalism*, Professor Seymour correctly notes that the Supreme Court has been clear that the Code is not exceptional, so interpreting the Code ought not be exceptional either.[345] Too often have bankruptcy judges and those reviewing their decisions allowed the common adage that "bankruptcy courts are courts of equity" to displace generally applicable rules of statutory interpretation.[346] Professor Seymour is correct that, though special, bankruptcy law is not "exceptional" in this sense.[347] This Article advocates a broad interpretation of § 707. Taking Professor Seymour's concerns seriously, it is worth explaining that this Article's interpretation of § 707 is unexceptional.[348] Rather, it is faithful to the Code's text and its principal purpose.[349]

Applying the canon that specific provisions govern general ones prevents such exceptional interpretations and actions.[350] Bankruptcy judges do not have the power to abrogate or ignore the Code's text based on their broad powers in § 105 or discretion embedded throughout the Code's text, but they can act within the bounds of their discretion where the Code gives it.[351] Cases like *In re Law* are instances where a bankruptcy judge went against the Code's text and restricted the rights of the debtor in doing so.[352] In that case, the debtor fabricated a mortgage to prevent her home from selling in order to maximize her homestead exemption.[353] This fraudulent act led to years of litigation that "cost the trustee over $500,000 in attorneys' fees."[354] The bankruptcy judge "ordered that the trustee could, upon the sale of the property, surcharge Law's $75,000 homestead exemption, so that the

343. *See generally* Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925 (2022) (discussing how a broad interpretation of bankruptcy statutes grants excessive power to bankruptcy courts).

344. *Id.* at 1939.

345. *Id.* at 1946–56.

346. *Id.* at 1931–33, 1939.

347. *Id.* at 1946–56.

348. *See id.*

349. *See* 11 U.S.C. § 707. It is also worth noting that this Article's use of the principal purpose is not to endorse a purposivist approach to interpreting the Code. The text of the Code drives this Article's interpretation, as the text is supreme. After all, it is the Code's text, not its purpose, that was presented to the President and enacted into law. *See id.* But, as this Article has explained throughout, the text of the Code incorporates the principal purpose. The plain meaning of the word abuse, for example, requires considering purpose. *See supra* Sections II.C.2, 3.B (explaining the history and purpose of the Code).

350. *See, e.g.*, *In re* Law, 401 B.R. 447, 455 (Bankr. C.D. Cal. 2009), *rev'd sub nom.*, Law v. Siegel, 571 U.S. 415, 428 (2014) (providing an example of a bankruptcy court harming a debtor through broad interpretation of bankruptcy statutes).

351. 11 U.S.C. § 105(a).

352. 401 B.R. at 455.

353. *Seigal*, 571 U.S. at 418–19.

354. Seymour, *supra* note 343, at 1948 (citing *Law*, 401 B.R. at 453).

maximum amount of money possible could go towards compensating the trustee for his efforts to uncover Law's fraud."[355] The Supreme Court unanimously reversed, holding that the bankruptcy judge could not use its powers under § 105(a) to surcharge an explicit exemption in the Code.[356] The action that the bankruptcy judge approved in that case was "exceptional."[357]

Conversely, this Article's proposals are unexceptional. The plain text of § 707, especially § 707(a), is broad.[358] But, it would be exceptional to artificially narrow the scope of § 707, as an act of judicial amendment of the Code, out of concerns for the power of bankruptcy judges.[359] Congress can, and does, grant broad powers.[360] When constitutional concerns are not otherwise present,[361] the broad power is of no concern to the courts. Comparing the opinions of various courts interpreting § 707 supports this reading.[362] Many of the cases limiting the scope of § 707(a), both in its current and prior renditions, have relied on legislative history and atextual canons.[363] When courts look to the Code's text, they have reached conclusions similar to this Article's.[364]

IV. COULD-PAY DEBTORS

The 2005 Act was a substantial step in restoring the principal purpose of the Code, (to "grant a 'fresh start' to the 'honest but unfortunate debtor'") but the 2005 Act was flawed.[365] The Act's focus on "can-pay debtors" was far too limited, the important question when it comes to the honest but unfortunate debtor and the propriety of bankruptcy protection is not whether the debtor *can* repay—but *could* repay.[366] The means test examines a mere snapshot of the debtor's financial life.[367] The bankruptcy system must be

355. *Id.*

356. *Siegel*, 571 U.S. at 428.

357. Seymour, *supra* note 343, at 1931.

358. *See id.*

359. *See id.*

360. JARED P. COLE & DANIEL T. SHEDD, CONG. RSCH. SERV., R48523, ORGANIZING EXECUTIVE BRANCH AGENCIES: STRUCTURE AND DELEGATIONS OF AUTHORITY (2025).

361. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 152–69 (2019) (Gorsuch, J., dissenting) (discussing the nondelegation doctrine and Congress's inability to grant legislative powers to another entity through broad language).

362. *See, e.g.*, Crocker v. Bushyhead (*In re* Bushyhead), No. 15-89-JED-PJC, 2017 WL 1549467, at *5 (N.D. Okla. Apr. 28, 2017) (finding that the bankruptcy judges correctly applied § 707(a)); *In re* Huckfeldt, 39 F.3d 829, 832 (8th Cir. 1994) (considering the legislative history of § 707(a) to determine bad faith).

363. *See Crocker*, 2017 WL 1549467, at *5; *In re Huckfeldt*, 39 F.3d at 832.

364. *See* Krueger v. Torres (*In re* Krueger), 812 F.3d 365, 370–72 (5th Cir. 2016); Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1260–62 (11th Cir. 2013).

365. 11 U.S.C. § 522(p); Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (citing Grogan v. Garner, 498 U.S. 279, 286–87 (1991)).

366. *See* 11 U.S.C. § 707(b).

367. *See id.*

more concerned with the debtor's potential ability to repay.[368] This potential can be current or upcoming, based on the debtor's earning capacity—as opposed to the debtor's actual, current income.[369] This Part explains why bankruptcy law ought to be concerned with could-pay debtors and expand the focus of the Code's checks against abusive petitions.[370] This Part explains the importance of evaluating debtors' earning capacity, how courts can go about determining such capacity, and what the alternative to Chapter 7 is for could-pay debtors.[371]

A. Current Earning Capacity

The means test and its focus on "current monthly income"[372] creates perverse incentives for debtors.[373] Debtors may delay searching for a promotion or new position, reduce their hours, or otherwise choose to minimize their income to reduce their current monthly income below the applicable thresholds in § 707(b)(2).[374] Debtors could avoid the presumption of abuse and even limit the class of persons eligible to move to dismiss a case under § 707 by relying on any savings or accruing debt for a sixth-month period.[375] A debtor who makes sufficient income for years but then does not for six months will not be presumed to be abusing the provisions of the bankruptcy, regardless of the debtor's prior earnings or current earning capacity.[376] In an article entitled *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, bankruptcy Judge Eugene R. Wedoff provides the hypothetical scenario where a corporate CEO loses his position when the company goes out of business.[377] Finding himself unemployed, the former CEO "maintains his lifestyle by depleting his personal savings and incurring substantial debt."[378] After six months or so, he gains new employment with even higher compensation, but nonetheless chooses to file Chapter 7 bankruptcy.[379]

If the purpose of the bankruptcy system is to alleviate those who are insolvent or at serious risk of insolvency, and bankruptcy is meant to be a last

368. *See id.*
369. *See id.*
370. *See id.* § (b)(2).
371. *See id.* § (b)(2)–(3) (establishing means testing and judicial discretion to dismiss Chapter 7 petitions when a debtor has to pay).
372. The Code defines this term as the average monthly income that the debtor received in the six months before "the last day of the calendar month immediately preceding the date of the commencement of the case." *Id.* § 101(10A)(A)(i).
373. *See id.* § 707(b).
374. *See id.* § 707(b)(2).
375. *See id.* § 707(b)(2), (6)–(7).
376. *See id.*
377. Wedoff, *supra* note 15, at 1035–36.
378. *Id.*
379. *Id.*

resort, then the Code must take into account the earning capacity of the debtor.[380] The means test is no hinderance to the CEO's filing because of the definition of current monthly income.[381] Albeit extreme, this example highlights the shortcomings of the means test's snapshot analysis. But the problem with the means test's reliance on current monthly income is far deeper than what Judge Wedoff suspects.[382] In addition to the window of income earned being far too short, the focus on *actual* income is likewise flawed.[383] When determining whether debtors have the ability to repay their debts, courts should also inquire as to whether the debtor has the ability to earn more than they did in the previous six-month period.[384] People may not live up to their potential, and their potential is the more relevant consideration of their abilities rather than their actual history.[385] Courts must thus apply other provisions of the Code as required, consider a debtor's current earning capacity, and impute income on the debtor as necessary for a more well-rounded analysis of whether the debtor is honest and unfortunate.[386]

