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## Chapter 13: Let's Call the Whole Thing Off

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## CHAPTER 13: LET'S CALL THE WHOLE THING OFF\*

*Lawrence Ponoroff\*\**

### ABSTRACT

*Courts cannot agree on much of anything about chapter 13, and legislators cannot agree and are confused over what to do about it. This state of affairs benefits no one and shows no signs of abating. So, in this Article, I propose to throw in the towel by imagining a world without chapter 13. Spoiler alert: although I am not superstitious, with just a few tweaks and tucks to chapter 7, I think the Bankruptcy Code might just be better off operating like a high-rise elevator that goes directly from floor twelve to floor fourteen. I will lay it out and readers can decide for themselves if they are prepared to become anti-choice. For me, in the words of the legendary Louis Armstrong, “and I think to myself what a wonderful world” it would be without chapter 13.\*\*\**

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\* The song with the same title (*sans* “chapter 13”) was composed by George and Ira Gershwin in 1937 for the film of the same year titled *Shall We Dance*. George Gershwin & Ira Gershwin, *Let's Call the Whole Thing Off*, in *SHALL WE DANCE* (RKO Radio Pictures, 1937) (on file with the Library of Congress). It was originally sung in the movie by Fred Astaire and Ginger Rogers, and since has been covered by numerous other artists, including, perhaps most notably, Ella Fitzgerald and Louis Armstrong in 1957.

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\*\*\* The song “*What a Wonderful World*,” written by Bob Thiele (as “George Douglas”) and George David Weiss, was released by Mr. Armstrong in 1967. Louis Armstrong, *What a Wonderful World* (ABC Records 1967).

## TABLE OF CONTENTS

INTRODUCTION .....	2
I. EXAMPLES OF THE FLAWED QUIDDITY OF CHAPTER 13 .....	6
A. <i>Issue 1—Resolved by the Supreme Court</i> .....	8
B. <i>Issue 2—Entitlement to Postpetition Assets Not Derived         from Income</i> .....	11
C. <i>Issue 3—Post-Confirmation Property of the Estate</i> .....	14
II. WHY IS IT A PROBLEM? .....	19
III. A WORLD WITHOUT CHAPTER 13 .....	22
A. <i>Benefits</i> .....	22
B. <i>Objections</i> .....	24
1. <i>Avoiding the Stigma of Bankruptcy</i> .....	24
2. <i>Retaining Property</i> .....	26
3. <i>Can-Pay Debtors</i> .....	30
CONCLUSION .....	34

## INTRODUCTION

Congress has long held a strong but ultimately misguided partiality in favor of chapter 13 of the Bankruptcy Code (the “Code”).<sup>1</sup> This might be understood as legislators’ discomfort—whether as a matter of policy or due to lobbying pressures—with liquidation and discharge as the alternative to rehabilitation.<sup>2</sup> The idea that someone might be forgiven from debts that they have some ability to pay is simply too bitter a pill to be swallowed in certain quarters,<sup>3</sup> though that

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<sup>1</sup> References in this Article to the “Code” or the “Bankruptcy Code” are to the current law of bankruptcy, which is found in Title 11 of the United States Code. 11 U.S.C. § 101 (originally enacted as Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 92 Stat. 2549). It was enacted on November 6, 1978, and it governs all cases filed on or after October 1, 1979.

<sup>2</sup> See generally Robert M. Thompson, *Substantial Abuse and Section 707(b) of the Code*, 55 MO. L. REV. 247, 249–50 (1990) (discussing a controversial study conducted by the Credit Research Center at the Purdue University Krannert Graduate School of Management that suggests rehabilitation is a superior alternative to liquidation and discharge).

<sup>3</sup> Initially, in 1984, Congress added section 707(b) to the Code, providing that dismissal of an individual-consumer case might occur not only upon a showing of “cause” under section 707(a), but also if the court were to determine that the filing constituted a “substantial abuse” of chapter 7. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 355. Unquestionably, section 707(b) was aimed at debtors who had the future ability to pay their debts, a factor that Congress did not intend to fall within the definition of “cause” under section 707(a). See S. REP. NO. 95-989, at 94 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5881. In 2005, Congress completely overhauled section 707(b) by replacing judicial discretion over the determination of substantial abuse with a formulaic test (“means test”) in section 707(b)(2) for ascertaining when a “presumption of abuse” warrants dismissal under section 707(b)(1). 11 U.S.C. § 707(b). See generally Hon. Eugene R. Wedoff, *Means Testing in the New §707(b)*, 79 AM. BANKR. L.J. 231 (2005).

view ignores the ignominy and disutility of living under a draconian chapter 13 plan for at least three and up to as long as five years.<sup>4</sup>

Thus, repayment has been touted as the “honorable” alternative to liquidation, going all the way back to chapter XIII under the Bankruptcy Act of 1898.<sup>5</sup> While chapter XIII did not live up to the expectation that debtors would be eager to employ this new alternative to liquidation,<sup>6</sup> enactment in 1978 of a new chapter 13 was trumpeted as having cured the ills of the past with the promise that henceforth debtors would be drawn to this superior alternative to straight bankruptcy.<sup>7</sup> The articulated rationale was an almost too good to be believed goldilocks formula under which debtors would maintain their pride by avoiding the stigma of chapter 7, while being able to retain their most treasured property, and creditors would receive a greater payout than they would enjoy in

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<sup>4</sup> Since 2005, the “applicable commitment period” for a chapter 13 plan will be either three years or five years, depending on whether the debtor’s family income is, respectively, below or above the state median for a family of the same size. *See* 11 U.S.C. §§ 1325(b)(4)(A), 1322(d).

<sup>5</sup> The precursor to chapter 13 was chapter XIII of the Bankruptcy Act of 1898. Bankruptcy Act §§ 601–86, added by 52 Stat. 930 (1938), amended by 11 U.S.C. §§ 1001–86 (1940). At the time chapter XIII was added to the law by the Chandler Act of 1938, ch. 575, 52 Stat. 840 (codified prior to repeal in scattered sections of 11 U.S.C.). Congress believed that debtors would be eager to use what was perceived as this less-stigmatizing alternative to liquidation. Congress could not have been more wrong. *See generally* Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come From and Where Should it Go?*, 10 AM. BANKR. INST. L. REV. 741 (2002) (detailing the history of what would eventually become chapter 13). In this piece, my long-time co-author and his co-author offer a detailed and fascinating history of the early twentieth century origins of chapter XIII but, with all due respect, not much direction where it should go in the future. *Id.* at 757–760 (identifying chapter XIII as the direct descendant of Valentine Nesbit’s Birmingham Debtor’s Court). By the time serious discussion of bankruptcy reform began in the 1970s, it was clear that chapter XIII was not working well. This view was reflected in the Senate Report accompanying the Bankruptcy Reform Act of 1978:

In theory, the basic purpose of chapter XIII has been to permit an individual to pay his debts and avoid bankruptcy by making periodic payments to a trustee under bankruptcy court protection, with the trustee fairly distributing the funds deposited to creditors until all debts have been paid. The hearings record and the bankruptcy literature show uniform support for this principle. In practice, however, the results have been less than satisfactory, [even] though chapter XIII has been available since 1938.

S. REP. NO. 95-989, at 12.

<sup>6</sup> DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 133 (2001).

<sup>7</sup> Hon. Joe Lee, *Chapter 13 nee Chapter XIII*, 53 AM. BANKR. L.J. 303, 326 (1979) (“The objectives of the draftsmen of chapter 13, to promote greater use of the chapter and in turn obtain a greater return for creditors in consumer bankruptcy cases, may very well be realized.”). Among the improvements to chapter XIII touted by the proponents of the new chapter 13 were statutorily prescribed confirmation standards in lieu of creditor voting, eligibility for any individual with regular income (not just wage earners), the promise of the “superdischarge” upon plan completion, and a three-year fixed term as the norm.

liquidation.<sup>8</sup> That rationale, however, is something of a fable, untethered from the reality of the processes and outcomes of chapter 13. I believe the time has come to give up the ghost.<sup>9</sup>

Nevertheless, the bias that Congress has consistently demonstrated for repayment over liquidation has been unmistakable.<sup>10</sup> This bias has been expressed in different ways at different times—most notably with the abrupt shift in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,<sup>11</sup> which created incentives to encourage debtors to choose chapter 13 over chapter 7 and barred the door to chapter 7 in certain instances.<sup>12</sup> Moreover, paradoxically, Congress has made chapter 13 less attractive over the years just as it ramped up its efforts to make chapter 13 more mainstream.<sup>13</sup>

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<sup>8</sup> S. REP. NO. 95-989, at 12–13. As then-Professor Porter pointed out in 2011, for a while debtors and debtors' lawyers bought into this myth of a nirvana-like bankruptcy alternative, but it did not last. See Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 107 (2011).

<sup>9</sup> See Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1042 (2017) (finding that post-BAPCPA the completion rate was slightly higher than the “one-third” completion statistic that has endured for decades).

<sup>10</sup> Cf. Porter, *supra* note 8, at 107–08 (pointing out that, while heralded as a grand triumph for consumer debtors, the reality has been that not only did chapter 13 deliver little protection to most of those who turned to it for help, but the complexity of chapter 13 meant that the attorneys' fees were significantly higher than for chapter 7).

<sup>11</sup> Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended throughout 11 U.S.C. and scattered sections of 18 U.S.C. and 28 U.S.C.) [hereinafter “BAPCPA” or the “2005 Amendments”].

<sup>12</sup> See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

<sup>13</sup> See Lawrence Ponoroff, *Rethinking Chapter 13*, 59 ARIZ. L. REV. 1, 22 (2017) (“Congress has converted chapter 13 from a kind of Eden to a chaotic purgatory. Not surprisingly, therefore, it has neither met with any meaningful success in invigorating repayment over liquidation nor has it advanced particularly well the interests of any of the parties involved in a bankruptcy case.”); TERESA A. SULLIVAN, ELIZABETH WARREN & JAY L. WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 339 (1999) (“In short, there are a lot of people in bankruptcy who bought a bill of goods when they filed Chapter 13. These Chapter 13 failures were cheated by a system that made unjustified promises of successful repayments and reestablished creditworthiness, and then left them to founder alone.”). The denuding of chapter 13 baubles occurred more gradually, beginning with the addition of the projected disposable income test in the 1984 Amendments (codified as 11 U.S.C. § 1325(b)(1)). See *infra* note 157. It continued through the dismantling of the super-discharge beginning in 1990. Sections 3103 of the Crime Control Act of 1990 amended sections 1328(a) to the Code to exclude criminal restitution obligations and criminal fines, and debts for personal injury resulting from driving under the influence, from the types of debt that would be included in the discharge. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789. The trend culminated with BAPCPA's myriad of amendments that made chapter 13 more restrictive and less inviting. See *infra* note 134 (concerning new restrictions on cramdown of secured claims). See generally Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”*, 79 AM. BANKR. L.J. 191, 221 (2005) (“The fact that Chapter 13 is made much less attractive reveals much about the true agenda of the bill's proponents, who proclaimed their desire for more debtors to file under that chapter. The real goal of the creditor lobby was to make bankruptcy of all types more difficult for debtors who need it.”).

Congress's irreconcilable and inconsistent approach to chapter 13, in addition to being shameful as a matter of responsible legislative stewardship, has also caused chaos and uncertainty for courts and litigants in a variety of contexts that arise during the course of a chapter 13 case.<sup>14</sup> The problem is particularly acute since most chapter 13 debtors are hardly in a position to pay the freight to litigate issues as they arise. Indeed, it is amazing they get formally adjudicated as often as they do.

I have written recently about one of these circumstances—entitlement to postpetition appreciation in exempt assets upon conversion from chapter 13 to chapter 7 prior to plan completion.<sup>15</sup> I have also previously suggested a broader reconceptualization of chapter 13 in a fashion that would render it more utile and efficient for creditors and debtors alike.<sup>16</sup> Alas, those proposals, not unlike many others I have proffered in the past, have fallen on deaf ears, save for one exception for which I can hardly claim credit.<sup>17</sup> Thus, I would like to use this opportunity to put forth another simpler, albeit more extreme, proposal; namely, scrap chapter 13 in its entirety. This would require simultaneously putting a few additional guard rails around, and adding a couple of amendments to, chapter 7 in anticipation of the objections most likely to be raised to the expunction of chapter 13 by both consumer protection and consumer creditor advocates alike.<sup>18</sup> While this initial antagonism to the proposal probably does not bode well for its adoption, nonetheless, getting these two sides to agree on anything might be regarded as a moral victory and, as such, worth the effort even in the face of long odds.

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<sup>14</sup> See *infra* Part I.

<sup>15</sup> See generally Lawrence Ponoroff, *Allocation of Property Appreciation: A Statutory Approach to the Judicial Dialectic*, 13 WM. & MARY BUS. L. REV. 721 (2022). Courts also disagree about creditors' entitlement to increments in a debtor's assets during the course of a chapter 13 case. Some believe that creditors are entitled to boosted plan payments, while others believe that increased payments are due only if the debtor's earned income has increased. See also *infra* Part I.C (discussing the larger kerfuffle over what constitutes property of the chapter 13 estate).

