

***The Price of Inequality* and the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act**

I. INTRODUCTION

In *The Price of Inequality*, Nobel Prize winning economist Joseph E. Stiglitz explores the growing problem of wealth inequality in the United States.¹ Stiglitz, riding the momentum of the Occupy Wall Street protests and “the 99 percent” political slogan,² argues that economic and political factors have worked in concert to increasingly help shift wealth from the middle and lower classes to those at the top of the American socioeconomic ladder. With traditional economic models and political theory, Stiglitz analyzes the nature of wealth inequality by examining its causes, potential ramifications if policymakers continue to ignore it, and solutions to help reverse the trend.³

Overall, Stiglitz provides a searing indictment of the top 1 percent of America’s socioeconomic ladder, as well as the government officials who pander to the requests of the wealthy. One of the central tenants of his book is that political factors, such as policy decisions laden with inherent trade-offs, have contributed to the growing inequality problem just as much as economic factors. Together, these forces have continually shifted wealth from the middle and lower classes up the ladder to the elites of society.

In *The Price of Inequality*, Stiglitz’s contribution to the political discourse should not be understated. He has offered policymakers and individuals alike a comprehensive explanation of many of the economic problems plaguing the American system, without relying too heavily on

1. See generally JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* (2012) [hereinafter STIGLITZ]. Stiglitz is an economics professor at Columbia University. He is a recipient of the Nobel Prize in Economics (2001) and the John Bates Clark Medal (1979).

2. See generally Ezra Klein, *Who are the 99 Percent?*, WASHINGTON POST WONKBLOG (Oct. 4, 2011, 9:16 AM), http://www.washingtonpost.com/blogs/ezra-klein/post/who-are-the-99-percent/2011/08/25/gIQAt87jKL_blog.html (explaining the Occupy Wall Street protests through a series of short, individual anecdotes).

3. See generally STIGLITZ, *supra* note 1.

technical jargon. Stiglitz succeeds in explaining complex and interrelated issues in an understandable and accessible manner. However, because Stiglitz writes for a broad audience, he provides little detailed analysis of the legal issues associated with wealth inequality. By building on Stiglitz's arguments, this Review contends that the legal framework of bankruptcy laws in America was designed by the credit industry for the credit industry, furthering inequality rather than alleviating it. This Review identifies the strengths of Stiglitz's arguments by applying his theories on rent seeking, lobbying and campaign contributions, and regulatory capture to American bankruptcy laws.

Part II will give a short overview of wealth inequality in America and how it compares with other advanced industrialized countries around the world.⁴ Part III will explain why increased wealthy inequality is a problem and should concern policymakers.⁵ Part IV will detail the causes of the problem as identified by Stiglitz, with special emphasis on the political factors that shape the economic landscape.⁶ Part V will apply Stiglitz's theories to analyze the sweeping amendments to the United States bankruptcy laws in 2005.⁷ Finally, Section VI will briefly explore some of Stiglitz's proposed solutions to the problem of wealthy inequality in America, while also suggesting additional recommendations.⁸

II. THE NATURE OF THE AMERICAN INEQUALITY PROBLEM

A. *Trends in Income and Wealth Inequality*

Relying on economic indicators and leading reports, Stiglitz concludes that American wealth and income distribution have grown increasingly unequal over the past few decades.⁹ Two related trends illustrate this point: (1) the stagnation of, and even decline in, real income (adjusted for inflation) faced by the middle and lower class; and

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Part V.

8. *See infra* Part VI.

9. STIGLITZ, *supra* note 1, at 2-3.

(2) the explosion of wealth captured by the top 1 percent of income earners.¹⁰ Intuitively, if the middle and lower classes see no improvement in real wages¹¹ and the wealthy continue to become wealthier, the gap between the two groups will inevitably grow.¹²

According to the U.S. Census Bureau's income report, in 1997 the median household income (measured in 2010 dollars) was \$50,123.¹³ In 2010, the median household income had actually dropped to \$49,445.¹⁴ After accounting for inflation, the average American household was actually *worse off* than it was thirteen years previously.¹⁵ These stagnating and declining real wage trends continue even over a longer period.¹⁶ And while the middle and lower classes have seen no improvements to real income, America's elites have continued to flourish. A periodically updated study conducted by Thomas Picketty and Emmanuel Saez concluded that in 1979 the ratio of the average household income in the top 1 percent to that of the bottom 90 percent was 14:1.¹⁷ By 2010, this ratio had tripled to 42:1.¹⁸

When considering wealth inequality as opposed to income inequality, the distribution is even more skewed.¹⁹ According to a study conducted by the Economic Policy Institute, in 2009 the wealth held by the wealthiest 1 percent of households was 225 times greater than that held by the median American household.²⁰ Huge concentrations of wealth is perhaps more problematic than income inequality because it allows larger gains from wealth holding through unearned or capital income.²¹ This enables elites to be less reliant on wages as a primary

10. *Id.* at 3.

11. See generally Thomas Picketty & Emmanuel Saez, *Income Inequality in the United States: 1913-1998*, 118 Q. J. OF ECON. 1 (2003) (indicating that some areas of the country have actually seen a declining of real income, rather than just stagnation).

12. See STIGLITZ, *supra* note 1, at 2-3.

13. Table H-9: Type of Household—All Races by Mean and Median Income: 1980 to 2011, U.S. CENSUS BUREAU (Sept. 12, 2011), <http://www.census.gov/hhes/www/income/data/historical/household/>.

14. *Id.*

15. See *id.*

16. See *id.*

17. Picketty & Saez, *supra* note 11, at 27.

18. STIGLITZ, *supra* note 1, at 3.

19. *Id.* at 2.

20. Lawrence Mishel & Josh Bivens, *Occupy Wall Streeters are Right about Skewed Economic Rewards in the United States* 1 (Econ. Policy Institute, Briefing Paper No. 331, 2011).

21. See *id.* at 6.

income source and further entrenches an “idle” elite class.²² However, regardless of whether it is measured through income or wealth, Stiglitz argues that the inequality trends are clearly present.²³ For the purposes of this analysis, unless otherwise stated, when the term “inequality” is used, it is referring to both income and wealth distribution.

B. The Great Recession Further Entrenched Inequality Trends

While these trends have been in place for the last several decades, the recent Great Recession has exacerbated the problem and has further entrenched disparate wealth distribution in the United States.²⁴ According to Stiglitz, the Great Recession contributed to the furthering of inequality through two distinct forces: (1) the significant loss of wealth through the nationwide devaluation of housing; and (2) a smaller relative reliance on wages by the wealthy.²⁵

The bursting of the housing bubble was devastating to millions of Americans.²⁶ According to a report conducted by The Center for Responsible Lending, between the beginning of the foreclosure crisis and November 2011, 2.7 million Americans had their homes foreclosed on, with another 3.6 million more at risk of foreclosure in the near future.²⁷ Any home equity that these families had been able to amass prior to foreclosure, which in many instances significantly contributed to the family’s overall wealth, was wiped out.²⁸ Those who were lucky enough to avoid foreclosure still often faced a mortgage that was underwater, owing more on the house than it was worth on the market.²⁹ Since the middle and lower classes held most of their wealth in housing rather than other investment instruments, these effects were felt most strongly further down the socioeconomic ladder.³⁰

22. *See id.* at 6-7.

23. STIGLITZ, *supra* note 1, at 2-3.

24. *Id.* at 3.

25. *Id.* at 3, 11.

26. *See generally* DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES – EXECUTIVE SUMMARY (2011), *available at* <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-exec-summary.pdf>.

27. *Id.* at 2.

28. STIGLITZ, *supra* note 1, at 13.

29. *Id.*

30. *See id.* at 3; *see also* Walter Buiter, *Housing Wealth Isn’t Wealth* 18 (Nat’l Bureau

As the 99 percent faced the brunt of the economic consequences from the financial meltdown, Stiglitz argues that the top 1 percent has been relatively isolated from the adverse economic effects.³¹ As hinted at above, the wealthy are relatively less reliant on wages and housing value compared to the middle and lower class. In fact, among the top 1 percent, 85 percent held some sort of financial asset (stock, mutual fund, trust funds, etc.) as compared to only 23 percent of the middle class.³² Compared to the lower class, this disparity is even worse.³³ Put another way, whereas 77 percent of the middle class rely strictly on wages, income, and housing valuation, only 15 percent of the wealthy heavily rely on these types of earnings. Because of their ability to better diversify, the wealthy have not been decimated by the collapse of the housing to the same extent as the rest of the population.