B. Future Earning Capacity

In addition to current earning capacity, a debtor's future earning capacity is relevant to determining whether a debtor's Chapter 7 case should be dismissed for cause or is an abuse of the provisions of Chapter 7.[387] Assessing debtors' current earning capacities requires an analysis of whether debtors are voluntarily and unreasonably unemployed or underemployed based on their skill, experience, and qualifications.[388] Debtors' future earning capacities rely on the same factors, but the scope of review extends past income that debtors could earn now to what they could earn in the future.[389] Personal circumstances or in-progress credentials may make debtors presently unable to earn a sufficient income but able to repay their debts in the long run.[390] The purpose of the bankruptcy system is to allow individuals to obtain financial relief when there is nowhere else to turn.[391] It is available

380. *See* 11 U.S.C. § 707(b)(2)–(3).
381. 11 U.S.C. § 707(b).
382. Wedoff, *supra* note 15, at 1035–36.
383. *See id.*
384. *Id.* at 1047.
385. *See id.*
386. *See id.* at 1047–48.
387. *See id.*
388. *See In re* Henderson, No. 23-50381-BEM, 2024 WL 322170 at *9 (Bankr. N.D. Ga. Jan. 25, 2024) (explaining the case-specific inquiry into income and expenses is necessary to determine special circumstances affecting ability to repay debts).
389. Culhane & White, *supra* note 15, at 673.
390. *See In re* Hughes, No. 22-10078, 2023 WL 5525043, at *3 (Bankr. D. Me. Aug. 25, 2023) (ruling that the meaning of income depends on the context).
391. *See Process - Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/process-bankruptcy-basics# (last visited Sep. 2, 2025).

only to the insolvent.[392] Debtors are not usually obligated to repay all of their debts immediately, so it would make sense for the Code to determine the ability for one to repay one's future debts based on one's future ability.[393]

A key factor that will always be relevant is age.[394] Franco Modigliani and Richard Brumberg formulated the life-cycle theory in the early 1950s.[395] They theorized that wealth accumulation for individuals follows a bell curve, with wealth accumulating early on in an individual's life, increasing until they begin to prepare for retirement, and then decreasing as they live off of the accumulated wealth.[396] Later on, Modigliani and Tullio Jappelli responded to criticisms of the theory and conducted research to verify the life-cycle hypothesis.[397] Their research confirmed this curve.[398] In Italy, for example, median discretionary income generally increases from the age of twenty-five and begins to decrease by the age of sixty.[399] Earned income follows a similar curve.[400] They also identified numerous studies from other countries that confirmed their findings.[401]

Individuals in their early twenties, for example, are just entering their careers, especially those who attend college. Individuals in their mid-twenties reap the benefit of having attained a few years of experience in their careers, earned a promotion or raise, or left their entry-level position for a new position with increased pay. As individuals age, they continue to increase their earning capacity, albeit at a slower rate,[402] until they slow down their career in preparation for retirement, and then ultimately retire. Though each individual's situation is unique, this trend is of tremendous relevance to estimating a debtor's future earning capacity.[403] Young debtors are more likely to see a substantial increase in income that could render them able to repay their debts.[404] Old debtors, particularly those in or past their mid-fifties, are far less likely to see an increased earning capacity; it is more likely to decrease.[405] In tandem with other factors, age is thus an important consideration in analyzing a debtor's ability to repay his or her debts.[406]

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392. *See id.*
393. *See id.*
394. Franco Modigliani & Richard Brumberg, *Utility Analysis and the Consumption Function: An Interpretation of Cross-Section Data* (1954), *reprinted in* FRANCO MODIGLIANI, THE COLLECTED PAPERS OF FRANCO MODIGLIANI 3 (Andrew Abel ed., 2005) (discussing the life-cycle theory of wealth accumulation).
395. *Id.*
396. *Id.* at 31–33.
397. *Id.* at 141.
398. *Id.*
399. *Id.* at 149–54.
400. *Id.* at 155.
401. *Id.* at 160–61.
402. *Id.*
403. *See id.*
404. *See id.*
405. *See id.*
406. *See id.*

For young debtors, their future earning capacity is particularly relevant because they are the most likely age group to soon see meaningful increases in income.[407] The "biggest jump in salary from one age group to the next is between the 20–24 and 25–34 age groups, meaning that's when most people make the most substantial moves and jumps in their careers."[408] The average individual will reach their peak income between the ages of forty-five and fifty-four.[409]

One reason to be concerned this future abuse of the bankruptcy system is that young individuals are feeling increasing economic burdens that make a head start through bankruptcy more appealing.[410] Young individuals are particularly prone to economic instability, as they have lower earnings and savings on average.[411] The effects of the COVID-19 pandemic and recent recession have thus had a greater impact on young individuals than on their older counterparts.[412] Young individuals are also more likely to have student debt today, and that debt is likely to be greater.[413] Housing prices have also risen sharply over the past twenty years.[414] Young individuals entering their careers now start off with greater financial burdens than before.[415] With these increasing burdens, it is understandable that young individuals are looking to the bankruptcy system for relief. It is not the purpose of this Article to make life harder for young individuals. Policymakers and society at large may look to other means to ease these burdens.[416] But for most of these young individuals, the Code does not provide the answer.[417]

The Code has been concerned with young debtors attempting to gain a "head start" for decades.[418] The 1978 Act included an exception to discharge for educational loans to governmental units or nonprofit higher education units for the first five years of the loan.[419] Even after that period, debtors had to show that exemption from discharge of these loans would cause "undue

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407. See Katherine Haan, *Average Salary by Age in 2025*, FORBES (July 29, 2025, at 8:55am CT), https://www.forbes.com/advisor/business/average-salary-by-age/.

408. *Id.*

409. *Id.*

410. Laura Feiveson, Arik Levinson, & Sydney Schreiner Wertz, *Rent, House Prices, and Demographics*, U.S. DEP'T OF THE TREASURY (June 24, 2024), https://home.treasury.gov/news/featured-stories/rent-house-prices-and-demographics.

411. *See id.*

412. *See Covid-19 and Youth: The Future of Work for Young People*, UNITED NATIONS, https://www.un.org/en/academic-impact/covid-19-and-youth-future-work-young-people (last visited Sep. 2, 2025).

413. Karen L. Webber & Rachel Burns, *Increases in Graduate Student Debt in the US: 2000 to 2016*, 62 RSCH. HIGHER EDUC. 709, 709–11 (2021).

414. *See* Feiveson, Levinson & Wertz, *supra* note 410.

415. *See id.*

416. *See id.*

417. 11 U.S.C. § 523(a)(8)(A). This section is functionally identical to a section in Title 20 that was enacted just two years before. *See* Education Amendments of 1976, Pub L. No. 94-482, § 127, 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1977)).

418. *See* 11 U.S.C. § 523(a)(8)(A); 20 U.S.C. § 1087-3.

419. *See* 11 U.S.C. § 523(a)8)(A); 20 U.S.C. § 1087-3.

hardship" on themselves and their dependents.[420] The undue hardship standard remains in the Code today.[421] The burden to prove undue hardship is substantial.[422] Courts apply different tests for undue hardship, but most follow the *Brunner* test, originating in the Second Circuit and requiring the debtor to show:

> (1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[423]

To be sure, there has been a substantial amount of criticism from legislators, scholars, and the like regarding the disparate treatment of student-loan borrowers in bankruptcy.[424] Some of the concerns have merit, especially the concern that the *Brunner* test is too stringent and at odds with the Code's plain language.[425] But some of these concerns are relevant to consideration of future potential earnings.[426] For instance, many suggest that this student-debt provision unfairly singles out student-loan borrowers and treats them more like serious tortfeasors or fraudsters than like young, innocent debtors.[427] Though wrongdoing by the debtor serves as the basis for many of the exceptions to discharge, not all exceptions require wrongdoing.[428] Exceptions also apply to domestic support obligations, certain taxes, and certain debts owed to plans under the Employee Retirement Income Security Act.[429] Exceptions to discharge are thus not all because of some moral wrongdoing by the debtor.[430] These exceptions serve various purposes.[431]

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420. 11 U.S.C. § 523(a)(8)(B).

421. *Id.* § 523(a)(8).

422. *See* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

423. *Id.*

424. *See, e.g.*, H. R. REP. NO. 95-595, at 147–52 (1978) (statement of James O'Hara) (explaining the difficulties students go through in filing for bankruptcy).

425. *See In re* Bender, 297 B.R. 126, 131 (D. Neb. 2003), *aff'd*, 368 F.3d 846, 848 (8th Cir. 2004) (rejecting the *Brunner* test for a totality of the circumstances test which considers past, current, and future income if it is reasonably reliable).