<sup>16</sup> See generally Ponoroff, *supra* note 13, at 22.

<sup>17</sup> This lone exception was the Bankruptcy Threshold Adjustment and Technical Corrections Act, which, among other things, laudably increased the chapter 13 debt threshold to \$2.75 million, and eliminated separate limits applied to secured and unsecured debts. Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, § 2(c) 136 Stat. 1298, 1298 (2022) (codified as amended at 11 U.S.C. § 109). This increased debt limit sunsets on June 21, 2024, at which time the original debt limits are set to be reimposed. *Id.* § 2(i)(1) (codified as amended at 11 U.S.C. §§ 109, 1182).

<sup>18</sup> See Jeffrey A. Logan, Comment, *The Troubled State of Chapter 13 Bankruptcy and Proposals for Reform*, 51 SMU L. REV. 1569, 1585–87 (1998) (suggesting that the repeal of chapter 13 would draw resistance not only from the consumer credit lobby, but also from consumer protection advocates who regard the existence of choice as important to individual debtors).

## I. EXAMPLES OF THE FLAWED QUIDDITY OF CHAPTER 13

Imposition of the death penalty is an extreme solution to any problem. In all fairness, therefore, the burden must be placed on the proponent to come forward with compelling evidence to support the harsh sentence. With that in mind, it bears noting that the practice under, and the attitudes toward, chapter 13 vary dramatically from one district to another,<sup>19</sup> hardly a shining example of the constitutionally-called-for mandate of uniformity in bankruptcy.<sup>20</sup> Even more concerning, chapter 13 itself has been subjected to persistent criticism from commentators who have taken the time to closely explore its operation and outcomes.<sup>21</sup> This suggests that the Code's individual debtor rehabilitation option is deeply debilitated. These criticisms of chapter 13, I believe, are instantiated by the existence of contrary authority on almost every major issue arising in chapter 13 cases that has not yet been resolved by the Supreme Court.<sup>22</sup> These issues include a circuit split over whether debtors can cure plan defaults after sixty months;<sup>23</sup> the standards governing approval of a request to modify an

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<sup>19</sup> E.g., NAT'L BANKR. REV. COMM'N, 1 BANKRUPTCY: THE NEXT TWENTY YEARS (NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT) 235 (1997) ("Chapter 13 practices differ dramatically from state to state, district to district, and even from judge to judge in the same district. Debtors in very similar circumstances encounter extremely different Chapter 13 systems. These variations in the systems determine whether debtors are eligible for Chapter 13 relief at all and how much they will have to pay for that relief."). The National Bankruptcy Review Commission was established pursuant to the Bankruptcy Reform Act of 1994 to investigate and evaluate current aspects of the bankruptcy system and prepare a report containing recommendations to Congress for improving the current bankruptcy system. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 602-603(3), 108 Stat. 4106, 4147 [hereinafter the "1994 Amendments"]; see also Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 502-503 (1993); Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Role of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 431 (2007).

<sup>20</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>21</sup> See, e.g., Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1320-21 (2006) (predicting that the net result of BAPCPA on chapter 13 would be even lower rates of usage, even less plan completion, and even less unsecured debt repayment than under prior law); Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 166 (1990) (criticizing required repayment as a condition to discharge); Porter, *supra* note 8, at 113 ("Chapter 13 is a pretend solution. I use this term to mean a social program that does not work as intended but is not critiqued or reformed because its flaws are hidden. The consumer bankruptcy system fits this description, as the data show. While this study's findings are new, the systemic failure of Chapter 13 has existed for decades."); William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85, 104 (1989) (discussing the low completion rate, the significant difference in practices from district to district, the lack of explanation for the frequency of use of chapter 13 as opposed to chapter 7, and the phenomenon of debtors' lawyers steering debtors into chapter 13 because of pressure from judges and trustees).

<sup>22</sup> See, e.g., *infra* notes 23-29 and accompanying text.

<sup>23</sup> See *Kinney v. HSBC Bank USA, N.A.* (*In re Kinney*), 5 F.4th 1136, 1141, 1144 (10th Cir. 2021) (disagreeing with the Third and Seventh Circuits based on ambiguity in statutory language). *But see In re Albert*,

existing plan;<sup>24</sup> entitlement to an unsecured claim for the amount of a stripped-off lien when the debtor has been discharged in the earlier chapter 7 phase of a so-called “chapter 20” case;<sup>25</sup> the calculation of “projected disposable income”;<sup>26</sup> whether section 1306 extends the timeframe under which inheritances become property of a chapter 13 bankruptcy estate beyond 180 days or the timeframe is fixed under section 541(a);<sup>27</sup> whether a settlement from a postpetition injury constitutes a “windfall” entitling creditors to a modification

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634 B.R. 380, 392 (Bankr. D. Colo. 2021) (distinguishing the circumstances from *Kinney* due to changes to section 1329(d) of the Code resulting from passage of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, and by extension the COVID-19 Bankruptcy Relief Extension Act of 2021).

<sup>24</sup> Compare *Murphy v. O'Donnell* (*In re Murphy*), 474 F.3d 143, 149 (4th Cir. 2007) (requiring a showing that the circumstances prompting the modification were “substantial” and “unanticipated”), with *Meza v. Truman* (*In re Meza*), 467 F.3d 874, 877–78 (5th Cir. 2006) (noting the absence of any “cause” requirement in section 1329, as supporting the view that a prior showing of an unanticipated, substantial change as a condition to modification), and *Whaley v. Guillen* (*In re Guillen*), 972 F.3d 1221, 1226 (11th Cir. 2020) (agreeing that a party need not demonstrate any unforeseen change in circumstances in order to modify a confirmed chapter 13 plan). There is also strong sentiment, based on the res judicata nature of entry of confirmation, that the rule may be different when it is the debtor, as opposed to a third party, seeking modification, i.e., there is no necessity of a showing of changed circumstances even in the jurisdictions that require it in the case of a modification request initiated by someone other than the debtor. *E.g.*, *Freedom Mortg. Corp. v. Smith*, No. 21cv11025, 2022 WL 17093102, at \*19–20 (D.N.J. Nov. 21, 2022).

<sup>25</sup> Compare *Washington v. Real Time Resol., Inc.* (*In re Washington*), 602 B.R. 710, 716 (B.A.P. 9th Cir. 2019) (exemplifying one approach courts take to handle unsecured stripped-off lien claims after discharge), with *In re Hopper*, 2021 WL 3435445, at \*1, \*7 (Bankr. E.D.N.Y. 2021) (exemplifying another approach courts take when handling unsecured stripped-off lien claims after discharge). See generally Lawrence Ponoroff, *The Last Dance: Righting the Supreme Court's Greatest Bankruptcy Apostasy*, 96 AM. BANKR. L.J. 199 (2022).

<sup>26</sup> For example, there is currently some confusion even in the same circuit over whether an above-median-income chapter 13 debtor may exclude from her “disposable income” the monthly 401(k)-contribution amount that her employer withheld from her wages prior to her bankruptcy. Compare *Davis v. Helbling* (*In re Davis*), 960 F.3d 346, 355 (6th Cir. 2020) (stating that contributions may be excluded), with *Penfound v. Ruskin* (*In re Ruskin*), 7 F.4th 527, 534 (6th Cir. 2021) (stating that retirement contributions may not be excluded if the debtor had historically made such payments in the months preceding bankruptcy). Other courts have reached widely divergent results on the same question. See *In re Perkins*, No. 22-20035, 2023 WL 2816687, at \*1 (Bankr. S.D. Tex. Apr. 6, 2023) (surveying the various different approaches that have been taken to this issue and permitting the deduction of 401(k) contributions as part of the calculation of projected disposable income even when the debtor had not been making such contributions prior to filing chapter 13). There is also a split of authority as to whether, when a chapter 13 plan is modified, the liquidation test should be calculated as of the petition date or the date of modification. See *In re Hunsucker*, No. 22-01689-5, 2023 WL 4163475, at \*6 (Bankr. E.D.N.C. 2023) (discussing cases on both sides of the issue).

<sup>27</sup> Compare *Carroll v. Logan*, 735 F.3d 147, 149, 152 (4th Cir. 2013) (holding section 1306 extends timeframe set by section 541 beyond 180 days in chapter 13 cases), and *Dale v. Maney* (*In re Dale*), 505 B.R. 8, 13 (B.A.P. 9th Cir. 2014) (holding that “an inheritance received by chapter 13 debtors more than 180 days following the petition date” is property of the bankruptcy estate), with *In re Key*, 465 B.R. 709, 712 (Bankr. S.D. Ga. 2012) (holding section 1306 does not extend 180-day postpetition timeframe established under section 541).



of the plan<sup>28</sup>—and the list goes on.<sup>29</sup> I have neither the endurance, nor I doubt the reader the patience, to detail them all at this juncture. Rather, I think this unhealthy state of affairs is satisfactorily demonstrated by one such issue that, after over thirty years of disagreement, was finally resolved by a Supreme Court decision, and by examining two additional issues that remain hopelessly mired in confusion notwithstanding the fact that a broader interpretation of that Supreme Court case could have offered a path forward, but failed to do so.

#### A. Issue 1—Resolved by the Supreme Court

As noted, for decades the courts could not find common ground on the rather pedestrian issue of who is entitled to undistributed funds received and held by the chapter 13 trustee upon conversion of the case to chapter 7. Prior to 1994, there was also a preliminary issue of whether the undistributed funds did or did not pass to the post-conversion estate.<sup>30</sup> The Bankruptcy Reform Act of 1994 largely resolved this issue in the debtor's favor with the adoption of section

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<sup>28</sup> Compare *McKinney v. Russell*, 567 B.R. 384, 386 (M.D. Ala. 2017) (characterizing postpetition personal injury proceeds as a result of a car accident as a “windfall”), with *In re Hill*, 625 B.R. 212, 219–20 (Bankr. S.D. Ala. 2023) (holding that the Code does not require that the plans be modified to account for the postpetition proceeds of the personal injury claim). See also *infra* Part I.B.

<sup>29</sup> Other disputed and unresolved issues persist. For one, whether a lien passes through bankruptcy when the creditor elects to file a claim as an unsecured creditor. Compare *Bowman v. Cal. Franchise Tax Bd.* (*In re Bowman*), 649 B.R. 541, 544 (Bankr. N.D. Cal. 2021) (ruling that creditor did not waive its secured claim by filing an unsecured claim in debtor's chapter 13 case), *aff'd*, 2022 WL 19073915, No. 4:21-CV-07129, at \*1224–25 (N.D. Cal. Sept. 22, 2022), with *Harmon v. Farmers Home Admin.*, 101 F.3d 574, 581 (8th Cir. 1996) (describing the maxim that liens pass through bankruptcy unaffected as too broad), and *Garner v. Chi. Title & Tr. Co.*, (*In re O'Gara Coal Co.*), 12 F.2d 426, 429 (7th Cir. 1926) (observing that the consequence of filing a secured claim as an unsecured debt is the waiver of the security). Another question is what happens when a secured creditor does not file a claim and does not object to confirmation. Compare *In re Weyer*, 692 B.R. 192, 195 (Bankr. W.D. Wisc. 2020), *aff'd sub nom.* *Weyer v. Valley Cmities. Credit Union*, No. 19-cv-926-wmc, 2022 WL 1597293, at \*5 (W.D. Wisc. May 19, 2022), with *In re Flores*, 649 B.R. 534, 538–40 (Bankr. N.D. Ind. Mar. 8, 2023). Although strong circuit precedent now appears to tip the balance in favor of auto lenders, there has also been a lively debate in the case law over whether a chapter 13 debtor who had purchased a motor vehicle for personal use with financing obtained less than 910 days prior to petition date was entitled, pursuant to the plain language of the infamous “hanging paragraph” in section 1325(a), to the surrender motor vehicle in full satisfaction of purchase-money lender's secured claim. Compare *In re Wright*, 492 F.3d 829, 832–33 (7th Cir. 2007) (ruling that any deficiency between value of vehicle and balance on loan that remained after debtors surrendered vehicle had to be treated as unsecured debt in the debtors' plan), with *In re Adams*, 403 B.R. 387, 396 (Bankr. E.D. La. 2009) (holding that section 506(a) bifurcation does not apply to “910 financing” claims). See also *supra* note 15 and accompanying text.

<sup>30</sup> Compare *In re Lybrook*, 951 F.2d 136, 137 (7th Cir. 1991) (ruling that an inheritance received more than 180 days after the filing of a chapter 13 case became property of the estate upon conversion to chapter 7), with *In re Bobroff*, 766 F.2d 797, 803–04 (3d Cir. 1985) (holding that a tort claim, which arose after the debtor filed his petition under chapter 13, was not property of the estate upon the case being converted to another chapter).