In addition to being relatively isolated from the housing debacle, Stiglitz contends that the wealthy have benefited almost exclusively from the economic recovery coming out of the recession.³⁴ When the financial sector began its meltdown in the fall of 2008, stock and housing prices dropped considerably.³⁵ While the housing prices have remained depressed, the stock market has seen a steady and substantial recovery. As discussed above, the top 1 percent owns a disproportionate amount of financial assets, specifically corporate stock.³⁶ While the middle and lower classes saw very little benefit from this recovery, the elites have been well on their way to recovering their pre-recession levels of wealth. To illustrate this point even further, the top one percent of Americans gained ninety-three percent of the additional income created in 2010.³⁷

of Econ. Research, Working Paper No. 14204, 2008) (“A fall in house prices due to a change in its fundamental value redistributes wealth from those long housing (for whom the fundamental value of the house they own exceeds the present discounted value of their planned future consumption of housing services) to those short housing (from whom the fundamental value of the house they own is less than the present discounted value of their planned future consumption of housing services.”).

31. STIGLITZ, *supra* note 1, at 3.

32. Edward Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle Class Squeeze—An Update to 2007* 18 (Levy Econ. Institute, Working Paper No. 589, 2010).

33. *Id.*

34. STIGLITZ, *supra* note 1, at 3.

35. *Id.*

36. Wolff, *supra* note 32, at 15-17.

37. Thomas Picketty & Emmanuel Saez, *Income Inequality in the United States: 1913-*

C. *American Inequality Compared to Other Industrialized and Non-Industrialized Countries*

While the American inequality trends are striking in a vacuum, they become even more pronounced when compared to other industrialized countries—and even to some non-industrialized countries.³⁸ For international comparison purposes, the most often used measurement of inequality is the Gini coefficient.³⁹ The Gini coefficient attempts to measure national inequality levels through a ratio: a measure of 1 would indicate complete inequality and a measure of 0 would reflect perfect equality.⁴⁰ Stiglitz concludes that the most equal societies have a coefficient of around .3; the most unequal nations have a coefficient of .5 and above.⁴¹

According to the CIA World Fact Book, the United States Gini coefficient in 2010 was .47.⁴² This coefficient makes the United States the 42nd most unequal country in the world, falling just between Uruguay (41) and Cameroon (43).⁴³ Countries like Uzbekistan (78), India (79), and Spain (104) are all significantly more equal than the United States.⁴⁴ Furthermore, when compared to the European Union member countries and other advanced industrialized countries, the United States had the *most* unequal distribution.⁴⁵

In sum, wealth and income inequality in the United States has been a problem for decades and according to Stiglitz, the trends are only worsening. The middle class of America is getting hollowed out as

1998 2012 Updates, <http://elsa.berkeley.edu/~saez/> (last visited Feb. 5, 2013).

38. STIGLITZ, *supra* note 1, at 21-22.

39. While comparison between different countries is never an exact science, the Gini coefficient is the measure most used by the United Nations and its Development Program and is useful for general international comparisons.

40. STIGLITZ, *supra* note 1, at 23.

41. *Id.*

42. Data for the U.S. Gini Coefficient was last obtained in 2010. *See Country Comparison: Distribution of Family Income-Gini Index*, CIA WORLD FACT BOOK (2009), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html>.

43. The Gini coefficient is ranked from the most unequal to the most equal countries in the world. *See id.* (showing that Namibia is the most unequal at number 1 and Sweden is the most equal at number 136).

44. Other countries' inequality ranking include: United Kingdom at 91, France at 100, Italy at 105, and Germany at 124. *See id.*

45. *See* STIGLITZ, *supra* note 1, at 21-22 (citing *An Overview of Growing Income Inequalities in OECD Countries: Main Findings*, OECD DIVIDED WE STAND, 21-45 (2011), <http://www.oecd.org/els/social/inequality>).

more wealth is being transferred to the elites of society. The Great Recession has made life more difficult for those in the middle and at the bottom, while the top 1 percent have benefited almost entirely from the recent economic recoveries. While this problem is not completely isolated to the United States, wealth distribution is worse in America than in any other industrialized country in the world.

III. WHY INEQUALITY IS A PROBLEM THAT NEEDS TO BE ADDRESSED

While inequality is obviously a problem for the middle and lower classes finding it harder to make ends meet, Stiglitz argues that there are also larger, structural problems that occur when high levels of inequality are allowed to persist.⁴⁶ Because of these structural problems, Stiglitz believes that it is in the best interests of all Americans, including the wealthy, to address the disproportionate distribution of wealth.⁴⁷

A. *Overall Decline in Economic Growth*

Stiglitz argues that as the nation's wealth becomes highly concentrated in the hands of the elites, the country's macroeconomic health suffers in two distinct ways: (1) the country's "aggregate demand"⁴⁸ sinks below the nation's production possibility, requiring the economy to underutilize its resources (mainly labor);⁴⁹ and (2) a diminished public investment strategy lowering overall returns on investment.⁵⁰ These phenomena work together to weaken economic performance in both the long and short run timeframes. I address each factor separately below.

46. STIGLITZ, *supra* note 1, at 83.

47. *Id.* at 83-84.

48. See Bruce Bartlett, *It's the Aggregate Demand, Stupid*, N.Y. TIMES ECONOMIX BLOG (Aug. 16, 2011, 6:00 AM), <http://economix.blogs.nytimes.com/2011/08/16/its-the-aggregate-demand-stupid/> (defining Aggregate Demand as the total level of consumption, investment, and government spending of the nation minus net imports).

49. See STIGLITZ, *supra* note 1, at 85.

50. See *id.* at 93-94.

1. Diminished Aggregate Demand

Within the Keynesian economic model, aggregate demand is the measure of the country's total demand for finished goods and services. Roughly speaking, when aggregate demand is higher, the country produces more goods and services, resources are utilized, and the economy is growing. On the other hand, when aggregate demand falls, production of goods and services falls, resources are underutilized, and the economy contracts. Therefore, following a Keynesian model, stimulating aggregate demand is the best method to grow the economy.⁵¹

According to Stiglitz, as more of the nation's wealth is concentrated at the top of the socioeconomic class, aggregate demand contracts.⁵² One of the key components of aggregate demand is consumption, which is the total spending by households and businesses. Stiglitz argues that a high level of inequality puts downward pressure on overall consumption levels.⁵³ Stiglitz relies on the spending and saving trends of the rich, middle class, and poor to illustrate his point.⁵⁴

Perhaps intuitively, the rich save more than the middle and lower classes.⁵⁵ In fact, according to the study conducted by K. Dynan, J. Skinner, and S. Zeldes, the wealthy save anywhere between 15-20 percent of their yearly income.⁵⁶ On the other hand, the middle and lower classes save almost none of their yearly income, allocating it all toward consumption.⁵⁷ As more of the country's wealth is being diverted to the top 1 percent, less is being spent on goods and services, diminishing consumption, and in turn, diminishing aggregate demand.⁵⁸

While overall economic growth is slowed because of a decrease in aggregate demand, Stiglitz believes that downward pressure on

51. Bartlett, *supra* note 48 (explaining that the only way to improve employment is to stimulate aggregate demand).

52. STIGLITZ, *supra* note 1, at 85.

53. *Id.*

54. *Id.*

55. See generally Karen Dynan et al., *Do the Rich Save More?*, 112 J. POLITICAL ECON., no. 2, 397 (2004) (explaining the different motives for high income households to save more than low income households).

56. *Id.*

57. See *id.*

58. STIGLITZ, *supra* note 1, at 85. This concept, derived from the Keynesian Economic Model, is called diminishing marginal propensity to consume, or diminishing MPC.

consumption, triggered by the skewed distribution of wealth, is also one of the main factors contributing to current high unemployment levels.⁵⁹ As touched upon briefly above, a diminished aggregate demand means the country is not utilizing all of its resources to produce at its maximum capabilities. While this sometimes results in idle capital, a firm's most likely strategy is to cut labor.⁶⁰ The unemployment rate was around 8.1 percent in November 2012.⁶¹ Stiglitz calculates that if the top 1 percent took only 15 percent of the nation's wealth (as opposed to the 20 percent it currently gains), and if that 5 percent were redistributed to the middle and lower class, unemployment could drop to around 6.1 percent.⁶² Further redistribution means further unemployment rate declines.⁶³

2. Lower Public Investment

Stiglitz also points to a lower rate of government investment in public goods as a consequence of less equal wealth distribution. To come to this realization, Stiglitz relies on a basic economic tenant: in a capitalist society, the market fails to provide goods that benefit the public rather than individuals.⁶⁴ This is because public goods such as roads, schools, parks, and safety cost much more to implement than the benefits to any one individual.⁶⁵ In a capitalist system, it is up to the government to provide these public goods.

Stiglitz argues that wealth inequality leads to the government underinvesting in public goods. According to Stiglitz, "[t]he more divided a society becomes in terms of wealth, the more reluctant the wealthy are to spend money on the common need."⁶⁶ The very rich are capable of providing what is generally considered public goods for

59. *Id.*

60. *See id.* at 85-86.

61. *Labor Force Statistics from Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS (Nov. 11, 2012), <http://data.bls.gov/timeseries/LNS14000000>.

62. STIGLITZ, *supra* note 1, at 85.

63. *Id.*

64. Randall Holcombe, *The Theory of the Theory of Public Goods*, 10 REV. AUSTRIAN ECON. 1, 1 (1997) (explaining the traditional concept of a public good, but arguing that the basic concept of the private sector not providing public goods is an oversimplification).

