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Bernard R. Trujillo

*Valparaiso University School of Law*

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# THE WISCONSIN EXEMPTION CLAUSE DEBATE OF 1846: AN HISTORICAL PERSPECTIVE ON THE REGULATION OF DEBT

BERNARD R. TRUJILLO\*

We live in a time of crisis for consumer bankruptcy. Despite good economic times in the United States, an unprecedented number of individuals and households are going bankrupt. Dramatic changes in the distribution of credit have created new possibilities and pitfalls for the consumer and worked fundamental changes in the profile and political power of the creditor who stands to lose when the consumer goes broke. These conditions have created an environment for reconsidering, in Congress and in popular conversation, the appropriate measure of relief that the laws of the United States should afford to an individual debtor.

The purpose of this short Article is to give our contemporary crisis some historical perspective. A central feature of U.S. consumer bankruptcy policy has been the idea of the "fresh start": filing bankruptcy is to be a new beginning for the debt-laden consumer. To restore the debtor as a potentially productive member of the economy, the bankruptcy process must allow the debtor to retain a sufficient level of basic resources. Implicit in the fresh start approach is the notion that legal institutions should attend to the economic and structural facets of debt (i.e. create conditions that will get the debtor back on her feet and into the economy as soon as possible), leaving scrutiny of the moral aspects of debt to other institutions more competent to the task. The present crisis challenges us to ask how committed we, as a society, should remain to this idea of the fresh start.<sup>1</sup>

To determine whether we should reaffirm our social commitment to the fresh start, it may be useful to remind ourselves of why such a policy was chosen in the first place. There was a time when the fresh start was not an enshrined objective of our laws on debt collection, but instead merely one of a number of directions that society could take. This essay

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\* Assistant Professor, University of Wisconsin Law School. A.B., 1988, Princeton University; J.D., 1992, Yale Law School. Thanks to Chris Dickerson, Arthur McEvoy, Michael Morgalla, Gary Rowe, Victoria Trujillo and William Whitford.

1. See William C. Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. CONSUMER POL'Y 179 (1997)(describing eroding commitment to goal of fresh start).

considers such a time by taking a close look at a debate over a proposed clause that occurred at Wisconsin's Constitutional Convention of 1846. The clause, which would have exempted some debtor's property from the collection efforts of creditors, was among the first "exemption" laws considered in the United States. Study of the Wisconsin Exemption Clause Debate of 1846 shows that the eventual selection of the fresh start was not the inevitable destiny of a nineteenth-century frontier population, but rather a deliberate policy choice, made for reasons that may or may not remain persuasive today.

By reviewing the Wisconsin Exemption Clause Debate of 1846, this Article hopes simply to establish that a central question of nineteenth-century Wisconsin debt regulation resembles a central question in our contemporary conversation: namely, should the law treat debt primarily as a moral or an economic problem? Giving historical perspective to a contemporary occasion of choice is not, of course, the same thing as making an argument that we should strengthen or weaken our present commitment to the fresh start and the particular approach to the law of debt collection that it entails. But re-visiting one foundational moment of bankruptcy law may help clarify our thinking as we confront another.

Finally, this Article will conclude with some tentative thoughts comparing the contemporary crisis in bankruptcy to another crisis presently occurring in the field of immigration, as well as some equally tentative thoughts regarding "debt" as a useful organizing concept for analyzing U.S. law.

## I. CONTEMPORARY CRISIS IN BANKRUPTCY LAW

Federal laws affording bankruptcy relief to debtors are receiving a terrific amount of attention these days. Perhaps there is a romantic reason for this renewed interest, as lawyers make ready to celebrate the twentieth anniversary of the enactment of the Bankruptcy Code of 1978 ("Code"). A more mundane, but perhaps realistic reason for boundless energy of the bankruptcy reform movement is the fact that bankruptcy petitions are soaring, and this in an economy that most agree is doing well. The Administrative Office of U.S. Courts reported that there were more than 1.4 million bankruptcy petitions filed in the calendar year 1997, with filings by individual consumers accounting for 1.35 million of the total.<sup>2</sup> For a short-term perspective on these numbers, consider that the number

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2. See *Breaking News from A.P.* (visited Feb. 27, 1998) <<http://www.nytimes.com>>.

of filings increased 26% from 1995 to 1996,<sup>3</sup> and increased another 19% from 1996 to 1997.<sup>4</sup> For long-term perspective, consider that last year's consumer filings represent a 742% increase over the consumer filings of twenty years ago when the Code was new.<sup>5</sup>

Numbers like these require some explanation. One likely reason for the explosion in consumer bankruptcies is the explosion in the extension of credit by lenders to "subprime" borrowers; that is, people whose low income, youth, prior credit history or other factors make it more likely that they would default on the loan. The number of subprime loans (mainly in the form of credit cards issued to high-risk borrowers) increased as lenders realized that charging higher interest rates created a handsome profit even after writing off the loans that went bad. Corresponding with this market reality is the political reality that unsecured lenders (i.e., entities who lend money without having the borrower pledge some property as collateral), who do most of the subprime lending, are now, in stark contrast to the recent past, quite well organized and capable of assuring Congressional responsiveness to their concerns.