348(f), providing that only estate property as of the date of the filing of the petition that is still in the debtor's possession or control is included in the post-conversion chapter 7 estate.<sup>31</sup> An exception is made if the debtor converts from chapter 13 in bad faith, with the result that all property of the estate as of the date of conversion is included in the post-conversion estate.<sup>32</sup> Otherwise, this amendment made clear that undistributed funds do not pass to the post-conversion estate.

However, the 1994 Amendments did not tell the chapter 13 trustee what she should *do* with those funds. The now-deposed chapter 13 trustee certainly cannot simply pocket the money, and it does not go to the new chapter 7 trustee because of section 348(f)(1); necessarily then, the erstwhile chapter 13 trustee either has to hand the monies over to creditors in accordance with the now-abandoned chapter 13 plan or return the funds to the debtor. Post-1994 case authority could be found for each of these options.<sup>33</sup>

Then, in 2010, Charles Harris III petitioned for relief under chapter 13 and confirmed a plan calling for the chapter 13 trustee to collect a portion of Harris's postpetition wages for distribution to creditors, including the mortgagee on his house, in accordance with the terms of Harris's plan.<sup>34</sup> When Harris again fell behind on his mortgage payments, his bank foreclosed on the home. The chapter 13 trustee continued to collect money from Harris's postpetition wages but stopped distributing the portion of those funds previously earmarked for the bank. By the time Harris later converted his bankruptcy case from chapter 13 to a chapter 7 liquidation, the trustee had in her possession over \$5,000 from Harris's monthly plan payments that had yet to be distributed.<sup>35</sup>

A few days after the case was converted, the trustee distributed the accumulated wages to Harris's creditors (other than the bank), and Harris moved to have those wages refunded to him. The bankruptcy court held that Harris was

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<sup>31</sup> 1994 Amendments § 311.

<sup>32</sup> 11 U.S.C. § 348(f)(2).

<sup>33</sup> Compare *In re Michael*, 699 F.3d 305, 316 (3d Cir. 2012) ("Overall, a textual reading of § 348(f), particularly in light of its legislative history, leads us to conclude that undistributed plan payments held by a Chapter 13 trustee at the time of conversion must be returned to the debtor absent bad faith."), with *In re Galloway*, 134 B.R. 602, 603 (Bankr. W.D. Ky. 1991) (holding that after a debtor "voluntarily part[s] with wages and deliver[s] them to the custody of a trustee in performance of a confirmed Chapter 13 plan, the creditors have a vested right to receive those payments pursuant to the plan.") (quoting *In re Redick*, 81 B.R. 881 (Bankr. E.D. Mich. 1987)).

<sup>34</sup> *Harris v. Viegelahn*, 575 U.S. 510, 515 (2015).

<sup>35</sup> *Id.* at 515–16. This money represented the portion of Harris's wages that would have gone to the mortgagee had the foreclosure not occurred.

entitled to the return of his wages because, although a debtor's postpetition earnings frequently are used to fund payment of chapter 13 payment plans, such postpetition earnings are not part of the bankruptcy estate to be distributed in a chapter 7 liquidation.<sup>36</sup> The district court affirmed,<sup>37</sup> but the Fifth Circuit reversed,<sup>38</sup> holding that the creditors had a superior claim to the accumulated but undisbursed earnings, notwithstanding the debtor's conversion to chapter 7.<sup>39</sup>

The Supreme Court granted certiorari and eventually reversed the court of appeals,<sup>40</sup> ruling that the postpetition wages held by the chapter 13 trustee at the time the case was converted to chapter 7 were required to be returned to the debtor.<sup>41</sup> The Court observed that, although the Bankruptcy Code did not "expressly" direct that "[o]n conversion, accumulated wages go to the debtor," that "is the most sensible reading of what Congress did provide."<sup>42</sup> The Court found further support for its conclusion in provisions of the Bankruptcy Code terminating the services of a chapter 13 trustee (except for specified ministerial tasks) at the time the debtor converts the case to chapter 7,<sup>43</sup> as well as based upon bankruptcy's core fresh start policy.<sup>44</sup>

Justice Ginsburg's opinion in *Harris* made perfect sense, consistent with the intent of the 1994 Amendments, because it served to encourage hesitant debtors, uncertain about their ability to complete a plan, to give chapter 13 a go. Because of this decision, debtors may find comfort in the knowledge that if their chapter 13 case fails, as it often does, they will at least get back any postpetition earnings paid over to the chapter 13 trustee but not yet distributed to creditors.<sup>45</sup> Of

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<sup>36</sup> *Id.* at 516.

<sup>37</sup> *Viegelahn v. Harris (In re Harris)*, 491 B.R. 866, 867 (W.D. Tex. 2013).

<sup>38</sup> *Viegelahn v. Harris (In re Harris)*, 757 F.3d 468, 471 (5th Cir. 2014).

<sup>39</sup> *Id.* at 475. ("[T]here is no reason why prospective termination of the plan necessarily prohibits the trustee from distributing the funds remaining in her possession—which were paid at a time when the plan was still in force, and the debtor was still obligated to make payments—pursuant to the plan.").

<sup>40</sup> *Harris*, 575 U.S. at 522.

<sup>41</sup> *Id.* at 518. Two other chapter 13 issues that had to go all the way to the Supreme Court for resolution include, first, can the definition "current monthly income" for purposes of the disposable income test in section 1325(b) include changes in income that are virtually certain to occur. *Hamilton v. Lanning*, 560 U.S. 505 (2010). And second, the Supreme Court considered the res judicata effect of a plan confirmation order. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

<sup>42</sup> *Harris*, 575 U.S. at 519–20.

<sup>43</sup> *Id.* at 520.

<sup>44</sup> *Id.* at 518 (citing *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007)) ("Shielding a Chapter 7 debtor's postpetition earnings from creditors enables the 'honest but unfortunate debtor' to make the 'fresh start' the Bankruptcy Code aims to facilitate.").

<sup>45</sup> The legislative history that accompanied enactment of section 348(f)(1) in 1994 indicated that the new provision was intended to avoid the disincentive to chapter 13 filings that would be created if equity created by payments on secured debt during the chapter 13 case became part of the chapter 7 case. H.R. REP. NO. 103-835,

course, that assurance is of no help to the debtor if the chapter 13 trustee had already distributed all the plan payments prior to conversion. But a contrary ruling would have guaranteed that the debtor, by attempting chapter 13 and failing, would have lost all postpetition earnings paid over to the chapter 13 trustee.

Nonetheless, the same rationale has proved inadequate in the view of many courts to award the debtor postpetition, pre-conversion appreciation in the debtor's home,<sup>46</sup> ruling instead that such excess value inures to the benefit of the chapter 7 estate.<sup>47</sup> It is certainly true that there is contrary authority.<sup>48</sup> The point, however, is even a relatively clear and uncontroversial Supreme Court decision resting on explicitly articulated bankruptcy policy grounds has not been sufficient to avoid yet another disagreement by the lower courts on this closely related issue.

### *B. Issue 2—Entitlement to Postpetition Assets Not Derived from Income*

Now, suppose Sally, a chapter 13 debtor, who is almost but not completely through a confirmed plan paying unsecured creditors a fifty percent dividend, is injured as a result of a slip and fall on a sticky patch of watermelon juice on the floor at her local grocery store. Shortly after Sally completes the payments under her plan and the case is closed, Sally brings an action against the grocery store based on negligence in allowing a dangerous condition to exist with no warning to customers. The grocery store responds with a motion to dismiss, based on judicial estoppel and lack of standing, maintaining that the tort claim belonged to the chapter 13 estate, should have been disclosed in the chapter 13 case, and could only be brought by the chapter 13 trustee. Sally responds by moving to re-

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at 57 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340. See also Ponoroff, *supra* note 15, at 749–50 (urging that the articulated legislative intent in enacting section 348(f)(1)(A), coupled with the policy considerations articulated in *Harris*, make a strong case that an increase in the debtor's equity, whether due to payments on the mortgage or market factors, should stay with the debtor).

<sup>46</sup> Most notable is the decision of the bankruptcy court in *In re Castleman*, 631 B.R. 914, 919–20 (Bankr. W.D. Wash. 2021), *aff'd sub nom.* *Castleman v. Burman (In re Castleman)*, 75 F.4th 1052 (9th Cir. 2023). See also *Goetz v. Weber (In re Goetz)*, 651 B.R. 292, 296 (B.A.P. 8th Cir. 2023) (holding that postpetition, pre-conversion nonexempt equity resulting from market appreciation and payments toward mortgage lien accrued for benefit of estate upon conversion).

<sup>47</sup> See, e.g., *In re Adams*, 641 B.R. 147, 151 (Bankr. W.D. Mich. 2022) (finding that postpetition appreciation from prepetition property inures to the bankruptcy estate, not the debtor).

<sup>48</sup> Perhaps the most cogently reasoned opinion can be found in *In re Barrera*, 620 B.R. 645, 654 (Bankr. D. Colo. 2020), *aff'd*, No. BAP CO-20-003, 2020 WL 5869458 (B.A.P. 10th Cir. Oct. 2, 2020), *aff'd*, 22 F.4th 1217 (10th Cir. 2022). See also *In re Harmon*, Case No. 18-10579, 2022 WL 20451952 (Bankr. E.D. La. June 9, 2022). See generally Robert M. Lawless, *Reframing the Issues Around Postpetition Appreciation in Chapter 7*, AM. BANKR. TR. J., Winter 2022, at 19.A.

open her chapter 13 case with the intent to amend her schedules to include the claim.

With a few key differences, these were essentially the facts behind the bankruptcy court's decision in *In re Calixto*.<sup>49</sup> In the actual case, the key differences were that the debtor's plan provided for full payment of unsecured creditors.<sup>50</sup> As far as standing was concerned, the court observed that "in a chapter 13 case—regardless of whether it is property of the estate or has re-vested in the debtor—only the individual debtor can bring a litigation claim."<sup>51</sup> This observation is open to serious question.<sup>52</sup> In any case, however, the defendant had rested its judicial estoppel argument based on the debtor's failure to have disclosed the claim in her earlier bankruptcy case.

To begin with, and adumbrating the issue to come next,<sup>53</sup> in its ruling on the debtor's motion to re-open and amend, the bankruptcy court in *Calixto* was first required to address whether the tort claim represented property of the estate at all. After concluding that it did,<sup>54</sup> the court turned to the question of disclosure. The court began its analysis with Bankruptcy Rule 1007(h), which addresses the duty to disclose interests acquired after the commencement of the case. That rule provides the debtor must disclose any property falling within the categories detailed in section 541(a)(5), governing certain property interests acquired within 180 days after filing.<sup>55</sup>

Clearly, the debtor's tort claim did not fall into one of the section 541(a)(5) categories. However, citing Eleventh Circuit precedent,<sup>56</sup> the court noted that chapter 13 debtors are under a continuing duty to disclose any post-confirmation

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<sup>49</sup> *In re Calixto*, 648 B.R. 119, 121–22 (Bankr. S.D. Fla. 2023).

<sup>50</sup> *Id.* at 124.

<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g., In re Cecil*, 488 B.R. 200, 202 (Bankr. M.D. Fla. 2013) ("The underlying premise upon which Creditors base their argument [that the chapter 13 trustee has no authority to bring avoidance actions] is that the language contained in § 704(a)(1) is the source of a trustee's power to bring avoidance actions. But a review of the Bankruptcy Code, case law, and bankruptcy treatises makes clear that there is no authority to support this premise.").

<sup>53</sup> *See infra* Part I.C.

<sup>54</sup> *Calixto*, 648 B.R. at 124–25.

<sup>55</sup> *Id.* at 124; FED. R. BANKR. P. 1007(h). These property interests include inheritances, life insurance proceeds, and property settlements received in divorce proceedings.

<sup>56</sup> *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274–75 (11th Cir. 2010); *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1244 (11th Cir. 2008); *Ajaka v. BrooksAmerica Mortg. Corp.*, 453 F.3d 1339, 1344 (11th Cir. 2006); *De Leon v. Comcar Indus., Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003).

litigation claims.<sup>57</sup> But here is where things start to get goofy. The court then dropped a footnote suggesting that the line of cases calling for disclosure may have been misguided and that, if revisited, the Eleventh Circuit might well relax the rule.<sup>58</sup>

Quite obviously, the court wanted to allow the debtor to amend her schedules so she could proceed with her tort action. However, the court felt constrained by relevant circuit precedent, even though that precedent had been questioned, but not actually overruled, by other circuit comments.<sup>59</sup> This is where the difference between the facts of *Calixto* and those of our hypothetical came to the court's rescue. Because unsecured creditors were to be paid in full under the plan, the bankruptcy court opined that an amendment, if required and filed, "would not have made any difference to [the debtor's] creditors, the chapter 13 trustee, or [the debtor's] bankruptcy estate."<sup>60</sup> Therefore, the court concluded that because re-opening to permit amendment of the schedules would benefit the debtor and nobody else would be worse off—sort of Pareto efficient—she should be permitted to do so.<sup>61</sup> Although this approach did not really resolve the judicial estoppel defense, the bankruptcy court determined that it was properly resolved in the state court proceeding.<sup>62</sup>

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<sup>57</sup> *Calixto*, 648 B.R. at 126 ("The Eleventh Circuit has, however, acknowledged the argument that this line of cases has been incorrectly perpetuated based on dicta from its decision in *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002), which in turn cited dicta from a Fifth Circuit decision in *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)."). See also *Robinson*, 595 F.3d at 1274 (stating that even reasoning from a prior case that is dicta, still becomes the law of the circuit).

