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THE LIMITED LIFESPAN OF THE BANKRUPTCY ESTATE: MANAGING CONSUMER AND SMALL BUSINESS REORGANIZATIONS

Jonathan M. Seymour[*]

ABSTRACT

Congress has a great affinity for debt adjustment bankruptcies. These are bankruptcies in which a debtor keeps rather than liquidates her assets and instead repays creditors out of future income. Chapter 13, which allows individual consumer debtors to reorganize in this way, was supplemented in 1986 by chapter 12 for farm bankruptcies. In 2019, in the largest expansion of debt adjustment bankruptcies since the Bankruptcy Code was enacted, Congress made debt adjustment bankruptcy available to small businesses.

The reality is, however, that most debt adjustment bankruptcies fail. For that reason, the relative rights of debtors and creditors when tensions arise are of great importance. The bankruptcy court must know what protections a debtor may resort to if she is struggling to make payments under her plan, and whether new, unpaid creditors may undertake their own collection efforts if doing so will jeopardize the bankruptcy case. Although these questions are basic, they are unresolved. A deep split among bankruptcy courts and courts of appeals has persisted in the law of chapter 13 since the early years of the Code. This disunity threatens the bankruptcy courts' ability to coherently implement Congress's new small business bankruptcy provisions. This Article proposes a solution to this Gordian Knot, and then attempts to situate that solution within a broader normative conception of debt adjustment bankruptcy law.

Doctrinally, the key division among courts concerns the lifespan of the bankruptcy estate. Property within the estate is subject to court supervision and protected by the automatic stay. This Article defends a theory of the bankruptcy estate in debt adjustment bankruptcies known as the estate termination theory. This theory holds that the bankruptcy estate is of a limited lifespan. Once the debtor has secured court approval for a repayment plan and the case is

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underway, she is both free from bankruptcy court supervision and without special bankruptcy court protection. Moreover, although a default rule, the early termination of the bankruptcy estate is sticky. Preserving property within the estate is possible, but the power to do so is limited. Some valid bankruptcy law purpose is necessary before property can be retained within the estate.

On a broader level, this Article attempts to situate the limited lifespan of the bankruptcy estate within a model of bankruptcy it dubs "light-touch" bankruptcy. This model emphasizes the advantages of simple, streamlined, and cheaply administrable procedures, and suggests that debtors may benefit most by being able to enjoy a financial fresh start, free from entanglement with the bankruptcy court, at the earliest possible moment during their bankruptcy cases.

INTRODUCTION

Outside of the world of big business, debt adjustment plans are Congress's favored form of bankruptcy law.[1] Congress has deployed both carrot and stick to encourage individual debtors to seek relief under chapter 13 of the Bankruptcy Code, preferring that debtors attempt to repay their debts over time rather than liquidate their existing assets.[2] As a result, hundreds of thousands of consumer debtors file for chapter 13 each year. Owners of family farms and fisheries take advantage of a similar invitation from Congress by seeking relief under chapter 12 of the Code. Congress has now taken its enthusiasm for debt adjustment plans one step further. In 2019, Congress responded to complaints that the traditional forms of business bankruptcy under chapter 11 of the Code are unworkable or prohibitively expensive for owners of small businesses by passing the Small Business Reorganization Act ("SBRA").[3] The SBRA makes debt adjustment plans available to businesses with less than $2.7 million in debt,[4] a category that may comprise more than 40% of all business debtors.[5]

The SBRA went into effect in February 2020; bankruptcy courts, therefore, are only just beginning to grapple with the applicable rules for such cases.[6] In all forms of debt adjustment bankruptcy, however, the basic mechanics of the bankruptcy case are the same. Instead of liquidating their assets, debtors keep all their pre-existing property and commit to paying their projected disposable income to their pre-bankruptcy creditors during a repayment plan that typically lasts from three to five years.[7] After making those payments, and with certain

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[1] The Bankruptcy Code describes chapters 13 and 12 of the Code as regulating the "adjustment of debts" of "an individual with regular income" and "a family farmer or fisherman with regular income" respectively. 11 U.S.C. §§ 101(18), (19A) (2019); *Id.* § 109(e). In this Article, I use the terms debt adjustment plan or debt adjustment bankruptcy to refer to a bankruptcy case filed under these chapters or under new subchapter V of chapter 11, each of which shares the same structure.