65. STIGLITZ, *supra* note 1, at 92-93.

66. *Id.*

themselves—i.e. private schools and medical care.⁶⁷ Thus, those with the most resources are unwilling to support government programs that provide goods for the public because these people can provide most of these goods for themselves.

Stiglitz points to the underinvestment in public education as an example of the long run problems that can occur from diminished government investment in public goods.⁶⁸ In the last year alone, 41 of the 50 states have made significant cuts to their public university program, which has resulted in rising tuition nearly across the board.⁶⁹ If quality education is made available to just those capable of paying high prices for it, the possibility of advancement in society declines.⁷⁰ Those who are currently wealthy stay wealthy, and those in the middle to lower classes either maintain or see a deterioration of living standards.⁷¹ This diminishes long run mobility and further entrenches inequality in society.⁷²

B. *Poorly Functioning Democratic System*

In addition to the economic problems inequality poses, Stiglitz identifies and analyzes political concerns associated with inequality as well. While a discussion of the political factors involved in *creating* the current inequality landscape is set forth below, this sub-section explores why, if inequality is allowed to persist, the American democratic system could be in peril.⁷³

According to Stiglitz, concentration of economic power means a concentration of political power. Stiglitz argues that America faces the very real prospect of becoming a “one *dollar* one vote” society rather

67. *Id.*

68. *Id.*

69. See Robert Reich, *Slashed Funding for Public Universities is Pushing the Middle Class Toward Extinction*, ALTERNET (Mar. 5, 2012), http://www.alternet.org/story/154410/slashed_funding_for_public_universities_is_pushing_the_middle_class_toward_extinction; see also Robert Siegel, *Are Public Universities Still Public?*, NPR ALL THINGS CONSIDERED (June 21, 2012), <http://www.npr.org/2012/06/21/155524647/are-public-universities-still-public>.

70. STIGLITZ, *supra* note 1, at 19 (arguing that parental income has become a strong leading indicator for future child income with one factor being access to quality education).

71. *Id.* at 19.

72. *Id.* at 95.

73. *Id.* at 119.

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than a “one *person* one vote” society.⁷⁴ As discussed at length in the next section, the policy choices made by Congress and governmental agencies are less reflective of the public good and more reflective of the interests of the top 1 percent.⁷⁵ If “one dollar one vote” trends continue, the wealthy will “invest” in shaping the political process to reflect their interests through lobbying and other forms of political influence.⁷⁶ This will only further entrench the inequality trends in America.

In addition to a system less reflective of the public sentiment and more in-line with the top 1 percent’s interest, Stiglitz believes that with more people worse off, belief in the economic and political system will begin to erode.⁷⁷ One of the distinct characteristics of a democratic form of government is a necessary general trust in the system—a concept Stiglitz terms “social capital.”⁷⁸ Without trust and a general belief that the system is *fair*, Stiglitz argues that the social fabric begins to deteriorate.⁷⁹

An illustrative example of deteriorating “social capital” in America is the extremely poor voter turnout for the past half-century.⁸⁰ In order for a democratic system to work and best reflect the voice of the public, people need to express their voice through voting. But people choose not to vote when they believe that their voice is not being heard and their vote does not matter.⁸¹ Professor Walter Burnham explored the voting phenomenon in America in his paper, *Democracy in Peril: The American Turnout Problem and the Path to Plutocracy*.⁸² He believes that “a major contributor [to low voter turnout] has almost

74. *Id.* at 132.

75. *Id.* at 119.

76. STIGLITZ, *supra* note 1, at 120.

77. *Id.* at 121.

78. *Id.* at 121-122.

79. *Id.* at 122 (offering examples of a deteriorating social fabric: a rise in violent crime, fraud and abuse, fewer deals for fear of contract breach, weaker communal bonds).

80. Table 397: *Participation in Elections for President and U.S. Representatives: 1932 to 2010*, U.S. CENSUS BUREAU (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0397.pdf> (showing 55.7 percent of the voting-age population participated in the 2004 Presidential Election and 57.1 percent of the voting-age population participated in the 2008 Presidential Election).

81. STIGLITZ, *supra* note 1, at 127.

82. See generally Walter Burnham, *Democracy in Peril: The American Turnout Problem and the Path to Plutocracy*, 1-32 (The Roosevelt Institute, Working Paper No. 5, 2010).

certainly been the huge, and greatly increasing, input of interest money into campaigns in recent decades.”⁸³ This led him to conclude that concentration of money and low voter turnout are a “lethal combination for democracy.”⁸⁴

Stiglitz pushes Burnham’s thesis even further. He writes “[t]his is why ‘power’—political power—matters so much. If economic power in a country becomes too unevenly distributed, political consequences will follow . . . [the elite] will use their political power to tenure the preservation of inequalities rather than the attainment of a more egalitarian and more just economy.”⁸⁵ Stiglitz fears the beginning of a vicious cycle: as disillusionment grows among those at the bottom of the economic ladder and makes these people less likely to express their voice through voting, the politically elite gain more influence.⁸⁶ The elites use this influence to effectuate law and policy in their favor, which further reinforces the disillusionment among the rest of society.⁸⁷ Without intervention, Stiglitz believes the cycle inevitably leads to a government unresponsive to the needs and interests of most of its citizens.⁸⁸

IV. THE CAUSES OF THE INEQUALITY PROBLEM

The previous sections have explored the inequality problem and why it must be addressed. But without understanding the factors leading to the problem, decision makers cannot correctly implement policy that effectively and fairly leads to a more efficient distribution of wealth. One of the central tenants of Stiglitz’s argument is that the current inequality paradigm is largely a result of political factors and government decisions rather than abstract market forces. Because the government is ultimately responsible for making decisions that have inherent trade-offs, how the government weighs the relative sides of the trade-off has implications on where wealth will be distributed. And when government decisions consistently reflect the desires of the top 1 percent, wealth distribution will inevitably be skewed.

83. *Id.* at 25.

84. *Id.* at 1.

85. STIGLITZ, *supra* note 1, at 190-91.

86. *Id.* at 134.

87. *Id.*

88. *Id.* at 134-35.

A. *Rent Seeking has Distorted Economic Gains*

There are many situations where markets, *when left alone*, do not work. In these situations, the private incentives and social returns are out of alignment.⁸⁹ According to Stiglitz, this most often occurs when (1) the presence of externalities shifts costs to the public, (2) when one side of a transaction has more information about the deal and stronger bargaining power than the other side, or (3) when risk cannot be offset.⁹⁰ When one or more of these factors are present in a market, it is the government's job to rectify the problem and better align social and private interests.⁹¹ Unfortunately, under many situations the government has failed to correct these market failures, which has allowed certain actors to take advantage of their positions of power.⁹²

Rent seeking is the process of gaining wealth, not through productive enterprises that add to the total production of an economy, but by transferring it away from others.⁹³ Rent seeking can take on many different forms, but it almost always involves one party exploiting its position of power or superior knowledge and profiting from market failures.⁹⁴ As Stiglitz sees it, rather than providing innovative advancements and revolutionary changes, much of the wealth amassed by the top 1 percent has been the result of rent seeking.⁹⁵ Instead of preventing this destructive process, Stiglitz argues that government policies have enabled, and in some instances even encouraged, rent seeking by the wealthy.⁹⁶

89. *Id.* at 34.

90. *Id.*

91. STIGLITZ, *supra* note 1, at 33-34.

92. *Id.* at 34.

93. *Id.* at 32.

94. *Id.* at 40.

95. *Id.* at 32; *see also* Kevin M. Murphy et al., *Why is Rent-Seeking so Costly to Growth?*, 83 AM. ECON. REV. 409, 409 (1993) (defining rent seeking as "any distributive activity that takes up resources").

96. Stiglitz argues that government munificence contributes significantly to rent seeking. He cites poorly run auctions for government contracts and mineral extraction, the Federal Reserve discount window, and legislation designed to aid corporations' bottom line as examples of government encouraged rent seeking. This review only explores the rent seeking enabled by the government. *See* STIGLITZ, *supra* note 1, at 41, 48-51.

1. Lack of Competition: Monopolization of Markets

One manner in which rent seeking has moved wealth from the 99 percent to the top 1 percent is through monopoly profits.⁹⁷ Basic economic theory holds that large profits by one or a small group of firms should be driven to zero as other firms enter the market to share in the success.⁹⁸ However, in practice this is hardly the case as firms routinely collude, establish artificial barriers to entry, and conduct pricing strategy to deter competition. Once competition has been effectively eliminated, monopolists can produce below and price above optimal social levels.⁹⁹ Without strong enforcement of anti-competition laws to prevent these activities, monopoly profits can be enormous and captured by a small percentage of the economy.¹⁰⁰

While there was a rash of antitrust breakups during the early years of the twentieth century, since the 1970s and the rise of the Chicago School's economic thought (The Chicago School) competition laws have become significantly weakened.¹⁰¹ The Chicago School, and its leading economists Milton Friedman and George Stigler, believed that free markets were naturally self-correcting and efficient, and any government intervention would stifle efficiency.¹⁰² Accordingly, the Chicago School and other think-tank foundations advocated against a strong antitrust policy and set out to "educate" judges, policymakers, and the public.¹⁰³ Eventually judicial opinions and the Department of Justice's antitrust enforcement policy began to reflect the Chicago School teachings. As a result, over time the effect of anti-competition statutes has weakened.¹⁰⁴ Stiglitz argues that this has contributed to

97. *Id.* at 35.

