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TERMINATION OF THE STAY FOR SUCCESSIVE FILERS: INTERPRETING § 362(C)(3)

INTRODUCTION

In bankruptcy, the automatic stay thwarts the attempts of eager creditors to collect their debts, offering debtors in bankruptcy much-needed breathing space and providing for the most equitable distribution of estate property. It is no surprise that debtors remain eager to take advantage of the stay's vast protection, and for some time, repeated filings merely to access the stay were a major problem in this country.[1] Congress responded by enacting § 362(c)(3)(A) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[2] Section 362(c)(3)(A) mandates that the automatic stay terminate, "with respect to the debtor," thirty days after the petition is filed if the debtor has had a prior case dismissed within one year of filing.[3]

A split of authority currently exists regarding the proper interpretation of this provision of the Bankruptcy Code.[4] The majority of courts hold that when a debtor has had a prior case dismissed within one year of filing, the automatic stay terminates thirty days after the second petition is filed as to the debtor and the debtor's property only.[5] The stay continues to protect the property of the estate.[6] Alternatively, the minority of courts hold that under such circumstances, the stay terminates in its entirety.[7] Underlying this debate is an often unrecognized discrepancy regarding the proper method by which the changes that BAPCPA made are analyzed. Though principles of statutory interpretation are generally not the express focus of the courts' consideration of § 362(c)(3)(A), the divergent methods of interpretation adopted by the courts on either side of the debate explain their disparate outcomes.

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[1] *See* Laura B. Bartell, *Staying the Serial Filer—Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 AM. BANKR. L.J. 201, 202 (2008).

[2] *In re* Daniel, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009).

[3] 11 U.S.C. § 362(c)(3)(A) (2006).

[4] *See, e.g.*, Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 365–66 (B.A.P. 9th Cir. 2011); Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008); Jumpp v. Chase Home Fin., LLC (*In re* Jumpp), 356 B.R. 789, 796–97 (B.A.P. 1st Cir. 2006); *In re* Jones, 339 B.R. 360, 363–65 (Bankr. E.D.N.C. 2006).

[5] *See, e.g.*, *Holcomb*, 380 B.R. at 816; *Jumpp*, 356 B.R. at 796–97; *Jones*, 339 B.R. at 365.

[6] *See, e.g.*, *Holcomb*, 380 B.R. at 815–16; *Jumpp*, 356 B.R. at 796–97; *Jones*, 339 B.R. at 365.

[7] *Reswick*, 446 B.R. at 366.

The resulting split of authority stems largely from the lack of a clearly articulated Supreme Court–endorsed framework of statutory interpretation. Rather than providing lower courts with clear direction of the steps to be taken when analyzing congressional text, the Supreme Court has handed down various rules or "canons" of statutory construction.[8] These rules stem from the specific factual premise of the particular case and may often be vague as to their intended application to a new set of facts. When applied differently, they may advise entirely different courses of action. Given the volume and range of available rules, courts are able to pick and choose those that most support their position on an issue which inevitably leads to a loss of predictability regarding the § 362(c)(3)(A) analysis a court will conduct.

The Honorable Thomas F. Waldron, a former United States Bankruptcy Judge for the Southern District of Ohio, addressed the difficulty of interpreting BAPCPA in his article *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*.[9] Judge Waldron discussed the need to consider "an entire range of statuory principles" when interpreting BAPCPA and proposed a coherent framework of analysis. [10]

This Comment argues that the Supreme Court should adopt Judge Waldron's fully articulated framework of statutory interpretation when interpreting BAPCPA. An analysis of the split of authority over § 362(c)(3)(A) demonstrates that the outcome each court ultimately reaches is dictated in large part by the rules of interpretation it employs. The current "system" of statutory interpretation, consisting of numerous conflicting Supreme Court rules, produces decisions that are inconsistent and unpredictable. Judge Waldron's approach to statutory interpretation produces a complete framework through which BAPCPA may be analyzed. Applying Judge Waldron's approach to the split of authority over § 362(c)(3)(A) reveals that the better interpretation of § 362(c)(3)(A) is that of the majority.

Part I of this Comment provides pertinent background information regarding the automatic stay, the development of the bankruptcy courts' equitable powers which enable them to enforce the stay, and the evolution of § 362(c) of the Bankruptcy Code. Part II of this Comment discusses precedent

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[8] *See* Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 209–10, 212 (2007) ("The toolbox containing established canons of statutory interpretation holds an array of tools, many appearing capable of completing a given task. The difficult decision is determining which is best suited to yield the correct result.").

[9] *Id.*

[10] *See id.* at 228.

regarding statutory interpretation and the absence of a well-articulated framework of statutory interpretation suited for analyzing BAPCPA. Judge Waldron's proposed approach to statutory interpretation is then introduced, followed by an argument for its adoption. Part III discusses the split of authority regarding § 362(c)(3)(A) and the courts' disparate approaches to statutory interpretation. Part III then offers a critique of each analysis, revealing the logical holes left by the courts. Part IV applies Judge Waldron's fully-articulated framework of statutory interpretation to § 362(c)(3)(A), demonstrating that the majority has produced the better interpretation.

I. BACKGROUND OF 11 U.S.C. § 362(C)

An understanding of the basics of § 362 of the Bankruptcy Code is crucial to understanding the current interpretive debate surrounding § 362(c)(3)(A). This Part describes the automatic stay and the protection it affords a debtor under § 362, the bankruptcy court's role as a court of equity, and the purpose behind the enactment of § 362(c).

A. The Automatic Stay

The filing of a bankruptcy petition creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case."[11] Once a voluntary, involuntary, or joint bankruptcy petition is filed, § 362 of the Bankruptcy Code imposes an immediate stay of creditor action.[12] This automatic stay prohibits initiating or continuing an action against the debtor, enforcing any judgment against the debtor, taking any action to gain possession of estate property, or taking any action "to create, perfect, or enforce" any lien securing a prepetition claim.[13]

Likened to a shield by some courts,[14] the automatic stay was enacted as "one of the fundamental debtor protections provided by the bankruptcy laws."[15] The stay prevents all creditor collection, harassment, and foreclosure

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11 11 U.S.C. § 541(a)(1) (2006).

12 *Id.* § 362(a).

13 *Id.* § 362(a).

14 *See, e.g.*, McMahon *ex rel*. Winters v. George Mason Bank, 94 F.3d 130, 136 (4th Cir. 1996) ("Section 362 is a shield, not a sword."); *In re* Cinnabar 2000 Haircutters, Inc., 20 B.R. 575, 577 (S.D.N.Y. 1982) ("So too, the bankruptcy laws should not be a haven for contumacious conduct . . . behind the shield of the automatic stay.")

15 H.R. REP. NO. 95-595, at 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97; S. REP. NO. 95-989, at 54–55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840–41 ("The automatic stay is one of the

action, providing the debtor with valuable breathing space to attempt to emerge from insolvency.[16] The House Report accompanying the Bankruptcy Reform Act of 1978 explained:

> The stay is the first part of bankruptcy relief, for it gives the debtor a respite from the forces that led him to bankruptcy. Frequently, a consumer debtor is severely harassed by his creditors when he falls behind in payments on loans. The harassment takes the form of abusive phone calls at all hours, including at work, threats of court action, attacks on the debtor's reputation, and so on. The automatic stay at the commencement of the case takes the pressure off the debtor.[17]

In addition to the protections afforded the debtor, the stay benefits the creditors by ensuring an orderly and equitable distribution of any property of the estate.[18] Absent the stay, creditors would have every incentive to act as quickly and aggressively as possible to collect on their debts.[19] Those to collect first might recover their debts in full, but this would be to the severe detriment of the remaining creditors.[20] The stay attempts to ensure that whatever the debtor has available to give to his creditors is divided equitably amongst them.[21] The stay also acts to preserve the estate property and ensure maximum distribution for the creditors.[22]

Bankruptcy law affords two remedies when a creditor acts in violation of the automatic stay. First, the courts provide for a civil contempt action by treating the automatic stay as a court order.[23] Courts impose contempt sanctions for a violation of the stay upon finding from "clear and convincing

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fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.").

[16] H.R. REP. NO. 95-595, at 340, 1978 U.S.C.C.A.N. at 6296–97; S. REP. NO. 95-989, at 54–55, 1978 U.S.C.C.A.N. at 5840–41.

[17] H.R. REP. NO. 95-595, at 125–26, 1978 U.S.C.C.A.N. at 6086–87 (footnote omitted).

[18] *Id.* at 340, 1978 U.S.C.C.A.N. at 6297; S. REP. NO. 95-989, at 49, 1978 U.S.C.C.A.N. at 5835.

[19] H.R. REP. NO. 95-595, at 340, 1978 U.S.C.C.A.N. at 6297; S. REP. NO. 95-989, at 49, 1978 U.S.C.C.A.N. at 5835.

[20] H.R. REP. NO. 95-595, at 340, 1978 U.S.C.C.A.N. at 6297; S. REP. NO. 95-989, at 49, 1978 U.S.C.C.A.N. at 5835.

[21] H.R. REP. NO. 95-595, at 340, 1978 U.S.C.C.A.N. at 6297; S. REP. NO. 95-989, at 49, 1978 U.S.C.C.A.N. at 5835.

[22] Kathryn R. Heidt, *The Automatic Stay in Environmental Bankruptcies*, 67 AM. BANKR. L.J. 69, 74 (1993).

[23] 3 COLLIER ON BANKRUPTCY ¶ 362.12 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

evidence" that a party "violated a specific and definite court order and that the party had knowledge of the order sufficient to put him on notice of the proscribed conduct."[24] The second remedy for an automatic stay violation is the §362(k) action.[25] Under § 362(k) an "individual injured by any willful violation of a stay provided by [§ 362] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[26] These remedies aim to ensure creditors will not overstep the boundaries put in place by the automatic stay.

B. Bankruptcy Courts as Courts of Equity

The power to issue an automatic stay stems from the bankruptcy courts' historic role as courts of equity. Early bankruptcy decisions reinforced the courts' power to issue injunctions, a traditional form of equitable relief.[27] In *Ex parte Christy*, the Supreme Court held that, despite the lack of express statutory authorization under the Bankruptcy Act of 1841, bankruptcy courts had the power to enjoin secured creditor action against the property of the debtor.[28] The Court recognized that bankruptcy courts have *in rem* jurisdiction over the debtor's assets.[29] Therefore, as courts of equity, they may issue injunctions, a traditional form of equitable relief, to protect the property within the courts' jurisdiction.[30] In *Continental Illinois National Bank & Trust Company v. Chicago, Rock Island & Pacific Railway Company*, the Supreme Court reinforced the bankruptcy courts' injunctive powers, even when the debtor's property was in the physical custody of a secured creditor.[31]

Asserting this injunctive power required that some action be taken "by the trustee, receiver or debtor" and "this relief was hardly sufficient when a large

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[24] Wagner v. Ivory (*In re* Wagner), 74 B.R. 898, 902 (Bankr. E.D. Pa. 1987).

[25] 11 U.S.C. § 362(k) (2006).

[26] *Id.*

[27] Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 7 n.34 (2006).

[28] COLLIER, *supra* note 23 ¶ 362.LH; *see Ex parte* Christy, 44 U.S. 292, 312 (1844).

[29] COLLIER, *supra* note 23 ¶ 362.LH.

[30] *See Christy*, 44 U.S. at 312 ("[I]t is manifest that the purposes so essential to the just operation of the bankrupt [sic] system, could scarcely be accomplished; except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required the end, they should at the same time have withheld the means by which alone it could be successfully reached."); COLLIER, *supra* note 23 ¶ 362.LH.

[31] COLLIER, *supra* note 23 ¶ 362.LH; *see* Cont'l Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648 (1935).

corporate enterprise required injunctive relief in myriad situations."[32] Logistical issues with respect to providing creditors proper notice arose from allowing the seeker of injunctive relief to come into court on its own accord.[33] The legislative solution was to enact the current self-executing stay, which automatically takes effect upon the filing of a bankruptcy petition.[34]

The automatic nature of the stay gives filers immediate access to its powerful protection and it is quite obvious why debtors are so eager to take advantage of the stay. Freedom from harassing creditors, the ability to retain one's assets, and the chance to reorganize a failing business are available immediately upon filing.[35] Not surprisingly, some debtors began to take advantage of the stay's protection by continuously refiling a bankruptcy petition each time their previous case was dismissed.[36] This indefinitely prevented creditor action to collect.[37] Present-day § 362(c)(3)(A) results from congressional response in 1978 to abuse of the stay through serial filings and subsequent legislative reform.[38]

C. Section 362(c)

Section 362(c) was enacted with BAPCPA in 2005.[39] It has undergone significant modification in response to continued abuse by serial filers, as documented by the National Bankruptcy Review Commission.[40] This section discusses its evolution, and describes the modern version of Section 362.