Prior to 1978, when the Code was enacted, the profile of a typical unsecured lender resembled the corner grocer. A borrower would wander down Main Street, doing business on credit with the butcher and the baker and the candlestick maker.<sup>6</sup> When the borrower went bust, such merchants had very little recourse. Because unsecured lenders were small and dispersed, and each had relatively few dollars at stake in any potential default, they had very limited political power. The Code reflects this imbalance on unsecured lenders *vis-a-vis* secured lenders (such as banks that loan money by using the borrower's car or house as collateral). Now, the profile of the typical unsecured lender looks more like CitiBank.<sup>7</sup> When a borrower wanders down Main Street today, she uses her credit card to fund her purchases, thus creating a debt owed not to the individual merchant, but rather to the bank or financial institution whose name is on the credit card. Now when the borrower goes bust, it is a

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3. See NATIONAL BANKRUPTCY REVIEW COMMISSION, FINAL REPORT at ii (1997)[hereinafter NBRC REPORT].

4. See *Breaking News from A.P.*, *supra* note 2.

5. See NBRC REPORT, *supra* note 3, at ii.

6. There were, of course, plenty of credit cards in circulation prior to 1978, along with a good concentration of unsecured debt owed to small loan companies. The difference between the nature of unsecured consumer debt prior to 1978 and today is a (perhaps dramatic) difference of degree rather than a difference of kind. See generally TERESA SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS (1989).

7. Perhaps to be re-christened "CitiGroup" after its merger with Travelers' Insurance. See WALL ST. J., Apr. 7, 1998, at 1.

relatively small number of well-financed and highly organized lenders that stand to lose a lot of money.

Whatever the causes behind the explosion in consumer bankruptcies, attention has focused on whether filing for bankruptcy offers "too much relief" to the individual debtor. The debate about whether the law affords debtors too much relief goes like this: Creditors claim that debtors filing for bankruptcy feel too little pain, and so are turning to bankruptcy as a sort of "financial planning" tool, as the first recourse. Behind this is the assertion that bankruptcy has lost its "stigma," and that the law should be reformed to restore the negative moral charge to a decision to file for bankruptcy.<sup>8</sup> Those who support a higher level of relief for debtors believe that, while the accumulation of debt may well have implications for personal morality, the U.S. Congress and other institutions of the state should limit their treatment to the economic and structural aspects of debt regulation;<sup>9</sup> allowing the debtor enough basic resources to return to the financial fray on firm footing after the bankruptcy will benefit the entire economy.

Having sketched the contours of the contemporary debate, let us now turn to the events of 1846 Wisconsin.

## II. THE EXEMPTION CLAUSE DEBATE OF THE 1846 CONVENTION

When delegates from around the Territory of Wisconsin gathered together in 1846 to write a Constitution, two members of the body came, as it were, from different worlds. The member from Racine County was Marshall Strong, who was 33 at the time the convention. Strong was the son of a judge, born in Amherst, Massachusetts and educated at Amherst College. He became a lawyer and moved to the Wisconsin territory in 1836. He was elected to the Territorial Council, a body organized for the purposes of revising the territorial laws in anticipation of statehood. In January of 1846 (just a few months prior to the events I shall describe),

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8. The debate in the United States House of Representatives prior to the overwhelming passage of a bankruptcy reform bill was replete with language that sought to "moralize" debt by legal means. See Katharine Q. Seelye, *House Passes Bankruptcy Reform Bill*, N.Y. TIMES, June 11, 1998, at A22 (quoting Representative Scott McInnis, R. Colorado: "[This bill] represents another example of this Congress's efforts to encourage individual responsibility. We will re-notify people that they do need to be held accountable for their debts that they have accumulated. We will remind them about keeping their word. We will remind them about 'Don't go out and spend money that you don't have.' . . . If you can't afford it [he said, nearly shouting], don't buy it.").

9. See Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962) (describing nineteenth-century reevaluation of poverty from a problem of personal morality to an economic problem that could be addressed with state action).

while he was away attending to the work of the Territorial Council, his wife and children died in a fire that also destroyed his home in Racine.<sup>10</sup> The tragedy evoked the sympathy of the entire Territory. Popular acclamation compelled Strong to stand for election as Racine County's delegate to the Constitutional Convention, and he was elected overwhelmingly. Strong ultimately resigned his position as delegate to the Convention (in large part because of the disagreement over the Exemption Clause that we shall consider), and subsequently used all of his efforts to secure the defeat of the Constitution.<sup>11</sup> After his resignation from the Convention, Strong may have lost some of the confidence of the populace,<sup>12</sup> and gradually faded from public life. He died at his home in Racine in 1864.