98. *Id.*

99. *See id.* at 97.

100. *Id.* at 43; *see also id.* at 96-97 (claiming that monopoly profits distort the economy because of the higher prices charged when there is a lack of competition).

101. David Balto, *Restoring Trust in Antitrust Enforcement*, CTR. FOR AM. PROGRESS (May 2009), <http://www.americanprogress.org/issues/regulation/report/2009/05/11/6122/restoring-trust-in-antitrust-enforcement/>.

102. STIGLITZ, *supra* note 1, at 44.

103. *Id.* (specifically naming the right wing Olin Foundation as responsible for this education process).

104. *Id.* at 44-45 (pointing to Microsoft in PC operating systems and AT&T, Verizon, T-Mobile, and Sprint in telecommunications as examples of monopoly or near monopoly industries critical to our modern functioning society).

large concentrations of market power held by a few firms, with the top executives benefiting from the monopoly rents at the expense of consumers.¹⁰⁵

Since the financial meltdown, the Chicago School theory has taken an intellectual beating. There has been a rash of academic writing criticizing its laissez-faire approach,¹⁰⁶ with others arguing that the lax anti-competition enforcement significantly contributed to the systemic risk problems of the financial sector.¹⁰⁷ Looking at the distinct lack of competition in the banking industry and the enormous profits reported each year, Stiglitz agrees that poor antitrust enforcement, combined with a lack of regulatory oversight, is largely to blame.¹⁰⁸ Because of this, policymakers have begun to reconsider the country's competition policy, with a strong call for more stringent antitrust enforcement.¹⁰⁹

2. Asymmetrical Information

As the discussion on monopolization of markets indicates, basic economic theory predicts competition in profitable industries will push individual firm profits to zero.¹¹⁰ In addition to anti-competitive practice, another way that firms avoid competition and maintain large profits is by making markets less transparent.¹¹¹ The less transparent a market is, the less information prospective buyers have about the

105. *Id.* at 46.

106. See generally Paul Krugman, *How Did Economists Get it So Wrong*, THE N.Y. TIMES MAG., Sep. 6, 2009, at MM36, available at <http://www.nytimes.com/2009/09/06/magazine/06Economic-t.html?pagewanted=all> (arguing that the Chicago School economists' focus on the beauty and simplicity of their economic models blinded them to the poor underlying assumptions); see also Lloyd I. Rudolph & Susanne H. Rudolph, *Economics' Fall from Grace*, 43 PS: POL. SCI. & POL. 4, 747-48 (2010).

107. 'Too Big to Fail?': *The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry: Hearing Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 13 (2009) (statement of Albert A. Foer, President, American Antitrust Institute, Washington, DC).

108. STIGLITZ, *supra* note 1, at 46-47 (noting that, even though there are a large number of banks across the country, the nation's four biggest banks control nearly half of the country's banking assets, limiting competitive pricing practice).

109. Balto, *supra* note 101; see also Prepared Remarks, Christine Varney, Assistant Attorney Gen., Antitrust Div., Dep't of Justice, Vigorously Enforcing Antitrust Laws in the Obama Administration (July 12, 2011).

110. STIGLITZ, *supra* note 1, at 35.

111. *Id.*

product in question.¹¹² Buyers, who participate in the market sporadically, are unlikely to obtain the necessary information, and the sellers can thus take advantage of their superior power in the transaction.¹¹³

One area where transparency problems are particularly troubling to Stiglitz is in the financial services industry. He blames much of the recent troubles in the financial markets on a lack of transparency and asymmetrical information between the sellers and buyers of derivatives and other financial products.¹¹⁴ Specifically, Stiglitz argues that a hallmark of the financial service industry in recent decades, the over-the-counter¹¹⁵ derivatives market, has made it difficult for customers to understand associated risks.¹¹⁶ Stiglitz believes that the lack of transparency in derivatives markets hid the excessive risk associated with the products, increased the profits of banks at the expense of customers, and lowered economic performance.¹¹⁷

B. *Shaping Policy and Perception*

Stiglitz rejects the notion that abstract market forces are to blame for America's current wealth distribution problems.¹¹⁸ Markets do not exist in a vacuum as traditional economic models assume. Instead, markets are shaped by laws and regulations that, because of inherent trade-offs, can have enormous distributive effects.¹¹⁹ Depending on how the policymaker weighs the trade-offs, they can either work to even the playing field or further entrench inequality.¹²⁰

112. *Id.*

113. *Id.* at 35-36; see also Dale Morse, *Asymmetrical Information in Securities Markets and Trading Volume*, 15 THE J. FIN. AND QUANTITATIVE ANALYSIS, 1129, 1129 (1980) (explaining the role of information asymmetries between buyers and sellers of financial goods).

114. STIGLITZ, *supra* note 1, at 35-36.

115. See *Product Descriptions and Frequently Asked Questions*, INT'L SWAPS AND DERIVATIVES ASSOC. (2012), <http://www.isda.org/educat/faqs.html> (defining over-the-counter derivatives as "customized, bilateral agreements that transfer risk from one party to the other.").

116. STIGLITZ, *supra* note 1, at 35.

117. *Id.* at 36 (claiming that banks purposely hide their true financial position in part through derivatives transactions).

118. *Id.* at 52.

119. *Id.*

120. *Id.* at 59 (explaining globalization effects, stating "nowhere do politics shape market forces more than in the globalization arena").

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Stiglitz believes that, unfortunately for most of America, the wealthy hold a considerable amount of influence over policymakers and the perceptions of the population in general. This influence has consistently resulted in policies designed to protect the interests of the wealthy over those of the rest of society and further entrench the inequality trends.¹²¹

1. Lobbying and Campaign Contribution

Stiglitz argues that as wealth becomes more skewed and society less equal, the wealthy hold a disproportionate amount of influence over policy decisions.¹²² Stiglitz sets forth two factors that contribute to the wealthy's increased influence over decision makers: (1) the wealthy have more at stake with each change in policy and thus have more incentive to get involved in the decision-making process; and (2) the wealthy have resources to spend on lobbying and campaign contributions to actually influence the decisions.¹²³

One area in which these factors are manifested is through lobbying efforts. To Stiglitz, lobbying is just a method of marketing ideas rather than goods or services; like marketing, lobbying is a form of "investment."¹²⁴ Not unlike traditional marketing mechanisms, corporations, industries, and wealthy individuals engage in lobbying to shape politicians' worldview and effectuate beneficial policies. Furthermore, when lobbying is effective, it not only ensures a particular policy is enacted, but it can work to gather the support of a politician's constituents.¹²⁵ As Stiglitz argues, "[p]ersuading politicians to adopt one's perspectives and perceptions has a double advantage: not only do they sell the ideas to the public; they translate the ideas into legislation and regulation."¹²⁶ According to Stiglitz, because lobbying is a form of investment for large corporations and the wealthy, it usually results in substantial returns on investment through favorable laws and regulatory policy.¹²⁷

121. *Id.* at 52-53.

122. STIGLITZ, *supra* note 1, at 120.

123. *Id.*

124. *Id.* at 120, 160 (stating "if goods can be marketed, so can ideas and especially the ideas that underpin policies")

125. *Id.* at 161.

126. *Id.*

127. *Id.* at 120.

Lobbying has become ever more prevalent in American society. Just two sectors, the health industry (which includes pharmaceutical companies) and the energy and natural resources industry, employ over 5,200 lobbyists—nearly 10 lobbyists *per congressman*.¹²⁸ It is estimated that the financial industry employees roughly 2.5 lobbyist per congressman on its own.¹²⁹ In total, just over \$3.3 billion was spent in 2011 on lobbying, with the number expected to reach even higher.¹³⁰ Like rent seeking, Stiglitz believes that huge expenditures on lobbying are an unproductive waste of resources designed to merely distort the political and economic system.¹³¹ With a further concentration of wealth, the importance of lobbying to shape policy will only increase, while laws and regulations will represent the interests of the economically powerful at the expense of the rest of society.¹³²

In addition to the wealthy spending on lobbying to effectuate policy changes, campaign contributions can be an effective method for shaping policy as well.¹³³ While the concern about corporate influence through large contributions is not new, thanks to the 2010 Supreme Court decision in *Citizens United v. Federal Election Commission*,¹³⁴ corporations and other organizations are unfettered in the amount they can contribute to campaign advertisements and other political communications.¹³⁵ In maintaining a corporate freedom of speech, Stiglitz believes the *Citizens United* decision further alienates individual citizens and gives even more political influence to corporations.¹³⁶ With corporations and other large businesses' ability to access enormous pools of resources, *Citizens United* ensures that politicians

128. STIGLITZ, *supra* note 1, at 95 (citing *Lobbying Database*, OPENSECRETS.ORG (Oct. 31, 2012), <http://www.opensecrets.org/lobby/index.php>).