In 1984, Congress amended the Bankruptcy Code to withhold imposition of the automatic stay from a debtor who had a prior case dismissed in the preceding 180 days under certain circumstances.[41] Despite the legislature's

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32 COLLIER, *supra* note 23 ¶ 362.LH.
33 *Id.*
34 *Id.*
35 11 U.S.C. § 362(a) (2006); *see also* Bartell, *supra* note 1, at 202 ("The advantage of this automatic stay to a debtor is clear: all creditor collection action (with limited exceptions) is prohibited, and any such action in violation of the stay is not only legally ineffective but may be punishable by an award of damages or as contempt.")
36 Bartell, *supra* note 1, at 202.
37 *Id.*
38 *Id.* at 202–03.
39 *Id.* at 201.
40 *See infra* text accompanying notes 44–53.
41 Bartell, *supra* note 1, at 202 n.14 (stating that 11 U.S.C. § 109(g) renders "the debtor ineligible if the prior case was 'dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or . . . the debtor requested and obtained the

attempt at reform, some courts continued to impose the automatic stay for filers that were ineligible according to the terms of the amendment.[42] In addition to judicial noncompliance, the amendment itself was insufficient to punish all serial filers.[43] For example, the stay continued to benefit debtors whose prior case had been dismissed earlier than the preceding 180 days or for reasons outside those expressly included in the 1984 amendment.[44]

Congress formed the National Bankruptcy Review Commission in 1994, in part to investigate and solve the issue of abuse by successive filers.[45] The Commission determined that abuse of the stay by successive filings was particularly problematic among chapter 13 filers.[46] In its report to Congress, the Commission discussed this phenomenon, stating that:

> Some debtors file for Chapter 13 . . . on the eve of a foreclosure or eviction for the sole purpose of delaying the state legal process. When the threat passes, they dismiss their cases, only to file again when the mortgagee or landlord brings another legal action to seize control of the property. The ability to file repeatedly for Chapter 13 relief increases a debtor's leverage in negotiations with creditors. In regions where this problem is particularly acute, judges have devoted significant time and resources to developing tools to address this problem.[47]

Alternatively, the Commission acknowledged that many other repeat filers may not be abusing the system and therefore dramatic changes should be avoided.[48] Ultimately, the Commission recommended to Congress that the automatic stay should not take effect in certain instances to avoid abuse by successive filers, stating that:

> [F]requent and repetitive access to the tools of bankruptcy should be discouraged if one trip to the bankruptcy system provides the relief that Congress intended. Thus, rather than advocating a flat two-year

voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.'").

42 *Id.* at 203.

43 *Id.*

44 *Id.*

45 *In re* Daniel, 404 B.R. 318, 327 (Bankr. E.D. Ill. 2009); s*ee also* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, §§ 602–03 (1994).

46 NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, 1, 281 n.731–32 (October 20, 1997), *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html.

47 *Id.*

48 *Id.* ("The evidence still is not sufficiently conclusive . . . to warrant a drastic change in access when a more moderate approach would suffice.").

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> ban, the Commission recommends a more moderate change to deter successive filings. A debtor would not be precluded from filing two petitions within a six-year time frame. If a debtor sought bankruptcy relief for the third time in six years, and within six months of the dismissal or conversion of the second filing, the filing would not trigger an automatic stay.[49]

In 1998, the year following the release of the Commission's report, the House Judiciary Committee released its own report titled "The Bankruptcy Reform Act of 1998."[50] This report included Section 121, entitled "Discouraging Bad Faith Repeat Filings."[51] Section 121 mandated that the automatic stay terminate "with respect to the debtor" and contained essentially the same language as modern-day § 362(c)(3)(A).[52] The accompanying committee report stated:

> The filing of a bankruptcy case causes the immediate imposition of an automatic stay, which prevents creditors from pursuing action against debtors and their property. In light of this some debtors file successive bankruptcy cases to prevent secured creditors from foreclosing on their collateral.
>
> Section 121 remedies this problem by terminating the automatic stay in cases filed by an individual debtor under chapters 7, 11 and 13 if his or her prior case was dismissed within the preceding year. In the subsequently filed bankruptcy case, the automatic stay terminates 30 days following the filing date of the case.[53]

Also in 1998, the Senate Judiciary Committee issued a report entitled "The Consumer Bankruptcy Reform Act of 1998."[54] This report contained § 303,

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[49] *Id.*

[50] H.R. REP. NO. 105-540 (1998).

[51] *Id.* at 80.

[52] As one court has noted:

> Section 121 stated: '"If a single or joint case is filed by or against an individual debtor under chapter 7, 11, or 13, and if a single or joint case of that debtor was pending within the previous 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) of this title, the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease will terminate with respect to the debtor on the 30th day after the filing of the later case . . . .'"

In re Daniel, 404 B.R. 318, 327–28 (Bankr. N.D. Ill. 2009).

[53] *Id.* at 328.

[54] S. REP. NO. 105-253 (1998).

also providing for the termination of the automatic stay with respect to the debtor and language essentially identical to modern-day § 362(c)(3)(A).[55]

The current version of § 362(c)(3)(A) was enacted in 2005 with BAPCPA.[56] Only a report of the House Judiciary Committee accompanied BAPCPA.[57] The report read:

> Section 302 of the Act amends section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period.[58]

Notably, the report does not include the phrase, "with respect to the debtor," that is found in the provision itself.[59] However, in all other aspects it is quite similar to the language of § 362(c)(3)(A).[60]

The language of the modern version of § 362(c)(3) reads:

> [I]f a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under § 707(b)-[61]

Subsection (A) further states:

> The stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any

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[55] As discussed by the court in *Daniel*, § 303 provided that:

> [T]he stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case if—(A) a single or joint case is filed by or against an individual debtor under chapter 7, 11, or 13; and (B) a single or joint case of that debtor (other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)) was pending during the preceding year but was dismissed.

Daniel, 404 B.R. at 328.

[56] The Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

[57] Waldron & Berman, *supra* note 8, at 217.

[58] H.R. REP. NO. 109-31(1), at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138.

[59] *See generally id.* at 69, 2005 U.S.C.C.A.N. at 138.

[60] *Compare id.* at 69, 2005 U.S.C.C.A.N. at 138, *with* 11 U.S.C. § 362(c)(3)(A) (2006).

[61] 11 U.S.C. § 362(c)(3)(A).

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> lease shall terminate *with respect to the debtor* on the 30th day after the filing of the later case[.][62]

A split of authority has emerged over the proper interpretation of the phrase "with respect to the debtor."[63] The majority of courts have held that the phrase, when considered in the context of the provision as a whole, has an unambiguous plain meaning.[64] That meaning is to qualify the extent of the automatic stay's termination.[65] These courts read "with respect to the debtor" as limiting the termination of the automatic stay to the debtor and the debtor's property, leaving the stay intact as to the property of the estate.[66]

Alternatively, the minority view rejects this interpretation and holds that the stay terminates in its entirety.[67] The minority's contextual analysis, restricted primarily to § 362(c)(3), concludes that the phrase serves to clarify that in a joint filing by a married couple the stay only terminates with respect to the spouse with the previously dismissed case.[68] The minority draws much of the support for its interpretation from the limited legislative history of BAPCPA.[69]

II. STATUTORY INTERPETATION

> Words are certainly not crystals, as Mr. Justice Holmes has wisely and properly warned us, but they are after all not portmanteaus. We can not quite put anything we like into them. And we may not disregard them in statutes. The real question in statutory interpretation is just what we shall do with them.[70]

A statute has been described as a "determinable," in the sense that "it is a statement which involves a number of possible events or individualizations, any one of which would be correctly described by that statement."[71] Put another way, statutes are drafted by representatives seeking to formulate a rule

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[62] *Id.* § 362(c)(3)(A) (emphasis added).

[63] *See, e.g.*, Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 365–66 (B.A.P. 9th Cir. 2011); Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813 (B.A.P. 10th Cir. 2008); Jumpp v. Chase Home Fin., LLC (*In re* Jumpp), 356 B.R. 789 (B.A.P. 1st Cir. 2006). *See generally In re* Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006).

[64] *See, e.g.*, *Holcomb*, 380 B.R. at 815; *Jumpp*, 356 B.R. at 793; *Jones*, 339 B.R. at 363.

[65] *See, e.g.*, *Holcomb*, 380 B.R. at 815; *Jumpp*, 356 B.R. at 793; *Jones*, 339 B.R. at 363.

[66] *See, e.g.*, *Holcomb*, 380 B.R. at 815; *Jumpp*, 356 B.R. at 793; *Jones*, 339 B.R. at 363.

[67] *Reswick*, 446 B.R. at 366.

[68] *Id.*; *see* 11 U.S.C. § 362(c)(3).

[69] *See Reswick*, 446 B.R. at 371–72.

[70] Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866 (1930).

[71] *Id.*at 868.

that deals appropriately with varying factual situations.[72] Ideally, legislators consider the full range of circumstances to which a statute may potentially be applied and draft the language to produce the desired result in each instance.

Courts engaging in statutory interpretation focus on deciphering "the intent of the legislator[s]" enacting the statute, as it would exist for the specific factual circumstances at hand.[73] During litigation, the necessary inquiries then become whether the question posed by the relevant factual circumstances is one of these "events or individualizations" that the enacting legislators considered, and if so, what outcome was intended.[74]

Traditionally, two competing jurisprudential theories of statutory interpretation have provided the basis for interpreting statutory law, including the Bankruptcy Code.[75] These theories are widely known as purposivism and textualism.[76] The Supreme Court has often drawn on the various logical underpinnings of these theories when discussing statutory interpretation.[77] However, what remains lacking is an overarching method of statutory interpretation that properly organizes for the courts the steps to be taken in an analysis of statutory language. As a possible solution, the Honorable Thomas F. Waldron, a former United States Bankruptcy Judge for the Southern District of Ohio, proposed an approach to interpreting BAPCPA in 2007.[78] Judge Waldron presented a well-articulated approach to statutory analysis, organized into the specific steps a court should take in analyzing BAPCPA.[79]

A. *Purposivism*

The following assumptions have traditionally been regarded as the foundation of purposivism.[80] Congress passes statutes with a desire to fulfill some underlying purpose.[81] While the text of the statute ordinarily reflects this purpose, occasionally a particular provision will yield results at odds with

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72 *Id.*
73 *Id.* at 869.
74 *Id.*
75 Waldron & Berman, *supra* note 8, at 203.
76 *Id.* ("The Supreme Court's decisions involving bankruptcy issues have often been the battleground for the competing jurisprudential theories denominated purposivism and textualism.").
77 *Id.*
78 *Id.* at 228.
79 *Id.*
80 *Id.* at 203–04.
81 *Id.* at 203.

Congress's intended purpose.[82] This occasional discrepancy, between Congress's intended application and a particular court's application, is inevitable due to the various "constraints" on legislators. [83] These constraints include "limited resources, bounded foresight, and inexact human language."[84]

Where a given piece of statutory text is at odds with the intended statutory purpose, judges should make every effort to determine congressional intent and "enforce Congress's commands as accurately as possible."[85] Purposivism focuses on "what it is the legislature ultimately sought to accomplish."[86] The federal courts are to act as Congress's "faithful agents" and enforce the "spirit" of a statute, rather than consider themselves bound by the text.[87]

Purposivism was once the predominant theory subscribed to by the United States courts.[88] The Supreme Court decision known for articulating this theory of statutory interpretation, *Holy Trinity Church v. United States*, introduced the ways a court might discern the legislature's purpose.[89]

> We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to congress, the reports of the committee of each house, all concur in affirming that the intent of congress was simply to stay the influx of this cheap, unskilled labor.[90]

Many of these considerations continue to form modern courts' legislative history analyses.[91] In *In re Reswick*, discussed in Part III of this Comment, the court relied on similar considerations: the title of the BAPCPA legislation, which added § 362(c)(3) to the Bankruptcy Code ("the title of the act"); the problematic abuse of the automatic stay by "serial filers" ("the evil which was intended to be remedied"); and the accompanying House Judiciary Committee

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82 *Id.*

83 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–72 (2006) (footnote omitted).