The member from Rock County was David Noggle. Unlike Marshall Strong, David Noggle was no a child of privilege. Born of pioneer parents in Pennsylvania, Noggle spent time working in a factory in New York City and as a farm hand in Illinois. Self-educated, Noggle studied law in his free time while working on the farm. Noggle was admitted to the bar and began his practice in Beloit in 1839.<sup>13</sup> Thirty-seven years old at the time of the Convention of 1846, Noggle was one of the more influential and original thinkers of the Convention. After the Convention, Noggle's career went in the opposite direction from Strong's: in 1869,

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10. See *THE CONVENTION OF 1846*, at 793 (Milo M. Quaife ed. 1919)[hereinafter *QUAIFE, CONVENTION*].

11. See Marshall Strong, *Speech to the Territorial Legislature Opposing the Ratification of the Constitution* (February 5, 1847), reprinted in *THE STRUGGLE OVER RATIFICATION* 235-62 (Milo M. Quaife ed. 1920)[hereinafter *QUAIFE, RATIFICATION*]. In April of 1847, after four months of intense debate, the proposed Constitution was voted down by 59% of the population. See *THE ATTAINMENT OF STATEHOOD* v-vii (Milo M. Quaife ed. 1928)[hereinafter *QUAIFE, ATTAINMENT*]; *QUAIFE, RATIFICATION, supra*, at 698. In December of that year delegates met in Madison to draft a second attempt at a Constitution, which contained a somewhat weaker version of an Exemption Clause. See *QUAIFE, ATTAINMENT, supra*, at 44-47. The second draft of the Constitution was ratified by 74% of the popular vote in March 1848. See *id.* at vii. The current Wisconsin Constitution still contains exemption language: "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." WIS. CONST. art. I, sec. 17.

12. Strong's performance at the Convention, even prior to the debate over the proposed Exemption Clause, seemed to have diminished his popular credibility. See *Letter from the Convention to the Platteville Independent American* (November 8, 1846) reprinted in *QUAIFE, RATIFICATION, supra* note 11, at 118-19 ("Marshall M. Strong, who was a prominent man and regarded as certain of high preferment in the new order of things when we assume state sovereignty . . . is now considered by all as effectually laid out and to be trusted by none . . .").

13. See *QUAIFE, CONVENTION, supra* note 10, at 784.

Noggle was appointed by President Ulysses S. Grant to be Chief Justice of the Territory of Idaho. Noggle served in that capacity until 1874 and died four years later.<sup>14</sup>

On December 7, 1846 the member from Racine County and the member from Rock County clashed bitterly over the issue of whether an Exemption Clause should be included in the organic law of the nascent state of Wisconsin.<sup>15</sup> As described by Strong, the provision under discussion provided that "forty acres of land, to be selected by the owner, shall be exempt from sale on execution issued on judgment obtained for debt contracted after the adoption of this constitution."<sup>16</sup>

Such a provision, exempting or shielding some of a debtor's property from being seized and sold by creditors looking to make good on the debt, is now a quite common feature of the debt collection laws of the states and of federal bankruptcy law.<sup>17</sup> But in 1846, an exemption law was something new.<sup>18</sup> Strong began his passionate opposition to the proposed Exemption Clause by suggesting that the provision was novel and untried, noting that "[n]othing similar . . . can be found in the constitutions of any state except Texas, and surely we will not go to that noted asylum for all the desperadoes in the country for examples of public morals and correct laws on the collection of debts."<sup>19</sup>

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14. See *id.* at 785.

15. Territorial Governor Henry Dodge issued a proclamation formally declaring the popular ratification of the Wisconsin Constitution in April 1848, and one month later Congress passed an act admitting Wisconsin to the United States. See QUAIFFE, ATTAINMENT, *supra* note 11, at vii.

16. QUAIFFE, CONVENTION, *supra* note 10, at 649. A neighboring section of the proposed constitution, treating the property rights of married women, was perhaps equally controversial. See *id.* at 631.

17. See, e.g., NBRC REPORT, *supra* note 3, at 118 (compiling state and federal exemption statutes).

18. At the time of the 1846 Wisconsin convention, only the Texas Constitution, ratified in 1845, contained exemption language. A Mexican statute of 1829, following Spanish law, had made exemption laws applicable to the Mexican territory of Texas, and Texas enacted a similar statute for itself ten years later. See Joseph W. McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 SOUTHWESTERN HIST. Q., 369, 369 (1983). Besides Texas, the states of Mississippi, Georgia, Alabama and Florida all had exemption legislation prior to 1846. See McKnight at 396, n.81. See also Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 810 (1983).