<sup>58</sup> *Calixto*, 648 B.R. at 126 n.55 (quoting *Martin v. Singletary*, 956 F.2d 944, 945 (11th Cir. 1992)) ("But under the 'prior precedent rule,' these Eleventh Circuit cases are 'the law in this circuit unless and until reversed, overruled, vacated, or otherwise modified by the Supreme Court of the United States or by [the Eleventh Circuit] sitting en banc.'").

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 128. The court also cited Federal Rule of Bankruptcy Procedure 1009, which affords debtors a liberal right to amend. *Id.* at 127.

<sup>61</sup> *Id.* at 128. It is instructive and perplexing to contrast this ruling with the opinion of the bankruptcy court in *In re Robinson*, No. 18-31989-KLP, 2023 WL 2563537 (Bankr. E.D. Va. Mar. 17, 2023). In that case, the debtor's home burned to the ground and the debtor received \$82,500 in insurance proceeds, which was net of what was used to pay off the mortgage. The debtor never amended her schedules to disclose the insurance proceeds and, after conversion, the chapter 7 trustee learned of receipt and filed a motion to dismiss. *Id.* at \*2–4. The court stated that, even though disclosure was not required (property having re-vested in the debtor), the debtor's duty to cooperate with the chapter 13 trustee required accurate and timely disclosure of the insurance claim and proceeds. Having failed to satisfy this obligation, the court granted the trustee's motion to dismiss for bad faith and imposed a ban on any subsequent filing "in this or any other court for a period of one year." *Id.* at \*9.

<sup>62</sup> After all, the only issue before the court was the debtor's motion to reopen the case to file amended schedules disclosing the post-confirmation litigation claim. *Calixto*, 648 B.R. at 121.

Of course, if we go back to our hypothetical where unsecured creditors are *not* receiving full payment, the failure to disclose would, at least potentially, be prejudicial. If the tort claim was meritorious and indeed an asset of the estate, the creditors or the chapter 13 trustee might have sought modification of the plan to increase the payout.<sup>63</sup> Alternatively, prohibiting amendment hardly brings any additional funds the creditors' way, although it deprives the debtor of a potential tort recovery and gives the state law defendant a wholly unearned windfall.<sup>64</sup> True, the creditors might seek revocation of the discharge, but there is a great deal of uncertainty about that.<sup>65</sup> Moreover, what if this hypothetical arose in another circuit where, based solely on the statute and the rules, there would seem to be no duty to disclose?<sup>66</sup> I confess that I have no answers to these questions, nor do I doubt do others—and that is really the point.

### C. Issue 3—*Post-Confirmation Property of the Estate*

In *Calixto*, the court began with the threshold question of whether the tort claim was property of the estate.<sup>67</sup> This question arises because of the antinomy between sections 1306(a)(1) and 1327(b). Section 1306(a)(1) states that property of the chapter 13 estate includes property of a type designated in section 541 (the general provision defining property of the estate) “that the debtor acquires” after filing and prior to the close of the case.<sup>68</sup> By contrast, section 1327(b) provides that, “the confirmation of a plan vests all of the property of the estate in the debtor,” except where the plan or order of confirmation makes a provision to the contrary.<sup>69</sup> The conflict, or inconsistency, if you prefer, could hardly be starker.<sup>70</sup>

Necessarily, therefore, this disconnect would need to be worked out in the courts. Except, like almost every other issue of consequence in chapter 13 on which the Supreme Court has yet to directly rule, the courts have not been able

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<sup>63</sup> But, in *Calixto*, why would they bother since they were being paid in full under the plan?

<sup>64</sup> This would be especially true if the court's position was that the chapter 13 trustee could not bring the claim for the estate. *See supra* note 51 and accompanying text.

<sup>65</sup> Of course, that issue is also not free from controversy as revocation requires a showing of fraud. *See* 11 U.S.C. § 1328(e).

<sup>66</sup> One answer can be found in the court's decision in *In re Robinson*, 2023 WL 2563537, at \*9. *See also supra* note 61 and accompanying text.

<sup>67</sup> *See Calixto*, 648 B.R. at 124–25.

<sup>68</sup> 11 U.S.C. § 1306(a)(1).

<sup>69</sup> 11 U.S.C. § 1327(b).

<sup>70</sup> *See generally* Amir Shachmurove, *A Once and Future Muddle: The Ever-Uncertain Relationship Between §§ 1306(a) and 1327(b)*, AM. BANKR. INST. J., 38-Dec. 2019, at 20.

to resolve the clashing language of the statutory provisions in question.<sup>71</sup> To the contrary, in a recent opinion involving who is entitled to appreciation in exempt property sold after confirmation of the debtor's plan, the bankruptcy court in *In re Marsh* identified no less than *five* different approaches to resolving the discordant language of the two provisions.<sup>72</sup>

Before turning to a brief précis of the *Marsh* opinion, it is important to take a moment to consider other issues affected by how this question regarding property of the estate is answered beyond the issue of entitlement to appreciation in property. These potentially include, among others, the applicability of those provisions of the automatic stay that apply only to property of the estate.<sup>73</sup> Thus, a determination that the property belongs to the debtor rather than the estate could mean that property is amenable to execution in favor of post-confirmation claims not covered by the plan. In addition, the right to assert a priority administrative claim under section 507(a)(2) requires that the obligation be incurred to preserve estate property.<sup>74</sup> The ability to seek modification may also hinge on to whom post-confirmation-acquired property inures in the absence of specific direction in the plan,<sup>75</sup> as well as the right of post-bankruptcy creditors of the debtor to reach such property. Lastly, the answer to the question may dictate whether the debtor has adequate resources with which to successfully

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<sup>71</sup> David Gray Carlson, *The Chapter 13 Estate and its Discontents*, 17 AM. BANKR. INST. L. REV. 233, 233 (2009) (“Thirty years into the life of the Bankruptcy Code, the courts still have no coherent theory of chapter 13. This is decidedly not their fault, as the text of the Bankruptcy Code virtually precludes a perfect theory. Every known theory of chapter 13 does violence to some part of the Bankruptcy Code. The choice is one between the lesser of evils.”); *see also In re Scholl*, 605 B.R. 163, 173 (Bankr. S.D. Ohio 2019) (quoting *In re Rangel*, 233 B.R. 191, 193 (Bankr. D. Mass. 1999)) (describing the competing provisions as possibly “impossible to reconcile”).

<sup>72</sup> *In re Marsh*, 647 B.R. 725, 730–33 (Bankr. W.D. Mo. 2023) (identifying the following approaches: (1) Estate Termination, (2) Estate Preservation, (3) Conditional Vesting, (4) Estate Transformation, and (5) Estate Replenishment).

<sup>73</sup> Paragraphs (3) and (5) of section 362(a) apply to actions against property of the estate. Paragraph (2) applies to actions against both the debtor and the estate. 11 U.S.C. § 362(a).

<sup>74</sup> *Cf.* 11 U.S.C. § 503(b)(1) (administrative expenses including the actual, necessary costs and expenses of preserving the estate are allowable only when the obligation to preserve estate property is incurred).

<sup>75</sup> *See* 11 U.S.C. § 1329(a). The issue in *Marsh*, focusing on the right to post-confirmation appreciation in property, reflected a species of this problem inasmuch as modification to increase payments would only be appropriate if the appreciation belonged to the estate. *See Marsh*, 647 B.R. at 729–30; *see also supra* note 24 and accompanying text. There is a related question of whether sales proceeds should be treated differently from unrealized appreciation. The court in *Marsh* considered them distinct, reasoning that proceeds differ materially from the property that generated them, but observed that not all courts agree. *Marsh*, 647 B.R. at 735–36. This issue typically arises in the case of conversion to a chapter 7. *See generally* Ponoroff, *supra* note 15 (describing the discord when cases convert).



complete the plan.<sup>76</sup> In sum, the determination of who has the right to post-confirmation property of the estate is fundamentally important to a number of key issues affecting a confirmed chapter 13 plan, and yet the courts have created a veritable crisis of disuniformity and uncertainty surrounding the question.

A good sense of the chaos can be garnered by returning to *In re Marsh*. The facts were straightforward: the Marshes filed a chapter 13 petition in September of 2018, listing their residence with a value of \$140,000, subject to a first lien with a balance of \$124,842.<sup>77</sup> The Marshes also claimed a \$15,000 homestead exemption,<sup>78</sup> effectively eliminating any equity in the property. The Marshes' five-year plan called for maintenance of the payments on their home mortgage but zero payments for general unsecured creditors.<sup>79</sup> None of the Marshes' valuations were challenged and their plan was confirmed in November of 2018 without objection.<sup>80</sup>

In April of 2022, the court entered an order permitting the Marshes to sell their home at a sale price of \$210,000, which they did. The sale generated proceeds of \$73,252, net of the balance due on the first mortgage.<sup>81</sup> The Marshes then moved the court for an order allowing them to retain such proceeds that, if applied to the plan, would be sufficient to pay 100 cents on the dollar to unsecured creditors.<sup>82</sup> The chapter 13 trustee unsurprisingly objected to the motion, and a hearing ensued. As could be expected, the Marshes urged that the proceeds were not available to the chapter 13 trustee to apply to a modified plan because, the confirmation order not having provided otherwise, all property of the estate reverted in the debtor upon confirmation per section 1327(b).<sup>83</sup> The trustee, predictably, took the opposite position, contending that the proceeds were property of the estate under section 1306(a)(1) that could be applied to prepetition debts.<sup>84</sup>

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<sup>76</sup> If the funds are property of the debtor, these non-committed assets could be used to buffer a temporary interruption in the debtor's income, affecting the ability to make plan payments.

<sup>77</sup> *Marsh*, 647 B.R. at 728.

<sup>78</sup> *Id.* at 728. It's unclear from the opinion if this was the maximum amount permitted under applicable law (probably the case) or it just represented the difference between the scheduled value and the amount outstanding under the lien.

<sup>79</sup> *Id.* The plan was modified at some point, but not in a manner that affected these particulars.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* The motion indicated that the Marshes intended to use the monies to obtain a new residence and to cover other expenses. *Id.* at 728–29. The court distinguished the treatment of proceeds from the separate question of property appreciation. *Id.* at 736.

<sup>83</sup> *Id.* at 729.

<sup>84</sup> *See id.*

With unalloyed and unabashed understatement, the court acknowledged that it is “somewhat difficult to reconcile” removal of property from the estate under section 1327 with section 1306’s inclusion in the estate of all property the debtor acquires between the petition date and the closure, dismissal, or conversion of the case.<sup>85</sup> Undaunted, the court proceeded to identify the five approaches that have emerged.<sup>86</sup> While a detailed review of all of these tests is beyond the scope of, and extraneous to, this treatment, the two predominant and most antipodal of those—the “estate termination” approach and the “estate preservation” approach—are worth brief consideration. The former, as its moniker implies, gives hegemony to the language in section 1327(b). Advocates of this view point out the value of offering the debtor the choice to vest in herself all, none, or a combination of estate property.<sup>87</sup> Cases adopting this approach reconcile the conflicting language in section 1306 by construing it as establishing the moment when estate property is first created but not as precluding property of the estate from becoming non-estate property under circumstances other than when the case is closed, dismissed, or converted.<sup>88</sup>

The estate preservation perspective, on the other hand, discounts the impact of section 1327(b), reasoning that its vesting provision simply establishes the debtor’s right to possess and deal with property of the estate after confirmation.<sup>89</sup> Under this theory, the estate retains all pre-confirmation property and includes any property the debtor acquires after confirmation.<sup>90</sup> In effect, there is no distinction between property of the debtor and property of the estate. Courts adopting this understanding emphasize the need to, as the moniker for this test suggests, preserve assets for creditors and protect priority.<sup>91</sup>

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<sup>85</sup> *Id.* at 730.

<sup>86</sup> *Id.* at 730–34 (citing *In re Baker*, 620 B.R. 655, 663–64 (Bankr. D. Colo. 2020)).

<sup>87</sup> Cal. Franchise Tax Bd. v. Jones (*In re Jones*), 420 B.R. 506, 515 (B.A.P. 9th Cir. 2009).

<sup>88</sup> *Id.* (citing 8 COLLIER ON BANKRUPTCY ¶ 1327.03 (15th ed. rev. 2008)). The *In re Jones* court proceeded to explain its conclusion that “vesting” property of the estate in the debtor terminates estate property is confirmed by section 1327(c), which provides that “property vesting in the debtor . . . is free and clear of any claim or interest . . . provided for by the plan.” *Id.* See also *Baker*, 620 B.R. at 667 (asserting that the estate termination approach is the only interpretation that respects the plain meaning of the language of section 1327(b)).