84 *Id.*

85 *Id.* at 72 ("Accordingly, the Court long assumed that when the clear import of a statute's text deviated sharply from its purpose, (1) Congress must have expressed its true intentions imprecisely, and (2) a judicial faithful agent could properly adjust the enacted text to capture what Congress would have intended had it expressly confronted the apparent mismatch between text and purpose." (footnote omitted)).

86 EVA H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, ELEMENTS OF LAW 255 (1994).

87 *See* Manning, *supra* note 83, at 71–72.

88 *Id.* at 71 ("For a not inconsiderable part of our history, the Supreme Court held that the 'letter' (text) of a statute must yield to its 'spirit' (purpose) when the two conflicted.").

89 Holy Trinity Church v. United States, 143 U.S. 457, 465 (1892).

90 *Id.*

91 *See* Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 371–72 (B.A.P. 9th Cir. 2011).

Report ("the reports of the committee of each house"); to conduct its analysis of legislative history.[92]

Though purposivism was once fully endorsed by the Supreme Court, the theory came under heavy criticism at the end of the twentieth century.[93] Supreme Court Justice Antonin Scalia and Judge Frank H. Easterbrook, Chief Judge of the United States Court of Appeals for the Seventh Circuit, shaped the "new textualist" movement by criticizing purposivism on two bases.[94] First, they argued that only the text of the statute has survived the constitutionally mandated hurdles a bill must pass to become law, namely bicameralism and presentment.[95] New texualists believe that overreliance on sources other than the text itself dishonor these procedural safeguards built into the Constitution.[96] Second, the new textualists asserted that the idea that a multi-member body passes a statute with a single intent is "fanciful."[97] In reality, many of the issues which judges are meant to rule on likely never passed through the minds of most of the legislators who voted to enact the statute.[98]

B. Textualism

Textualism, like purposivism, purports to determine congressional intent; however, it does so through an analysis of the words that Congress selected to convey that intent.[99] In *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, the Supreme Court stated what has now become an axiom of statutory interpretation, "the starting point for interpreting a statute is the language of the statute itself."[100] Textualists' primary rationale for looking

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92 *See id.*

93 Waldron & Berman, *supra* note 8, at 204.

94 *Id.*; Manning, *supra* note 83, at 73; *see* W. VA Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991) (employing textualist reasoning).

95 Manning, *supra* note 83, at 73 (citing Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 445 (1990) ("What distinguishes laws from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President's signature." (emphasis omitted)).

96 *Id.*

97 *Id.* at 73–74; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway.").

98 *See* Manning, *supra* note 83, at 74.

99 Waldron & Berman, *supra* note 8, at 203.

100 Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *see also* Hallstrom v. Tillamook Cnty., 493 U.S. 20, 25 (1989) ("As we have repeatedly noted, 'the starting point for interpreting a statute is the language of the statute itself.'") (citing *Consumer Prod. Safety Comm'n*, 447 U.S. at 108); Atwell v. KW Plastics Recycling Div., 173 F.Supp. 2d 1213, 1217 (M.D. Ala. 2001) ("It is axiomatic that 'the starting

solely to the text stems from the underlying concern that sources other than the text are invalid and harmful to determining the proper interpretation of a statute.[101] Professor Michael Herz noted:

> First, only the statutory text undergoes [the] full [constitutionally required] procedures for lawmaking, including a vote by both houses and presentment to the President . . . legislative history does not indicate congressional intent because, as a rule, it is written by staff members, under the direction of lobbyists, and goes unread by the legislators themselves. Second, a morsel of legislative history can usually be found to support any proposition, making its use redundant at best and pernicious at worst. Finally, resort to any interpretive guide other than the statutory text is an opportunity for judges to read their own policy preferences into the statute.[102]

Current Supreme Court precedent has adopted the "plain meaning approach" as the default rule of statutory interpretation.[103] According to this doctrine, if the courts are able to determine the plain meaning of the statute from the language of the statute itself, the courts must enforce that meaning.[104] The Supreme Court has adopted this approach when interpreting the Bankruptcy Code.[105] In *United States v. Ron Pair Enterprises*, the Supreme Court interpreted another provision of the Bankruptcy Code and stated "[t]he plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[106]

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point for interpreting a statue is the language of the statute itself.'") (citing *Consumer Prod. Safety Comm'n*, 447 U.S. at 108);

[101] *See* Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 183–84 (1992).

[102] HANKS, HERZ & NEMERSON, *supra* note 86, at 259 (quoting Herz, *supra* note 101, at 183–84).

[103] *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."); Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."); Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414, 416 (4th Cir. 2004) ("It is an axiom of statutory interpretation that the plain meaning of an unambiguous statute governs, barring exceptional circumstances.").

[104] *See Caminetti*, 242 U.S. at 485; *Lamie*, 540 U.S. at 534; *Schmidt*, 388 F.3d at 416.

[105] *Ron Pair Enters.*, 489 U.S. at 240–41 ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.").

[106] *Id.* at 242 (internal quotation marks omitted).

Under the plain meaning approach, courts begin by considering whether a provision is ambiguous.[107] The existence of ambiguity in a phrase may be a point of contention among courts.[108] Various semantic canons of construction exist to assist courts in deciphering a statute's meaning.[109] When a statute contains a phrase that explicitly includes certain things, a canon known as *expressio unius est exclusio alterius*, advises that the phrase impliedly excludes those things not mentioned.[110] Two canons, *noscitur a sociis* and *ejusdem generis*, focus on the position of the phrase or words in question as they relate to the surrounding text.[111] *Noscitur a sociis* advises that a word is known by its associates and its meaning may be limited or expanded by the surrounding language.[112] *Ejusdem generis* proposes that if a list of specific terms is followed by a more open-ended residual term, that residual term is modified to a narrower interpretation and meant only to include that within its definition, which has the same characteristics as the preceding terms.[113]

While the plain meaning approach is the current default rule of statutory interpretation, modern bankruptcy courts have tended to blend the principles of both textualism and purposivism in analyzing BAPCPA.[114] Proponents of these two theories, separated by what source each adheres to as most evident of true congressional intent, are collaborating and drawing from one another's bank of arguments.[115] The result is a "more holistic view of statutory interpretation."[116]

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[107] *See, e.g.*, Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008) ("First, we see no ambiguity in the language of the statute."); Jumpp v. Chase Home Finance, LLC (*In re* Jumpp), 356 B.R. 789, 793 (B.A.P. 1st Cir. 2006) ("We begin by considering whether section 362(c)(3)(A) is ambiguous.").

[108] *Compare* Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 370–71 (B.A.P. 9th Cir. 2011) (determining the phrase "with respect to the debtor" in § 362(c)(3)(A) is ambiguous), *with* Jumpp, 356 B.R. at 796 (determining the phrase "with respect to the debtor" in § 362(c)(3)(A) is unambiguous).

[109] JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 222 (Robert C. Clark et al. eds., 2010).

[110] *Id.*; *see* Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 885 (9th Cir. 2005) (discussing the *expressio unius est exclusio alterius* canon and stating that "Congress' explicit listing of who *may* sue for copyright infringement should be understood as an *exclusion of others* from suing for infringement.").

[111] *See* Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (relying on the *noscitur a sociis* canon to inform its interpretation of "prospectus" in the statute); Gooch v. United States, 297 U.S. 124, 128 (1936) (describing the *ejusdem generic* canon).

[112] *See Gustafson*, 513 U.S. at 575–76 (discussing the doctrine of *noscitur a sociis* and ultimately holding that because "prospectus" appears in a list of other documents of wide dissemination, it only includes "communications held out to the public at large.").

[113] *Gooch*, 297 U.S. at 128.

[114] Waldron & Berman, *supra* note 8, at 205 ("Conventional wisdom has it that textualists emphasize statutory text and purposivists emphasize statutory purposes. But when one considers how modern textualists go about identifying textual meaning and how purposivists go about identifying statutory purposes, the differences between textualism and purposivism begin to fade.").

[115] *Id.* at 204.

An example of this collaboration is the modern textualist focus on deriving intent from a statute's context, in addition to its language, in the event a provision's text is ambiguous.[117] For instance, courts will consider surrounding provisions of the Bankruptcy Code in determining a provision's meaning.[118] The Supreme Court has authorized this sort of consideration, albeit with a vague set of directions to courts hoping to determine the proper parameters of their inquiry:

> The definition of words in isolation, however, is *not necessarily controlling* in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any *precedents or authorities that inform the analysis*.[119]

From this excerpt, it is not entirely clear what the precise meaning of "not necessarily controlling" is and what "precedents and authorities" are actually relevant or proper to "inform the analysis."[120] As will now be discussed, this is not the only notion which the Supreme Court has left to the lower courts to decipher.

C. Supreme Court's Direction Regarding Statutory Analysis

The Supreme Court has not left the lower courts entirely without direction regarding statutory interpretation.[121] However, rather than articulating an overall framework of statutory interpretation, the Supreme Court has handed down a plethora of rules, which include the following: "Congress says in a statute what it means and means in a statute what it says there;"[122]

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[116] *Id.*

[117] *Id.* at 205.

[118] *See, e.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (10th Cir. 2008) ("As observed in *Jones*, a plain reading of those words ['with respect to the debtor'] makes sense and is *entirely consistent with other provisions of § 362 and other sections of the Bankruptcy Code*." (internal quotation marks omitted) (emphasis added)); Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 367 (B.A.P. 9th Cir. 2011) ("[R]eading the phrase in context, rather than in isolation, better comports with principles of statutory construction . . . .").

[119] Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (emphasis added).

[120] *See id.*

[121] *See, e.g.*, Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989); Caminetti v. United States, 242 U.S. 470, 485 (1917); Wachovia Bank, N.A. v. Schmidt, 388 F.3d 414, 416 (4th Cir. 2004).

[122] Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000).

"[s]urplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute;"[123] "[a]chieving a better policy outcome . . . is a task for Congress, not the courts."[124]

Lower courts have presumably made faithful attempts to adhere to such Supreme Court precedent, but their holdings have been inconsistent on many key issues.[125] The lack of clarity surrounding the interpretation of BAPCPA provisions on these key issues demonstrate the dire need for a more organized approach to statutory interpretation.[126] This is especially evident in bankruptcy law, just as many commentators predicted it would be given the Bankruptcy Code's vague provisions.[127] What the lower courts desperately need is an overarching framework that explains how the various rules provided by the Supreme Court work together and in what order they should be considered.

D. Difficulty Interpreting § 362(c)

To say that § 362(c) is unpopular with some courts is an understatement.[128] The first court to report a decision on the provision called the language of § 362(c) "at best, particularly difficult to parse and, at worst, virtually incoherent."[129] Another court found four distinct plausible interpretations of § 362(c)(3)(A).[130] In 2006, the Bankruptcy Court for the Eastern District of North Carolina described its reluctance to engage in interpreting § 362(c)(3)(A), stating: "Once again, warily, and with pruning shears in hand, the court re-enters the briar patch that is § 362(c)(3)(A)."[131]

Judge Waldron noted the problematic unpredictability of the analysis any given court will undertake in interpreting the BAPCPA provisions:

> Although it would be unreasonable to expect complete, or nearly complete, uniformity in the interpretation of BAPCPA, the stark differences in how the new law is being interpreted throughout the nation's bankruptcy courts have compromised, if not crippled, any

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[123] *Lamie*, 540 U.S. at 536.
[124] *Hartford Underwriters*, 503 U.S. at 13–14.
[125] *See* Waldron & Berman, *supra* note 8, at 195–96.
[126] *See, e.g.*, *id*.
[127] *Id.* at 197 ("Due to the readily apparent problems in BAPCPA's text, this lack of uniformity among reported decisions of the bankruptcy courts is not surprising and was correctly predicted by many commentators when BAPCPA was enacted.").
[128] *See* Bartell, *supra* note 1, at 227 (citing *In re* Charles, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005)).
[129] *Charles*, 332 B.R. at 541.
[130] *In re* Daniel, 404 B.R. 318, 321 (Bankr. N.D. Ill. 2009).
[131] *In re* Jones, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006).