19. QUAIFFE, CONVENTION, *supra* note 10, at 647-48. See also McKnight, *supra* note 18, at 393 ("The American financial crisis of 1837, which precipitated the movement of so many distressed debtors to Texas, was a likely catalyst to the 1839 Texas enactment [of exemption legislation].").

Aside from its novelty, Strong believed that the Exemption Clause would amount to a constitutional license to fraud, calling it the “knave’s magna carta.”<sup>20</sup> So Strong opines from the floor:

Suppose a man in embarrassed circumstances residing in some town in the state of New York near a farmer worth some five thousand dollars. Under some pretence he procures his endorsement to that amount. Having obtained the money, and read our glorious constitution, and converted his property into cash, he comes to Wisconsin and purchases a valuable flouring mill and the forty acres upon which it stands. Soon the farmer is compelled to pay the endorsed notes; his property is all sold for that purpose; his wife and children are turned out upon the world, destitute and penniless. He follows his worthy neighbor to Wisconsin, ascertains his place of residence, calls upon him, and finds him sleek, contented, surrounded with all the luxuries of life, and perhaps exceeding polite withal. But the farmer is informed that it is not convenient for the man to pay him then. He calls upon a constitutional lawyer to ascertain what remedy he has, and the lawyer very gravely says to him —

“Sir, the law furnishes you with no remedy. Our wise men in the days when the constitution was made anticipated such cases as these and have expressly provided that your worthy friend shall be protected in the enjoyment of what he has. Possession was formerly only nine points in the law, but it is now ten. The reason of the law is this, that every man should be protected in holding what he has in his own possession, no matter how he came by it, for lawsuits to ascertain these conflicting rights are very expensive. Besides you should not repose confidence in any of the human race, and as it seems you have, you are therefore justly punished therefor.”<sup>21</sup>

The upshot of such a law that privileges debtors at the expense of creditors, according to Strong, is bloodshed: “Pass this act, and I predict that violence and murder will abound.”<sup>22</sup>

Strong also makes an argument about the long-term effects of an Exemption Clause upon the system of credit:

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20. QUAIFE, CONVENTION, *supra* note 10, at 657.

21. *Id.* at 650-51.

22. *Id.* at 651.



No matter how much property a man may have, or what kind of property it may be, so long as he is able to convert it all into a valuable forty acre tract, which will be exempt from execution, no man can trust him without knowing that it is in the debtor's power at any time to deprive him of all legal remedy to collect the debt. The consequence is, then, that at one fell swoop you destroy all credit. . . .

. . . [C]redit is not only the bond, but the distinguishing mark of civilized society.<sup>23</sup>

Strong's opposition culminates in a promise: "Sir, I dare not vote for this section! I will not vote for the constitution if it contains it, either here or at the polls. But, on the contrary, will spare neither time, or exertions, or means to defeat it." In fact, on the afternoon of December 7, 1846 (moments after Strong's speech in opposition and David Noggle's response) the Convention voted 61 to 34 in favor of the article including the Exemption Clause.<sup>24</sup> Immediately after the vote, Marshall Strong resigned his delegacy and returned to Racine to mount his opposition.<sup>25</sup>

What explains Strong's desperate tone? Why does he put his back to the wall on this issue? Perhaps one thing on Strong's mind was the phenomenon summed up in the phrase "Shays' Rebellion," a series of events that showed the shocking side of a Populism gone bad. Daniel Shays had been a captain during the U.S. Revolutionary War. After the war, Shays returned to his Massachusetts home deeply in debt.<sup>26</sup> The country was torn by a post-war depression that had robbed the currency of much of its value. Shays and his followers (many of whom were also

23. *Id.* at 652-53.

24. *Id.* at 670.

25. *See id.* at 673. Strong's resignation was described five days later by the *Madison Democrat* newspaper as a "political suicide." QUAIFFE, RATIFICATION, *supra* note 11, at 144.

26. Shays' situation was typical of his countrymen. As one Massachusetts farmer opined in 1786:

What are the present state of facts as they represent the yeomanry of this Commonwealth? Our taxes are so high, together with calls of a private nature, that our stock and cattle are greatly diminished . . . the greater part then of those who gloriously supported our independence now find their moveables vanishing like empty shades, their lands sinking under their feet.