<sup>89</sup> See, e.g., *Annese v. Kolenda (In re Kolenda)*, 212 B.R. 851, 853 (W.D. Mich. 1997) (explaining that all property remains estate property post-confirmation contingent upon the debtor completing the plan); *In re Tarby*, No. 11-32886/JHW, 2012 WL 1390201, at \*4 (Bankr. D.N.J. Apr. 20, 2012).

<sup>90</sup> See *Tarby*, 2012 WL 1390201, at \*3 (treating the vesting language in section 1327(b) as merely giving the debtor the right to present or future enjoyment of the property subject to the terms of the plan).

<sup>91</sup> *Annese*, 212 B.R. at 854–55.

In *Marsh*, the court adopted one of the intermediary approaches, commonly referred to as the “estate replenishment” theory.<sup>92</sup> Under this approach, at confirmation, all property of the estate becomes property of the debtor, thus giving effect to section 1327(b), but the chapter 13 estate continues to exist and “refills” with property, as defined in section 1306(a)(1), that is acquired by the debtor after confirmation, without regard to whether that property is necessary to performance of the plan.<sup>93</sup> While recognizing that this approach is not without its flaws,<sup>94</sup> the court believed that it most fairly harmonized the conflicting language in sections 1306(a) and 1327. In applying the estate replenishment test to the facts of the case, the court then concluded:

[B]ecause the proceeds are distinct from the Marshes’ former residence and because the proceeds were not property of the estate at confirmation, the proceeds could not have vested in the Marshes at confirmation under § 1327. Consequently, under the estate replenishment approach, § 1306 makes the proceeds property of the replenished chapter 13 estate if they are “property of the kind specified in [section 541]” that the Marshes “acquire[d]” after confirmation.<sup>95</sup>

Not uncharacteristic of chapter 13 litigation that reaches the level of a published opinion, sections 1306(a)(1) and 1327(b) were not the only provisions of chapter 13 in dispute.<sup>96</sup> Without going into greater detail, this fact underscores

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<sup>92</sup> *In re Marsh*, 647 B.R. 725, 733–34 (Bankr. W.D. Mo. 2023); see also *In re Ellassal*, Case No. 21-42801, 2023 WL 5537061, at \*5 (Bankr. E.D. Aug. 28, Mich. 2023) (suggesting that “estate replenishment” has become more recently favored by courts facing the issue); *In re Larzelere*, 633 B.R. 677, 682 (Bankr. D.N.J. 2021) (“estate replenishment approach best harmonizes sections 1306(a) and 1327(b).”).

<sup>93</sup> See *Larzelere*, 633 B.R. at 681; see also *In re Barbosa*, 236 B.R. 540, 550 (Bankr. D. Mass. 1999), *aff’d sub nom.* *Barbosa v. Solomon*, 243 B.R. 562 (D. Mass. 2000) (following the estate replenishment approach), *aff’d*, 235 F.3d 31 (1st Cir. 2000).

<sup>94</sup> *Marsh*, 647 B.R. at 734 (quoting *In re Baker*, 620 B.R. 655, 669 (D. Colo. 2020)) (“Some courts conclude that, by including post-confirmation property in the estate, the estate replenishment approach ‘reads § 1306 too broadly and gives insufficient weight to § 1327(b),’ undermining ‘the chapter 13 bargain a debtor makes when trading his future income [devoted to the plan] for his assets.’”).

<sup>95</sup> *Marsh*, 647 B.R. at 736 (citation omitted); cf. Laura B. Bartell, *Postpetition Proceeds of Exempt Interests in Property—Who Owns the Appreciation?*, 95 AM. BANKR. L.J. 587, 606–08 (2021) (urging that in the case of exempt property it is inappropriate to award the estate an exclusive claim on the proceeds of sale and proposing that, as an alternative, any proceeds obtained from property attributable to appreciation should belong to the debtor to the extent of the debtor’s proportionate share in the full interest in the property).

<sup>96</sup> Compare *Marsh*, 647 B.R. at 739 (observing that resolving the debtors’ motion to retain the proceeds from the sale of their home did not *ipso facto* also resolve the separate question of whether the debtors could retain a portion of the proceeds under section 1329), with *Willard v. Preuss* (*In re Willard*), No. 21 Civ. 10220 (NSR), 2023 WL 2601769, at \*3 (S.D.N.Y. Mar. 22, 2023) (reversing the holding below in favor of the trustee, ruling that a chapter 13 debtor could not be compelled to turn over the proceeds from the sale of a prepetition property, as the only thing that the Bankruptcy Court is authorized to compel a debtor to turn over is the debtor’s postpetition disposable income. The court also rejected the chapter 13 trustee’s further argument that the limitation on property turnover to earned income applies only after confirmation of a plan).

the more general thesis of this Article—that chapter 13 is fraught with ambiguity, incertitude, and confusion. These qualities radically undermine chapter 13's core mission of purportedly providing debtors with a more respectable way of dealing with unmanageable debt and allowing them to keep most their nonexempt property while providing greater returns to creditors.

Finally, nowhere in the case law grappling with this issue, which is hopelessly irresolvable on the face of the Code, is there any argument or suggestion that resolution might be found in the same manner that the Supreme Court derived the answer to the question of entitlement to undistributed funds in *In re Harris*.<sup>97</sup> As noted,<sup>98</sup> in the absence of clear or express direction in the Code, Justice Ginsburg concluded that requiring the funds be paid to the debtor made sense because it advanced and was consistent with bankruptcy's core fresh start policy.<sup>99</sup> In fairness, there was also some indirect Code support for the outcome in *Harris*,<sup>100</sup> so it is not a foregone conclusion that this decision mandates adoption of “estate termination,” but it certainly could be a factor that contributes toward finding consensus on a path forward.

## II. WHY IS IT A PROBLEM?

Chapter 11 is not free from opacity and discordance by any stretch of the imagination. However, the stakes are much higher in the prototypical reorganization and the average chapter 11 debtor, even when an individual debtor,<sup>101</sup> is far savvier and more sophisticated than the archetypal chapter 13 debtor. In short, chapter 11 cases by and large can bear the overhead of litigating these issues, which is the inescapable cost of uncertainty. Not so in the traditional chapter 13 case where the debtor is often already living hand-to-mouth, and, if not yet already, will likely be in that boat upon plan confirmation.<sup>102</sup>

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<sup>97</sup> See *Harris v. Viegelahn (In re Harris)*, 575 U.S. 510, 518 (2015).

<sup>98</sup> See *supra* text accompanying notes 39–44.

<sup>99</sup> *Harris*, 575 U.S. at 518.

<sup>100</sup> *Id.* at 519–20 (explaining that section 348(e) requires the trustee to return undistributed postpetition wages to the debtor).

<sup>101</sup> The Supreme Court established in *Toibb v. Radloff*, 501 U.S. 157 (1991), that individuals are eligible to seek relief under chapter 11.

<sup>102</sup> This is largely a function of chapter 13's current insistence that all, as opposed to a percentage, disposable income go to plan payments. 11 U.S.C. § 1325(b); see also *infra* notes 124, 167–69 (discussing an alternative approach to calculating disposable income to be applied to the plan); cf. David R. Jones, *Savings: The Missing Element in Chapter 13 Cases?*, 26 AM. BANKR. INST. L. REV. 243, 246 (2018) (describing an innovative voluntary “savings program” to provide a method by which debtors might weather the unexpected negative financial events that almost inevitably will occur during the term of a chapter 13 plan).

As it is, numerous studies have shown that most chapter 13 cases never make it to full completion.<sup>103</sup> While it is true that the filing of a chapter 13 petition may be beneficial to a debtor, even when the likelihood of seeing a plan to its end is remote,<sup>104</sup> having a debtor relief chapter that serves its ordained and intended objective only on relatively rare occasions is not exactly a ringing endorsement of the system.<sup>105</sup> Moreover, this trend is not likely to abate in the face of Congress's decision to remove many of the advantages of chapter 13, making it less attractive and less useful to prospective debtors,<sup>106</sup> and the means test has proven feeble in terms of actually compelling chapter 13 filing over chapter 7.<sup>107</sup>

In fact, after BAPCPA, a chapter 13 debtor is only in a position to succeed, in the sense of completing a plan,<sup>108</sup> if the debtor has a steady source of income not subject to temporary interruption, fluctuation, or unanticipated needs or demands. That is not impossible, of course, but the likelihood of five years of

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<sup>103</sup> See Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal to Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 589 (2000) (noting only one-third of chapter 13 filers were able to complete repayment plans, and many were only able to make minimal repayment); Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 476 (2006) (finding a 33% completion rate in a seven-district study for plans of chapter 13 debtors who filed in 1994); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 410–11 (1994) (reporting a 31% average completion rate across the country). A post-2005 study suggested a higher than one-third success rate, but only slightly so. See Greene et al., *supra* note 9, at 1042 (finding that post-BAPCPA the completion rate was slightly higher than the "one-third" completion statistic that has endured for decades).

<sup>104</sup> See *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 283 (4th Cir. 2008) (noting the protections or benefits available under chapter 13, such as to cure a mortgage, deal with other secured debts, or simply pay debts under a plan with the protection of the automatic stay, might be an incentive for a debtor to file for relief even when a discharge under section 1328(f) does not apply). Also, at least temporarily, the debtor retains possession of their property. *But see* Porter, *supra* note 8, at 141 (finding in this comprehensive empirical study of bankruptcy outcomes that the non-discharge-based benefits of bankruptcy are ephemeral at best); *see also infra* note 114.

<sup>105</sup> See Pamela Foohey et al., "No Money Down" Bankruptcy, 90 S. CAL. L. REV. 1055, 1062–63 (2017) (demonstrating that a small fraction of failed chapter 13 cases are converted to chapter 7, and that most chapter 13 bankruptcies end without debt forgiveness of any kind).

<sup>106</sup> See *supra* note 13 and accompanying text; *see also infra* note 134 and accompanying text. *But see supra* note 17 and accompanying text (noting the one exception was the temporary increase passed by Congress in 2022 to raise the debt limit for eligibility to file chapter 13 to \$2.75 million and eliminate separate caps for secured and unsecured debt).

<sup>107</sup> See *infra* note 160.

<sup>108</sup> A caveat to be noted here is the existence of the hardship discharge in section 1328(b), although the circumstances under which one might be sought are strict and, thus, uncommonly sought and even more rarely granted. See generally Abbie Schmadeke, Comment, *The Hardship Discharge and How it Can Improve Debtor Success*, 38 EMORY BANKR. DEV. J. 355 (2022) (examining the hardship discharge, its use, and urging an expansion of availability).

clear skies and fair winds is unrealistic. Life happens, as the COVID-19 Pandemic, among many other events, aptly illustrates.<sup>109</sup>

There are certainly many ways in which this problem can be addressed without tossing the infant out along with its bathing suds,<sup>110</sup> but there seems to be no impetus to do so, and, quite frankly, there is a question of whether it is even worth the trouble when there is a far simpler and arguably more cost-effective way to resolve the dual objectives of debtor relief and creditor repayment. So, is it time to call the whole thing off? Some consumer bankruptcy attorneys may rush to the barricades to resist such an outcome,<sup>111</sup> but I think many bankruptcy debtors would be better off. Surely, the initial reaction of the consumer credit lobby would also be highly critical, but that antagonism may not be warranted. Still and all, such drastic action does not come without some adjustments, so let us take a look into what a world without chapter 13 might look like and who might or might not benefit.<sup>112</sup>

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<sup>109</sup> Congress did respond with some temporary measures (initially one-year and then extended an additional year) bearing on the definition of “income” in chapters 7 and 13, providing that the calculation of disposable income for purposes of confirming a chapter 13 plan would not include Coronavirus related payments, and explicitly permitting individuals and families currently in chapter 13 to seek payment plan modifications if they were experiencing a material financial hardship due to the Coronavirus Pandemic, including extending their payments for up to seven years after the initial plan payment was due. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, § 1113(b)(C), 134 Stat. 281; COVID-19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5, 135 Stat. 249 (extending the CARES Act Bankruptcy provisions for an additional year).

<sup>110</sup> *See generally* Jones, *supra* note 102 (explaining and illustrating the use of voluntary savings accounts in some districts to buffer interruptions in income).

<sup>111</sup> *See* Pamela Foohey et al., *supra* note 105, at 1070–71 (discussing empirical evidence supporting the proposition that some attorneys maximize their profits by steering clients to chapter 13 even when those clients’ interests would be better served by filing under chapter 7); Logan, *supra* note 18, at 1579–85 (identifying debtor’s attorneys and local legal cultures as the external factors bearing on debtors’ choice under which chapter to file). This phenomenon is sometimes a product of avarice because fees are greater in chapter 13, but also sometimes due to the attorney’s own moral sense of “the right thing” for the debtor to do. *See also* Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 249–50 (1986); Nancy B. Rapoport, *Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney*, 70 IND. L.J. 783, 791–93 (1995).