129. STIGLITZ, *supra* note 1, at 48.

130. *Lobbying Database*, OPENSECRETS.ORG (Oct. 31, 2012), <http://www.opensecrets.org/lobby/index.php> (showing that 2010 saw the highest levels of expenditures on lobbying in history, with over \$5.5 billion).

131. STIGLITZ, *supra* note 1, at 95.

132. *Id.* at 120.

133. *Id.* at 131 (arguing that large campaign contributions contributes to a “one-dollar one-vote” system).

134. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (ruling that “[t]he Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation”).

135. Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 220 (2010).

136. STIGLITZ, *supra* note 1, at 131.

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will consider placating these entities to finance their campaign communications.¹³⁷ Stiglitz fears this will lead to stronger commitments by politicians to push policy that benefits corporations—and the wealthy that run the corporations—rather than the public good.¹³⁸

2. Capture and Shaping Perceptions

Large expenditures in lobbying and campaign contributions are examples of direct methods of influence over elected officials. Agencies often give in to the interests of corporations and the wealthy individuals who run them.¹³⁹ Stiglitz believes regulatory agencies such as the Federal Communications Commission, the Securities and Exchanges Commission, and the Federal Reserve have all, in certain circumstances, succumbed to this influence.¹⁴⁰ It is manifested in two ways: (1) regulatory capture, and (2) cognitive capture.¹⁴¹

Regulatory capture occurs when those in the regulatory agency come from, or plan to go into, the industry they are charged with regulating.¹⁴² When regulatory capture is in full force, rather than pushing for policy enforcement that might be beneficial for the public good, agencies create and enforce regulations that are more in line with the interests of the industry.¹⁴³ Agency policy, therefore, reflects the influence of special interests that can offer regulators pecuniary incentives following their government employment.¹⁴⁴ In practice, the revolving door¹⁴⁵ phenomenon is real. Hundreds of revolving door employees have worked or currently work for the largest agencies in the

137. *Id.*

138. *Id.*

139. *Id.* at 47.

140. *Id.*

141. *Id.* at 47-48.

142. *Id.* at 47.

143. Michael Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167, 169 (1990).

144. *Id.* at 169 n.6 (“[W]ell organized subgroups of the general population use government power to *force wealth transfers in their favor.*”) (emphasis added).

145. The revolving door is a term used to define the movement of government employees to interest groups and other lobbyist capacities and vice versa, taking advantage of the connections made during government work. See Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT’L AFF. 3, 652 (2010).

United States government.¹⁴⁶ While certainly not all of these revolving door regulators neglect their civic duties, if enough agency personnel are more in line with the industry than the public, policy and regulation can suffer.¹⁴⁷

Instead of the motivation of pecuniary incentives being the driving force, cognitive capture occurs when the regulators and the industry they are designed to regulate share the same mindset.¹⁴⁸ Professor Barry Eichengreen of the University of California at Berkeley describes cognitive capture: “the attitudes of regulators may be infected not merely by the practices and attitudes of their fellow regulators, but also by those of the regulated.”¹⁴⁹ Stiglitz argues that while neither Alan Greenspan nor Tim Geithner worked for the banking industry prior to their employment for the Federal Reserve and Department of the Treasury respectively, they both held a similar ethos: weak regulations on big banks resulted in the most efficient financial system.¹⁵⁰ When the regulators and the industry share similar assumptions, the agency fails to achieve its goal of limiting risk and maintaining the public good, with the worst case scenario occurring in the fall of 2008.¹⁵¹

In essence, expenditures on lobbying and campaign contributions and the capture phenomenon are part of a broader attempt by the wealthy to shape perceptions to align with their own interests.¹⁵² Stiglitz argues that large business and the wealthy have been consistently successful at influencing the beliefs and preferences of the rest of society for their own gain.¹⁵³ Many times the top 1 percent shape

146. See *Revolving Door: Top Agencies*, OPENSECRETS.ORG, <http://www.opensecrets.org/revolving/top.php?display=G> (last visited Jan. 17, 2013) (showing the agencies with the largest revolving door employees, including the Department of Commerce with 432, the Department of Justice with 216, and the Department of Treasury with 199).

147. STIGLITZ, *supra* note 1, at 47.

148. *Id.* at 48.

149. Barry Eichengreen, *The Last Temptation of Risk*, NAT'L INT., May/June 2009, at 4, available at <http://nationalinterest.org/article/the-last-temptation-of-risk-3091> (blaming policymaker's, regulator's, and academia's cognitive capture as a reason for the financial meltdown and the inability to identify the risks).

150. STIGLITZ, *supra* note 1, at 48.

151. *Id.*

152. *Id.* at 166 (explaining that battles over discrete policies are just a subsection of the larger battle over perceptions.).

153. *Id.* at 148.

perceptions with direct monetary efforts, other times it is through testimony and statistics from experts that support a particular view.¹⁵⁴ Just as modern marketing influences consumers' consumption preferences, framing the issues of a debate in a particular light or convincing policymakers to accept certain beliefs can have broad implications for a favorable public image and beneficial legislation.¹⁵⁵

V. EXPLAINING THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005¹⁵⁶

Stiglitz's theories can help to explain why significant changes to American bankruptcy laws were adopted in 2005, and how these laws have furthered economic inequality. While Stiglitz does not spend much time exploring the 2005 bankruptcy changes, he is extremely critical of the current bankruptcy paradigm. In fact, he considers current American bankruptcy laws as "a system of 'partial indentured servitude'" and he advocates heavily for reform.¹⁵⁷

While the essence of bankruptcy law is to assign the rights and liabilities between debtors and creditors,¹⁵⁸ the manner in which the laws are designed have strong implications for wealth distribution and lending incentives.¹⁵⁹ When bankruptcy laws are more lenient—with easier to discharge debt and flexible payback systems—the filing party is able to retain more of their property and wealth through a bankruptcy proceeding.¹⁶⁰ On the other hand, when bankruptcy laws are less debtor-friendly, the filing party has a harder time discharging debts and more of their property and wealth is transferred to their creditors.¹⁶¹

154. *Id.* at 162 (arguing that any side of a debate can find an expert capable of supporting that side through studies or empirical research).

155. *Id.* at 147-48 ("[T]he 1 percent have shaped beliefs about what is fair and efficient, about the strengths and weaknesses of the government, and even about the extent of inequality in America."); *see also id.* at 161 (arguing that one of the most effective ways to shape public opinion is through the capture of politicians and regulators).

156. Because Stiglitz writes for a broad audience and tackles multiple issues, he declines to fully explore the legal framework of any one issue. This section will apply some of the theories Stiglitz offers to the bankruptcy system in America, and argue that Stiglitz's theories have substantial merit.

157. STIGLITZ, *supra* note 1, at 194.

158. *See In re Pommerer*, 10 B.R. 935 (Bankr. D. Minn. 1981).

159. STIGLITZ, *supra* note 1, at 193.

160. *Id.*

161. *Id.* Furthermore, bankruptcy laws allocate risk. *Id.* When bankruptcy laws are stricter, there is less incentive to be prudential with lending. *Id.* This increases the

Because of this unique impact on resource allocation, the rest of this review will focus on the 2005 changes to the Bankruptcy Code.

A. *Background and Key Provisions of BAPCPA*

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹⁶² (BAPCPA or Act) into law, ending over a decade of legislative debate and intense lobbying efforts by the banking¹⁶³ and credit card industries.¹⁶⁴ The BAPCPA marked the largest modification of federal bankruptcy law since the Bankruptcy Code was passed in 1978.¹⁶⁵ Through a series of amendments, the Act has significantly altered the procedures associated with bankruptcy filings, limited judicial discretion in bankruptcy cases, and redefined the debtor-creditor relationship.¹⁶⁶ In essence, it has increased the costs and decreased the effectiveness of bankruptcy relief.¹⁶⁷

In the most basic sense, the Act was passed in response to the rising number of consumer bankruptcy filings since the original Bankruptcy Code was passed in 1978.¹⁶⁸ In 2004, the year before the Act was passed, there were more than 1.5 million bankruptcies filed in the United States.¹⁶⁹ While increased bankruptcy proceedings had

likelihood of predatory and risky lending.

162. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.) [hereinafter BAPCPA].

163. I include banks in the discussion because large banks, including Bank of America and J.P. Morgan Chase, control several of the top card issuers. For the rest of the discussion, the simple description “credit card companies” will be used.

164. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005).

165. See Dariely Rodriguez, *Left Behind: The Impact of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Economic, Social, and Racial Justice*, 18 BERKELEY LA RAZA L.J. 65, 65 (2007). The 1978 Bankruptcy Code superseded the original bankruptcy act of 1898.