> pretense of predictability in the analysis a court might apply in interpreting its many poorly drafted provisions.[132]

Courts have reached diametrically opposed conclusions on some of the most basic elements of BAPCPA and the federal bankruptcy system.[133] The current circuit split over the extent to which the automatic stay terminates pursuant to § 362(c)(3)(A) is evidence that the unpredictability continues.[134]

BAPCPA's inartful drafting is further aggravated by a general absence of legislative history.[135] The statute is the result of years of proposed legislation, though it was not accompanied by many of the traditional forms of legislative history upon which courts may rely to interpret statutory text.[136] There is no joint conference committee report or accompanying floor statements, which are generally made by floor managers and have been considered "persuasive evidence of congressional intent."[137] There is also no Senate Judiciary Committee Report preceding BAPCPA.[138] There is a House Judiciary Committee Report, but it merely repeats BAPCPA's text and provides little interpretive assistance.[139]

In the absence of legislative history specific to BAPCPA, courts have considered the legislative history of the various proposed pieces of legislation leading up to the enactment of BAPCPA.[140] It seems however, that reports and

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[132] Waldron & Berman, *supra* note 8, at 196.

[133] Several scholars have noticed this split:

> A review of a growing body of bankruptcy court and appellate decisions on issues as basic as a debtor's eligibility to file bankruptcy, the applicability of the automatic stay, the rights of secured vehicle creditors and the calculation of disposable income in chapter 13, demonstrates that the bankruptcy courts have often reached diametrically opposed legal conclusions.

Id. at 195–96.

[134] *See, e.g.*, Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 365–66 (B.A.P. 9th Cir. 2011); Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008); Jumpp v. Chase Home Fin., LLC (*In re* Jumpp), 356 B.R. 789, 796–97 (B.A.P. 1st Cir. 2006); *Jones*, 339 B.R. at 363–65.

[135] Waldron & Berman, *supra* note 8, at 217.

[136] *Id.* at 216–17 ("It is a matter of record that, despite multiple versions of proposed bankruptcy legislation that eventually resulted in BAPCPA, beginning with the September 18, 1997 Responsible Borrower Protection Bankruptcy Act and the Consumer Bankruptcy Reform Act of 1997, it was not until 2005 that Congress passed, and the President signed into law, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.").

[137] Begier v. IRS, 496 U.S. 53, 64 n.5 (1990).

[138] Waldron & Berman, *supra* note 8, at 217.

[139] *See* H.R. REP. NO. 109-31, at 69 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 138; Waldron & Berman, *supra* note 8, at 217.

[140] Waldron & Berman, *supra* note 8, at 217 (citing *In re* Quevedo, 345 B.R. 238, 243–46 (Bankr. S.D. Cal. 2006)).

statements surrounding a predecessor statute cannot offer interpretive guidance of the same weight as those forms of legislative history surrounding the statute itself. Considerations and objectives that prompted the predecessor statute may have lost support prior to the drafting of the revised version. In terms of BAPCPA legislative history, the House Judiciary Committee Report stands alone.[141]

E. Judge Waldron's Proposed Analysis

Judge Waldron suggests a framework of statutory interpretation that employs a range of principles to deal with BAPCPA's difficult language and limited legislative history.[142] His proposed analysis is as follows:

> (1) Analyze the text to arrive at a plain meaning or determine the statute is ambiguous; (2) if the statute is ambiguous, use other canons of statutory interpretation that are not focused on the text, including legislative history, if available, to determine the text's meaning; (3) after reaching a determination of the text's meaning, an additional analysis should be undertaken to determine an articulable congressional purpose consistent with that determination and, in the event that such a purpose cannot be demonstrated, the earlier conclusions should be reconsidered; and (4) an analysis should then be conducted by examining the doctrines of scrivener's error, absurdity, contrary to the drafters' intention and constitutional avoidance as a last check prior to reaching a final conclusion.[143]

The first step is to conduct a plain meaning analysis.[144] Judge Waldron notes this initial step may require reliance on those specific provisions of the Bankruptcy Code included by Congress to assist in the interpretation of BAPCPA.[145] These provisions include § 101 – Definitions; § 102 – Rules of Construction; and § 103 – Applicability of Chapters.[146] Judge Waldron further advises: "To the extent these specific provisions are not of assistance, consideration should be given to an examination of specific dictionaries cited by the Supreme Court in bankruptcy cases to determine the meaning of

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[141] *See id.*
[142] *Id.* at 228.
[143] *Id.*
[144] *Id.* at 229.
[145] *Id.*
[146] *Id.*; *see* 11 U.S.C. §§ 101 and 102 (2006).

words."[147] If at this point a plain meaning is determined, Judge Waldron claims "no further textual examination is required."[148]

Next, he writes "however, as part of this plain meaning process, it is significant to note that the text at issue exists only as part of a comprehensive bankruptcy statutory scheme and is properly considered in that context."[149] It seems Judge Waldron is saying that if a plain meaning is determined from the words themselves, it is not *necessary* that courts look to context ("no further textual examination is required.").[150] However, context is "significant" and, therefore, when there is still uncertainty, or when an overwhelming amount of contextual evidence suggests another meaning than that found in the words alone, the courts should consider context.[151] This is in line with the Supreme Court's direction in *Dolan v. U.S. Postal Service*, referenced earlier, stating that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."[152] Judge Waldron qualifies the appropriate context to be considered, stating that "it is appropriate to consider whether the text at issue appears elsewhere in Title 11, either in the same exact form, or, sometimes, even more significantly, in a variation of that form."[153]

Next, courts must determine whether ambiguity exists, meaning whether "more than one principled meaning is permissible."[154] However, ambiguity does not incorporate interpretations that render apparent grammatical errors, surplusage, or "unforeseen consequences in connection with one or more provisions of [the] Title."[155] Judge Waldron argues that "where the text at issue is found to be ambiguous, principles of statutory interpretation expand the range of resources available to assist in reaching the appropriate interpretation."[156] If, however, there is a plain meaning, courts should

147 Waldron & Berman, *supra* note 8, at 229.
148 *Id.*
149 *Id.*
150 *See id.*
151 *See id.*
152 Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006).
153 Waldron & Berman, *supra* note 8, at 229.
154 *Id.*
155 *Id.* at 229–30.
156 *Id.* at 230.

articulate a congressional purpose consistent with this interpretation as the Supreme Court has done on occasion.[157]

As a "final check," courts should consider four doctrines: scrivener's error; absurdity; contrary to the drafters' intention; and constitutional avoidance.[158] The doctrine of scrivener's error recognizes a court's power to "correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission."[159] The modern absurdity doctrine is "linguistic rather than substantive."[160] This means that courts are to use the doctrine to deal with text that may be incomprehensible or clearly unfit, rather than to improve the substantive effect of the text or to make the text more aligned with the court's interpretation of what the statute is to accomplish.[161] The third doctrine, contrary to the drafters' intention, recognizes that "[t]he plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls."[162] Finally, the constitutional avoidance canon maintains that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[163] The rationale for this doctrine is that Congress likely did not write a statute to pose constitutional issues; therefore, if another interpretation is reasonable that does

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[157] *Id.* (citing Lamie v. U.S. Trustee, 540 U.S. 526, 539 (2004)).

[158] *Id.* at 230–31.

[159] United States v. Robinson, 368 F.3d 653, 655 (6th Cir. 2004).

[160] Jaskolski v. Daniels, 427 F.3d 456, 462 (7th Cir. 2005).

[161] As one court has noted:

> In other words, the modern decisions draw a line between poor exposition and benighted substantive choice; the latter is left alone, because what judges deem a "correction" or "fix" is from another perspective a deliberate interference with the legislative power to choose what makes for a good rule. Admit the propriety of "fixing mistakes" and you allow a general power to *identify* "mistakes," which means a privilege to make the real substantive decision. Even when the statute *invites* modification, as the "context clause" in some definitions does, judges are limited to considering the linguistic context rather than trying to "improve" the statute's substantive effect.

Id.

[162] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (citations omitted) (internal quotations omitted).

[163] Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

not raise constitutional issues, it is more likely the latter that Congress intended.[164]

It is important to be mindful that these doctrines are meant to serve as guidance in situations where provisions remain ambiguous and not to afford courts the power to recreate law.[165] These doctrines aid a court in deciphering the proper meaning of an ambiguous statutory phrase, but should not serve as the sole foundation for a reading that is not supported by the text or the purpose.[166]

F. Adoption of Judge Waldron's Approach

Judge Waldron's approach to statutory interpretation is exceedingly fit for deciphering the Bankruptcy Code, primarily because it appropriately weighs the competing strengths and weaknesses of each of the traditional methods of statutory interpretation: purposivism and textualism. The approach properly places the greatest emphasis on the text: the text is the law. As the new textualists argued, only the text has survived bicameralism and presentment. [167] Only the text has been voted on by every member of Congress. [168] Therefore, those wishing to interpret BAPCPA should, first and foremost, follow the Supreme Court's well-settled method of considering the text.[169] However, if the text is not clear, non-textual canons of statutory interpretation, such as legislative history, are used.[170]

Judge Waldron's analysis also places proper weight on context, which while significant, should not overturn an otherwise clear meaning found in a phrase. A number of courts have criticized BAPCPA, and specifically § 362(c)(3), as examples of sloppy legislation.[171] Given Congress's heavy

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[164] Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing the doctrine as "resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

[165] *See* Boumediene v. Bush, 553 U.S. 723, 787 (2008) ("We cannot ignore the text and purpose of a statute in order to save it.").

[166] Waldron & Berman, *supra* note 8, at 230–31.

[167] HANKS, HERZ & NEMERSON, *supra* note 86, at 259 (quoting Herz, *supra* note 101, at 183–84).

[168] *Id.*

[169] Waldron & Berman, *supra* note 8, at 203 (noting that "the mantra of plain meaning and the focus on the statutory text that permeates [the Supreme Court's] current jurisprudence").

[170] *Id.* at 230 ("In circumstances where the text at issue is found to be ambiguous, principles of statutory interpretation expand the range of resources available to assist in reaching the appropriate interpretation of the text at issue. These resources would include, among others, legislative history . . . .").

[171] *See, e.g.*, *In re* Daniel, 404 B.R. 318, 320 (Bankr. N.D. Ill. 2009); *In re* Jones, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006); *In re* Charles, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005).

workload and the quality of the drafting that emerged, it seems unlikely that Congress gave serious consideration to every other instance of similar phrasing throughout the Code when voting on a particular provision. Furthermore, Congress is a multi-member body. Therefore, even if a few members on the respective drafting committees did consider context, the argument that many or most took context into consideration when voting on the amendments is questionable.[172]

Judge Waldron's analysis appropriately places legislative history after the text. Legislative history is dangerous if given too much weight during statutory analysis.

> Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply.[173]

Conceptualizing Congress as one unit is problematic and rarely can one expect that all the individual minds of congressional representatives are uniform, even amongst those who vote the same way.[174] Additionally, a vote of yes or no for a piece of legislation does not inform us as to the individual's understanding of what a specific provision's meaning and application might be; alternate motives may guide the direction of one's voting.[175] Finally, although a member of Congress votes for a piece of legislation in one instance, it is unclear how that member might vote given a new set of facts.[176]

Ultimately, legislative history is subject to the courts' unguided interpretation and can be manipulated, even absent intention by the courts, to support a range of conclusions.[177] Legislative history has not undergone the

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[172] *See* Radin, *supra* note 70, at 870 ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred [legislators] each will have exactly the same determinate situations in mind ... are infinitesimally small.").

[173] *Id.* at 870–71.

[174] *Id.* at 870.

[175] *See id.* at 870–71.