<sup>112</sup> I am not, by the way, the first commentator to raise the specter of repealing chapter 13. Porter, *supra* note 8, at 155–56 (“The new consumer bankruptcy system should reject the idea of broad consumer choice” and arguing that “reform efforts should resolutely abandon Chapter 13.”); Whitford, *supra* note 21, at 94–95 (suggesting the so-called benefits of filing for chapter 13 are illusory). *But see* Braucher, *supra* note 19, at 582–83 (proposing chapter 13 as the only vehicle for consumer bankruptcy). It is notable that two of these three articles were written prior to the successive reforms, culminating in BAPCPA, that have made chapter 13 less generous to debtors. *See supra* note 13 and accompanying text; *infra* note 134 and accompanying text.

## III. A WORLD WITHOUT CHAPTER 13

A. *Benefits*

We all know that there is no way that we could live without big screen televisions and Netflix, but could we live without chapter 13? Undoubtedly, there would be some benefits. Not trivial among them is, first, the assurance that individuals are not placed in a repayment plan when it is not necessarily in their best interest. Empirical evidence suggests this occurs far more than we ought to be comfortable with.<sup>113</sup> Second, because the impact of not completing a chapter 13 plan is far from benign,<sup>114</sup> most debtors who might otherwise have been persuaded, or unwisely elected, to file under chapter 13 will be better off for not having that option. Third, in the absence of chapter 13, there would no longer be a need for the means test, at least in its present labyrinthine design, with all its complexity and expense.<sup>115</sup> Rather, except for the relatively rare individual chapter 11 case, consumer debtors in need of bankruptcy relief would be relegated to chapter 7.<sup>116</sup>

This means that the administrative overhead associated with supervising debtors over the course of three to five years would be replaced with the much simpler and more efficient process of liquidation and discharge. Perhaps sacrificing a few nonexempt assets in exchange for retaining all future income would not be that bad of a deal. Debtors could get on with their lives instead of living on a frugal budget over an extended period of time. Creditors might be burned somewhat, but the damage could easily be mitigated by incentivizing more disciplined credit decisions on the front end. Plus, given the high failure

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<sup>113</sup> See *supra* note 111 (noting factors other than the debtor's best interest influencing the decision to file under chapter 13). This work has also identified that a greater proportion of black debtors are placed in chapter 13 than white debtors; thus, suggesting racial bias in the practice of attorney steering of debtors to chapter 13. E.g. Jean Braucher et al., *Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors' Attorneys*, 20 AM. BANKR. INST. L. REV. 611 (2012); Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623 (2012); Pamela Foohey et al., *supra* note 105, at 1060 (suggesting a correlation for what she terms "no money down" bankruptcy and the racial disparity in chapter 13 filing rates). The concept entails no initial payment from the client to file the case, and the fee is then collected through the plan. *Id.* at 1059.

<sup>114</sup> E.g., NAT'L BANKR. REV. COMM'N, *supra* note 19, at 234–35 ("When noncompletion leads to dismissal rather than discharge, as it so often does, debtors exit the system having paid a substantial filing fee and attorneys' fees but have not discharged any debt."); see also Porter, *supra* note 8, at 111–12 (relating the results of an empirical study showing that, of the chapter 13 cases that failed plan completion, only 26.6% converted to chapter 7, while the remainder ended up in dismissal).

<sup>115</sup> But see *infra* text accompanying notes 166–170 (suggesting a simplified version of the means test might be retained).

<sup>116</sup> Cf. Braucher, *supra* note 19, at 582 (discussing the concept of a single portal into bankruptcy for consumer debtors, without necessarily concluding whether chapter 7 or chapter 13 is superior to the other).

rate in chapter 13,<sup>117</sup> and administrative costs associated with monitoring a troubled credit, creditors too might be better off in the long run simply absorbing the loss and moving on.

From a system point of view, doubtless, the most obvious and valuable benefit would be the eradication of the current perplexity and discord in the case law over virtually every issue of consequence in chapter 13 cases.<sup>118</sup> The wastefulness of litigation, including actual and indirect costs, such as the nonproductive use of labor and squandering of judicial resources, takes a toll on all system participants, save possibly for the hopefully only very few lawyers who see personal gain in that state of affairs. Undoubtedly, this could be addressed by a wholesale reform of chapter 13,<sup>119</sup> but there seems no disposition or appetite to do so. Moreover, the recent temporary expansion of the debt limitations in section 109(e) governing eligibility to file under chapter 13,<sup>120</sup> alone a good thing,<sup>121</sup> ironically only exacerbates the problem absent other changes that would streamline and make chapter 13 more viable and successful in truly accomplishing repayment and rehabilitation.

Lastly, while it is certainly true that bankruptcy is not myopically or exclusively focused on debtor relief alone,<sup>122</sup> the concept of a fresh start remains a powerful animating principle of contemporary bankruptcy law.<sup>123</sup> Laboring for up to sixty months under a rigid and unforgiving repayment plan, with little monthly income available to cover more than bare necessities,<sup>124</sup> and no

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<sup>117</sup> See *supra* note 103. In fairness, it should be borne in mind that not completing a confirmed chapter 13 plan is not always a failure. Cf. *Branigan v. Bateman* (*In re Bateman*), 515 F.3d 272, 283 (4th Cir. 2008) (noting the protections or benefits available under chapter 13, other than discharge, that might be an incentive for a debtor to file for relief even when section 1328(f) applies). The same could be said about conversion or dismissal after following an installment cure of default on a secured obligation.

<sup>118</sup> See *supra* text accompanying notes 22–29. See generally Part I.

<sup>119</sup> See generally Ponoroff, *supra* note 13.

<sup>120</sup> See *supra* note 109.

<sup>121</sup> See Ponoroff, *supra* note 13, at 15–18 (urging expansion of chapter 13 eligibility).

<sup>122</sup> For instance, the Supreme Court in *Cohen v. de la Cruz* observed that each of section 523(a)'s exceptions to discharge "reflect[s] a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start.'" *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)).

<sup>123</sup> *City of Chi. v. Fulton*, 141 S. Ct. 585, 593 (2021) (Sotomayor, J., concurring) (citing *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007)) (identifying the fresh start as the principal purpose of the Code); *USA Sales, Inc. v. Off. U.S. Tr.*, 76 F.4th, 1248, 1255–56 (9th Cir. 2023) (citing the fresh start for the honest but unfortunate debtor as one of the animating purposes for the bankruptcy law).

<sup>124</sup> This is the reason I proposed that in a "new chapter 13" the projected disposable income test of section 1325(b) should be revised to require only a percentage of such disposable income to be devoted to the plan. See *infra* notes 167–169 and accompanying text.



entitlement to discharge until the plan is successfully completed,<sup>125</sup> severely handicaps the concept of a financial fresh start. Indeed, it is akin to providing the debtor with, at most, a steep, almost Sisyphean upward slog to financial forgiveness and independence. By contrast, a near-immediate discharge of all pre-filing obligations, coupled with retention of key exempt assets, is far more likely to facilitate the fresh start for the fiscally overburdened debtor.

## B. Objections

### 1. Avoiding the Stigma of Bankruptcy

To be sure, there would be several (and likely loud) objections to even a whisper of doing away with chapter 13. To many, the idea of depriving the debtor of the *choice* between liquidation and repayment would be regarded as repugnant.<sup>126</sup> However, it is not at all clear that, in most cases, the choice is really being made by the debtor, or that even when it is, it is a fully informed decision.<sup>127</sup> Depriving the debtor of the opportunity to do the “honorable” thing also implies a level of moral calibration that really should have no place in matters of commercial intercourse.<sup>128</sup>

Furthermore, even if the debtor’s motives for electing repayment are more utilitarian than altruistic—such as to preserve a better credit rating<sup>129</sup>—there is

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<sup>125</sup> 11 U.S.C. § 1328(a). *But see supra* note 108.

<sup>126</sup> *See Logan, supra* note 18, at 1587 (observing that not only has much of the country become accustomed to debtors having a choice between liquidation and repayment, surely the influential consumer credit lobby would pressure Congress not to repeal chapter 13).

<sup>127</sup> In general, debtors considering a bankruptcy alternative are not in a prime mental state calculated to produce the best decisions. Moreover, many bankruptcy debtors are unaware, or even if aware perhaps unrealistic, about the full consequences of their choice. Complicating the picture, the determination of where the debtor lives and who she selects as her attorney are surely likely to play as much if not a more important role in the decision than the debtor’s subjective preference. *See Jean Braucher, Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 181 (1997) (suggesting the way that lawyers should counsel debtors to make responsible decisions in the debtor’s best interest).

<sup>128</sup> *See generally* Gordon Bermant, *What’s Stigma Got to Do With It?*, AM. BANKR. INST. J., 22-Aug. 2003, at 22 (examining the arguments for and against the means test based on an assumption that the personal shame and social stigma traditionally accompanying bankruptcy have been eroded under the Code).

<sup>129</sup> *See Braucher, supra* note 19, at 538–39 (explaining the role of counsel in mistakenly convincing the debtor that chapter 13 will result in better credit availability than chapter 7); *see also Braucher, supra* note 127, at 187–88 (chiding lawyers who, for self-interested reasons, falsely tell clients that future creditors will look more favorably on a chapter 13 filing than a chapter 7). According to the House Report that accompanied the passage of the Code, Congress, too, bought into the fairy tale that “Chapter 13 also protects a debtor’s credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk.” H.R. REP. NO. 95-595, ch.3, at 118 (1977), *as reprinted in* 1978 U.S.C.A.N. 5963, 6079.

no empirical evidence to suggest the market makes such distinctions between different debtor relief alternatives. In short, just the opposite appears to be true, i.e., that the market makes no such distinctions.<sup>130</sup> Finally, if there is a “stigma,” be it personal or financial, associated with filing bankruptcy,<sup>131</sup> then, at the risk of sounding redundant, there is a stigma associated with filing bankruptcy and the debtor who runs out waving a piece of paper reading: “But it was a 13,” is not likely to alter the reaction in the market for better or worse.<sup>132</sup> Granted, it is conceivable in some instances that it is neither exogenous opprobrium nor personal interest that drives the chapter choice, but rather an internal sense of shame on the part of the debtor over not making an effort to repay her debts that may cause the preference for chapter 13.<sup>133</sup> Again, not only is this sentiment misplaced in what should be a purely economic calculation, but also debtors may redeem or reaffirm certain debts, and are, of course, always free to pay any debts they so choose, even after discharge. Furthermore, the role of creditors that make

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<sup>130</sup> See Braucher, *supra* note 19, at 540 (stating that “better credit availability after chapter 13 is a myth, but it is one that many clients believe and that can be used to manipulate them into choosing chapter 13.”); see also Braucher, *supra* note 127, at 190 (suggesting that future credit availability may actually be better after chapter 7 than after chapter 13); Ponoroff, *supra* note 13, at 45 (noting debtors were, and to an extent still are, actually penalized for choosing repayment over liquidation).

<sup>131</sup> Certainly, there has been a belief in Congress that chapter 13 is less stigmatizing than chapter 7. H.R. REP. NO. 95-595, at 118 (“[Chapter 13] satisfies many debtors’ desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one’s obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.”). This was also part of the rationale behind the enactment of old chapter XIII. See Dixon & Epstein, *supra* note 5, at 749 (articulating Valentine Nesbit’s, the author of the bills that became chapter XIII, rationale behind chapter XIII).

<sup>132</sup> The extent of the “stigma of bankruptcy,” if one exists at all, is inherently difficult to determine other than on an anecdotal basis. See Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 [EMORY] BANKR. DEV. J. 425, 453 (2001) (book review) (concluding that there is no “statistically valid study of the general population’s attitude toward the stigma of bankruptcy.”). As part of the most comprehensive empirical study of consumer bankruptcy to date, the authors reached the tentative conclusion that the hypothesis of a decline in stigma since 1978 is unwarranted. Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213 (2006). Congress’s own decision post-adoption of the Code to abandon the carrots in favor of sticks in encouraging chapter 13 filings suggests that debtors generally did not find chapter 13 somehow less stigmatizing. See *supra* note 3. Moreover, as early as 1956, Professor MacLachlan opined that it was doubtful that much less stigma attached under chapter XIII than in a straight liquidation. JAMES A. MACLACHLAN, *BANKRUPTCY* 374 (1956). Finally, a more recent study concludes that, over the four decades following the adoption of the Code, bankruptcy stigma actually increased regardless of chapter choice. Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 AM. BANKR. INST. L. REV. 217 (2018).

<sup>133</sup> See Braucher, *supra* note 19, at 540–41. The fact that lawyers have a financial incentive in the form of a larger fee to recommend chapter 13 over chapter 7, does not help with the debtor’s plight. See *supra* note 111 and accompanying text; see also Pamela Foohey et al., *supra* note 105, at 1064–65 (finding that in some situations, lawyers encourage their clients to file under chapter 13 because of the lawyer’s own sense of morality and their belief that it is “the right thing” to do).

ill-advised credit decisions is not to be ignored in allocating blame to the extent that blame has any role in the discussion in the first place.