[2] Sara Sternberg Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1031 (2017); H.R. REP. NO. 95-595, at 5, *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5966 ("In the consumer area, proposed chapter 13 encourages more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge"); *see* H.R. REP. NO. 109-31, at 12–13 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 99.

[3] Small Business Reorganization Act (SBRA) of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019), (codified at 11 U.S.C. §§ 1181–1195).

[4] *Id.*; *see* 11 U.S.C. § 101(51D) (2019) (defining "small business debtor").

[5] Professor Robert Lawless estimates that approximately 40% of business debtors filing for bankruptcy under current law would qualify for relief under the SBRA. Robert Lawless, *How Many New Small Business Chapter 11s*, CREDIT SLIPS (Sept. 14, 2019), https://www.creditslips.org/creditslips/2019/09/how-many-new-small-business-chapter-11s.html. In 2019, 5,814 business bankruptcy cases were filed under traditional chapter 11, Table F-2, U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2019.pdf (last visited Feb. 19, 2019).

[6] SBRA § 5, 133 Stat. 1087.

[7] 11 U.S.C. § 1325(b) (2019) (defining projected disposable income as the debtor's projected gross

exceptions, the debtor's remaining liabilities that pre-date the bankruptcy case are discharged.[8] The statutory language in large part tracks from chapter to chapter of the Code. The pre-existing law of chapters 13 and 12, therefore, should tell us much about how small business reorganizations are to be administered.

Even if simple in concept, the law of debt adjustment plans is far from settled.[9] When all does not go according to plan, the hierarchy of rights among the bankruptcy case's stakeholders is unclear. That lack of clarity is particularly important given debtors' low rate of success in completing reorganization plans.[10] Individual debtors in as many as two-thirds of all chapter 13 cases fail to make all payments required by their plans and are forced either to dismiss their cases or convert to another form of bankruptcy relief (most likely simple liquidation under chapter 7 of the Code).[11] Similarly, about 60% of chapter 12 reorganizations do not result in a completed plan.[12] There are thousands of new small business cases expected each year. Once tensions arise in these cases, just as in the failed chapter 12 and 13 cases, the bankruptcy court must determine whose rights take precedence among three groups of parties to the case: the debtor herself; the debtor's pre-bankruptcy (or prepetition) creditors; and the debtor's new, postpetition creditors to whom she has incurred debts only after filing the bankruptcy case. Yet, the law on which bankruptcy courts must base these determinations is subject to bitter dispute.

Consider a debtor who has begun a debt adjustment bankruptcy and some months later wants to buy a truck. This may be a consumer debtor who wants to buy a truck for personal use or to drive to and from work, or a small business debtor who wants to use the truck in its business. In either case, the debtor expects to use some of her pre-bankruptcy savings to make the down payment for the truck and, thereafter, to use a portion of her income earned during the bankruptcy case to make monthly payments, while continuing to make her ongoing payments to prepetition creditors. May the debtor make these expenditures, or does the use of either pre-existing savings or current monthly income require the bankruptcy court's permission? And if the debtor's

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income less projected necessary or permitted expenses).

8 *Id.* § 1328

9 *See* David Gray Carlson, *The Chapter 13 Estate and Its Discontents*, 17 AM. BANKR. INST. L. REV. 233, 233 (2009) ("Thirty years into the life of the Bankruptcy Code, the courts still have no coherent theory of chapter 13.").

10 Greene, Patel & Porter, *supra* note 2, at 1032.

11 Greene, Patel & Porter, *supra* note 2, at 1032.

12 *See* Jamey Mavis Lowdermilk, *A Fighting Chance? Small Family Farmers and How Little We Know*, 86 TENN. L. REV. 177, 192 (2018).

prepetition creditors believe the deal is a bad one, may they object and be heard in the bankruptcy court?

Next, assume that the debtor has purchased the truck, but has fallen behind on his payments. May the auto lender repossess the truck from the debtor (as it would do if no bankruptcy case existed), or must the lender also obtain permission from the bankruptcy court? And does it matter whether taking the truck would interfere with the debtor's ability to make her continuing payments to prepetition creditors or to provide for her own needs?

The unanswered question is this: when a debtor has already finalized the details of her repayment plan and begins making payments to creditors, is the debtor fully in control of all of her other assets—meaning she is able to immediately enjoy the benefits and responsibilities of the fresh start—or does her property remain subject to bankruptcy court supervision and protection while she is making payments in accordance with her plan?