426. *See id.*

427. MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR AMERICAN BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 47–50 (2024); H. R. NO. 95-595, at 149 (1978) (statement of James O'Hara).

428. *See* 11 U.S.C. § 523(a)(1), (5), (18).

429. *Id.*

430. *See id.*

431. *See id.*

One of the reasons to make discharge of student-loan debt more difficult is not because student-loan borrowers have done anything wrong; rather, the incentives for young debtors are different such that recent graduates have less to lose when filing bankruptcy under Chapter 7.[432] As Representative John Erlenborn explained in regard to the discharge exception for certain student loans: "For the most part, a student completing his or her postsecondary education is at that moment technically eligible to declare bankruptcy because tangible assets are usually quite small—indeed, none may exist at all."[433] The impact on one's credit score after filing bankruptcy is not as substantial as conventionally thought, and the effect is minimal after seven years.[434] The average age for first-time home buyers is increasing and opportunities for access to credit are diversifying, meaning that young debtors are less likely to suffer more financially after bankruptcy than they otherwise would with the burden of ever-increasing, debts.[435] Young debtors may also be less likely to view bankruptcy as a negative social or economic mark, making the choice even more attractive.[436] For these young debtors, student-loan debt is often the most substantial source of debt, and thus restricting the ability for young debtors to eschew loan repayment through bankruptcy may be an important policy goal.[437] But it is not a moral denouncement of student-loan borrowers or their actions.[438] Many of the reasons for this Article's proposal stem from similar concerns.[439] Even with the Code's limitation on discharge of student-loan debt, the rise of consumer debt amongst young debtors is now driving similar concerns regarding a general discharge for young debtors.[440]

Conversely, the life cycle has tremendous importance for those debtors who are more advanced in years.[441] Just as young individuals are likely to see an increase in earnings in the future, debtors nearing retirement age are more likely to see a decrease in future earnings.[442] In the United States, individuals'

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432. H.R. REP. NO. 05-595, at 156–57 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5963.

433. *Id.*

434. *See* Ethan Cohen-Cole, Burcu Duygan-Bump & Judit Montoriol-Garriga, *Forgive and Forget: Who Gets Credit After Bankruptcy and Why?*, FED. RSRV. BANK OF BOS. (Nov. 1, 2009), https://www.bostonfed.org/publications/risk-and-policy-analysis/2009/forgive-and-forget-who-gets-credit-after-bankruptcy-and-why.aspx.

435. *See id.* § 5.6.

436. *See* Natalie Campisi, *Bankruptcy Boom: Why More Young Adults Are Drowning in Debt*, NASDAQ (Sep. 6, 2024, 2:01 PM ET), https://www.nasdaq.com/articles/bankruptcy-boom-why-more-young-adults-are-drowning-debt.

437. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 369 (2013).

438. *See infra* Section IV.C (clarifying that certain limits on dischargeability reflect policy concerns about debt repayment, not moral condemnation of debtors).

439. *See infra* Section IV.C (drawing parallels between policy limits on student-loan discharge and broader concerns with debtors' earning capacity).

440. *See* 11 U.S.C. § 523(a)(8); Cohen-Cole, Duygan-Bump & Montoriol-Garriga, *supra* note 434.

441. *See* Modigliani & Brumberg, *supra* note 394, at 31–33.

442. *Id.*

incomes tend to hit their apex in their early fifties and then decrease.[443] It will thus be unlikely that debtors in that age range and above should expect an increase in their future earning capacity. A decrease is more likely.[444] This trend makes sense, as they are less likely to receive intervening education or training that would justify a substantial increase in earnings;[445] mental and physical limitations may prevent pursuing a more demanding career or continuing to work at the rate that they had in the past.[446]

The importance of age is just an example of how essential these factors are to determining whether debtors can repay their debts.[447] Debtors' education, experiences, accreditations, and the like will also be important.[448] The means test is entirely agnostic to all of these factors and thus reality.[449] Future earning capacity is the only means by which bankruptcy judges can truly determine whether debtors can repay their debts.[450] But it is not to say that these factors are perfect or easily weighed—bankruptcy judges lack a crystal ball.[451] The next Section explains the practical and moral concerns that come with estimating debtors' future earning capacity.[452]

C. Practical and Moral Concerns Regarding Earning Capacity

There may be some practical and moral concerns with considering a debtor's current earning potential under § 707.[453] Unlike the definition of "current monthly income" in the Code, earning capacity is not so certain.[454] Luckily, there is a rich history in our legal system of imputing income onto capable individuals.[455] In family law, for example, it is common for states to impute income onto parents when determining the appropriate amount of child support and alimony that one is obligated to pay.[456]

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443. Haan, *supra* note 407.

444. *Id.*

445. *Cf. Total Fall Enrollment in Degree-Granting Postsecondary Institutions, by Attendance Status, Sex, and Age of Student: Selected Years, 2001 Through 2031*, NAT'L. CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d22/tables/dt22_303.40.asp (last visited Sep. 2, 2025) (showing that in 2021, almost 80% of students in postgraduate education were thirty years old or younger, and that almost 87% of students were younger than thirty-five).

446. Gregory v. Ashcroft, 501 U.S. 452, 472 (1991) (explaining the "unfortunate fact of life that physical and mental capacity sometimes diminish with age").

447. *See id.*

448. *See Chapter 7 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited Sep. 1, 2025).

449. *See id.*

450. *See id.*

451. *See id.*

452. *See infra* Section IV.C (addressing practical and fairness issues in projecting future earnings).

453. *See* 11 U.S.C. § 707.

454. *See id.* § 101(10A).

455. *See* 27C C.J.S. DIVORCE § 1156.

456. *See id.*

In *Sharpe v. Sharpe*, a "non-custodial parent moved to modify a child support order after she quit her job in Anchorage, moved to a remote village, and adopted a subsistence lifestyle."[457] She argued that her voluntary unemployment was "reasonable in light of her cultural, spiritual, and religious needs."[458] Before her move, she earned approximately $120,000 annually, and the court ordered her to pay $1,507 monthly in child support—she requested a reduction to $50 monthly.[459] The superior court concluded that the non-custodial parent's actual income was not as relevant as her income capacity.[460] Under Alaska law, a parent's actual income is the presumptive baseline for calculating child support, but the state's Civil Rules allowed courts to recognize a non-custodial parent's voluntary, unreasonable unemployment or underemployment and instead base child support on potential income "based upon the parent's work history, qualifications, and job opportunities."[461] Alaska had previously recognized that it did "not believe that an obligor-parent should be 'locked in' to a particular job or field during the minority of his or her children when accepting a lower-paying position may ultimately result in personal or professional advancement."[462] But Alaska law also recognized that "the children of the marriage and the custodial parent should not be forced to finance the noncustodial parent's career change."[463] The Alaska Supreme Court affirmed the superior court's determination.[464]

Federal regulations regarding imputing income for the purpose of determining the amount of child support provide a helpful list of factors relevant to determining one's earning capacity generally:

> The noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, prevailing earnings level in the local community, and other relevant background factors in the case.[465]

These factors are numerous and necessarily unique to each individual. Just as in these other areas of law, courts in the bankruptcy context will need to examine the circumstances of each debtor.[466]

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457. Sharpe v. Sharpe, 366 P.3d 66, 67 (Alaska 2016).
458. *Id.*
459. *Id.* at 68.
460. *Id.* at 69.
461. *Id.* (quoting ALASKA CIV. R. 90.3(a)(4)).
462. *Id.* at 70 (quoting Pattee v. Pattee, 744 P.2d 658, 662 (Alaska 1987), *overruled on other grounds*, Nass v. Seaton, 904 P.2d 412 (Alaska 1995)).
463. *Id.* (quoting *Pattee*, 744 P.2d at 659).
464. *Id.* at 74.
465. 45 C.F.R. § 302.56(c)(1)(iii).
466. *See id.*

In a similar vein, courts often look to potential earnings to determine whether a defendant is indigent and thus, unable to pay restitution for certain crimes.[467] Some special assessments apply in criminal cases, such as certain offenses against children.[468] Those assessments are mandatory unless the defendant is indigent.[469] Multiple courts of appeals have stated that a defendant's potential earning capacity, based on future earnings or potential earnings, is relevant in determining indigency.[470] In *United States v. Wesley*, for example, the Eighth Circuit explained that whether a defendant is indigent for the purposes of the Justice for Victims of Trafficking Act "depends on 'a defendant's current financial situation and his ability to pay in the future.'"[471] It further explained that defendants can be eligible for the assessment because their "young age, good health, 'education, skills [or] work experience'" suggest a sufficient earning capacity.[472] There are thus no real practical concerns with assessing a debtor's earning potential, or at least none that are unique to bankruptcy law.[473] The lack of a perfect formula is not an excuse to ignore the principal purpose of the Code, and it is not an excuse to ignore the relevant provisions in § 707 that require a review of the debtor's current earning capacity.[474]

There are moral concerns as well with the use of current capacity in this context.[475] This Article does not suggest that a debtor's earning capacity is based solely on the highest paying position that he or she has held. Not all debtors operate at their maximum earning capacity, nor do they necessarily need to.[476] Individuals may choose a job because of interest or passion, location, stability, flexibility, or a plethora of other considerations. These preferences may be reasonable. It is not always reasonable, however, for individuals to voluntarily take lower-paying positions and eschew their debts.[477] Financial duties must skew the calculation for one deciding which position to take, and whether to remain at a current job.[478]

Sharpe is a helpful example of the approach advocated in this Article.[479] Debtors need not be cemented into a particular job, and courts have discretion

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467. *See, e.g.*, United States v. Wesley, 96 F.4th 1045 (8th Cir. 2024) (explaining that a defendant's indigency under restitution statutes depends not only on present finances but also on future earning capacity).