## 2. *Retaining Property*

Perhaps the most serious and telling objection to deep-sixing chapter 13 would be that the debtor will lose all unencumbered property, as well as the ability to retain property subject to one or more liens through the cramdown provisions of chapter 13.<sup>134</sup> In most cases, the assets of greatest importance to debtors are their home and car, followed perhaps by tools of the trade. On the face of it, this is a serious challenge to my proposal to offer last rites for chapter 13. However, on closer examination, these chapter 13 advantages may be more chimerical than real, and there may be other ways to skin the cat.

To begin with the most obvious, the debtor, of course, would not lose unencumbered exempt property in chapter 7.<sup>135</sup> The value of this right may vary tremendously depending on whether the debtor is in an opt-out jurisdiction and, if so, how miserly or generous applicable state law exemptions might be. As an aside, this is one more argument in favor of normalizing property and income exemptions in bankruptcy cases—a hobby horse I have been on for quite a while.<sup>136</sup> However, for discussion's sake, let us start by looking at the federal exemptions in section 522(d).<sup>137</sup>

Assume a couple, the Wilsons, have a home worth \$300,000, and they own the property jointly in tenancy by the entirety. The home is subject to a mortgage in favor of First Bank with a current balance outstanding of \$240,000. Assume further, they are current on their mortgage payments, and they have two vehicles that they own free and clear, worth \$8,000 each. The Wilsons want to file under chapter 7 because, although they have a steady, albeit modest, income, they have

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<sup>134</sup> See 11 U.S.C. § 1325(a)(5)(B). Notably, with the 2005 Amendments, Congress made this alternative for dealing with secured debt more difficult by imposing several subsidiary requirements to the basic requirement that the plan provide for payment to the secured creditor of an amount that is not less than the present value, as of the effective date of the plan, of the allowed amount of the secured claim. 11 U.S.C. § 1325(a)(5)(B)(ii). These include requirements that the plan also be made in equal installments and in an amount sufficient to provide adequate protection to the holders of such claims. 11 U.S.C. § 1325(a)(5)(B)(iii).

<sup>135</sup> A qualification on this point needs to be made for situations where the value of the property exceeds the amount of the exemption. In those cases, the property might be sold to realize the equity for the estate.

<sup>136</sup> E.g., Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353 (2014).

<sup>137</sup> These exemptions apply in cases where the debtor resides in a non-opt-out state and elects the federal exemptions over applicable state and non-bankruptcy federal exemptions. See 11 U.S.C. § 522(b)(1).

accumulated more than \$75,000 in dischargeable credit card debt and medical bills.

Currently, the federal homestead exemption is only \$27,900,<sup>138</sup> which does not seem particularly magnanimous. However, three factors potentially come into play. First, in a joint case involving spouses,<sup>139</sup> each spouse is entitled to their own exemptions,<sup>140</sup> so the actual exemption available is \$55,800. This still appears to be insufficient to save the home. The second consideration is the wildcard exemption in section 522(d)(5), discussed below, and the third factor is the reality that in calculating net proceeds, the trustee must also factor in costs of sale, which typically approach ten percent in connection with residential real property. So, as a practical matter, the Wilsons need to use only approximately \$30,000 of their combined exemptions in this case to save their home, as its value net of sales costs is only \$270,000.

Turning to the cars, under 11 U.S.C. § 522(d)(2), each debtor may exempt up to \$4,450 in the value of one motor vehicle. That is obviously not enough in this hypothetical to cover both vehicles. However, debtors can use whatever wildcard exemption is available under section 522(d)(5). Currently, the wildcard is \$1,475 plus up to \$13,950 of unused homestead.<sup>141</sup> None of this had to be applied to save the home. Thus, the full wildcard is available. This would be sufficient not only to cover both vehicles, but also leave some leftover wildcard for application to other property.<sup>142</sup>

As for the mortgage on their residence in favor of First Bank, so long as the debtors continue to make scheduled payments, they should be able to ride-through the bankruptcy, sections 522(a)(2) and 522(d) notwithstanding.<sup>143</sup> If the

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<sup>138</sup> 11 U.S.C. § 522(d)(1), as of April 1, 2022. The amount in this and several other Code sections adjusts for inflation every three years. *See, e.g.*, 11 U.S.C. § 104(a).

<sup>139</sup> 11 U.S.C. § 302(a).

<sup>140</sup> 11 U.S.C. § 522(m). The only prohibition is that both spouses must elect the same scheme (state or federal), and, if they cannot agree, the federal exemptions control. Accordingly, the homestead exemption in section 522(d)(1) is double in our hypothetical. 11 U.S.C. § 522(b)(1).

<sup>141</sup> 11 U.S.C. § 522(d)(5).

<sup>142</sup> On these facts, the capped unused homestead exemption of \$13,950 would alone be more than sufficient to cover the \$3,550 deficiency on each vehicle.

<sup>143</sup> Three sections amended or added by BAPCPA seem to have been designed to limit a debtor's right to elect the "ride-through" option as to personal property. Ride-through refers to the practice of retaining encumbered property without either reaffirming the debt or redeeming the property. First, a new section 521(a)(6) was added and provides that a debtor shall not retain possession of personal property as to which a creditor has an allowed secured claim unless the debtor reaffirms or redeems. 11 U.S.C. § 521(a)(6). Second, former section 521(2)(C), now section 521(a)(2)(C), was amended to provide that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under

debtors were *not* current with respect to payments on their home mortgage, then there is a risk that the bank could move to lift the stay with the intent of foreclosing on the property, exemption notwithstanding.<sup>144</sup> However, the Wilsons could still potentially save their property by reaffirming the debt so long as the bank is amenable,<sup>145</sup> which it ought to be.<sup>146</sup> Nonetheless, there is no guarantee. Thus, with chapter 13 abrogated, some consideration might be given to providing a limited cure right in chapter 7 for home mortgages,<sup>147</sup> coupled with express recognition of the ride-through right for residential real estate.<sup>148</sup> This might operate much like current section 1322(b)(5), which provides a cure and reinstatement option for debts where the last payment is not due until after the final payment of the debtor's chapter 13 plan, but with a much truncated temporal limit for effecting cure, e.g., no longer than one year.<sup>149</sup>

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this title, except as provided in section 362(h).” Notably, the Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, sec. 2(a)(16)(A)(iii), 124 Stat. 3557, 3559, struck the “designator” (C) from section 521(a)(2), and added the words “except that” to the beginning of the phrase relating to not altering the rights of the debtor or the trustee. Third, section 362(h) was added and provides that the automatic stay terminates with respect to personal property when the debtor does not state an intention to reaffirm or redeem or does not perform such stated intention within a specified period of time. 11 U.S.C. § 362(h)(1)(A). The plain language of these statutes limits their application to a debtor’s rights with regard to personal property. A debtor’s rights as to real property appear to be unaffected by the BAPCPA amendments. See Lawrence Ponoroff, *A Contemporary Approach to Ride-Through, Ipso Facto Clauses, and the Nondefaulting Debtor*, 21 NEV. L.J. 209, 249–51 (2021) (pointing out that this does not necessarily mean ride-through is permitted everywhere depending on pre-BAPCPA practice in any given circuit).

<sup>144</sup> Exemptions are subordinate to secured claims, save for the limited ability of the debtor to avoid certain exemption-impairing liens under section 522(f). See *United States v. Sec. Indus. Bank*, 459 U.S. 70, 75 (1982) (citing *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935)) (“The bankruptcy power is subject to the Fifth Amendment’s prohibition against taking private property without compensation.”). By contrast, waivers of exemption rights in favor of unsecured claims are unenforceable. 11 U.S.C. § 522(e).

<sup>145</sup> Reaffirmation requires an “agreement” between the debtor and the holder of the obligation sought to be reaffirmed. 11 U.S.C. § 524(c).

<sup>146</sup> Certainly, the cure of any arrearages, coupled with the continuation of current payments and nondischarge of the underlying obligation, would be preferable in most cases to foreclosure. 11 U.S.C. § 1322(b)(5).

<sup>147</sup> See Amber J. Moren, Note, *Debtor’s Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 YALE L.J. 1594, 1626–27 (2013) (proposing to codify ride-through as a sanctioned alternative for any debtor who is current on the secured obligation, as well as for debtors who are able to cure any prepetition defaults within a reasonable time).

<sup>148</sup> This would be desirable because if, as has been established, BAPCPA did not address ride-through in connection with real estate, then the pre-BAPCPA state of affairs would still exist for real estate ride-through, in which case there is a split in the circuits. See Ponoroff, *supra* note 143, at 249–51 (discussing the ambiguity of BAPCPA regarding real property collateral ride-through, noting varying court interpretations, and emphasizing the continued reliance on pre-BAPCPA circuit precedent in some jurisdictions).

<sup>149</sup> See generally Andriana Glover, Comment, *The “Cure” to the Homeowner’s Bankruptcy Blues: An Analysis Of A Homeowner’s Ability To Cure His Mortgage Default Under § 1322(B)(5) of the Bankruptcy Code*, 34 EMORY BANKR. DEV. J. 89 (2017).

If the vehicles had been encumbered, and the principal amount of the loans exceeded the current value, as is often the case, the Wilsons also might well lose the vehicles to relief from stay and foreclosure. However, the reality since the 2005 Amendments is the same outcome would be likely to occur under chapter 13.<sup>150</sup> Specifically, by removing section 506(a) from the equation in certain cases,<sup>151</sup> the ability to cramdown most personal motor vehicle loans has been largely shut down.<sup>152</sup> Thus, the situation for debtors, while necessarily an unhappy one, would not be materially worse under chapter 7 than it would have been under chapter 13 insofar as the motor vehicles held for personal use are concerned. In addition, hope is not completely lost as redemption remains another option if an alternative source of financing can be obtained,<sup>153</sup> as well as negotiations with the creditors about reaffirmation of a portion of the debt.

Nonetheless, to assure meaningful protection of the debtor's fresh start, if chapter 13 were to be purged from the Code, two further revisions of chapter 7 should be considered. The first would be to increase the homestead exemption in section 522(d)(1) and the tools of the trade exemption in section 522(d)(6) and to have both apply even in cases where the state law exemptions otherwise control because of election or the state's exercise of the opt-out.<sup>154</sup> Second, the redemption right in section 722 should be extended to include real as well as personal property.<sup>155</sup> The former would likely be of import in a much larger number of cases than the latter, but together, these two reforms would enhance

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<sup>150</sup> BAPCPA added a new subparagraph following section 1325(a)(9), but it does not bear a separate letter or number. Hence, it has come to be referred to as the "hanging paragraph" or section 1325(a)(\*).

<sup>151</sup> As a general rule, section 506(a)(1) bifurcates undersecured claims into a secured claim to the extent of the value of the collateral and an unsecured claim for the balance. In pertinent part, the hanging paragraph provides that, "section 506(a) shall not apply to a claim described in [section 1325(a)(5)] if the creditor has [1] a purchase money security interest securing the debt that is the subject of the claim, [2] the debt was incurred within the 910-day period preceding the date of the filing of the petition, and [3] the collateral for that debt consists of a motor vehicle . . ." 11 U.S.C. § 1325(a).

<sup>152</sup> By taking section 506(a) out of the equation, an undersecured lender's claim is not bifurcated and, therefore, must be treated as fully secured for purposes of section 1322(b)(2). *See, e.g., In re Durham*, 361 B.R. 206, 209 (Bankr. D. Utah 2006). *See generally* William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 150–56 (predicting, accurately as it turned out, that automobile lenders are likely to benefit more than any other group under BAPCPA).

<sup>153</sup> *See* 11 U.S.C. § 722 (explaining that redemption is available with respect to tangible personal property used for consumer purposes but requires a full, lump sum payment to the secured lender).

<sup>154</sup> BAPCPA actually set this precedent by adding section 522(b)(3)(C) to the Code, which makes certain retirement assets exempt regardless of whether state or section 522(d) otherwise control.

<sup>155</sup> This could be of value to the debtor in the relatively rare circumstance where the value of the home is less than the mortgage *and* the debtor can come up with the funds or the financing to pay off the secured claim. For this purpose, with section 1322(b)(2) no longer part of the Code, bifurcation in the usual fashion would be permitted under section 506(a)(1).

a debtor's ability to protect her home and rebuild her financial life after bankruptcy.

### 3. *Can-Pay Debtors*

It did not take long after the enactment of the Code for criticism to appear about scheming debtors with relatively few unencumbered assets but the ability to repay their debts, or at least a goodly portion thereof, from future income who instead used chapter 7 to secure a discharge and retain their earnings.<sup>156</sup> While the prevalence of this kind of abuse of the system was never documented empirically, certainly that opportunity for abuse existed prior to 1984,<sup>157</sup> and with almost equal certainty the opportunity was taken advantage of on occasion.<sup>158</sup> Therefore, the concern would surely be voiced that the elimination of a repayment plan option for debtors would resurrect this abusive practice of minimal payment plans proposed by debtors with few assets but significant income in excess of expenses.