*Massachusetts Gazette* (October 20, 1786), reprinted in DAVID P. SZATMARY, SHAYS' REBELLION 36 (1980). Szatmary describes the post-Revolutionary War squeeze British merchants of manufactured goods put on U.S. retailers of those goods for specie, and the corresponding increase in debt actions for specie brought against the yeomanry. *See id.* at 19-36.

indebted veterans of the Revolutionary War) rose in August of 1786 and shut down the courts in Northampton so that debtors could not be tried and imprisoned. Shays and his men then broke up the Massachusetts Supreme Court in Springfield in an attempt to avoid being tried for treason, and ultimately captured the state arsenal. The federal army intervened in February of 1787, leading to the capture of Shays and the end of the Rebellion. Many historians look to Shays' Rebellion, seen as evidence of the unsustainable nature of the Confederation, as the proximate cause of the federal constitutional convention that met in Philadelphia beginning in the summer of that year.<sup>27</sup>

One condition that made Shays' Rebellion possible may strike a familiar chord with the observer of our own contemporary debt crisis: namely, the depersonalization of the relationship between debtor and creditor. In the time of Daniel Shays, promissory notes, which could be assigned and transferred among creditors, were just beginning to replace "book debt" as the chief mode of credit transactions. As described by historian Jonathan Chu, book debt was the

delineation of a series of mutual promises and obligations rendered in precise economic terms and carried in a merchant's account book. The process by which book debt was accumulated denoted a constant pattern of interaction and a constant ebb and flow of credit and debit. Payable on demand, book debt was a legally enforceable economic obligation, but it might go years without settlement or collection since it also represented ties of social relationships. Under these circumstances repayment rested upon the trust of the creditor and the ability of the debtor to provide labor or goods when the occasion arose over a lifetime.<sup>28</sup>

Promissory notes, on the other hand, "could change hands at a dazzling and confusing rate. . . . [P]romissory notes facilitated economic

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27. So wrote editor Benjamin Russell in the *Massachusetts Sentinel* shortly after the establishment of the federal Constitution:

In investigating the causes which gave life to the happy form of government which we shall ere long be under, the Historian will not forget the era of the late insurrections in this Commonwealth. The insurrections . . . must be considered as the causes of bringing in existence, at a much earlier period than would otherwise have been, the [federal] government.

Quoted in Robert A. Gross, *The Uninvited Guest: Daniel Shays and the Constitution*, in *IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION* 5 (Robert A. Gross ed. 1993).

28. Jonathan M. Chu, *Debt Litigation and Shays' Rebellion*, in *IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION*, *supra* note 27, at 82.

transactions; but in so doing, they also eliminated the moderating effects of multifaceted social relationships when hard times struck."<sup>29</sup> Such a phenomenon of "facelessness" is also an earmark of our own times, as unsecured debt moves from the corner grocer to some corporation distant and unseen.

Marshall Strong was undoubtedly influenced by a concern that the same sort of pro-debtor populism that motivated the lawlessness of Shays' Rebellion was returning to trouble the drafting of Wisconsin's organic law. Indeed, less than one month before the Exemption Clause debate and Strong's subsequent resignation, the Convention had considered an article that would have constitutionally prohibited all debt collection laws.<sup>30</sup> Sponsoring the proposed article was John Crawford, the delegate representing Milwaukee County at the Convention. Crawford, who was fifty-four years old at the time of the Convention, was a former military general who had gone into business. No friend of lawyers, Crawford advocated the abolition of debt collection law in part because he thought that debt collection was a make-work industry for lawyers.<sup>31</sup> Aside from a few vintage nineteenth-century lawyer jokes,<sup>32</sup> Crawford also advanced the notion that abolishing debt collection laws would have the *beneficial* effect of destroying the system of credit:

My views on this subject are that it will, in a measure, put a stop to the credit system, which I consider a very great curse to both debtor and creditor. But in the end it will have a glorious effect, for it will place men upon their honor . . . . [a]nd a[n] honest man will have no trouble in getting all necessary accommodations. . . . The collection laws we shall have if this resolution does not pass will destroy the natural confidence between man and man, and the debtor will say to the creditor . . . "You hold a rod or iron over me, and you may make the best use of it you can; I do not consider myself honorably bound to pay it."<sup>33</sup>

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29. *Id.* at 82-83.

30. *See* QUAIFE, CONVENTION, *supra* note 10, at 81 ("Mr. Crawford introduced the following resolution, which was read to wit: 'Resolved, That all laws for the collection of debts shall forever be prohibited within this state.'").

31. *See id.* at 341-42.

32. "Mr. Chairman, if in speaking of lawyers I am to be accused of descending to low epithets, the fault is not with me; I have to descend to low grounds to reach the object of my search." JOHN CRAWFORD, SPEECH ON ABOLISHING LAWS FOR THE COLLECTION OF DEBTS BY CONSTITUTIONAL CONVENTION COMMITTEE OF THE WHOLE (October 31, 1846), *reprinted in id.* at 348.

33. JOHN CRAWFORD, SPEECH INTRODUCING THE MEASURE TO ABOLISH LAWS REGULATING THE COLLECTION OF DEBTS (October 10, 1846), *reprinted in id.* at 94-96.