[176] *See id.*

[177] Waldron & Berman, *supra* note 8, at 215 ("Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'") (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005)).

constitutionally required checks of becoming law[178] and heavy reliance upon it may undermine the importance of the text, which is actually the law. As Judge Waldron wrote, "[r]egardless of how one views the history of BAPCPA, legislative history cannot be used as a substitute for the statutory text."[179]

In addition to these general concerns regarding the validity of legislative history, BAPCPA presents a particularly precarious environment in which to rely upon legislative history because of the scarcity of available legislative history.[180] The House Judiciary Committee Report was the only traditionally recognized source of legislative history accompanying BAPCPA.[181] The language regarding modern-day § 362(c)(3)(A) is nearly identical and therefore does not offer much interpretive guidance.[182]

Finally, Judge Waldron properly places the four doctrines which provide courts a foundational basis for ignoring the plain meaning of a provision as the last consideration of his analysis.[183] These four doctrines include Scrivener's Error, Absurdity, Contrary to the Drafters' Intention, and Constitutional Avoidance.[184] While the doctrines provide guidance in selecting between two or more reasonable meanings, they are not meant to serve as the sole basis for issuing a decision, nor are they meant to empower the judiciary as makers of law.[185] Their placement as the final step of the proposed analysis properly reflects their intended use.

The split of authority regarding § 362(c)(3)(A) serves as something of a case study that exemplifies the need for a coherent approach to statutory interpretation, such as Judge Waldron's. The diverging views adopted by the courts, discussed in Part III in detail, stem from their varying approaches to statutory interpretation. The outcomes reached by the courts depend on which

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178 *See* HANKS, HERZ & NEMERSON, *supra* note 86, at 259 (citing Herz, *supra* note 102, at 183–84).

179 Waldron & Berman, *supra* note 8, at 218.

180 *Id.* at 217; *see* Jumpp v. Chase Home Finance, LLC (*In re* Jumpp), 356 B.R. 789, 765 (B.A.P. 1st Cir. 2006) (noting the "sparse legislative history").

181 Waldron & Berman, *supra* note 8, at 217.

182 *Id.*

183 *Id.* at 230–31; *see also In re* Sorrell, 359 B.R. 167, 174 (S.D. Ohio 2007) (recognizing the doctrines of scrivener's error, absurdity, and constitutional avoidance as "exceptions" to the requirement that bankruptcy courts apply "the ordinary meaning of the statutory text."); *In re* Am. Home Mortg., Inc., 379 B.R. 503, 515 (Bankr. D. Del. 2008) (referring to the doctrines of scrivener's error, absurdity, contrary to the drafter's intention, and constitutional avoidance as a "'reality check' on the meaning of statutory language.") (citing Waldron & Berman, *supra* note 8, at 230–31).

184 Waldron & Berman, *supra* note 8, at 231.

185 *Id.*

of the various rules of statutory construction they choose, as well as those that they do not. The majority and minority views will be presented and explored, followed by an in-depth analysis according to Judge Waldron's approach. From a critique of the individual courts' methods of statutory interpretation, as well as the application of Judge Waldron's approach, it is clear that the majority position is better reasoned.

III. THE SPLIT OF AUTHORITY OVER THE PROPER INTERPRETATION OF § 362(C)(3)(A)

The debate over the meaning of § 362(c)(3)(A) ultimately focuses on the meaning of the provision's language "with respect to the debtor."[186] Two dominant views have emerged across the circuits.[187] The minority of courts have interpreted the phrase "with respect to the debtor" to clarify as to whom the stay terminates.[188] These courts hold that the phrase is meant to distinguish between the debtor and the non-debtor spouse in a joint filing.[189] The Ninth Circuit exemplifies the minority approach in its Bankruptcy Appellate Panel's 2011 decision in *In re Reswick*.[190] In contrast, the majority of courts have interpreted the phrase "with respect to the debtor" as a modification of the extent to which the automatic stay terminates.[191] These courts hold that the stay terminates only with respect to the debtor and the debtor's property, leaving the stay intact as to the property of the estate.[192] The majority approach is exemplified by the Bankruptcy Appellate Panel of the First Circuit's 2006 decision in *In re Jumpp*.

The discussion that follows presents the drastically different approaches the courts in *Reswick* and *Jumpp* took to interpret § 362(c)(3)(A). First, the minority approach is presented and critiqued, followed by a presentation and critique of the majority approach. The analysis in *Jumpp*, which led to the

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[186] *See, e.g.*, Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 365–66 (B.A.P. 9th Cir. 2011); Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008); Jumpp v. Chase Home Fin., LLC (*In re* Jumpp), 356 B.R. 789, 796–97 (B.A.P. 1st Cir. 2006); *In re* Jones, 339 B.R. 360, 363–65 (Bankr. E.D.N.C. 2006).

[187] *See, e.g.*, *Reswick*, 446 B.R. at 365–66; *Holcomb*, 380 B.R. at 816; *Jumpp*, 356 B.R. at 796–97; *Jones*, 339 B.R. at 363–65.

[188] *Reswick*, 446 B.R. at 366–67; *In re* Curry, 362 B.R. 394, 400–01 (Bankr. N.D. Ill. 2007); *In re* Jupiter, 344 B.R. 754, 759–60 (Bankr. D.S.C. 2006).

[189] *Reswick*, 446 B.R. at 369; *Curry*, 362 B.R. at 401; *Jupiter*, 344 B.R. at 759.

[190] *See Jupiter*, 344 B.R. at 759.

[191] *Holcomb*, 380 B.R. at 816; *Jumpp*, 356 B.R. at 797; *Jones*, 339 B.R. at 365.

[192] *See, e.g.*, *Holcomb*, 380 B.R. at 816; *Jumpp*, 356 B.R. at 797; *Jones*, 339 B.R. at 365.

court's adoption of the majority interpretation, is much closer to Judge Waldron's proposed analysis and presents a more coherent and complete examination of § 362(c)(3)(A).

A. *The Minority's Interpretation*

1. *In re Reswick*

The debtor in *Reswick* sought damages for violation of the automatic stay following his ex-wife's postpetition garnishment of his wages.[193] This debtor had initially filed a voluntary chapter 13 petition, which the court dismissed for failure to make payments.[194] Two months later the debtor filed a second voluntary chapter 13 petition, from which this case arose.[195] The ex-wife successfully argued in the Bankruptcy Court for the Northern District of California that because the second chapter 13 petition was filed within one year of the earlier case's dismissal, § 362(c)(3)(A) mandated a termination of the automatic stay in its entirety.[196]

The Ninth Circuit's Bankruptcy Appellate Panel affirmed, adopting the minority view that § 362(c)(3)(A) "terminates the automatic stay in its entirety on the thirtieth day after the petition date" when a debtor has had a previous case dismissed within the prior year.[197] The Ninth Circuit's analysis consisted of a summarization of the majority and minority views, some consideration of principles of statutory construction supporting the minority view, an adoption of the minority view, and lastly, a discussion of the legislative history's support of the minority view.[198]

The Ninth Circuit began its analysis by acknowledging the split of authority regarding the proper interpretation of § 362(c)(3)(A).[199] The court introduced each side's interpretation, noting the disagreement regarding the presence of any ambiguity in the phrase "with respect to the debtor."[200] The debtor argued that the phrase "with respect to the debtor" has an unambiguous meaning, which the court acknowledged to be true when the phrase is read in

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193 *Reswick*, 446 B.R. at 364.
194 *Id.*
195 *Id.*
196 *Id.* at 373.
197 *Id.*
198 *See generally id.*
199 *Id.* at 366.
200 *Id.* at 366–67.

isolation.[201] However, the court refused to consider the phrase in isolation and proceeded to consider the phrase within the context of § 362(c)(3) as a whole.[202]

> Because reading the phrase in context, rather than in isolation, better comports with principles of statutory construction, the minority interpretation is more persuasive. And while we recognize the desire to be cautious in designating statutory text as "ambiguous," we believe that such a designation is appropriate here. Our interpretation of section 362(c)(3)(A) finds support in the legislative history.[203]

The court went on to consider the placement of the phrase in question, following the language "with respect to a debt or property securing such debt or with respect to any lease."[204] The court argued that if the phrase were meant to clarify that the stay terminates only as to the debtor personally and his non-estate property, as the majority of courts had held, the phrase is "surplusage," making § 362(c)(3)(A) "internally inconsistent."[205] Assuming the phrase "with respect to the debtor" has the meaning assigned to it by the majority, it already clarifies as to *what* the stay terminates, and there is no need for the preceding "with respect to a debt or property securing such debt."[206]

The court continued its contextual analysis focusing primarily on the provision's introductory language, "if a single or joint case is filed."[207] The court held that, given this introductory language, the phrase "with respect to the debtor" is meant to clarify that when a married couple jointly files for bankruptcy, the stay terminates only "as to a repeat-filing debtor, but not as to the debtor's spouse who is not a repeat filer."[208]

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201 *Id.* at 367. The Ninth Circuit stated:

> When read in isolation, "with respect to the debtor" may appear unambiguous; however, when read within the context of section 362(c)(3) a provision which begins with the phrase "if a single or joint case of the debtor . . ." and goes on to discuss the stay of any action taken "with respect to a debt or property securing debt or with respect to any lease"—the phrase must be examined more closely to give the full provision meaning.

Id. at 367.

202 *Id.*

203 *Id.*

204 *Id.* at 368.

205 *Id.*

206 *Id.*

207 *Id.* at 369.

208 *Id.*

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Ultimately, the court found it "appropriate to conclude that the provision is ambiguous."[209] The court clarified that this was not merely because courts disagreed on the provision's meaning or found it to be poorly drafted.[210] Rather, the provision was ambiguous because two distinct lines of interpretation existed and the plain meaning analysis resulted in reading other language out of the provision.[211]

The court saw the presence of ambiguity as an invitation to look to legislative history, which it found to support the view "that the automatic stay terminates in its entirety 30 days after the petition date for a repeat filer."[212] First, the court noted the "essentially identical language" of the House and Senate Judiciary Committees' bankruptcy reform drafts, following the National Bankruptcy Review Commission's report, and § 362(c)(3)(A), adopted by BAPCPA.[213] The court also noted the title of the BAPCPA section which added modern-day § 362(c)(3)(A), "Discouraging Bad Faith Repeat Filings."[214] Because the minority interpretation terminates the stay in its entirety, the court found it to be more in line with the BAPCPA section's title and more persuasive of an interpretation.[215] Furthermore, the court argued that because § 362(c)(4) prevents the stay from going into effect at all, and does not differentiate between the debtor, the debtor's property, or the property of the estate, "there is no need to make such a distinction."[216]

The court briefly mentioned one policy concern: if the automatic stay does not terminate in its entirety, there is no "meaningful consequence" for the repeat filer.[217] Practically speaking, the court argues there are very few instances where a creditor would take action directed only at the debtor or his non-estate property as most of his property is considered part of the estate.[218] Congress must have intended for more harsh consequences than those for which the majority interpretation provides.[219]

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209 *Id.* at 370–71.
210 *Id.* at 370.
211 *Id.* at 370–71.
212 *Id.* at 371.
213 *Id.* at 371–72.
214 *Id.* at 372.
215 *Id.*
216 *Id.* at 372–73.
217 *Id.* at 373.
218 *Id.*
219 *Id.*

The Ninth Circuit ultimately adopted the minority interpretation of § 362(c)(3)(A).[220] Because § 362(c)(3)(A), when applicable, calls for a termination of the automatic stay in its entirety, the automatic stay was not in effect for the debtor or his property when the wage garnishment proceedings commenced, and therefore there was no violation of the automatic stay.[221]

2. Critique

The Ninth Circuit seems to prematurely adopt one interpretation over another, prior to engaging in a full statutory analysis. Rather than starting with the facts and applying interpretive principles to move towards the proper interpretation, the court chose its desired end point, worked backwards to develop its reasoning.[222] For example, the Ninth Circuit noted the existence of a split of authority and that fact that the "two lines of interpretation [were] so distinct" as support for finding ambiguity.[223] This is backwards reasoning in the sense that in finding ambiguity, the Ninth Circuit relies in part on the fact that other courts found the phrase ambiguous, rather than first examining the phrase with an unbiased eye. This sort of backwards reasoning is detrimental to statutory interpretation and can prevent the development of a full, unbiased analysis.[224] A summary of the existing arguments is certainly appropriate; however, it seems the Ninth Circuit determined it was going to adopt the minority viewpoint from the start and was using rules of statutory construction to support its view, rather than inform it.