In response to this criticism, the first point to be made is that such fears would be unwarranted because abolishing chapter 13 would not itself automatically result in the elimination of the means test in section 707(b)(2). Removing chapter 13 from the menu would not affect the requirement of means testing

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<sup>156</sup> The legislative history to BAPCPA demonstrates that Congress was clearly dissatisfied with inconsistent, unpredictable outcomes under former section 707(b), where the "inherently vague" substantial abuse standard "led to disparate interpretation . . . by the bankruptcy bench." H.R. REP. NO. 109-31, pt. 1, at 12 (2005); see, e.g., Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 492-93 (2005) (discussing pre-amendment section 707(b) citing to court decisions showing disparate application of the "substantial abuse" standard); Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 111 (1999) (focusing on the lack of definition of "substantial abuse" as resulting in ambiguous court decisions).

<sup>157</sup> Congress listened and responded by adding a second confirmation standard relating to unsecured debt: the projected disposable income test in section 1325(b). Under this test, the debtor must apply all surplus income—i.e., gross income less reasonably necessary living expenses—during the life of a plan to the payment of unsecured claims. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317(3), 98 Stat. 333. The test is only triggered upon objection to the plan, but objection is routine. Richard A. Coulson, *Substantial Abuse of Bankruptcy Code Section 707(B): An Evolving Philosophy of Debtor Need*, 52 CONSUMER FIN. L.Q. REP. 261, 280 (noting that an objection under section 1325(b)(1) is routine in most districts). The same Act ushered in the first version of dismissal of a chapter 7 filing based on substantial abuse. See *supra* note 3.

<sup>158</sup> Complaints about can-pay debtors using chapter 13 persisted and was a major motivation for adoption of the means test in section 707(b). See Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 514 (2007) ("The consumer credit industry has long been concerned that many consumer debtors with the ability to repay some or all of their debts out of future income nevertheless file under chapter 7 and seek an immediate discharge of their debts."). However, the problem was almost certainly not as pervasive as some of the supporters of BAPCPA and its means test maintained. H.R. REP. NO. 109-31(I), at \*5 n.18 (citing sources estimating anywhere from 3.6% to 25% of chapter 7 filers represent can-pay debtors).

debtors in chapter 7 to determine if the filing was undertaken in bad faith. Instead, it would simply mean that a filing determined to constitute a “substantial abuse” would be dismissed with no bankruptcy alternative other than chapter 11—an unrealistic option for most individual debtors.<sup>159</sup> Ultimately, neither scenario is particularly desirable, i.e., re-opening the door to potential abuse by can-pay debtors or depriving deserving debtors of a meaningful bankruptcy alternative.

In its present form, the means test has received a healthy quantum of criticism, and deservedly so.<sup>160</sup> It is overly complicated and unnecessarily costly to apply. Moreover, it has done a mediocre job at best in closing the portal to chapter 7 for can-pay debtors.<sup>161</sup> Thus, it would be a boon to the system to eliminate section 707(b)(2) in its present form at the same time that chapter 13 is purged from Title 11. However, in fairness, some form of protection against system abuse needs to be put in place.

Two options come to mind. The first, and the cleanest solution, would be to return to the pre-BAPCPA practice of putting discretion back in the hands of

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<sup>159</sup> Although individuals are eligible to file under chapter 11, and occasionally do, for most people the expense and complexity of reorganization make it an unappealing and unrealistic alternative. *See generally* Richard M. Hynes et al., *National Study of Individual Chapter 11 Bankruptcies*, 25 AM. BANKR. INST. L. REV. 61 (2017) (providing a comprehensive study of individual chapter 11 cases).

<sup>160</sup> *E.g.*, Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 383–84 (2008) (opining that the means test has proved administratively burdensome and increased the costs of bankruptcy by increasing filing fees and attorneys’ fees); *see also* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007) (“The conclusion of my study is that the means test either encourages bankruptcy abuse or has no effect. To be sure, BAPCPA adds a great amount of detail and is rife with bad draftsmanship, dumbfounding contradictions, and curious, even comical, special interest exceptions.”); Tabb & McClelland, *supra* note 158, at 514 (“[I]t appears that the means test actually catches very few can-pay debtors . . .”). *See generally* Hon. Wedoff, *supra* note 3, (concluding the means test will prove costly, poor at catching can-pay debtors, and highly dependent on judges and the Internal Revenue Service).

<sup>161</sup> Pamela Foohey et al., *supra* note 105, at 1063–64 (“[T]he reality is that 90% of debtors who file under chapter 13 have so little income that they could file under chapter 7. The means test is irrelevant for most debtors.”); *see also* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 665 (2005) (predicting that over 95% of chapter 7 filers will pass the means test, partly because it is predictable and therefore can be manipulated); Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 363 (2008) (discussing how the 2005 Amendments had no material effect on the distribution of chapter 7 versus chapter 13 filings).



bankruptcy judges,<sup>162</sup> which is where it arguably belonged in the first place.<sup>163</sup> BAPCPA's overall effort to legislatively dictate rules that rigidly control the outcome in every case with a one-size-fits-all approach was an exercise in futility from the get-go. Any such undertaking is only effective until it inevitably encounters the unanticipated case.<sup>164</sup> By definition, such an approach lends itself to accommodating the equities of any particular case only stochastically, which is why some measure of judicial discretion must also be part of a just system, and particularly so in the bankruptcy arena.<sup>165</sup> Of course, debtors determined to have committed an abuse of the system by virtue of ability to repay a substantial portion of their debts or other evidence of bad faith would be left with chapter 11 as the only bankruptcy option. That sort of "tough love" may be the appropriate remedy for one who, after all, has been adjudged to have engaged in behavior deemed detrimental to the integrity of the system.

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<sup>162</sup> See *In re Nance*, 371 B.R. 358, 366 (Bankr. S.D. Ill. 2007) (noting that one of the major goals of BAPCPA "was to replace judicial discretion with specific statutory standards and formulas"); see also Kara J. Bruce, *Rehabilitating Bankruptcy Reform*, 13 NEV. L.J. 174, 191–93 (2012) (analyzing BAPCPA's shift from "standards to rules"); Culhane & White, *supra* note 161, at 679 (arguing that Congress intended to reduce judicial discretion rather than provide bankruptcy courts with more leeway and discretion).

<sup>163</sup> See, e.g., *Bankruptcy Reform: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 231 (2005) (statement of Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School) ("[D]on't press 'one-size-fits-all-and-they-are-all-bad' judgments on the very good and the very bad. Spend the time to make the hard decisions."); see also Lauren E. Tribble, Note, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 818 (2007) (arguing that abandoning judicial discretion in favor of a rigid means test was a mistake).

<sup>164</sup> Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of The Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 213–14 (2000).

The Code cannot anticipate each and every circumstance and regulate with specificity when bankruptcy relief is appropriate and when not; the legislative body cannot foresee every commercial need and circumstance that might warrant attention. It can, however, expressly or by implication direct that a debtor, to be eligible for bankruptcy relief, must proceed in a certain manner, for example, in good faith, but leaving it to the courts to direct application of that maxim in particular cases. If this description is accurate, then one cannot help but believe that in bankruptcy, if not elsewhere, the role of the courts and legislature have become dysfunctionally reversed.

*Id.* Actually, the two alternatives could be rolled into one, as any fair mechanism for assessing a debtor's ability to pay would inevitably have to allow some latitude for judicial discretion to take account of the totality of the debtor's situation. See *infra* text accompanying note 169.

<sup>165</sup> Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 AM. BANKR. L.J. 431, 433–40, 464–65 (1995) (implementing the goals of bankruptcy requires investing the judge with broad discretion to ensure that bankruptcy's goals are vindicated; according to Miller, the bankruptcy judge is a shepherd, whose job it is to push the flock in the desired direction); Jared I. Mayer, Response, *For Bankruptcy Exceptionalism*, 90 U. CHI. L. REV. ONLINE 1 (2023) (pointing out that bankruptcy cases are uniquely complicated, involving complex issues with multiple sub-issues, conflicting policy objectives, and parties with conflicting interests, thus requiring flexibility and creativity in coming to a successful conclusion).

The second option would be to craft a slimmed-down, less complex version of the means test, focusing on both current and prospective income.<sup>166</sup> If the debtor fails this means test, a *percentage* of the debtor's projected disposable income<sup>167</sup> (defined in much the same manner as current section 1325(b) for under-median debtors)<sup>168</sup> for the twelve months following commencement of the case would become property of the estate distributable to general unsecured creditors.

Admittedly, the second alternative with a repayment period would create a kind of “mini-chapter 13,” and does not represent my preferred solution. I believe bankruptcy judges are well-equipped by dint of the duties they are routinely asked to perform in bankruptcy cases to make informed and prudent decisions regarding system abuse based on the unique facts of individual cases.<sup>169</sup> The proposal would also mean building in an extensive statutory infrastructure to deal with all of the issues surrounding: the determination of the thresholds for triggering the repayment obligation, calculation of the repayment amounts, and the mechanisms for implementing and monitoring repayment. I harbor serious reservations over whether the game is worth the candle.

However, a truncated repayment period would certainly be more palatable to those concerned about invocation of the bankruptcy process to serve improper ulterior motives and may represent the kind of political compromise necessary to progress toward a single chapter approach to consumer bankruptcy. Thus, on the theory that a half a loaf is better than none at all, I reluctantly offer it as a by far second-best solution despite the reservations I have developed over the wisdom of trying to reform chapter 13.<sup>170</sup> While it is unclear how much of a deterrent this approach would be to the likely very small number of can-pay debtors seeking to bilk the system, it would only extend the life of the case by one year at most. Also, unlike current chapter 13, and more akin to repayment

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<sup>166</sup> See Lois R. Lupica, *The Costs of BAPCPA: Report of the Pilot Study of Consumer Bankruptcy Cases*, 18 AM. BANKR. INST. L. REV. 43, 46 (2010) (finding the costs of bankruptcy increased significantly due to BAPCPA's complexity, in particular, post-BAPCPA attorney fees, and questioning whether the costs of a less efficient system have been offset by having made the system less vulnerable to abuse); Tribble, *supra* note 163, at 792–93 (proposing an approach to revising the means test to inject greater judicial discretion into the inquiry).

<sup>167</sup> See generally Ponoroff, *supra* note 13 (advocating that chapter 13 should be amended to provide that only a percentage of disposable income should be paid over for unsecured creditors, to allow for changes in the debtor's financial situation and increase the likelihood of plan completion).

<sup>168</sup> 11 U.S.C. § 1325(b)(2). See *supra* note 147–49 and accompanying text (describing a comparable one-year period for the debtor to cure a mortgage arrearage).

<sup>169</sup> Jean Braucher, *supra* note 160, at 378.

<sup>170</sup> See *supra* text accompanying note 18.

options in other countries, it would only require a percentage of disposable income to be applied to pre-filing debts.<sup>171</sup>

#### CONCLUSION

As currently constituted, chapter 13 is not doing any system participant a service on a reasonably consistent or predictable basis, be it debtors, creditors, bankruptcy judges and lawyers, or society at large. There is simply too much variation in the use of, and practice under, chapter 13 from district to district and state to state, and too much oscillation and discordance over multiple key issues arising in chapter 13 cases. If it is to be meaningful, relief in most consumer bankruptcy cases requires certainty and expediency.

Sensible reform to save chapter 13 is not impossible by any stretch of the imagination. However, as a practical and political matter, it is not likely to be forthcoming. This is not to suggest that the elimination of chapter 13 would be an easy lift; it would not.<sup>172</sup> Nonetheless, the odds are considerably better both because: (1) it can honestly be pitched as neither debtor nor creditor friendly, but rather an elimination of unnecessary system overhead; and (2) it requires agreement on a handful of legislative points rather than the innumerable battlefronts that would be encountered in re-crafting the repayment option in a workable fashion, each of which could present an opportunity for impasse.

So, for now, I am proposing to call the whole thing off. Consumer bankruptcy generally has become far too complex given the relatively small amounts ordinarily at stake, but chapter 13 is the chief offender. This is not to say that there are no cases where chapter 13 works well. In the predominant number of cases, however, it falls short of achieving its dual goals of debtor rehabilitation and creditor repayment. If you have stayed with me to this point, maybe I have convinced you, and maybe not. At a minimum, however, I hope I have shone a spotlight on a problem, the existence of which seems beyond cavil. Perhaps others can craft better or at least more plausible solutions than I have put forth in this work. If so, I will be the first to doff my cap.

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<sup>171</sup> See, e.g., Braucher, *supra* note 21, at 1324–1327 (discussing the approaches in Canada and Australia, both of which provide for the debtor to keep a portion of income in excess of reasonable expenses). See generally Jacob Ziegel, *What Can the United States Learn from the Canadian Means Testing System?*, 2007 U. ILL. L. REV. 195 (2007) (discussing the differences between the U.S., Canadian, Australian, and English systems); Nathalie Martin, *Common-Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367 (2003).

<sup>172</sup> See Logan, *supra* note 18, 1586 (describing repeal of chapter 13 as a “radical” proposal and noting that “[m]ost of American society has grown accustomed to having the choice between liquidation or reorganization”).