468. *See* 18 U.S.C. § 3013.

469. *See id.* §§ 2259A(a)–(c), 3014(a), 3572.

470. *See Wesley*, 96 F.4th at 1047.

471. *Id.* at 1047 (quoting United States v. Kelley, 861 F.3d 790, 801 (8th Cir. 2017)).

472. *Id.* (quoting United States v. Otradovec, 72 F.4th 794, 797 (7th Cir. 2023)).

473. *See id.*

474. *See id.*

475. H.R. REP. NO. 109-31, at 2 n.1 (2025).

476. *See* Pattee v. Pattee, 744 P.2d 658, 662 (Alaska 1987), *overruled by* Nass v. Seaton, 904 P.2d 412 (Alaska 1995).

477. *See id.* at 662.

478. *See id.*

479. *See* Sharpe v. Sharpe, 366 P.3d 66, 69–72 (Alaska 2016).

under § 707(a) and § 707(b)(1), or (3) to consider factors other than the debtor's earning potential when determining whether there is cause to dismiss the case, or the petition abuses the provisions of Chapter 7.[480] To be sure, the weighing of the factors in *Sharpe* and a case with a debtor whose debts come from a major credit card company will be distinct, as the credit card company will likely suffer less from a particular debtor's discharge than a custodial parent losing a substantial amount of child support.[481] Courts are equipped to consider such a distinction in weighing the relevant factors.[482] But debtors' duties are valid contracts that the debtors entered into for some sort of gain.[483] They have received the benefit of their bargain and have a duty to uphold their end of said bargain.[484] Society can reasonably expect that those who owe debts work toward the top of their earning capacity to repay those debts off, rather than discharge them unnecessarily.[485] To be sure, each debtor's circumstance is unique, and family, health, or other obligations may limit their ability to actually work at the highest paying job for which they would otherwise be able to obtain and do.[486] Earning capacity is based on a series of factors, and courts will be able to consider all relevant factors just as they do in family law, criminal law, and many other areas of law where courts already do such analysis.[487]

The practical and moral concerns regarding current earning capacity apply to future earning capacity as well.[488] But the Code assumes that such analysis is not only possible, but feasible and important.[489] Projection in bankruptcy cases is quite common.[490] In Chapter 13 cases, one requirement for plan confirmation when the bankruptcy trustee or a creditor objects is that debtors plan to put all "projected disposable income" toward the plan.[491] The Supreme Court in *Hamilton v. Lanning* held that courts projecting the income of the debtor should not simply multiply their current monthly income by the

480. *See* 11 U.S.C. § 707(a), 707(b)(1), (3).

481. *See Sharpe*, 366 P.3d at 69.

482. *See id.*

483. *See infra* Section IV.C (discussing the common social practice of undertaking voluntary obligations for exchanged promises).

484. *See infra* Section IV.C (explaining the importance of adhering to one's contractual commitments).

485. *See infra* Section IV.C (discussing further moral obligation and society's reasonable expectations).

486. *See supra* Section IV.B (explaining how debtors' unique circumstances affect their earning capacity).

487. *See supra* Sections IV.A–B (discussing the factors relevant to assessing current and future earning capacities).

488. *See supra* Sections IV.A–B (discussing the practical concerns of current and future earning capacities).

489. *See supra* Sections IV.A–B (discussing the analyses for current and future earning capacities)

490. *See, e.g.*, Hamilton v. Lanning, 560 U.S. 505, 524 (explaining how courts are to project the monthly income of debtors).

491. 11 U.S.C. § 1325(b)(1).

number of months in the plan.[492] Instead, the Court recognized that "[w]hile a projection takes past events into account, adjustments are often made based on other factors that may affect the final outcome."[493] The Court therefore concluded that courts must adjust the debtor's projected monthly income based on known or virtually certain changes in the debtor's future income over the course of the plan.[494] The dissent correctly noted that the limiting language of "known or virtually certain" had no basis in the Code and instead opined that "[i]f the evidence indicates it is merely more likely than not that the debtor's income will increase by some minimal amount, there is no reading of the word 'projected' that permits (or requires) a court to ignore that change."[495] The dissent goes on to conclude that adjustments were never appropriate and that projected disposable income was merely the product of multiplying the debtor's current monthly income by the number of months in the plan.[496] The reasons for this conclusion are not directly relevant here, as the dissent relied on the definition of "disposable income" in § 1325(b)(2) and that definition is not relevant to interpreting § 707 as it does not use the phrase in the relevant provisions.[497] The lesson here is that courts can be called to project changes in a debtor's financial circumstances.[498] The uncertainty of the future thus presents no insurmountable barrier to this Article's interpretation of § 707.[499]

Determining future earning capacity should work in much of the same way as projected disposable income in Chapter 13 of the Code.[500] The debtor's current earning capacity will often be the basepoint for determining the future earning capacity, and the debtor's current income will often be the basepoint for determining current earning capacity.[501] Absent anticipated changes in the debtor's experience, qualifications, or the like, a court may reasonably assume that a debtor's income will not change substantially beyond the normal curve.[502] And courts may look at a debtor's past earning history, the nature of the debtor's occupation, and other relevant factors to determine whether it would be appropriate to think that the debtor's earning capacity is likely to change.[503]

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492. *Hamilton*, 560 U.S. at 524.
493. *Id.* at 514.
494. *Id.* at 524.
495. *Id.* at 527 (Scalia, J., dissenting).
496. *Id.* at 536–37.
497. *Id.* at 526.
498. *See id.* at 524 (majority opinion).
499. 11 U.S.C. § 707; *see supra* Section III.C (discussing the interpretation of § 707).
500. *See* 11 U.S.C. § 1325.
501. *See id.*
502. *See supra* Section IV.B (discussing the factors likely to impact a debtor's future income).
503. *See supra* Section IV.B (summarizing the factors generally considered in determining future earning capacity).

In some cases, there will be reasonably foreseeable changes in a debtor's future earning capacity.[504] Consider a medical resident in the last year of her residency, an electrician-to-be's apprenticeship in the final stages of his apprenticeship, or a third-year law student nearing graduation. Should these individuals file for bankruptcy, it would be foolish to think that the ability to repay their debts will not change substantially. Conversely, consider a worker nearing retirement or a laborer with a newly discovered, serious health condition. It would be equally foolish to think that these individuals will have the same earning capacity in the future.[505] These are just a few examples of how courts could foresee a change in future earning capacity.[506]

D. The Gap Between Current and Future

Any attempt to investigate a debtor's future earning capacity must keep in mind that life is a process.[507] It may often be possible for debtors to take steps to increase their income in the future.[508] But the debtor must get there. Young debtors entering their careers may be likely to see an increase in their earnings in the future, but their current earning capacity may be such that they will be insolvent before they receive the promotion, new opportunity, or the like.[509] Similarly, debtors' potential may be such that their future potential income would be enough to avoid default on current debts, but that future income will not be enough to prevent insolvency when that income materializes, as interest and new, necessary debts accrue in the meantime.[510]

Consider Minnie Medstudent. Minnie accrues $30,000 in unsecured debt in the three years following her college graduation at a rate of $10,000 per year. Her monthly disposable income is $100, which she pays toward her debt. But her interest accumulates more than $100 each month. Minnie is in the middle of her residency. Once she finishes the seven-year residency, she will likely receive a new position with a substantial pay increase. With that new position, her monthly disposable income would be an amount sufficient to repay a meaningful amount to the credit card company. But, by the time that Minnie finishes her residency, her new principal debt and accumulated interest have amassed substantially. Even with Minnie's new salary, her

504. *See supra* Section IV.B (discussing circumstances when a debtor's future earning capacity is likely to change).