The Ninth Circuit also argued that the majority interpretation of "with respect to the debtor" renders the phrase superfluous because of its placement after the language "with respect to a debtor or property securing such debt or with respect to any lease."[225] However, consideration of the language that precedes both phrases offers a legitimate explanation. Section 362(c)(3)'s subsection (A) begins with the language "the stay under subsection (a) with respect to any action taken."[226] Subsection (a) of § 362 lists eight "entities" to which the stay applies, distinguishing between property of the debtor, the

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220 *Id.*
221 *Id.*
222 *Id.* at 370–71. .
223 *Id.*
224 Waldron & Berman, *supra* note 8, at 231 ("In commencing a statutory interpretation analysis, it is important to always start with the reasoning and work forward to the result and avoid any process which begins with the result and works backward to the reasoning.").
225 *Reswick*, 446 B.R. at 368.
226 11 U.S.C. § 362(c)(3)(A) (2006).

debtor's estate, and the property of the estate.[227] Congress may have intended "with respect to a debt or property securing such debt" to clarify what the modified stay, which is the subject of the provision, actually encompasses.[228] Then, the phrase "with respect to the debtor" may clarify that the stay terminates as to the debtor and the debtor's property, without that phrase constituting surplusage.[229] The placement of the phrase following the verb "terminate"[230] would seem to further suggest it modifies the extent of termination, rather than the language "if a single or joint case," which appears at the very beginning of the subsection.

Additionally, the court's argument that the introductory language serves as evidence of the minority interpretation is subject to criticism that the phrase "with respect to the debtor" is then superfluous. In a joint filing, the cases are administered together to ease the judicial process, but the rights of the creditors are unaffected, and there are still essentially two automatic stays, one protecting each of the separate estates.[231] The provision itself only applies to a debtor whose single or joint case was "pending within the preceding 1-year period but was dismissed."[232] Therefore, if the phrase's sole purpose is to clarify as to whom the stay terminates, it offers no new meaning to the provision itself and is superfluous. Courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."[233]

Finally, the court seemed to give extraordinary weight to what is ultimately a minimal amount of legislative history. The court referenced the "essentially identical language" of the House and Senate Judiciary Committees' bankruptcy reform drafts and § 362(c)(3)(A), adopted by BAPCPA.[234] However, the

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[227] *Id.* § 362(a); *see* Jumpp v. Chase Home Finance, LLC (*In re* Jumpp), 356 B.R. 789, 794 (B.A.P. 1st Cir. 2006) (noting that § 362(a) lists those actions which are stayed and distinguishes between acts against the debtor, against the debtor's property, and against the property of the estate).

[228] *Jumpp*, 356 B.R. at 794 (acknowledging that "the phrase 'with respect to the debtor' also speaks the same language as other subsections that differentiate between the debtor, property of the debtor, and property of the estate.").

[229] *Id.*

[230] 11 U.S.C. § 362(c)(3)(A).

[231] *In re* Kosenka, 104 B.R. 40, 43 (Bankr. N.D. Ind. 1989).

[232] 11 U.S.C. § 362(c)(3).

[233] Boise Cascade Corp. v. U.S. Envtl. Prot. Agency, 942 F.2d 1427, 1432 (9th Cir. 1991); *see also* Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006).

[234] Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 372–73 (B.A.P. 9th Cir. 2011).

analysis stopped there.[235] The court never explained how similar language of successive pieces of legislation lends interpretive support to one reading over another.[236] Furthermore, the court did not fully explain its argument that the absence of any differentiation between the debtor, his property, or the property of the estate in § 362(c)(4) suggests Congress did not intend such differentiation in § 362(c)(3)(A).[237] It would seem to prove the exact opposite: Because Congress chose to include such language only in § 362(c)(3)(A), logic would seem to suggest that Congress did intend a different termination of the automatic stay than that in § 362(c)(4).[238]

B. *The Majority's Interpretation of §362(c)(3)(A)*

1. *In re Jumpp*

Jumpp was decided in December of 2006 by the United States Bankruptcy Appellate Panel of the First Circuit, and it exemplifies the majority interpretation of § 362(c)(3)(A).[239] In that case, the debtor filed a chapter 13 petition.[240] The debtor previously had a chapter 13 case dismissed in February of 2006, within the "preceding 1-year period" of § 362(c)(3).[241] Chase Home Finance, LLC held a mortgage on the debtor's home.[242] The debtor filed various motions seeking in effect to prevent termination of the automatic stay as to the property of the estate.[243] The debtor appealed the lower bankruptcy court's denial of her Motion for Determination and Declaratory Judgment as to Continuation and Existence of the Automatic Stay and her Motion to Reimpose the Automatic Stay.[244] This appeal forced the Bankruptcy Appellate Panel of the First Circuit to venture into a statutory interpretation analysis to determine whether § 362(c)(3)(A) in fact terminated the automatic stay as to the property of the estate.[245]

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235 *Id.* at 372.
236 *See id.*
237 *See id.* at 372–73.
238 Jumpp v. Chase Home Finance, LLC (*In re* Jumpp), 356 B.R. 789, 795 (B.A.P. 1st Cir. 2006) ("Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citing Keene Corp. v. United States, 508 U.S. 200, 208 (1993))).
239 *Jumpp*, 356 B.R. 789.
240 *Id.* at 790.
241 *Id.* at 790, 792.
242 *Id.* at 790.
243 *Id.*
244 *Id.*
245 *Id.* at 791.

First, the court considered whether there was any ambiguity present in § 362(c)(3)(A).[246] Acknowledging the dominance of the plain meaning approach, the court stated, "[i]f a Bankruptcy Code provision is unambiguous, the plain language controls, so long as a literal application of the provision does not produce an absurd result or one that is 'demonstrably at odds with the intentions of its drafters.'"[247] The court noted that in determining whether ambiguity was present, it could consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[248] Ultimately, the court found that viewed in isolation, the language of the phrase "with respect to the debtor" is unambiguous.[249] The court quoted:

> Section 362(c)(3)(A) as a whole is not free from ambiguity, but the words, "with respect to the debtor" in that section are entirely plain; a plain reading of those words make sense and is entirely consistent with other provisions of § 362 and other sections of the Bankruptcy Code. Section 362(c)(3)(A) provides that the stay terminates with respect to the debtor." How could that be any clearer?[250]

Having determined the phrase was unambiguous in isolation, the court considered the context in which the language appeared, comparing it to other provisions of § 362.[251] The court noted that the preceding § 362(a) clearly distinguishes between actions against the debtor, actions against the property of the debtor, and actions against the property of the estate in a number of instances.[252] Likewise, other subsections isolate one or more of these three categories. The court stated:

> [S]ection 362(b)(2)(B) (providing that the automatic stay does not prevent "the collection of a domestic support obligation from property that is not property of the estate"), section 362(c)(1) (providing that "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no

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[246] *Id.* at 793 ("We begin by considering whether section 362(c)(3)(A) is ambiguous.").

[247] *Id.* (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–42 (1989)).

[248] *Id.* (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

[249] *Id.*

[250] *Id.* (citing *In re* Jones, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006)).

[251] *Id.* at 794.

[252] *Id.* at 794; *see Jones*, 339 B.R. at 363–64 ("Section 362(a)(1) stays actions or proceedings 'against the debtor;' 11 § 362(a)(2) stays enforcement of a judgment 'against the debtor or against property of the estate;' § 362(a)(3) stays 'any act to obtain possession of property of the estate or of property from the estate;' § 3629(a)(4) stays 'any act to create, perfect, or enforce any lien against property of the estate;" § 362(a)(5) stays 'any act to create, perfect, or enforce against property of the debtor any lien' to the extent it secures a prepetition claim; and § 362(a)(6) stays 'any act to collect, assess, or recover a claim against the debtor . . . .'").

> longer property of the estate"), and section 362(c)(2) (providing for the termination of the stay of "any other act" prohibited by § 362(a)).[253]

The court also mentioned that § 521(a)(6), which was added to the Code under BAPCPA, distinguishes between types stays and demonstrates that Congress knew how to write that the stay terminates as to the estate and the debtor.[254] Congress likely would have included language similar to § 521(a)(6) had it intended a similar outcome under § 362(c)(3)(A).[255]

Next, the court compared the language of § 362(c)(3)(A) to the language of § 362(c)(4)(A)(i), noting that the difference suggested a more limited scope of the stay termination under § 362(c)(3)(A).[256] Section 362(c)(4)(A)(i) refers to a debtor who has had two or more prior cases dismissed within a year, and it states that "the stay under subsection (a) *shall not go into effect* upon the filing of the later case."[257] The Supreme Court stated, "[w]here Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[258] While § 362(c)(3)(A) qualifies its language terminating the stay with the phrase "with respect to the debtor," § 362(c)(4)(A)(i) merely states the stay shall not go into effect at all, without any qualification.[259] The *Jumpp* court noted that "Congress could have removed the stay in its entirety, as it did under § 362(c)(4), by simply deleting the phrase 'with respect to the debtor.'"[260] The court expressed its serious doubt that Congress intended the same result despite the very different language of the two sections."[261]

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[253] *Jumpp*, 356 B.R. at 794.

[254] *Id.* at 794–95 (citing *In re* Pope, 351 B.R. 14, 16 (Bankr. D.R.I. 2006)) ("I feel that in this instance Congress has demonstrated an awareness of the difference between a stay against property of the estate, and a stay against the debtor. . . ."). Section 521(a)(6) reads, in part, "If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected." 11 U.S.C. § 521(a)(6) (2006).

[255] *Jumpp*, 356 B.R. at 795.

[256] *Id.*

[257] 11 U.S.C. § 362(c)(4)(A)(i) (emphasis added); *Jumpp*, 356 B.R. at 795.

[258] Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (alterations omitted) (citations omitted) (internal quotation marks omitted).

[259] 11 U.S.C. § 362(c)(4)(A)(i); *see Jumpp*, 356 B.R. at 795.

[260] *Jumpp*, 356 B.R. at 795 (citing *In re* Brandon, 349 B.R. 130, 132 (Bankr. M.D.N.C. 2006)).

[261] *Id.* at 796 (stating that "we are unconvinced that the significant difference in language between the two sections reveals a Congressional intent to say the very same thing. Rather, the language indicates intent to impose different penalties upon previous filers based on the number of previous cases [they have had dismissed]").

Then, the court stated, "[h]aving found the plain language to be unambiguous, we turn to whether a literal application of section 362(c)(3)(A) would produce an absurd result or one that is "demonstrably at odds with the intention of its drafters."[262] The court did not engage in a legislative history analysis because "[e]ven if Congressional intent is contained in the sparse legislative history, general legislative intent cannot overcome specific, unambiguous statutory language."[263]

Recognizing a general need to ensure the interpretation was not an "absurd result" given Congress's purpose, the court expressly disagreed with the minority approach that limiting the termination of the stay to the debtor and his property would cease to discourage successive filers from abusing the system.[264] Rather, the court here found that this interpretation struck a proper balance between Congress's intent to penalize and deter abuse through successive filings, while still providing protection to creditors.[265] The court considered the deterrence that termination of the stay only as to the debtor, would provide.[266]

> Given the wording and categorization found in section 362(a), termination of the stay with respect to the debtor means that: suits against the debtor can commence or continue postpetition because section 362(a)(1) is no longer applicable; judgments may be enforced against the debtor, in spite of section 362(a)(2); collection actions may proceed against the debtor despite section 362(a)(6); and liens against the debtor's property may be created, perfected and enforced regardless of section 362(a)(5).[267]

The availability of these actions to the creditors under the majority interpretation proved satisfactory deterrence to this court.[268] Therefore, the result of the court's interpretation was "neither absurd nor demonstrably at odds with the intention of the drafters" and was proper.[269]

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262 *Id.* (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)).
263 *Id.* at 765 (citations omitted) (internal quotation marks omitted).
264 *Id.*
265 *Id.*
266 *Id.* at 797 (citing *In re* Williams, 346 B.R. 361, 367 (Bankr. E.D. Pa. 2006)).
267 *Id.* (citing *Williams*, 346 B.R. at 367).
268 *Id.* (citing *Williams*, 346 B.R. at 367).
269 *Id.* at 796.