166. George H. Singer, *The Year in Review: Case Law Developments under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N.D. L. REV. 297, 304 (2006).

167. For a good discussion of the BAPCPA and its role in the financial crisis, see Melissa Jacoby, *Bankruptcy Reform and the Financial Crisis*, 13 N.C. BANKING INST. 115 (2009).

168. James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 863 (2006).

169. Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1464 (2005).

affected numerous areas of the American economy, the industry most notably harmed was the credit card industry.¹⁷⁰ Prior to the enactment of BAPCPA, it is estimated that credit card companies were losing roughly \$4 billion annually due to discharged debt through bankruptcy filings.¹⁷¹ Significantly, while the Act has changed some procedural methods in business and farm bankruptcies, its greatest impact is in consumer cases, which most often involve credit card debt.¹⁷² Not coincidentally, credit card companies saw record profits in both 2006 and 2007, the years immediately following implementation of BAPCPA's modifications.¹⁷³

1. Fundamentals of Bankruptcy Law

A quick overview of the consumer bankruptcy paradigm is required to understand the changes associated with BAPCPA. There are essentially two methods for personal bankruptcy: Chapter 7¹⁷⁴ Liquidation and Chapter 13¹⁷⁵ Rehabilitation.¹⁷⁶ Under a Chapter 7 proceeding, the debtor's non-exempt assets are sold to pay off the non-dischargeable debts.¹⁷⁷ The Chapter 7 proceeding, however, identifies many types of debts as dischargeable—debts that, after the bankruptcy proceeding, the filing party is not legally obligated to repay.¹⁷⁸ Among those considered dischargeable are debts accrued from unpaid medical costs, financial company loans, and *unsecured debt*, including credit card debt.¹⁷⁹ Importantly for this discussion, Chapter 7 bankruptcy does

170. Robert H. Scott, III, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: How the Credit Card Industry's Perseverance Paid Off*, 41 J. ECON. ISSUES 943, 943 (2007).

171. William Waller, *Kickin'em While They're Down: Consumer Bankruptcy Reform*, 35 J. ECON. ISSUES 871, 871 (2001).

172. Ronald Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 375 (2007).

173. Michael Simkovic, *The Effect of BAPCPA on Credit Card Industry Profits and Prices*, 83 AM. BANKR. L.J. 1, 19 (2009).

174. 11 U.S.C. §§ 701-84 (2006).

175. 11 U.S.C. §§ 1301-30 (2006).

176. DAVID G. EPSTEIN ET AL., BANKRUPTCY HORNBOOK SERIES, §§ 1-9 (West Publ'n Co., 1993).

177. *Id.* (explaining that exempt assets generally include the family house or family transportation method).

178. *Id.*

179. Scott, *supra* note 170, at 944 (emphasis added).

not discharge mortgage or education loans, alimony, child support, or outstanding tax debt.¹⁸⁰

As opposed to liquidation under Chapter 7, a Chapter 13 bankruptcy proceeding deals with rehabilitation.¹⁸¹ In a rehabilitation case, creditors look to the future earnings of the debtor, not to the property of the debtor at the time the bankruptcy proceeding is initiated, to satisfy their claims.¹⁸² Chapter 13 bankruptcies require the consumer to repay his debts through a structured repayment schedule, typically over a three- to five-year period as specified by the bankruptcy court.¹⁸³ Unlike Chapter 7, in a Chapter 13 filing the debts of the consumer are not considered immediately dischargeable.¹⁸⁴ Furthermore, under the colloquial “best interest of creditors test,” in order for a Chapter 13 case to proceed, unsecured creditors must be paid at least as much as they would have been paid under a hypothetical Chapter 7 filing.¹⁸⁵ Therefore, no unsecured creditor will ever be worse off under a Chapter 13 filing than under a Chapter 7 filing. In fact, more often than not, under a Chapter 13 proceeding, unsecured creditors, such as credit card lenders, are better off through the court appointed scheduled repayment than through a liquidation filing.¹⁸⁶

2. Means Testing

One of the ways BAPCPA changed consumer bankruptcy cases is through the new “means testing.”¹⁸⁷ The means testing provision has been described as the “heart” of the bankruptcy reform.¹⁸⁸ Prior to BAPCPA, bankruptcy courts were generally deferential to a debtor’s choice of Chapter 7 filing over Chapter 13.¹⁸⁹ BAPCPA’s new means test provision, however, is designed to establish a presumption that

180. *Id.*

181. EPSTEIN, *supra* note 176, at §§ 1-9.

182. *Id.*

183. Scott, *supra* note 170, at 944.

184. *Id.*

185. See 11 U.S.C. § 1325(a)(4) (2006).

186. Scott, *supra* note 170, at 944.

187. See 11 U.S.C. § 707(b) (2006).

188. Ransom v. FIA Card Services, 131 S. Ct. 716, 721 (2011) (citing H.R. REP. NO. 109-31, pt. 1, p. 2 (2005)).

189. Eugene Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 234 (2005) [hereinafter Wedoff, *Means Testing*], available at LN 102K7T.

filing Chapter 7 is an abuse of the bankruptcy laws to discharge debts when it may be possible for the debtor to repay the debt through future income.¹⁹⁰ The presumption of abuse is controlled through the means test.¹⁹¹

The means test has three steps designed to quantify the debtor's payback ability: (1) identify the total monthly income available to the debtor; (2) subtract any deductions allowed in determining available income pursuant to section 707(b)(2); and (3) compare the available income minus deductions to an income threshold dictated by the size of the household and the median income data for the state in which the filing occurs.¹⁹² If the available monthly income is above these predetermined thresholds, the presumption of abuse is triggered.¹⁹³ The bankruptcy court is then *required* to dismiss the Chapter 7 proceeding and force the debtor into Chapter 13 bankruptcy.¹⁹⁴

The differences between Chapter 7 and Chapter 13 bankruptcy cases illustrate the benefits credit card companies reap from the means test. As previously explained, Chapter 7 bankruptcy discharges unsecured debt, including credit card debt. Chapter 13, on the other hand, does not discharge debt and forces the debtor to adhere to a payment schedule. The best interest of the creditor test ensures that unsecured creditors are at least as well off, and more times than not *better off*, under Chapter 13 as opposed to Chapter 7. As the means test prevents more debtors from discharging their credit card debt, the credit card industry stands to recoup much more than under the previous bankruptcy framework.¹⁹⁵ Furthermore, this process has been at the expense of the financially insecure, allowing fewer debtors the "fresh start" bankruptcy laws were initially designed to provide.¹⁹⁶ In fact,

190. *Id.*

191. Eugene Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31, 49 (2007) [hereinafter Wedoff, *Consumer Bankruptcy Effects*].

192. 11 U.S.C. § 1325(b) (2006) (setting forth the disposable income test); Eugene Wedoff, *Consumer Bankruptcy Effects*, *supra* note 191, at 49.

193. Wedoff, *Consumer Bankruptcy Effects*, *supra* note 191, at 49.

194. Mann, *supra* note 172, at 381 (noting that the presumption is rebutted only with a detailed report outlining special circumstances that require more monthly allowance than the state median).

195. Scott, *supra* note 170, at 944. Importantly, mortgage loans, student loans for education, child support and alimony are not discharged through either Chapter 7 or Chapter 13. These areas have gained nothing through the means test.

196. *See generally* Local Loan Co. v. Hunt, 292 U.S. 234, 245 (1934) (explaining that the "fresh start" offered from bankruptcy laws is a matter of "great public concern.").

Chapter 7 filings dropped from 70 percent of all personal bankruptcy cases pre-BAPCPA to just below 30 percent after BAPCPA was enacted.¹⁹⁷

3. Delayed Filings

In addition to the benefits credit card companies accrued from the means testing provision, the BAPCPA includes provisions that force debtors to defer filing for bankruptcy.¹⁹⁸ While on the surface it seems counter-intuitive for a legislative scheme to slow the process of filings and reduce efficiency, when considering the unique business model of the credit card industry this makes perfect sense.¹⁹⁹ Unlike most types of traditional lenders, whose most profitable customers are those least likely to default, credit card companies extract most of their profits from customers who face financial insecurity.²⁰⁰ For credit card companies, the largest percentage of profits comes from interest income, late fees, and overdraft fees.²⁰¹ Financially distressed borrowers and those who carry a monthly debt balance consistently rack up these charges.²⁰² Thus, when financially distressed borrowers carrying a monthly debt balance are forced to wait several months for a needed bankruptcy filing, interest and other late fees continue to pile up, adding to the total debt owed to a credit card issuer.

There are several provisions in the BAPCPA that delay bankruptcy filings and thus require the debtor to accrue more interest on their outstanding debt. Under BAPCPA section 312, the time between discharges is extended.²⁰³ If a debtor has previously filed a Chapter 7 liquidation proceeding, the debtor must wait 8 years from the prior case to file for Chapter 7, and 4 years to file for Chapter 13.²⁰⁴ If a debtor has previously filed a Chapter 13 rehabilitation proceeding, the debtor

197. Scott, *supra* note 170, at 944.

198. Mann, *supra* note 172, at 384.

199. *Id.*

200. *Id.* at 384-85 (“Financially secure customers . . . do not generate any interest income, late fees, or overlimit penalties.”).