505. *See supra* Section IV.B (comparing the circumstances impacting the earning capacity of young and retiring debtors).

506. *See supra* Section IV.B (discussing different examples of changes to future earning capacities).

507. *See supra* Section IV.B (discussing how debtors' future earning capacities change throughout different stages of life).

508. *See supra* Section IV.B (providing several examples of how a debtor's future earning capacity may increase through career progress).

509. *See supra* Section IV.B (explaining that young debtors currently face greater financial burdens than older debtors).

510. *See supra* Section IV.B (discussing future earning capacity and how financial burdens may impact it).

disposable income is not sufficient to keep up with the interest on her unsecured debt.

Also consider Dolly Driver. Dolly signed a seven-year lease for a car last year with a monthly payment of $400. Her disposable monthly income at the time was sufficient to cover the payment. She lost her job this month due to downsizing. She was able to find another job delivering groceries across the city, and the job requires her to use her own car. The pay for the new position is lower, so she can no longer afford more than a $250-per-month car payment. With three years of experience as a delivery driver, she knows that she can qualify for a position at another company making more substantial deliveries. That position would pay more than enough for her to afford the $400 monthly car payment. If she were to attempt to return or sell her car right now, she would still owe the car company a considerable sum because her remaining debt is greater than the current value of the car. That remaining debt would prevent her from being able to afford a less expensive car to continue her job.

If she does not sell the car, it will be repossessed and she will remain in the same predicament. Dolly is thus likely to lose her current job and consequently never gain the experience necessary for the more desirable position in the near future. If, conversely, Dolly were to file for bankruptcy, she should be able to return the car to the car loan company and discharge the difference between the amount owed to the company and the value of the car.[511] Free from the duty to repay the car loan, Dolly would be able to get a loan for a cheaper car at a more reasonable cost, thus keeping her job and earning the promotion in the future.

In the situations of both Minnie and Dolly, a court would do a disservice to the individuals and the bankruptcy system by dismissing the Chapter 7 filings.[512] The ability to repay more to debtors in the future due to increased earnings is contingent on the ability of the debtors to remain afloat until the increased income comes to fruition.[513]

The need to consider the debtor's path to solvency is well-rooted in the historical purposes of the Code.[514] The very idea of insolvency presupposes the future, as an insolvent individual is "unable to pay debts as they fall due in the usual course of business."[515] The reforms and interpretations promoted in this Article seek to align the application of the Code with the notion of

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511. *See* 11 U.S.C. § 365(a).

512. *See supra* Section II.A (explaining that the main purpose of the bankruptcy system is to provide honest but unfortunate debtors a fresh start).

513. *See* Hamilton v. Lanning, 560 U.S. 505, 533 (2010) (Scalia, J., dissenting).

514. *See supra* Part II (discussing the purposes of the bankruptcy system and the evolution of the code).

515. *Insolvent*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 605 (10th ed. 1994); *see also Insolvent*, THE AMERICAN HERITAGE COLLEGE DICTIONARY 718 (4th ed. 2002) (defining insolvent as "[u]nable to meet debts or discharge liabilities").

insolvency.[516] But in considering temporary financial strain or temporary setbacks in these situations, Chapter 7 dismissal is not the only option.[517] As the next Section will explain, conversion to Chapter 13 under § 706 is also an option if the debtor so chooses.[518]

E. Conversion as an Alternative

Dismissal is not the only solution.[519] As also mentioned immediately above, an important consideration in expanding the bankruptcy judges' approach to a debtor's ability to repay is whether the debtor could "stay afloat" until the debtor's potential is further realized.[520] The likely most common barriers to a potentially solvent debtor's future are interest, penalties, and due dates.[521] As the circumstances of Minnie and Dolly above show, a debtor with even a certain and substantial increase in earnings may not be able to keep up with such restrictions and added costs.[522] The most appropriate solution may not be an immediate discharge.[523] The discharge makes all qualifying debts forever unenforceable, providing a windfall to the future debtor despite the eventual ability to repay his or her debts.[524] The Code contains less extreme means by which the bankruptcy system can prevent insolvency and thus allow the debtor to reach the debtor's full potential.[525] During the pendency of a bankruptcy case, interest on debts generally does not accrue.[526] Debts also do not become due, and the automatic stay prevents creditors from taking adverse action because of due dates.[527] Chapter 13 may be the solution.

Conversion to Chapter 13 will often be the preferential option for all involved.[528] Chapter 13's conditional discharge and automatic stay still give the debtor the opportunity to organize his or her finances and obtain substantial relief.[529] Conversion to Chapter 13 can give creditors the

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516. *See supra* Part V (discussing approaches that better apply the Code to a could-pay debtor's situation).

517. *See* 11 U.S.C. § 707(b)(1).

518. *See id.* §§ 706, 707(b)(1).

519. *See id.*

520. *See* Hamilton v. Lanning, 560 U.S. 505, 533 (2010) (Scalia, J., dissenting).

521. *See supra* Section IV.D (discussing the impact of interest and other factors on solvency).

522. *See supra* Section IV.D (illustrating the insufficiency of salary even after substantial income increases due to accumulating interest on debt).

523. *See supra* Section IV.D (proposing an alternative approach to addressing financial strain and setbacks).

524. 11 U.S.C. §§ 523–24; *see supra* Sections IV.B–C (explaining that younger debtors would receive an unfair benefit from discharged debts following their college education).

525. *See* 11 U.S.C. §§ 706, 707(b)(1).

526. *Id.* § 502(b)(2).

527. *Id.* § 362.

528. *See id.* §§ 706, 707(b)(1).

529. *See id.* § 362.

opportunity to recover more than they would be able to under Chapter 7[530] as well as gives the creditors the opportunity to work with the court, trustee, and debtor within the bankruptcy system where there is an opportunity for fair payments to all creditors, rather than creditors racing against one another outside of the bankruptcy system.[531]

Converting the case to Chapter 13 allows debtors to survive between their current financial troubles and future solvency.[532] A Chapter 13 plan may, for example, modify the rights of holders of most secured claims, cure or waive default, reject or assign executory contracts, and include other consistent, appropriate provisions to alleviate the debtor's current burden.[533] A Chapter 13 plan has the added benefit of the requirement that the plan be proposed in good faith.[534] The capacious meaning of good faith discussed above would similarly allow the district court to deny a plan that would give the debtor a windfall by granting a discharge of the remaining debt that is disproportionate to what the debtor could repay in the future based on potential income from another job.[535] The Chapter 13 system also allows holders of allowed, unsecured claims to object to the confirmation of the plan, further protecting against windfalls.[536] The court maintains added flexibility under Chapter 13.[537] While the debtor is making payments under a plan, the trustee or the holder of an allowed, unsecured claim can move to modify the plan in order to increase "the amount of payments on claims of a particular class provided for by the plan."[538] The debtor must disclose any "reasonably anticipated increase in income" in the twelve month period following the filing of the petition,[539] as well as the debtor's tax returns for the years in which the case is pending upon request of the court, United States trustee, or party in interest.[540] The debtor must also provide a statement of the debtor's income and expenses during each tax year while the case is pending.[541] But the plan must still be feasible for the debtor.[542] The bankruptcy system and society at large also benefit from conversion from Chapter 7 to Chapter 13 in cases where there is likely to be a substantial increase in earnings in the near future.[543] The nudge towards Chapter 13 will therefore minimize the

530. *See id.* § 1325(a)(4).
531. *See id.* § 1322.
532. *See id.*
533. *Id.* § 1322(b).
534. *Id.* § 1325(a)(3).
535. *See id.* § 1325.
536. *Id.* § 1325(b)(1).
537. *Id.* § 1329(a)(1).
538. *Id.* § 1329(a)(1).
539. *Id.* § 521(a)(1)(B)(vi).
540. *Id.* § 521(f)(1)-(3).
541. *Id.* § 521(f)(4).
542. *Id.* § 1325(a)(6).
543. *See id.* § 707.

incentive for those with minimal assets, but a substantial future increase in income, from obtaining a head start.[544]

However, a snapshot analysis still presents a barrier to preventing the windfalls identified in this Article.[545] If the current monthly income of the debtor and the debtor's spouse is below the median family income for the applicable state and household size, "[t]he plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period" not to exceed five years.[546]

Finally, it is worth noting that § 707(a) does not give courts the power to convert the case to Chapter 13.[547] But debtors may convert the petition under § 706 if they otherwise qualify to file a petition under Chapter 13.[548] A court that concludes that Chapter 7 is not appropriate for a debtor may announce its intent to dismiss the case but delay the order to dismiss in order to give the debtor the opportunity to convert the petition.[549] This practice already exists.[550]

V. APPLYING THE CODE TO COULD-PAY DEBTORS

With the best interpretation of these relevant provisions in mind, this Part examines three relevant provisions of § 707 to determine whether and to what extent the Code allows courts to dismiss or convert Chapter 7 petitions based on debtors' current and future earning capacity.[551] Sections 706(a), 707(a), and (b)(3)(B) serve as tools for courts to restore the principal purpose of the bankruptcy system by preventing could-pay debtors from taking advantage of the system.[552] This Part determines that one's ability to repay one's debts constitutes cause under the Code, and that a debtor's earning capacity determines said ability.