2. *Critique*

The majority remained faithful to a proper plain meaning analysis because they considered the phrase at issue both in isolation and in the context of the rest of the Bankruptcy Code. This allowed the court to make an initial determination regarding the meaning of the provision, relying solely on the language of the statute itself. The language of the statute has survived bicameralism and presentment, the constitutionally mandated hurdles a bill must pass to become law.[270] Then, the majority reasoned that given the lack of any ambiguity in the text, there was no reason to consult legislative history.[271]

It seems questionable that, given the lively debate that continues to exist regarding the interpretation of § 362(c)(3)(A), any court could find the phrase to be clearly unambiguous. *Jumpp* was decided five years prior to *Reswick*,[272] which may explain the absence of any consideration of the minority approach. It is likely that at the time of the decision, the minority approach had not yet been fully developed. However, a present-day analysis would face criticism for failure to respond to any of the minority's arguments regarding the ambiguity of the phrase.

IV. JUDGE WALDRON'S ANALYSIS

The Ninth and First Circuits' opposing outcomes were reached as a result of the disparate analyses used; these outcomes further demonstrate the need for a clearly articulated method of statutory interpretation. The majority's analysis was more persuasive and more closely adhered to Judge Waldron's proposed framework.[273] What follows is a complete analysis of § 362(c)(3)(A) using Judge Waldron's approach to statutory interpretation of BAPCPA. This analysis demonstrates that, while both approaches fall short of a complete analysis, the majority interpretation is the better reading of § 362(c)(3)(A) and the court's analysis in *Jumpp* is better reasoned in its approach to statutory interpretation.

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[270] Manning, *supra* note 83, at 73 (citing Easterbrook, *supra* note 95, at 445).

[271] *Jumpp*, 356 B.R. at 796.

[272] *Compare* Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 370–71 (B.A.P. 9th Cir. 2011), *with Jumpp*, 356 B.R. at 796.

[273] *Compare Jumpp*, 356 B.R. at 796, *with* Waldron & Berman, *supra* note 8, at 228.

A. Step One—Analyze the Text

The first step in analyzing § 362(c)(3)(A) according to Judge Waldron's approach is a plain meaning analysis to determine whether the language is ambiguous.[274] Here, the phrase in question is "with respect to the debtor."[275] In this instance, the immediately preceding verb is "terminate."[276] Applying the textualist canon *noscitur a sociis*, the verb "terminate" is limited by its neighboring language "with respect to the debtor."[277] The doctrine *expressio unius est exclusio alterius* advises that the inclusion of the phrase, "with respect to the debtor," implies an exclusion of that not mentioned.[278] Here, *expression unius est exclusio alterius* strongly suggests that the inclusion of the reference to "the debtor" impliedly excludes the other main category protected by the stay, the estate.[279] A textual analysis of the phrase in isolation and its immediately surrounding language reveals congressional intent to terminate the stay as to "the debtor."

However, it remains unclear what the term "the debtor" encompasses, and whether "the debtor" is intended to distinguish the debtor from some other person or whether "the debtor" somehow modifies the extent of termination as to the filer.[280] Sections 101 through 103 of the Bankruptcy Code do not offer much guidance. Of the words "with respect to the debtor," only "debtor" is defined in § 101 of the Bankruptcy Code.[281]

Section 102 covers the rules of construction, and its subsection (2) states that the phrase "claim against the debtor" is meant to encompass a claim against *property* of the debtor.[282] This may suggest congressional intent to group the debtor and his property into the term "debtor," meaning the phrase

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[274] Waldron & Berman, *supra* note 8, at 228.

[275] *See* 11 U.S.C. § 362(c)(3)(A) (2006); *Reswick*, 446 B.R. at 365–66; Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008); *Jumpp*, 356 B.R. at 796–97; *In re* Jones, 339 B.R. 360, 363–65 (Bankr. E.D.N.C. 2006).

[276] 11 U.S.C. § 362(c)(3)(A) ("the stay . . . shall terminate with respect to the debtor . . . .").

[277] *See supra* note 112.

[278] *See supra* note 110.

[279] *See supra* note 110.

[280] Note that this is ultimately what the majority and minority disagree on. *Compare Jumpp*, 356 B.R. at 796–97 (determining that the phrase "'with respect to the debtor' limits termination of the stay to the debtor and the debtor's non-estate property"), *with Reswick*, 446 B.R. at 370 (determining that the phrase distinguishes between the debtor and the non-debtor spouse in a joint filing).

[281] 11 U.S.C. § 101(13) ("The term 'debtor' means person or municipality concerning which a case under this title has been commenced.").

[282] *Id.* § 102(2).

"with respect to the debtor" clarifies that the stay terminates only as to the debtor and the debtor's property, but not as to the property of the estate.

Because the precise meaning of the phrase in isolation remains uncertain, Judge Waldron's approach directs that a contextual analysis be undertaken.[283] Starting with § 362, Congress repeatedly distinguishes between the debtor, the debtor's property, and the property of the estate, as they relate to the automatic stay.[284] Section 362(a) includes eight subsections discussing various "entities" protected by the stay, and it is this stay to which § 362(c)(3)(A) refers.[285] Each of these subsections in § 362(a) clarify an act or action that is stayed, and they distinguish between the debtor, the debtor's property, and the estate property.[286] The court in *Jumpp* explored these subsections, stating:

> Section 362(a)(1) stays actions or proceedings '*against the debtor*,' § 362(a)(2) stays enforcement of a judgment '*against the debtor or against property of the estate*;' § 362(a)(3) stays 'any act to obtain possession of *property of the estate* or of *property from the estate*;' § 362(a)(4) stays 'any act to create, perfect, or enforce any lien against *property of the estate*;" § 362(a)(5) stays 'any act to create perfect or enforce against *property of the debtor* any lien' to the extent it secures a prepetition claim; and § 362(a)(6) stays ' any act to collect assess , or recover a claim against *the debto*r.[287]

These distinctions further support the initial interpretation that the stay terminates only as to the debtor and his property, as they show Congress distinguished elsewhere the stay's effect as to the three categories: the debtor, the debtor's property, and the property of the estate.[288]

Section 521(a)(6), another section added to the Bankruptcy Code with BAPCPA in 2005, lends support to the existence of a modified stay that terminates only with respect to the debtor and the debtor's property under § 362(c)(3)(A).[289] Section 521(a)(6) reads, in part, "[i]f the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated *with respect to the personal property of the estate* or *of the debtor which is affected*."[290] As evidenced by § 521(a)(6), Congress knew how

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283 Waldron & Berman, *supra* note 8, at 229.
284 *Jumpp*, 356 B.R. at 794.
285 11 U.S.C. § 362(c)(3)(A) ("The stay under subsection (a) . . . .").
286 *Id.* § 362(a).
287 *Jumpp*, 356 B.R. at 794; *see In re* Jones, 339 B.R. 360, 363–64 (Bankr. E.D.N.C. 2006).
288 *Jumpp*, 356 B.R. at 794–95; *see Jones*, 339 B.R. at 364.
289 *Jumpp*, 356 B.R. at 795.
290 11 U.S.C. § 521(a)(6) (emphasis added).

to convey that the stay terminated as to the estate *and* the debtor, and likely would have done so in § 362(c)(3)(A), had it intended such an outcome.[291]

Finally, a comparison of the language in § 362(c)(3)(A) to the language of § 362(c)(4)(A)(i) confirms that the legislators intended a more limited scope of the stay termination under § 362(c)(3)(A).[292] "[U]se of a particular phrase in one statute but not in another 'merely highlights the fact that Congress knew how to include such a limitation when it wanted to.'"[293] Section 362(c)(4)(A)(i) refers to a debtor who has had two or more previous cases dismissed within a year, and it states "the stay under subsection (a) *shall not go into effect* upon the filing of the later case."[294] Alternatively, § 362(c)(3)(A) references "the stay under subsection (a)," then qualifies its language terminating the stay with the phrase "with respect to the debtor."[295] "Congress could have removed the Stay in its entirety, as it did under § 362(c)(4), by simply deleting the phrase 'with respect to the debtor.'"[296] The fact that Congress did not use such expansive language in § 362(c)(3)(A) as it did in § 362(c)(4)(A)(i) shows that § 362(c)(3)(A)'s phrase "with respect to the debtor" is intended to modify the extent to which the stay terminates.[297]

The contextual analysis supports that the original interpretation, which was discerned from analyzing the phrase in isolation, is proper.[298] The phrase "with respect to the debtor" refers to the extent to which the automatic stay terminates, clarifying that the property of the estate remains protected.[299] The stay terminates only as to the debtor and the debtor's property.[300] The numerous references to these three categories throughout § 362, the lack of any reference to the "property of the estate" as was present in § 521(a)(6), and the provision's limited language as compared to § 362(c)(4)(A)(i) all support the majority interpretation—that the stay terminates as to the debtor and the debtor's property, but not as to the property of the estate.[301]

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[291] *Jumpp*, 356 B.R. at 795.

[292] *Jones*, 339 B.R. at 364 (citing *In re* Paschal, 337 B.R. 274, 279–80 (Bankr. E.D.N.C. 2006)).

[293] *Paschal*, 337 B.R. at 279 (quoting Coleman v. Cmty. Trust Bank (*In re* Coleman), 426 F.3d 719, 725 (4th Cir. 2005)).

[294] 11 U.S.C. § 362(c)(4)(A)(i) (emphasis added).

[295] *Id.* § 362(c)(3)(A).

[296] *Id.* § 362(c)(4); *In re* Brandon, 349 B.R. 130, 132 (Bankr. M.D.N.C. 2006).

[297] *See Jones*, 339 B.R. at 364 (citing *Paschal*, 337 B.R. at 279–80); *Paschal*, 337 B.R. at 279 (quoting *Coleman*, 426 F.3d at 725); *Brandon*, 349 B.R. at 132.

[298] *See* discussion *supra* Part III.B.2.

[299] *See supra* note 294.

[300] *See supra* note 294.

[301] *See* discussion *supra* Part III.B.

Nonetheless, the fact that § 362(c)(3) begins with the language "[i]f a single or joint case is filed" has caused a significant number of courts to find that the phrase "with respect to the debtor" clarifies as *to whom* the stay terminates.[302] These courts, representing the minority interpretation, argue that the phrase is there to demonstrate that, in a joint filing of a married couple, where only one spouse has had a previous case dismissed within the requisite one-year period of § 362(c)(3), the stay only terminates as to the debtor's spouse, and it terminates in its entirety.[303] Ambiguity means "more than one principled meaning is permissible,"[304] and therefore it is arguable that a complete analysis should provide some consideration to this alternative interpretation followed by a minority of courts.

However, interpretations that render apparent surplusage do not create ambiguity.[305] Rather, the existence of surplusage suggests a different interpretation is correct.[306] As discussed in Part III in the critique of *Reswick*, the minority interpretation does render the phrase in question superfluous. While the two cases are administered together for ease in a jointly filed case, there are nonetheless two separate automatic stays protecting two separate estates.[307] The provision itself clarifies that it only applies to a debtor whose single or joint case was "pending within the preceding 1-year period but was dismissed."[308] Therefore, if the phrase "with respect to the debtor" is meant to clarify that the stay terminates only as to the spouse with the prior dismissed case, as the minority position purports, it offers no new meaning and is superfluous. The alternative reading then does not create ambiguity and the analysis may proceed with a plain meaning established.

B. *Step Two—If the Statute is Ambiguous, Consult Other Available Canons of Interpretation*

Because the phrase "with respect to the debtor" is unambiguous, there is no need to consult any additional canons of statutory interpretation, including

[302] *In re* Daniel, 404 B.R. 318, 326 (Bankr. N.D. Ill. 2009).

[303] *See, e.g.*, *In re* Curry, 362 B.R. 394 (Bankr. N.D. Ill. 2007); Jumpp v. Chase Home Finance, LLC (*In re* Jumpp), 344 B.R. 21 (Bankr. D. Mass. 2006), *vacated*, 356 B.R. 789 (B.A.P. 1st Cir. 2006); *In re* Jupiter, 344 B.R. 754 (Bankr. D.S.C. 2006).

[304] Waldron & Berman, *supra* note 8, at 229.

[305] *Id.* (citing Lamie v. U.S. Trustee, 540 U.S. 526, 541 (2004)).

[306] *Id.* at 212.

[307] *In re* Kosenka, 104 B.R. 40, 43 (Bankr. N.D. Ind. 1989).