201. *Id.* at 385 (stating that annual fees only account for 20% of the credit industry’s revenue).

202. *Id.*

203. BAPCPA, Pub. L. No. 109-8, 119 Stat. 23, § 211, 86-87 (2005) (amending 11 U.S.C. § 727(a)(8) (2006)).

204. Wedoff, *Consumer Bankruptcy Effects*, *supra* note 191, at 49.

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must wait 6 years to file Chapter 7, and 2 years to file Chapter 13.²⁰⁵ This extended time required between filings elongates the window in which bankruptcy relief is unavailable to a debtor, during which late fees and other charges accrue.²⁰⁶

Furthermore, the BAPCPA establishes credit counseling and debtor education as a requirement for any bankruptcy filing.²⁰⁷ Prior to filing, a debtor must receive counseling from a nonprofit budget-counseling agency within 180 days of the filing.²⁰⁸ This is another obstacle a debtor must hurdle in his attempt for debt relief and there is a compelling argument that the credit counseling requirement does nothing to prevent future financial problems.²⁰⁹ In addition, provisions such as attorney penalties for filing Chapter 7 when the means test points to Chapter 13²¹⁰ and raising the filing fees from \$250 to \$299 are other requirements that raise more hurdles to filing while the credit card companies continue to levy fees.²¹¹

B. Rent Seeking by Banks and Credit Card Companies

As the previous subsection explains, many key provisions of the BAPCPA have had the effect of improving the credit card companies' balance sheet at the expense of the bankrupt parties.²¹² Prior to 2005 and the enactment of BAPCPA, however, it was not inevitable that bankruptcy laws would be so heavily tailored to the credit industry.²¹³ Several factors contributed to the eventual paradigm, many of which Stiglitz identified in his analysis of American inequality. Specifically,

205. *Id.*

206. *See* Mann, *supra* note 172, at 392-93.

207. BAPCPA, Pub. L. No. 109-8, §106(a), 119 Stat. 23, 37 (2005) (adding 11 U.S.C. § 109(h) (2006)); Wedoff, *Consumer Bankruptcy Effects*, *supra* note 191, at 36.

208. BAPCPA, Pub. L. No. 109-8, §106(a), 119 Stat. 23, 37 (2005) (adding 11 U.S.C. § 109(h) (2006)).

209. Scott, *supra* note 170, at 946 (arguing that the credit counseling only leads about 3.2% of people away from bankruptcy and toward a debt management plan).

210. BAPCPA, Pub. L. No. 109-8, §102, 119 Stat. 23, 27-35 (2005) (amending 11 U.S.C. § 707 (2006)).

211. Ronald Mann describes the time between the onset of financial distress and bankruptcy filing as a "Sweat Box." During this time, the debtor accrues interest on the unpaid debt, but cannot find relief through bankruptcy. *See generally* Mann, *supra* note 172.

212. *See generally* Simkovic, *supra* note 173, at 19 (explaining that in 2006 and 2007 credit card companies saw record profits).

213. STIGLITZ, *supra* note 1, at 194.

the credit industry's effective rent seeking placed it in a position of immense political strength and gave it significant leverage over any proposed changes to the Bankruptcy Code.

1. Monopolization of the Credit Market

As Stiglitz contends, the rise of the Chicago School and the decline in antitrust enforcement had powerful effects on the concentration of wealth and power in many industries.²¹⁴ In the years preceding the BAPCPA, the credit card industry was largely left alone by antitrust enforcers, and as a result became increasingly monopolized.²¹⁵ In fact, in 2005, the top ten credit card issuers represented nearly 87 percent of all general outstanding credit card debt,²¹⁶ up from 57 percent of the general outstanding credit card debt for the top ten issuers in 1995.²¹⁷ While the market shares for a smaller percentage of companies have increased, the total pool of outstanding credit card debt has ballooned. Over that same period, 1995-2005, the level of outstanding revolving debt grew from \$378 billion to over \$815 billion.²¹⁸

The combined effect of a larger market share going to a smaller pool of corporations, along with the importance of credit card debt in American consumerism, has seen the credit card industry grow in economic prominence. In 1995 the industry pulled in roughly \$14 billion in pre-tax profits.²¹⁹ By 2005, the pre-tax profits for the industry more than doubled, reaching more than \$31 billion.²²⁰ Stiglitz predicts

214. *Id.* at 44; Ronald Mann also blames technological pressures of data mining and costs of acquiring information as a factor contributing to the monopolization of the credit industry. See Mann, *supra* note 172, at 385.

215. See Simkovic, *supra* note 173, at 17.

216. U.S. Gov't Accountability Office, GAO-11-311, CONSUMER COSTS FOR DEBT PROTECTION PRODUCTS CAN BE SUBSTANTIAL RELATIVE TO BENEFITS BUT ARE NOT A FOCUS OF REGULATORY OVERSIGHT 33 (2011) [hereinafter *Gov't Accountability Office*] (citing HSN Consultants Inc., *The Nilson Report*, 966 Feb. 2011, at 8-9). By 2007, the concentration was even greater, with the top ten companies commanding over 93 percent of the outstanding debt.

217. See Simkovic, *supra* note 173, at 20.

218. Consumer Credit Outstanding (Levels), BD. OF GOVERNORS OF THE FED. RESERVE, http://www.federalreserve.gov/releases/g19/HIST/cc_hist_mt_levels.html (last updated Jan. 8, 2013). As of August 2012, the outstanding revolving debt was \$854 billion.

219. See Simkovic, *supra* note 173, at 19.

220. *Id.* (noting that rising trends have continued through 2007, with record pre-tax profits of over \$41 billion).

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that a concentration of economic power translates into a concentration of political influence.²²¹ In the example of the credit card industry, the concentrated economic power had significant implications for the BAPCPA.²²²

2. Asymmetrical Information

In addition to an increased monopolization of credit markets leading to economic prosperity, card-issuing companies often took advantage of asymmetrical information market failures to amass economic and political influence.²²³ As Stiglitz points out in his discussion of market failures, markets, especially financial markets, require the buyer and seller to have similar knowledge about the transaction in order for it to function properly.²²⁴ Without relatively symmetrical information, the seller can charge a higher rate than competitively feasible, and the buyer has no way of better positioning himself in the market.²²⁵ For the years prior to BAPCPA, credit card companies routinely limited the information disseminated to consumers, while relying on their superior knowledge of the market to extract high profits.²²⁶

The information asymmetries in the credit market have manipulated competitive pricing mechanisms and made it nearly impossible for consumers to comparison shop and make informed decisions.²²⁷ According to the United States Government Accountability Office (GAO) and studies conducted by the Federal Reserve, many consumers find it difficult to assess financial services and products.²²⁸ Credit card companies employ complex, multi-tiered

221. STIGLITZ, *supra* note 1, at 132.

222. See Simkovic, *supra* note 173, at 19; see also *infra* Part V.C.

223. Simkovic, *supra* note 173, at 21.

224. STIGLITZ, *supra* note 1, at 34.

225. *Id.*

226. Simkovic, *supra* note 173, at 21. The Credit Card Accountability Responsibility and Disclosure Act of 2009 was designed to alleviate some of these concerns, but it has been met with mixed reviews, many arguing that more reform is needed. See generally Jaclyn Rodriguez, *The Credit CARD Act of 2009: An Effective but Incomplete Solution Evidencing the Need for a Federal Regulator*, 14 N.C. BANKING INST. 309 (2010).

227. Simkovic, *supra* note 173, at 21.

228. GOV'T ACCT. OFFICE, *supra* note 216, at 33 (indicating that while the Credit CARD Act of 2009 was designed to alleviate some of these concerns, problems with transparency exist even after its enactment).

pricing policies by including multiple factors that contribute to the overall “price” of the product.²²⁹ Studies show that consumers routinely choose cards that advertise low introductory rates, ignoring that fact that these cards are likely to cost more money in the long run due to higher interest fees and rates that increase over time.²³⁰ Furthermore, when faced with attempting to calculate the total price of a particular credit card, consumers routinely underestimated the fees levied when one carries monthly debt.²³¹ As Stiglitz contends, without properly understanding the market, the consumer cannot effectively assess the value of a product and thus will overpay.²³² This contributes to higher rents for the corporation, and less downward pricing pressure forced by consumers with adequate information.²³³

Through both an increased monopolization of the credit market and the inability of consumers to comparison shop, the top of the credit industry reaped significant profits in the decade preceding BAPCPA. These rent seeking techniques—and the general increased reliance on debt by the American consumer—enabled the credit card industry to ascend into a prominent economic and political position. As Stiglitz’s theories on the negative effects of wealth inequality explains, the credit industry used its position of power to shape the BAPCPA in its best interest.