A. Potential Earning Capacity as Abuse

The means test relies on a snapshot analysis, looking at only the debtor's financial situation at the time of the filing of the petition and the recent past

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544. *See id.*
545. *See id.* § 1322(d)(2).
546. *See id.*
547. *See id.* § 707(a).
548. *Id.* § 706.
549. *See id.*
550. *See, e.g.*, *In re* Scobee, 269 B.R. 678, 679 (Bankr. W.D. Mo. 2001) (notifying parties of his intent to dismiss the case but delaying the order by thirty days to allow debtor to move to convert the case); Witcher v. Early (*In re* Witcher), 702 F.3d 619, 621 (11th Cir. 2012) (noting that the bankruptcy judge "gave the Witchers [fourteen] days to convert their case to [C]hapter 13" when the judge determined that the debtors' Chapter 7 petition demonstrated abuse).
551. *See* 11 U.S.C. § 707.
552. *See id.* §§ 706(a), 707(a), (b)(3)(B).

and based on the debtor's actual income during that time.[553] The totality-of-the-circumstances test does not have such a limitation.[554] The text of § 707(b)(3)(B) refers to the totality of the circumstances of the debtor's financial situation.[555] It is noteworthy that the Code does not refer to the debtor's "current" financial situation.[556] Such conditions and circumstances must fairly include reasonably anticipated changes that will have an effect on the debtor's future financial status.[557] Though, for example, the boulder has not yet rolled over Indiana Jones, his situation is dangerous when the boulder is impending, for he is presently in a state of danger that he would not be in were the boulder not approaching him.[558] It is thus fairly stated that events or things impending are part of a situation.[559] The bankruptcy judge, analyzing the debtor's financial situation under the totality-of-the-circumstances test, must therefore consider reasonably anticipated changes in earning capacity.[560]

For the same reasons that debtors' abilities to repay their debts constitutes cause under § 707(a) for dismissal,[561] so too do these reasons constitute abuse of the Code. Recall that to abuse something means to misuse something, to use something improperly, excessively, or unreasonably.[562] Further recall that to determine whether something is being used in such a manner, we must understand its purpose.[563] The purpose of the bankruptcy system is to give the honest but unfortunate debtor a fresh start.[564] These could-pay debtors are not receiving a fresh start, are not honest, and are not unfortunate.[565] Their potential discharge would abuse the provisions of Chapter 7, namely the discharge provision,[566] and their financial circumstances show that all elements are thus met for § 707(b)(3)(B), so the courts should dismiss the case or allow the debtor to convert the case to Chapter 13 if doing so would otherwise be appropriate.[567]

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553. *Id.* § 707(b).
554. *See id.* § 707(b)(3)(B).
555. *Id.*
556. *See id.*
557. *Id.*
558. RAIDERS OF THE LOST ARK (Lucasfilm Ltd. 1981).
559. *See also* Witcher v. Early (*In re* Witcher), 702 F.3d 619, 622 (11th Cir. 2012) (noting that § 707(b)(3)(B)'s broad reference to "the totality of the circumstances . . . of the debtor's financial situation," was "surely intended to include the debtor's ability to pay his or her debts") (quoting 11 U.S.C. § 707(b)(3)(B) (ellipsis original)).
560. *Id.*
561. *See infra* Section V.B (discussing what constitutes abuse of the Bankruptcy Code).
562. *See Webster's Definition of Abuse*, *supra* note 206.
563. *See supra* Part III.B (discussing the importance of statutory purpose in determining abuse of statutes).
564. Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
565. *See, e.g.*, *supra* Part IV (discussing abuse of the bankruptcy system by dishonest debtors).
566. 11 U.S.C. § 727.
567. *See id.* § 707(b)(3)(B).

While the best reading of the provision is that a debtor's earning capacity may support dismissal or conversion under the provision, it is important to note that § 707(b) contains limitations for stopping could-pay debtors from abusing the Code under either provision of § 707(b)(3).[568] Section 707(b)(6)–(7) partially shields below-median debtors from dismissal or conversion under Chapter 13.[569] If the debtor's current monthly income falls below a certain threshold, no party may move to dismiss the petition under § 707(b)(2), and only the court, United States trustee, and the bankruptcy administrator may move to dismiss the case under § 707(b) generally.[570] Therefore, creditors may often be unable to move to dismiss or convert the case of a could-pay debtor under § 707(b), so its effectiveness is limited, especially before bankruptcy judges who do not agree with the conclusions of this Article.[571] Thus, § 707(a) will often be the best course of action for enforcing the Code against could-pay debtors.[572]

B. Earning Capacity as Cause

Section 707(a) allows courts to dismiss a Chapter 7 case for cause.[573] As the Fifth Circuit recognized in *In re Krueger*,[574] "cause" is a historically broad concept that encompasses "any reason cognizable to the equity power and conscience of the court as constituting an abuse of the bankruptcy process."[575] The paradigmatic instances of abuse under § 707(a) involve fraud, concealment, and violations of the procedures of the Code and Federal Rules of Bankruptcy Procedure.[576] Some examples include pre-petition conduct, such as inordinate and extravagant purchases, transfers, or agreements made on the eve of bankruptcy.[577] These actions constitute cause because the debtor is using the Code to unreasonably eschew legally binding promises.[578] For example, we do not want a debtor to make luxurious purchases on the eve of bankruptcy, because it is unfair to creditors and is an abuse of the bankruptcy system—those debtors are not unfortunate; they made luxurious purchases in anticipation of not repaying their debts.[579]

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568. *Id.* § 707(b).
569. *Id.* § 707(b)(6)–(7).
570. *Id.* § 707(b).
571. *See id.*
572. *See id.* § 707(a).
573. *Id.*
574. *In* re Krueger, 812 F.3d 365 (5th Cir. 2016).
575. *Id.* at 370 (quoting Little Creek Dev. Co. v. Commonwealth Mortg. Co. *(In re* Little Creek Dev. Co.), 779 F.2d 1068, 1072 (5th Cir. 1986)).
576. 11 U.S.C. § 707(a).
577. *See, e.g.*, *In re* Spraggins, 316 B.R. 317, 321 (Bankr. E.D. Wis. 2004) ("[T]here is something nefarious about purchasing a luxury item on credit on the eve of bankruptcy . . . .").
578. *See id.*
579. *Id.*

Case law recognizes other forms of Chapter 7 cases that are improper despite not being technical violations of the law.[580] When the debtor does not have a series of conventional debts but instead has one creditor and it appears that the debtor is using bankruptcy as a tool to prevent collection of that debt, courts have dismissed such cases as bad faith, despite the Code having no formal requirement that a debtor owe multiple creditors.[581]

A debtor's future ability to repay, based on current or future earning capacity, constitutes cause under this section.[582] There are, of course, numerous individuals entitled to bankruptcy relief and whose circumstances render them unable to live under the repayment obligations of massive debt.[583] But our legal system also recognizes the role that contracts play as essential components in our lives.[584] Contract law plays a supporting role in society, "recogniz[ing] and reinforc[ing] the social practice of undertaking voluntary obligations."[585]

To declare bankruptcy is to make a moral choice to take back one's promise.[586] In declaring bankruptcy, creditors may get more than they would otherwise get from insolvent debtors, but they are also often getting less than they would get had the contract been fully or substantially performed.[587] As Charles Fried explained:

> An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust. [588]

Randy Barnett has also explained that "the duty to adhere to one's contractual commitments is part of the public morality of duty and is a

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580. *See, e.g.*, Indus Ins. Serv., Inc. v. Zick (*In re* Zick), 931 F.2d 1124, 1128–30 (6th Cir. 1991) (listing factors bankruptcy courts use to determine bad faith); *In re Brown*, 88 B.R. 280, 283–84 (Bankr. D. Haw. 1988) (noting that a debtor with a single creditor may still act in bad faith when the debt is ignored but other expenditures are made).

581. *See, e.g.*, *In re Zick*, 931 F.2 at 1128–30 (stating good faith is inherent for bankruptcy purposes); *In re* Brown, 88 B.R. at 283–84 (noting that bankruptcy was never intended to be a shelter for calculated individuals).

582. *See Brown*, 88 B.R. 280 at 284.