Although unresolved, this issue is fundamental to bankruptcy practice. District-by-district, debtors and creditors' rights are significantly altered as individual bankruptcy courts give effect to their own interpretations of the Code. In some districts, a debtor seeking to use her assets outside the ordinary course may be denied permission because of the potential impact that decision will have on future payments to prepetition creditors under the plan.[13] This approach ascribes paramount importance to protecting the debtor's financial health so that she is able to continue making payments under the plan to prepetition creditors and may shield the debtor's property from collection efforts by new postpetition creditors. Other courts take the opposite view, relying on the law of traditional business reorganizations under chapter 11. Debt adjustment plans are similar to reorganization proceedings in both governing statutory text and structure. In consequence, in a debt adjustment plan proceeding—as in a traditional chapter 11 reorganization—these bankruptcy courts hold that a debtor who has embarked upon a repayment plan is financially independent; she is able to deal with her assets as she chooses, but equally unable to look to the bankruptcy court for protection should some new creditor look to those assets for satisfaction.

The outcome that is chosen depends on the bankruptcy court's theory of the bankruptcy estate. When a case is filed, the Code provides that all of the debtor's property is subsumed into the bankruptcy estate—a fictitious legal entity that holds the debtor's property and places it under the bankruptcy court's

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[13] *See, e.g.*, *In re* Ward, 546 B.R. 667, 679 (Bankr. N.D. Tex. 2016).

authority.[14] But there is no consensus as to when that property leaves the estate. Four theories have been advanced, each reflecting substantially different understandings of how debt adjustment bankruptcy operates. This four-way circuit split has persisted for most of the Code's history.[15] The competing theories have primarily been developed in cases addressing debt adjustment plans of individuals under chapter 13, but the courts have found equal application in cases under chapter 12. Now that the bankruptcy courts will face these same questions once again when dealing with the restructuring of small businesses under the SBRA, this long-time legal puzzle should be resolved.

This Article attempts that task. It defends a simple view of the bankruptcy estate in debt adjustment cases known as the estate termination theory. Despite its simplicity, this theory is rarely adopted by courts. The estate termination theory holds that the bankruptcy estate is of limited lifespan. None of the debtor's property remains in the bankruptcy estate after the debtor's plan is confirmed. At least by default, the debtor's assets are both liberated and unprotected. Addressing an issue that has received less attention, this Article further argues that the estate termination theory is a sticky default rule. Otherwise stated, property may be retained in the bankruptcy estate post-confirmation only when the debtor has made a showing that this property is necessary to the fulfilment of the debt adjustment plan. This rule has been adopted by even fewer courts than have endorsed the basic estate termination theory, but this Article traces the rule's origins to brief and cryptic dicta in a Seventh Circuit decision from over twenty years ago.[16] Recently, the Seventh Circuit reiterated this conclusion in a trio of short decisions that, while forceful in their conclusions, are not especially illuminating in their reasoning.[17] This Article supplies the doctrinal underpinnings to support the court's conclusion.

Finally, this Article describes how limiting the lifespan of the estate in debt adjustment bankruptcies may be one way of implementing a model of "light-touch" bankruptcy. Under this model, Congress and bankruptcy courts should favor rules for debt adjustment bankruptcies that render them cheaper and simpler to administer. The broad intention is to minimize both the shadow of the

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14 11 U.S.C. § 541 (2019).

15 *See* Carlson, *supra* note 9, at 233.

16 *See generally In re* Heath, 115 F.3d 521, 522–23 (7th Cir. 1997) (Judge Posner suggesting that "[i]t would presumably be an abuse of discretion for the bankruptcy judge to confirm a plan that retained more of the property in the hands of the trustee than was reasonably necessary to fulfill the plan, though we need not decide that in this case..").

17 *See In re* Steenes, 918 F.3d 554, 557 (7th Cir. 2019) [hereinafter *Steenes I*]; *In re* Steenes, 942 F.3d 834, 839 (7th Cir. 2019) [hereinafter *Steenes II*]; *In re* Cherry, 963 F.3d 717, 720 (7th Cir. 2020).

bankruptcy proceeding over the debtor and the debtor's need to interact with the bankruptcy court during the bulk of the plan period. In addition to the potential for positive effects on access to bankruptcy, structuring debt adjustment bankruptcy along these lines reflects the reality that most debtors do not seek bankruptcy protection because of financial mismanagement or for strategic reasons. Those debtors should be able to realize the benefits of a financial fresh start and the resulting independence as quickly and completely as possible.