C. *Shaping Policy and Perception*

Stiglitz’s theories concerning the wealthy exerting political influence over policymakers is directly applicable to the credit card industry and the passage of BAPCPA. Through an intense lobbying effort and significant campaign contributions, plus shaping the mindset

229. Simkovic, *supra* note 173, at 21.

230. Sumit Agarwal et al., *Learning in the Credit Card Market* (Nat’l Bureau Econ. Research, Working Paper No. 13822, 2011), available at <http://www.nber.org/papers/w13822>.

231. Adam Levitin, *A Critique of the American Bankers Association’s Study of Credit Card Regulation* (Business, Econ. and Regulatory Policy, Working Paper No. 11044327, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029191.

232. STIGLITZ, *supra* note 1, at 35-36.

233. *See id.*; see also, Simkovic, *supra* note 173, at 22 (proving that the credit card market is not price competitive by showing that after BAPCPA, none of the credit card companies dropped their fees or grace periods; companies were not forced to pass their gains on to consumers, meaning there was no price-competition in the industry).

of the general public, the credit card industry effectively manipulated the bankruptcy reform debate. Their efforts are manifested in the key provisions of the BAPCPA.

1. Lobbying and Campaign Contributions

Stiglitz contends that lobbying expenditures by industries can have a significant impact on how laws and regulations are shaped.²³⁴ This is especially true in the area of bankruptcy laws. During the buildup to BAPCPA, Professor Elizabeth Warren²³⁵ wrote, “bankruptcy is much more the province of interest groups [rather than professionals in the field] that have spent millions to hire lobbyists, to launch a public relations campaign, and to make strategic campaign contributions.”²³⁶ As she noted, bankruptcy laws can have huge implications for profits and because of this, there are strong incentives to influence policy creation.²³⁷ Various Congressmen throughout the BAPCPA’s legislative history echoed Professor Warren’s concern about corporate influence over bankruptcy laws.²³⁸

Prior to the enactment of BAPCPA, credit card companies made significant contributions to political campaigns in an effort to garner support for bankruptcy reform.²³⁹ President Clinton, cautious of bankruptcy reforms too tailored for the financial industry at the expense of debtors, had continuously threatened to veto any bankruptcy bill that he felt was unbalanced.²⁴⁰ Prior to the 2000 Presidential campaign, Republican candidate George W. Bush made it clear he supported the proposed bankruptcy reform.²⁴¹ Not coincidentally, MBNA, the world’s largest credit card issuer at the time, was the biggest contributor

234. STIGLITZ, *supra* note 1, at 160.

235. Professor Warren is a Harvard Law School Leo Gottlieb Professor of Law and a specialist in American Bankruptcy laws. In 2012 she was elected to the U.S. Senate from Massachusetts and frontrunner to take a seat on the Senate Banking Committee.

236. Elizabeth Warren, *The Market For Data: The Changing Role of Social Sciences in Shaping the Law*, WISC. L. REV. 1, 5 (2002).

237. *Id.*

238. See generally Jensen, *supra* note 164; 144 CONG. REC. H10225 (daily ed. Oct 9, 1998) (statement of Rep. Nadler) (arguing that the bill was written “by and for” credit card companies).

239. Warren, *supra* note 236, at 9.

240. Jensen, *supra* note 164, at 534-539 (noting that in 2000, President Clinton rejected BAPCPA’s predecessor bill through a pocket veto).

241. Warren, *supra* note 236, at 9.

to the Bush campaign.²⁴² President Bush's election in 2000 was a significant step toward enacting BAPCPA.²⁴³

In addition to garnering general support for bankruptcy reform, in the decade during which the BAPCPA was being debated in Congress, credit card companies spent millions on lobbying efforts in an attempt to influence particular provisions of the law.²⁴⁴ In just five years, MBNA spent over \$17 million in lobbying.²⁴⁵ The credit card industry as a whole spent an estimated \$100 million or more from 1995 to 2005 in lobbying to influence the bankruptcy reform.²⁴⁶ The means testing approach for determining Chapter 7 eligibility, considered the "heart" of the reform, was strongly supported by the credit card industry.²⁴⁷

2. Capture and Shaping Perceptions

While the credit industry spent millions on direct contributions to influence the proposed bankruptcy bill and garner support from politicians, it also campaigned heavily to shape the perceptions of the rest of society.²⁴⁸ The credit industry understood that politicians, no matter how much money was donated to campaign contributions, would be hesitant to support a bill that was widely seen as special interest legislation.²⁴⁹ Therefore, in an attempt to alter the perceptions of the bankruptcy reform bill, the industry funded a powerful public relations campaign.²⁵⁰

The main justification proffered by the proponents of the more creditor-friendly bankruptcy paradigm was that it would benefit the average American household.²⁵¹ The credit industry purchased a slew

242. *Id.* (citing Robert Zausner & Josh Goldstein, *Bush's Largest Funding Source: Employees of Credit-Card Firm*, PHILA. INQUIRER, Jul. 28, 2000, at A1).

243. Michelle J. White, *Bankruptcy Reform and Credit Cards 2* (Nat'l Bureau of Econ. Research, Working Paper no. 13265, 2007) available at <http://www.nber.org/papers/w13265>.

244. Scott, *supra* note 170, at 945.

245. *Id.* (noting that MBNA was acquired by Bank of America in 2006).

246. White, *supra* note 243, at 2.

247. See Jensen, *supra* note 164, at 534-539 (explaining the development of the means test as a measure of payback ability).

248. Warren, *supra* note 236, at 9.

249. *Id.* at 12.

250. *Id.*

251. Simkovic, *supra* note 173, at 2.

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of newspaper advertisements and funded press releases that all claimed abusive bankruptcies cost each American family \$400 a year.²⁵² The \$400 savings was cited in studies and became the lead argument for proponents of the bill.²⁵³ While years later a lobbyist employed by the credit card industry took credit for fabricating the \$400 “fact,”²⁵⁴ it was critical to the passage of BAPCPA.²⁵⁵

Consistent with Stiglitz’s prediction,, the economically-powerful credit card industry relied on a simple message to shape perceptions and convince the general public to adopt its interests.²⁵⁶ Professor Warren argues that the \$400 “fact,” combined with the rest of the public relations ad gave politicians “political cover” to support the bankruptcy reform.²⁵⁷ The fact that the \$400 claim was mathematically implausible mattered little;²⁵⁸ the credit industry effectively framed the debate. Through a concerted effort, the credit card industry was able to capture politicians through monetary contributions, influence the main provisions of the BAPCPA for its benefit, and shape the perceptions of the public to adopt its interests. The main provisions of the BAPCPA are a manifestation of this effort.

VI. CONCLUSION

Stiglitz’s *The Price of Inequality* effectively explores the growing inequality concern in America. He succeeds in providing the public and policymakers with a comprehensive discussion of the nature of the problem, the factors leading to the problem, and why inequality should be a national concern. As the case study on BAPCPA illustrates, Stiglitz’s arguments are borne out in practice. His theories on the wealthy’s influence over policymakers and public perception are particularly illuminating in the bankruptcy reform example.

While Stiglitz does not spend much time on policy

252. Warren, *supra* note 236, at 12.

253. *Id.* at 13.

254. *Id.*

255. Simkovic, *supra* note 173, at 2.

256. STIGLITZ, *supra* note 1, at 162 (“[S]imple, distorted stories, often repeated, can be more effective than longer and more subtle ones.”).

257. Elizabeth Warren, *The Phantom \$400*, 13 J. BANKR. L. & PRAC. 77, 86 (2004).

258. Warren, *supra* note 236, at 13 (arguing that it was nearly mathematically impossible for any proposed bankruptcy reform to save each American family \$400).

considerations to solve the inequality problem, he does offer some rudimentary proposed solutions.²⁵⁹ For him, the most pressing factors that need to be addressed are those that simultaneously weaken the economy while at the same time further entrench inequality.²⁶⁰ Specifically, Stiglitz proposes that the American government must curb the rent seeking of the financial sector,²⁶¹ better enforce competition laws,²⁶² reform the bankruptcy laws,²⁶³ and create a more effective tax code.²⁶⁴ Stiglitz believes that inequality has become so entrenched in American society that it has become acceptable.²⁶⁵ In order for this to change, the 99 percent needs to realize that wealth inequality is not inevitable and that change can occur.²⁶⁶ The Occupy Wall Street protests shows that there is hope; the rest of society must voice their disapproval as well.

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259. See STIGLITZ, *supra* note 1, at 165.

260. *Id.* at 81.

261. *Id.* at 269-70.

262. *Id.* at 270.

263. *Id.* at 271 (arguing that student loans should be changed from non-dischargeable to dischargeable status, and that Chapter 7 should still be available for those needing a fresh start, creating a more debtor-friendly Code while forcing banks to curtail any predatory pricing strategies).

264. *Id.* at 273.

265. STIGLITZ, *supra* note 1, at 287.

266. *Id.*