583. *Id.*

584. *See* United States v. Alabama, 691 F.3d 1269, 1293 (11th Cir. 2012).

585. Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 933 (1982).

586. *See, e.g.*, Zavelo v. Reeves, 227 U.S. 625, 629 (1913) (explaining that a moral obligation remains even after debt has been discharged through bankruptcy).

587. *See* Wilcox v. Anchor Wate Co., 164 P.3d 353, 357 (Utah 2007).

588. CHARLES FRIED, CONTRACT AS PROMISE 16 (1981) (footnotes omitted).

requirement of justice."[589] As Raz has similarly explained, "[o]ne protects the practice of undertaking voluntary obligations by preventing its erosion—by making good any harm caused by its use or abuse."[590] The "purpose of contract law *should* be not to enforce promises, but to protect both the practice of undertaking voluntary obligations and the individuals who rely on that practice."[591] Every state in our nation recognizes that it is a legitimate means of the government to enforce contracts.[592] Our federal system recognizes the importance of contracts, and in certain cases the federal government has gone so far as to waive its own sovereign immunity for contractual disputes.[593] The Code itself—though designed to modify and eliminate contracts in a variety of situations—recognizes the presumptive enforceability of contracts with every requirement and exception embedded in the Code.[594]

The differences between those theorists seeking a unified theory of contract law do not detract from the most basic assumptions underlying those theories.[595] Whether one sees contract law as based on promise, consent, or a mix of tort and restitution,[596] both our legal system and common morality see as socially valuable enforcing contracts or remedying breaches. It is clear that a contract creates a duty.[597] For many, the duty is to carry out one's obligations in a contract, either because one made a promise or because one consented to be legally bound.[598] For others, it may be the moral duty to attempt to make whole the other party after a breach through damages or restitution, even if there is no a moral duty to fulfill the terms of the underlying contract.[599] Further, the creditors themselves may not be the only ones to suffer harm from bankruptcy.[600] There is a "bankruptcy tax" that individuals pay.[601] Creditors realize that bankruptcy is a risk, so they increase

589. Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 664 (2011).

590. Raz, *supra* note 585.

591. *Id.*

592. *See* 42 U.S.C. § 1981.

593. *See, e.g.*, 43 U.S.C. § 390 (providing the United States agrees to be joined as a necessary party in cases arising out of federal reclamation law).

594. *See* Mortg. Corp. of the S. v. Bozeman, 57 F.4th 895, 909 (11th Cir. 2023).

595. *See* Kaltman v. All Am. Pest Control, Inc., 281 Va. 483 (Va. 2011).

596. For a primer on this debate, *see generally* Raz, *supra* note 585 (explaining the importance of enforcing voluntary obligations); Barnett, *supra* note 589 (explaining the morality of adhering to one's voluntary promises); P.S. ATIYAH, PROMISES, MORALS, AND LAW (1981) (rejecting the utilitarian view of promises); FRIED, *supra* note 588 (arguing one is morally bound to keep one's promises).

597. *See* Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508, 510 (1947).

598. *Compare* FRIED, *supra* note 588 (arguing contracts are promises that create moral obligations), *with Barnett*, *supra* note 589 (arguing contracts are instruments that create consent to be legally bound).

599. *See* GRANT GILMORE, THE DEATH OF CONTRACT (1974); RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 56 (1972).

600. *See* Jue v. Liu (*In re* Liu), 611 B.R. 864, 874–75 (B.A.P. 9th Cir. 2020).

601. 1 H.R. REP. NO. 109-31, at 2 n.1, 4–5 (2005).

interest on all loans to offset the amount of debt owed to them that becomes uncollectable as a result of a bankruptcy discharge.[602]

There are countervailing principles that undermine and negate our desire for the government to enforce all contracts in certain situations.[603] Bankruptcy is one such exception, akin to an implied clause in every contract.[604] Lurking in the background of every agreement is the common understanding that an honest but unfortunate debtor may be able to amend or void the contract.[605] Unforeseen expenses and loss of income, as well as the myriad other hurdles that negatively affect one's financial situation may lead to insolvency.[606] Insolvent, a debtor has no meaningful recourse by which to fulfill one's obligations.[607] No matter how morally strong or legally enforceable those obligations are, neither law nor morality may make the impossible possible.[608] Our moral obligations do yield to practicalities. Rather than letting creditors race to the courthouse to demand their pound of flesh, giving one or a few creditors the meager remains of the insolvent debtor's assets, we have decided to set up a complex system of ordering and spreading around some of an insolvent debtor's assets, thus giving the debtor a fresh start.[609] Debtors are able to give what they can, and creditors may get something in return without racing to judgment and competing with other creditors.[610] The debtor, equipped with minimal assets exempted from the liquidation and unburdened by most of the prior debt, may return to the marketplaces and continue living.[611] This debtor usually ought not to be considered to have committed an immoral act.[612] This debtor is certainly not considered to have abused the provisions of the Code, acted in bad faith, or acted in any way so as to give the courts cause to dismiss the case or deny a discharge.[613]

But, in the case of the could-pay debtor, our common moral understanding that one's duty to repay one's debts ought not evanesce simply because bankruptcy relief is available.[614] The could-pay debtor may have temporary financial strain, but the debtor is not insolvent.[615] The could-pay

602. *See* The Editorial Board, *Trump's Price Controls on Credit Cards*, WSJ OPINION (Sep. 22, 2024, 4:23 PM ET), https://www.wsj.com/opinion/donald-trump-credit-card-interest-cap-10-percent-new-york-rally-4f0dd47b.

603. Raz, *supra* note 585, at 935.

604. *See* 11 U.S.C. § 365.

605. *See id.*

606. *See also id.* § 101(32) (defining insolvent).

607. *See generally id.* (describing a party experiencing financial difficulties and who may seek recourse under the Code).

608. *See* Stagg v. Spray Water Power & Land Co., 171 N.C. 583, 595 (1916).

609. *See* 11 U.S.C. § 726.

610. *See id.*

611. *See id.* § 522.

612. *Id.* § 727.

613. *Id.*

614. *See id.* § 707(b).

615. *See id.*; *id.* § 101(32).

debtor has solutions outside of bankruptcy and similar actions and is thus neither insolvent nor unfortunate.[616] When the debtor files Chapter 7 bankruptcy, the debtor is dishonest.[617] The could-pay debtor violates the virtue of fidelity.[618]

The court's powers in the Code must also be squared with the reality that the Code does create rights.[619] Here, we have the legal right to liquidate one's non-exempt assets in exchange for a general discharge on most of one's unsecured debts.[620] This Article has described the importance of promises to society as between creditors and debtors.[621] There are other promises also fundamental to our legal system: the promises that the government makes to its people.[622] By setting up a bankruptcy system, the government has made a promise in the form of the right to make use of use the system.[623] But the limits in the Code limit those rights.[624]

The concern here closely resembles perennial problems in tax ethics.[625] Oliver Wendell Holmes famously wrote to Learned Hand that "the very meaning of a line in the law is that you may intentionally go as close to it as you can if you do not pass it."[626] Learned Hand responded that there was "nothing sinister in so arranging affairs as to keep taxes as low as possible."[627] These statements reflect an important reality in our legal system—that the system is full of rights that law-abiding citizens are generally free to exercise.[628] The Bankruptcy Code is full of such rights.[629] There are, however, clear and important differences between the Tax and Bankruptcy Codes.[630] The Tax courts have never been recognized as courts of equity, and the Tax Code never uses the phrase "for cause" when giving power to the Tax Code.[631] The Tax Code is not a "gift" in a sense that the bankruptcy system is, and taxes are an obligation rather than an opportunity.[632] And even

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616. *See* Miller v. FDIC, 428 B.R. 437, 446 (Bankr. N.D. Ohio 2010).

617. *See id.*

618. *In re* Rahim, 442 B.R. 578, 584 (Bankr. E.D. Mich. 2010).

619. *See* United States v. Pepperman, 976 F.2d 123, 131 (B.A.P. 3rd Cir. 1992).

620. 11 U.S.C. § 727.

621. *See* FRIED, *supra* note 588.

622. *See* U.S. CONST. amend. XIV.

623. *See* 11 U.S.C. § 301.

624. *See id.* § 109.

625. *See* Bret N. Bogenschneider, *Tax Ethics and Legal Indeterminacy*, 4 BUS. ENTREPRENEURSHIP & TAX L. REV. 1, 3 (2020).

626. *Id.* at 2 (internal quotation marks omitted).

627. *Id.* at 12.

628. *See, e.g.*, U.S. CONST. amend. I (stating that Congress shall make no law abridging free speech).

629. *See supra* Section II.A. (explaining that the Bankruptcy Code gives an honest but unfortunate debtor a right to a fresh start).