Crawford's resolution was voted down on November 9, 1846, and twelve days later Crawford offered a second provision to come to the aid of the debtor: the first version of the Exemption Clause. The initial formulation of the Exemption Clause, advanced by Crawford, directed that the "legislature shall provide by law for exemption from taxation and execution five hundred dollars worth of household furniture, mechanics' tools, farming utensils, professors' books, or other property belonging to each family in this state."<sup>34</sup> A resolution introduced on the same day sought to preserve from execution a parcel of land, and it was this formulation of the exemption idea that received the stinging denunciation of Marshall Strong on December 7, 1846.<sup>35</sup>

At the conclusion of Strong's passionate oration, David Noggle rose to take the floor in defense of the Exemption Clause. Noggle claimed that he had

until this moment . . . designed casting a silent vote in favor of the article; but, sir, when a provision, proposed to be made a part of the fundamental law of the land, one founded in so much equity and justice as is the one now before us, containing principles in which the honest laborer, the poor man, and the honest yeomanry of the country are so deeply interested, I cannot silently sit by and witness the sophisticated assaults of

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Discussions about the role of credit in the developing economy and society were very much at the forefront of the Exemption Clause debate. *Compare* Editorial of the SOUTHPORT TELEGRAPH(December 24, 1847)("Do away [with] your laws relating to debts and bankruptcy — throw away your legal standards of right and wrong in regards to matters of pecuniary deal and obligation; let integrity of character be the sole basis of credit — and you will soon find a moral sentiment and discrimination springing up in community [that will] furnish a better security for the honest and faithful discharge of mutual obligations and for safety in business transactions, than any legal system of coercion or regulation that human wisdom can devise.") *with* Editorial of the WISCONSIN ARGUS (Madison)(December 7, 1847)("Four-fifths of our wealthy men were once poor. Ask them how they became rich and they will generally tell you that they started on capital obtained by credit, and that without credit they must have remained comparatively poor. It is impossible to imagine any stroke of policy which would so effectually check the growing wealth of a nation and so suddenly put it upon a retrograde movement as the suspension of credit; for the poor, for the most part, would forever remain poor for want of capital to aid industry, and the rich would become poor for want of industry to aid their capital."), *reprinted in* QUAIFFE, ATTAINMENT, *supra* note 11, at 65, 53.

34. JOHN CRAWFORD, RESOLUTION TO CONSTITUTIONAL CONVENTION (November 21, 1846), *reprinted in* QUAIFFE, CONVENTION, *supra* note 10, at 516.

35. *See* JOHN MANAHAN, RESOLUTION TO CONSTITUTIONAL CONVENTION (November 21, 1846), *reprinted in id.* at 517 ("Resolved, that the legislature shall have power to prohibit by law, from forced sale, a certain portion of the property of all heads of families not to exceed 200 acres of land.")

the gentleman from Racine [Marshall Strong] upon the article and its friends without endeavoring in my feeble manner to free it from some of the abuses by him thus heaped upon it.<sup>36</sup>

Noggle's first strategy of defense is to sound the class themes that typically mark discussions of the regulation of debt:

[The] [g]entleman seem[s] very indignant at the idea of providing for the poor man and not for the rich. Sir, it is too true for the credit of this country, that the greatest portion of its legislation is designed alone for the rich; the motto is too common, "Take care of the rich, and the rich will take care of the poor." And now strange it is that when this article made its appearance, raising but a feeble appearance in behalf of the poor laborer, we should so suddenly hear the cry of "fraud, fraud, fraud" from so many honorable members upon this floor, who would not have been in the least suspected of having the interests of the common people at heart.<sup>37</sup>

Aside from this reference to "class conflict," Noggle, in fact, may have been hard pressed to present an account of when the law should absolve debtors from paying their debts. After all, we commonly take it as a matter of simple justice that a person should pay what she owes. An 1847 discussion by the editors of Madison's *Wisconsin Argus* newspaper thus put the question:

Upon what principle, then, is an exemption of property from the just demands of the creditor founded? We answer negatively that it is not founded in the principle of justice. Justice requires that a man should pay his debt simply because he owes it, and not because he is able or unable. . . . The principle of justice . . . admits of no exemption, but pursues the debtor with its inflexible demands to the last farthing he has, and holds him bound for the balance, if there be a farthing still due.<sup>38</sup>

36. *Id.* at 658.

37. *Id.* at 664; *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 326 (1988)(quoting a "Georgia scalawag delegate" at the time of Southern Reconstruction as saying, "This is a strife between capital and labor, between the wealthy aristocrats and the great mass of the people.")

38. Editorial, WISCONSIN ARGUS (Madison), Nov. 16, 1847, *reprinted in* QUAIFFE, ATTAINMENT, *supra* note 11, at 44-45.

But if exemptions are not a matter of justice, then where can their source be found? What lies opposite of "justice" on the ledger that would yield relief to a debtor from collection on a debt that he deliberately contracted? There are at least three possible, and perhaps indistinct, answers: mercy, equity, and a consideration of the social and economic factors that may affect debtor and creditor behavior.