[308] 11 U.S.C. § 362(c)(3) (2006).

legislative history.[309] Even if there were ambiguity present, Judge Waldron directs courts to consider legislative history, *if available*.[310] Given the extremely scarce amount of legislative history surrounding BAPCPA, it would be difficult to qualify legislative history as an available canon of statutory interpretation.[311] Attempting to decipher meaning from BAPCPA's legislative history could very well produce unnecessary ambiguity.

C. Step Three—Determine an Articulable Congressional Purpose

Having found a plain meaning of the text, Judge Waldron advises courts to determine a congressional purpose that is consistent with that interpretation.[312] If a court cannot find a consistent purpose, the court must reconsider its earlier conclusions.[313] While both the majority and minority approaches include some policy considerations, neither expressly seeks an articulable congressional purpose consistent with a predetermined statutory meaning. The majority ensured their meaning did not lead to an "absurd result" given Congress's purpose,[314] but Judge Waldron's third step requires more; the plain meaning should actually *be consistent with* an articulable congressional purpose.[315] Here, the plain meaning analysis suggests that the text unambiguously mandated a termination of the automatic stay as to the debtor and the debtor's property, but not as to the property of the estate. Therefore, the next step is to determine an articulable congressional purpose consistent with this interpretation.

The two overarching policy goals of the federal bankruptcy system, and the automatic stay in particular, are to provide a fresh start to the debtor and equal distribution to creditors.[316] The automatic stay shields the debtor, preventing all creditor collection, harassment, and foreclosure action, which provides the debtor with valuable breathing space to attempt to come out of insolvency.[317] In addition to the protections afforded the debtor, the stay is meant to benefit

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[309] Waldron & Berman, *supra* note 8, at 229–30.

[310] *Id.* at 228.

[311] *Id.* at 217 ("[T]here is no joint conference committee report, there is no Senate Judiciary Committee Report and the House Judiciary Committee Report is often a mere repetition of the text of BAPCPA.").

[312] *Id.* at 228.

[313] *Id.*

[314] Jumpp v. Chase Home Finance, LLC (*In re* Jumpp), 356 B.R. 789, 796 (B.A.P. 1st Cir. 2006) (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)).

[315] Waldron & Berman, *supra* note 8, at 228.

[316] Rinard v. Positive Invs., Inc. (*In re* Rinard), 451 B.R. 12, 19 (Bankr. C.D. Cal. 2011).

[317] H.R. REP. No. 95-595, at 340 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297; S. REP. No. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840–41.

the creditors by ensuring an orderly and equitable distribution of any property of the estate.[318] By protecting and preserving the estate, the stay ensures maximum distribution for the creditors.[319] The current system represents a congressional response to the prior lack of organization surrounding insolvency, which previously encouraged a creditor race to the courthouse to collect on debts.[320] These underlying goals continue to exist as the foundation for the current federal bankruptcy system.

Section 362(c)(3)(A) partially removes one of these protections and reflects an intent to deter abuse of the system by successive filings. However, Congress did not express any intent to upset the foundational goals of bankruptcy, which continue to be providing a fresh start for the debtor and equitable distribution for creditors.[321] The minority approach thwarts equitable distribution to the creditors because thirty days after filing, the first creditor to get a judgment has full access to property that might otherwise become part of the estate.[322] "Such property may be necessary to implement a debtor's chapter 13 plan; or, in a chapter 7 case, equity in the property above the creditor's security interest could be realized by the trustee to pay a dividend to creditors."[323] Interpreting § 362(c)(3)(A) as a limitation on the extent to which the automatic stay terminates strikes a proper balance between the competing micro- and macro-level policy goals. On a micro level, it deters abuse of the automatic stay; and on the macro level, it advances fundamental bankruptcy policies by promoting a fresh start for debtors and equitable distribution for creditors.[324]

Critics argue that the majority interpretation does not do enough to deter successive filings because most of the debtor's valuable property is property of the estate, which remains protected.[325] It is true that upon filing, much of the debtor's property becomes property of the new bankruptcy estate.[326] However,

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[318] H.R. REP. No. 95-595, at 340, 1978 U.S.C.C.A.N. at 6297; S. REP No. 95-989, at 49, 1978 U.S.C.C.A.N. at 5835.

[319] Heidt, *supra* note 22, at 74.

[320] *Rinard*, 451 B.R. at 19.

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] Jumpp v. Chase Home Finance, LLC (*In re* Jumpp), 356 B.R. 789, 796 (B.A.P. 1st Cir. 2006).

[325] *In re* Jupiter, 344 B.R. 754, 761–62 (Bankr. D.S.C. 2006) ("If § 362(c)(3)(A) merely allowed creditors to badger the Debtor with phone calls or obtain property of the debtor that is not property of the estate, then this section would be of no value. A creditor's threat to collect would be hollow if the stay remained as to the property of the estate because § 1306 broadly incorporates nearly all of a debtor's valuable pre- and post-petition property.").

[326] 11 U.S.C. § 541 (2006).

there are exceptions, including the debtor's exempt property. In bankruptcy, a debtor may seek to exempt certain amounts of various kinds of property.[327] Once the deadline for filing objections to the claimed exemptions has passed, the exempt property is no longer part of the estate.[328] Therefore, even though the stay remains in place as to the property of the estate, the debtor's exempt property is at risk. The exposure of this exempt property to creditors, under the majority interpretation, adds immense pressure to the debtor to perform according to his chapter 13 plan. In chapter 7, the stay serves as an important protection for creditors by increasing the property to be distributed.

Therefore, there is an articulable congressional purpose consistent with the majority interpretation. Terminating the stay as to the debtor and the debtor's property does offer creditor action that deters a debtor from successive filings merely to take advantage of the automatic stay. However, it does so without demolishing the macro level policy considerations of the federal bankruptcy system.

D. Step 4—Doctrinal Examination

The fourth and final step to Judge Waldron's approach is to apply four doctrines as a last check on the statutory meaning.[329] These doctrines include scrivener's error, absurdity, contrary to the drafters' intention, and constitutional avoidance.[330] Nothing in the language of § 362(c)(3)(A) suggests a clerical error resulting from the drafters' oversight, so scrivener's error presents no issues with the analysis. The absurdity doctrine, meant to deal with incomprehensible text, also does not present any issues here. The language reads clearly and has been found to comply with an articulable congressional purpose. Likewise, applying the doctrine of contrary to the drafters' intention presents no obstacle as this interpretation is not contrary to the purpose of deterring abuse. Rather, it represents a balanced approach of furthering that goal with the overarching goals of bankruptcy. Finally, no constitutional issues are raised, so the constitutional avoidance doctrine weighs in favor of the purported interpretation.

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[327] *Id.* § 522.
[328] Taylor v. Freeland & Kronz, 503 U.S. 638, 641–42 (1992).
[329] Waldron & Berman, *supra* note 8, at 228.
[330] *Id.*

E. Summary

The application of Judge Waldron's approach leads to the adoption of the majority interpretation of § 362(c)(3)(A). A plain meaning analysis of the language, determined according to traditional canons of statutory interpretation and BAPCPA's own interpretive sections, presents an initial finding that § 362(c)(3)(A) mandates termination of the automatic stay as to the debtor and his property. That finding is bolstered by a contextual analysis of the provision, focusing both on the surrounding language of § 362 and other provisions throughout the Bankruptcy Code that distinguish between various types of the stay. Given the clear plain meaning and the limited availability of legislative history surrounding BAPCPA, legislative history need not and should not be relied upon to inform the analysis. An articulable congressional purpose exists, as this meaning properly balances the federal bankruptcy system's macro level policy goals with the micro level policy goal of § 362(c)(3)(A). Finally, the doctrinal examination does not present any problems. Section 362(c)(3)(A) should be interpreted as requiring termination of the stay as to the debtor and the debtor's property, but not as to the property of the estate, thirty days after filing, if the debtor has had a prior case dismissed within the preceding year.

The analysis taken by the court in *Jumpp* was much closer to this Comment's independent application of Judge Waldron's approach to § 362(c)(3)(A) in its emphasis on the text of § 362(c)(3)(A),[331] its finding that the phrase has an unambiguous plain meaning,[332] and its brief discussion of policy concerns.[333] Also like this Comment's application of Judge Waldron's approach, the court in *Jumpp* did not rely on legislative history,[334] noting the scarce amount of available legislative history surrounding § 362(c)(3)(A).[335] Alternatively, the court in *Reswick* dedicated a sizeable portion of its opinion to the legislative history of § 362(c)(3)(A) and the history of abuse by

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[331] Jumpp v. Chase Home Finance, L.L.C. (*In re* Jumpp), 356 B.R. 789, 793 (B.A.P. 1st Cir. 2006) ("In our search for ambiguity, we consider 'the *language* itself, the specific context in which that *language* is used, and the broader context of the statute as a whole . . . Viewed in isolation, the *language* itself is unambiguous." (emphasis added)).

[332] *Id.*

[333] *Id.* at 796–97 ("A partial termination also protects creditors by protecting estate property. It is not absurd that Congress may have sought to balance the interests of individual secured creditors with the interests of creditors as a whole . . . .") (internal citations omitted).

[334] *Id.* at 796 ("In the face of an unambiguous statute, the Panel need not consider the statute's legislative history.").

[335] *Id.* at 796 n.4 (citing Bankers Trust Co. v. Gillcrese (*In re* Gillcrese), 346 B.R. 373, 376 (Bankr. W.D. Pa. 2006)); *Jumpp*, 344 B.R. 21, 26 (Bankr. D. Mass. 2006) (describing the legislative history as "sparse"), *vacated*, 356 B.R. 789 (B.A.P. 1st Cir. 2006); Waldron & Berman, *supra* note 8, at 227.

successive filings to support its adoption of the minority view.[336] The court's analysis in *Jumpp* more closely resembled Judge Waldron's approach and led to the more well-reasoned opinion that § 362(c)(3)(A)'s phrase "with respect to the debtor" is meant to clarify that thirty days after filing, a debtor who has had a prior case dismissed within the preceding year will lose the protection of the automatic stay as to himself and his property only. The estate remains protected.

Judge Waldron's approach provides for a thorough analysis of § 362(c)(3)(A) and is fit to serve as the framework of statutory interpretation for BAPCPA. The proposed approach draws from both competing foundational theories of statutory interpretation, properly placing the greatest emphasis on the text which has actually survived the Constitutionally-required obstacles to becoming the law. It mandates an examination of the phrase in isolation before moving to a contextual analysis, which limits courts' abilities to place improper emphasis on certain words or phrases unintended to affect a phrase's overall meaning. It also limits the influence of legislative history, which is proper given the limited amount that is available surrounding BAPCPA.

CONCLUSION

Through the application of Judge Waldron's thorough and clearly articulated framework of interpreting BAPCPA, it becomes evident that the majority interpretation is the better reading of § 362(c)(3)(A). The majority adheres more closely to the plain meaning of the language used by Congress and the context in which it appears, and more properly balances the macro level policy concerns of the bankruptcy system with the micro level policy concerns of § 362(c)(3)(A). Over-reliance on legislative history, especially when interpreting BAPCPA provisions, may be detrimental given its scarcity.[337] Courts should interpret § 362(c)(3)(A) to mandate termination of the automatic stay, as to the debtor and the debtor's property only, thirty days after the debtor has filed, if that debtor has had a previous case dismissed in the preceding year.

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[336] Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 370–73 (B.A.P. 9th Cir. 2011).

[337] *Jumpp*, 356 B.R. at 796 n.4 (citing Bankers Trust Co. v. Gillcrese (*In re* Gillcrese), 346 B.R. 373, 376 (Bankr. W.D. Pa. 2006)); *Jumpp*, 344 B.R. at 26 (describing the legislative history as "sparse"), *vacated*, 356 B.R. 789 (B.A.P. 1st Cir. 2006); Waldron & Berman, *supra* note 8, at 227.

The split of authority regarding the proper interpretation of § 362(c)(3)(A) demonstrates the dire need for a clearly articulated, Supreme Court–endorsed framework of statutory interpretation. The various "rules" of statutory construction from the case law do not provide sufficiently clear direction, given the scarce amount of legislative history and the inartful drafting of the Code. Judge Waldron's approach to interpreting BAPCPA proves far better than the current "system" of statutory interpretation, consisting of numerous conflicting Supreme Court rules and resulting in inconsistency and unpredictability. Through an application of Judge Waldron's approach to statutory interpretation, a complete framework is produced through which BAPCPA may be properly analyzed.

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