630. *See, e.g.*, Leandera Lederman, *Equity and the Article 1 Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357, 368 (2001) (discussing the extent of a tax court's equitable remedies); 26 U.S.C. § 1 (discussing income tax obligations).

631. *See* sources cited *supra*, note 630 (discussing the Tax Code).

632. *See* 26 U.S.C. § 1.

accepting that the Code creates a right to file a Chapter 7 petition, the provisions discussed in this Article are restrictions on that right.[633]

The *Marrama* dissenters correctly recognized the importance of rights in understanding the Code and that broad power, especially as codified in § 105 or inherent to the nature of the judicial power, must yield to the express provisions of the Code.[634] Where rights are concerned, that limitation must be even more stringent, for it is not within the judicial power to restrict or deny rights Congress created based on a judge's subjective policy preferences or even the perceived goals of Congress where not promulgated as restrictions in the law.[635] The often-referenced "honest but unfortunate debtor"—a notion integral to the *Marrama* majority's reasoning—is not an express requirement in the Code.[636] Unlike § 706(a), the provision at issue in *Marrama*, § 707(a) operates as an express limitation on the right of the debtor.[637] Section 707(a) contains an express limitation on the right of a debtor to seek discharge under Chapter 7.[638] The *Marrama* dissenters recognized that the Code elsewhere did provide similar restrictions on the right to convert.[639] Section 707 is one such section.[640]

In summary, "cause" under § 707(a) must be given the broad meaning that the courts in *Krueger* and *Piazza* gave it.[641] But, as Judge Posner recognized, courts need not get bogged down in these separate and ultimately unhelpful labels like "bad faith" and "abuse" and then attempt to create new tests under those labels—doing so adds unhelpful complexity to a word that otherwise has an expansive meaning that gives a great deal of discretion to bankruptcy judges.[642] Cause is "any reason cognizable to the equity power and conscience of the court as constituting an abuse of the bankruptcy process."[643] Whether courts further label it bad faith, abuse, or something else, an appropriate label for the prospect of giving debtors with the ability to repay their debts access to Chapter 7 is simply "cause."[644] The could-pay debtor filing a Chapter 7 petition is attempting to achieve a head start in life by eschewing otherwise valid debts for which the debtor received the benefit of the bargain.[645] Absent insolvency, there is no valid ground on which the debtor is entitled to receive such a windfall, for the could-pay debtor is

633. *See supra* Sections III.A–B (discussing limitations imposed in §§ 707 and 706).
634. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 382–83 (2007) (Alito, J., dissenting).
635. *See id.* at 379.
636. *Id.* at 373–75.
637. *See* 11 U.S.C. § 707(a) (describing when a court may dismiss a case).
638. *Marrama*, 549 U.S. at 382–83 (Alito, J., dissenting).
639. *Id.* at 376–77 (citing 11 U.S.C. §§ 706(b), 1112(b), 1208(b), 1307(c)).
640. *See* Krueger v. Torres (*In re* Krueger), 812 F.3d 365, 370–71 (5th Cir. 2016); Piazza v. Nueterra Healthcare Physical Therapy, LLC (*In re* Piazza), 719 F.3d 1253, 1260–62 (11th Cir. 2013).
641. *See Krueger*, 812 F.3d at 370–71; *Piazza*,719 F.3d at 1260–62 (11th Cir. 2013).
642. *In re* Schwartz, 799 F.3d 760, 763 (7th Cir. 2015).
643. *Krueger*, 812 F.3d at 370.
644. *See id.*
645. *See supra* Part IV (describing how the focus on can-pay debtors leaves room for abuse).

neither honest nor unfortunate.[646] The could-pay debtor is thus violating the principal purpose of the Bankruptcy Code, which serves no legitimate bankruptcy purpose and is a valid reason cognizable to the equity power and conscience of the court to dismiss the case or perhaps give the debtor an opportunity to convert the case to Chapter 13.[647]

VI. CONCLUSION

In an effort to effectuate the bankruptcy system's principal purpose, Congress tackled perceived abuses of the system by can-pay debtors by creating the means test.[648] To further effectuate the Code's principal purpose, however, courts must focus on another group—could-pay debtors.[649] As financial burdens increase and the up-front costs of life surmount, young debtors are particularly prone to begin seeking a Chapter 7 discharge as a means by which to get a head start in life.[650] Influencers and others seeking to reduce the stigma of bankruptcy have pursued laudable goals but opened the door for the proliferation of abusive practices.[651]

The means test uses the debtor's previous six months of actual income to determine whether the grant of a discharge would abuse the provisions of Chapter 7.[652] This "snapshot" analysis has no effect on could-pay debtors when their current, actual income is quite low and can unfairly restrain those who are insolvent because their earning capacity will likely decrease in the near future.[653] The means test alone will force them to wait and let their financial situation worsen unnecessarily before filing for bankruptcy.[654] But a debtor who could earn more, now or in the future, is not unfortunate and, should they file Chapter 7 bankruptcy, is not honest.[655] Based upon one's skill, aptitude, experience, and qualifications, they could be working to maximize their potential to pay off their debts rather than seeking a discharge.[656] The debtor with the capacity to earn more now or in the future is not insolvent, and thus is not entitled to the benefit that a discharge after

646. *See supra* Section II.B (mentioning that a could-pay debtor is not an honest but unfortunate debtor).

647. *See supra* Section II.A (describing the purpose of the Bankruptcy Code as being to help honest but unfortunate debtors).

648. *See supra* Section III.C (discussing Congress's intent for instituting the means test).

649. *See supra* Part IV (explaining why courts must focus on could-pay debtors).

650. *See supra* Section IV.A (discussing how financial burdens make Chapter 7 appealing).

651. *See supra* Section II.B (discussing how influencers have changed public perception of bankruptcy).

652. *See supra* Part I (discussing how the means test measures an individual's previous six months of income).

653. *See supra* Section IV.A (analyzing the shortcomings of the means test's snapshot analysis).

654. *See supra* Section IV.A (explaining how the means test does not look at all circumstances of a debtor's financial situation).

655. *See supra* Section II.B (arguing that a could-pay debtor is neither honest nor unfortunate).

656. *See supra* Section IV.A (explaining that the means test incentivizes reducing income rather than working to repay debts).

liquidation that Chapter 7 offers.[657] When they choose to do so, their actions constitute cause for which a bankruptcy judge can dismiss the case.[658] Their filing of the petition was also done in bad faith, and their financial circumstances demonstrate that a discharge would abuse the provisions of Chapter 7, both as an institution and under the discharge provision specifically.[659] The tools to prevent could-pay debtors from violating the Code and the principal purpose of the bankruptcy system thus already exist in §§ 706 and 707; bankruptcy judges just need to enforce them.[660] And they have the tools to determine when such actions are afoot.[661]

But bankruptcy judges must be careful to remember that even debtors with the capacity to repay their debts in the future must have the earning capacity by which to survive until that future status of solvency.[662] The bankruptcy judges must thus consider the debtors' financial trajectories and not dismiss the debtors' cases if they are unable to forge a path ahead without an immediate discharge.[663] Luckily, dismissal is not the only option.[664] If the bankruptcy judge concludes that liquidation would be abusive such that the prospect constitutes cause for dismissal or constitutes abuse of Chapter 7's provisions, courts should give debtors the opportunity to convert their cases to Chapter 13 if otherwise appropriate.[665]

We thus conclude where we started, by recognizing that "[t]he principal purpose of the Bankruptcy Code is to grant a "fresh start" to the "honest but unfortunate debtor."[666] Limiting access to bankruptcy relief to those unable to repay their debts, based on their current and future earning capacity, will do just that.[667]

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657. *See supra* Section IV.A (discussing how a debtor with the ability to earn more income but who does not act on it, benefits from and abuses the bankruptcy system).

658. *See* Krueger v. Torres (*In re* Krueger), 812 F.3d 365, 370 (5th Cir. 2016).

659. *See* 11 U.S.C. § 727.

660. *See supra* Part III (discussing §§ 706 and 707).

661. *See supra* Part III (explaining how courts may use §§ 706 and 707 to limit abuse within Chapter 7).

662. *See supra* Section IV.A (explaining that current earning capacity is one piece of a well-rounded analysis of whether a debtor is honest but unfortunate).

663. *See supra* Section IV.B (explaining that courts must consider future earning capacity).

664. *See supra* Section IV.E (discussing that conversion to another chapter of the Bankruptcy Code is an option).

665. *See supra* Section IV.E (explaining that conversion to Chapter 13 is an option for courts and debtors).

666. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 489 U.S. 279, 286–87 (1991)).

667. *See supra* Part IV (explaining how examining future and current earning capacity best enforces the text of the Bankruptcy Code).