On the theme of "mercy," the editors of the *Wisconsin Argus* continued:

We answer affirmatively that [the exemption of property] is founded in the principle of mercy, and in that alone. The question then arises: To what extent does the principle of mercy demand exemptions? It may be answered in general terms that its demand extends no further than to secure the debtor against immediate suffering by the rigorous operation of the principle of justice, and not even thus far when the arrest of justice would operate unmercifully upon the creditor. For example, if a man be so poor that he has but two loaves of bread in the world and honestly owes his neighbor one, and that neighbor has none, the principles of both justice and mercy require that he should pay it.<sup>39</sup>

Such a calculus of mercy counsels a messy balancing of the straits of a particular debtor against a particular creditor. A creditor who is a hospitalized victim of the debtor's tort may win a greater pull on one's interpretation of mercy than the creditor who is a bank.

Perhaps the law's name for "mercy" is "equity." An example of the law's use of equity to afford debtor relief is the "stay-law," which would literally stay the processes of debt execution in order to afford temporary relief to the debtor. Such laws were enacted in times of economic crisis and, while courts would generally strike these laws as unconstitutional, the laws would be effective long enough to afford the relief necessary to mitigate the rough edges of the financial downturns.<sup>40</sup> One Wisconsin case (post-statehood) presents a good example of a court's use of equitable reasoning to justify such debtor relief. In *Von Baumbach v. Bade*, the Wisconsin Supreme Court upheld a version of a stay-law, writing:

Although such changes are in general exceedingly unwise and unjust, yet if from sudden and unlooked-for reverses or

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39. *Id.* at 45.

40. See CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 148 (1935).

misfortune, or any other cause, the existing remedies become so stringent in all or a particular class of actions that great and extensive sacrifices of property will ensue, without benefit to the creditor or relief to the debtor, a relaxation of the remedies becomes a positive duty which the State owes to its citizens. . . . In passing upon questions like the present, Courts must look behind the statute itself and take notice of the causes which led to its enactment; for otherwise, they would be unable to determine whether its regulations are reasonable or not, or were demanded by the state of the times or the financial situation of the country. . . . I cannot say that the delay occasioned by it is so great or so unreasonable that it so obstructs or embarrasses proceedings for foreclosure on the part of the mortgagee as to make it under any circumstances unconstitutional and void.<sup>41</sup>

The legislative enactment and judicial preservation of such stay-laws seems a sort of inexact "legal override" to the demands of justice written across the face of the contract between debtor and creditor.<sup>42</sup>

A final justification for debtor relief lies in the scheme of incentives that it provides to shape debtor behavior. In his defense of the Exemption Clause, David Noggle touches on the idea that giving debtors a fresh start will liberate them to be productive members of society in a way that redounds to the common good: "The gentleman from Racine says he believes [the Exemption Clause] will make knaves and rascals. Sir, I believe it will tend to elevate the poor; it will level them up instead of down; it will tend to make the lower classes of community independent, high minded, and honorable citizens."<sup>43</sup> Thus, the essence of the "fresh start" idea: When people are saddled with debt, they lack incentive to be productive. For a debtor who is indebted past a certain point, the question becomes, "Why?": Why go to work? Why come up with ideas? Why struggle and strive when the debtor knows that her fate is dictated by her circumstances? When that debtor, on the other hand, is liberated from the debt that had kept her down, she becomes free to create and produce in a way that benefits the entire community.

The fresh start redounds not only to the economic productivity of the debtor, but also to her personal dignity. Noggle, demonstrating his personal familiarity with the debtor class, makes the point:

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41. 9 Wis. 559 (1859); *see also* Warren, *supra* note 40, at 88-89.

42. *See* PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1974); FONER, *supra* note 37, at 212 and 326-27; Mark Bradshaw, *The Role of Politics and Economics in Early American Bankruptcy Law*, 18 WHITTIER L. REV. 739 (1997).

43. QUAIFFE, CONVENTION, *supra* note 10, at 664.

The people have sense enough to know that the gentleman [Strong] preaches false doctrine when he assumes that making men independent makes rascals of them. They know, sir, that the very germ of fraud is necessity. Remove man's dependence and you remove in a great measure the inducements to dishonesty; but reduce him to penury and want and still continue to oppress him and you invite him to commit fraud, knavery, and every other species of robbery or dishonesty to sustain himself. Make your laws search the poor man's granary, his closet, and his bedroom to satisfy its execution, and you teach him to hide their contents. . . .<sup>44</sup>

Debtor relief laws provide incentives for shaping not only debtor behavior, but creditor behavior as well. Noggle thus contended that protecting some of the debtors' assets through exemption will force creditors to be more discriminating in the lending of money:

A fundamental law like the one now under consideration would not, as the gentleman imagines, annihilate credit; but it would no doubt annihilate that spurious, indiscriminating species of credit that is as readily granted to the spendthrift and the loafer, who never desire any property or means to be sheltered by the exemption, as to the industrious individual; yet, to the same extent that it enabled the former to obtain credit and accommodation, it would exhaust the means and the substance of the honest, prompt-paying debtor by making him pay (in the shape of high prices) the losses occasioned by accommodating the prodigal.<sup>45</sup>

Noggle's claim is that a legal rule making collection more difficult for creditors (by moving some debtor's assets beyond the creditor's reach) will cause creditors to be more discerning of credit-worthiness when lending money in the first instance.<sup>46</sup> Perhaps along with providing a

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44. *Id.* at 666-67.

45. *Id.* at 665.

46. A similar question arises in the context of contemporary legislative initiatives to add a "means test" requirement for allowing a consumer to file a Chapter 7 liquidation instead of a Chapter 13 plan of debt reorganization and repayment. *See, e.g., Congress Might Make Debt Harder to Escape*, BOSTON GLOBE, March 10, 1998, at A1. Such a means test would shift the cost of determining the credit-worthiness of potential borrowers from the lending institution (before the loan is made) to the court system (to evaluate future capacity to pay once relief has been sought). Such a proposal begs the institutional question of "Which institution (i.e., the Lender or the Court) is better equipped to determine the credit-worthiness of a borrower?" *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994).



“fresh start” for debtors, debtor relief laws may also provide a “more careful re-start” for creditors.

While “mercy” and “equity” present themselves as categories beyond measure, perhaps the project of considering the incentives (for both debtor and creditor) established by debtor relief laws is a science more given to measurement and calibration. The calculation of when it is better to execute the formal demands of the contract or when it is better to override the contract and afford extra-contractual relief to the debtor (calculation, in other words, of when a debt is not worth paying) is the central task of debt collection law.

The ultimate choice by Wisconsin (and eventually other states) to embrace a fresh start policy in its debt collection laws was motivated, at least in part, by a desire to champion economic growth. Much has been written regarding such efforts by nineteenth-century legal actors that shaped legal institutions to encourage entrepreneurship.<sup>47</sup> The present question, perhaps now better informed by a reading of history, is whether we want to return to a posture of “moralizing” debt by legal means as we turn to face the twentieth-first century.

### III. DEBTORS AND IMMIGRANTS

This Article concludes with two bits of unfinished business. I have asserted that “Debt” is a central organizing category in much of the law of the United States. A central case, of course, is the law of bankruptcy, which extends a “fresh start” to the debtor based on the calculation that the debtor can do more good, both for herself and for her community, when released from financial burdens and restored to firm financial footing.

The logic of the fresh start also animates immigration law. The rules that govern the process of admitting migrants and investing them with meaningful rights and remedies is a body of law that lies close to the heart of this or any country’s self-definition. We have heard that this nation of immigrants was started, in part, by people fleeing the debts (both financial and structural) of the old country. This nation then crossed a continent westward as people fled debts incurred in the eastern states and territories.<sup>48</sup> When the United States exhausted its geographic frontier (as Frederick Jackson Turner described it) near the close of the nineteenth century, it embraced a legislative frontier in the fresh start

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47. See generally WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN NINETEENTH CENTURY UNITED STATES* (1956).

48. See, e.g., McKnight, *supra* note 18, at 375 (“Moving West was a frequent early nineteenth century response to the series of economic crises in the new American nation.”).

policies that were finally made part of continuous federal law in the Bankruptcy Act of 1898.<sup>49</sup> The experience of the United States has shown that immigrants, if only released from the old-world burdens of a stultifying class structure that guarded access to wealth, opportunities, and hope, could raise up with their bare hands a great nation in a matter of decades.

Yet the warm glow fades from our speech when the subject turns from historical ruminations on "this nation of immigrants" to contemporary concerns of "immigration control." Just as the rhetorical power of the fresh start wanes for the New Debtor, it wanes also for the New Immigrant, and it is an important project to establish why this is so.

The second bit of unfinished business pertains to the concept of "Debt" itself. Much of the socio-legal history of the United States, both the stories that do us honor in the telling and the stories that our troubled consciences will not allow us to forget, can be organized along the concept of Debt: The Debt that the working class owes to the propertied class; the Debt that slaves owe to their masters; the Debt that criminals owe to society; the Debt that immigrants owe to the receiving country. Much of the law of the United States, in its perfectly ordinary operation, is about Debt. But the genius of the law of the United States is about releasing captives of Debt from debts that are false, or from debts that are not worth paying. It is the concept of the "debt not worth paying" that merits much further attention.

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49. See FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1947); see also FREDERICK JACKSON TURNER, *FRONTIER AND SECTION* (1961); Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201 (1996).