Part I of this Article sets forth the relevant statutory background. It gives most attention to chapter 13 of the Code because the vast majority of the cases discussing this issue have arisen under that chapter. It then explains that other debt adjustment bankruptcies arising under chapter 12 and the new small business bankruptcy provisions contain materially identical features. Part II discusses the four theories of the bankruptcy estate and explains that the estate termination theory both best reflects Congress's intent and best implements the policy goals of debt adjustment bankruptcy. Part III then explains why the default rule embodied in the estate termination theory is a sticky default rule. Part IV explains how early termination of the estate fits in with a broader theory of "light-touch" bankruptcy for consumers and small businesses.

I. THE DEBT ADJUSTMENT BANKRUPTCY BARGAIN

Congress has steadily expanded the availability of debt adjustment bankruptcies. Since February 2020, bankruptcy law has offered debt adjustment to three distinct categories of debtors. The oldest and by far the most widespread form of debt adjustment bankruptcy is chapter 13. Chapter 13 dates back to the enactment of the Code in 1978. It is available to individuals who earn regular income and have a total of less than approximately $1.7 million in secured and unsecured debt.[18] An individual whose debts arise from running an unincorporated business may file for chapter 13; the vast majority of chapter 13 cases, however, involve individual consumer debtors.

Congress next added chapter 12 to the Code. Chapter 12 has been available to family farmers and fishermen since 1986.[19] Chapter 12 cases, therefore, concern small businesses, albeit businesses of a specialized kind; the debtor may, as a technical matter, be either the business owner or the corporation or

[18] The debt limits are $419,275 in noncontingent, liquidated unsecured debt and $1,257,850 in noncontingent liquidated secured debt. 11 U.S.C § 109(e) (2019). The debt limits are updated triennially. *Id.* § 104(a).

[19] *Id.* § 109(f).

partnership owned by the family farmer or fisherman.[20] Since February 2020, chapter 12 has been available to family farms with up to $10 million in debt.[21] Again, the chapter 12 debtor must earn regular income.[22]

The newest form of debt adjustment bankruptcy is for small business debtors. The Code defines a small business as a business with less than $2.7 million in noncontingent and liquidated debt.[23] Those businesses may take advantage of a new subchapter V added to chapter 11 of the Code.[24] Prior to February 2020, chapter 11 contained some special provisions applicable to small businesses, but those provisions did not disturb the central mechanics of traditional chapter 11, including most importantly, the absolute priority rule, or the rule that the business owner could not keep any value in the bankruptcy case until all of her creditors are paid in full.[25] Subchapter V now makes available a form of bankruptcy for such businesses modeled on chapter 12 of the Code—and by extension chapter 13—although one that includes a number of variations from its two progenitors.[26]

At heart, all three forms of debt adjustment bankruptcy share the same structure. That structure reflects a basic bargain between a debtor and her creditors. The debtor may retain both ownership and possession of all her property. That distinguishes debt adjustment bankruptcy from other forms of bankruptcy. In contrast, in a chapter 7 bankruptcy case non-exempt property is liquidated for the benefit of the debtor's creditors by a chapter 7 trustee, while in a traditional chapter 11 case, the value of shareholders' ownership rights in a reorganizing business may be used to repay the business's creditors.[27] In debt adjustment bankruptcy, in exchange for being able to keep her prepetition property, the debtor agrees to commit her projected disposable income pursuant to a court-approved plan over an up-to-five-year period towards paying back prepetition creditors.[28] Creditors recover more by virtue of these payments than

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[20] *Id.* §§ 101(18), (19A).

[21] *Id.* § 101(18). The debt limits for family fishermen are smaller. *Id.* § 101(19A).

[22] *Id.* § 109(f).

[23] *Id.* § 101(51D). This limit has been temporarily raised to $7.5 million by the CARES Act. *Id.* § 1182.

[24] *See supra* text accompanying note 3.

[25] *See* 11 U.S.C. § 1116.

[26] *See* Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 AM. BANKR. L.J. 571, 575 (2019).

[27] 11 U.S.C. § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."); *see also id.* §§ 1207(b), 1185(b) (same); *but see id.* § 704(a)(1) ("The trustee shall—collect and reduce to money the property of the estate for which such trustee serves . . . .").

[28] *Id.* § 1322(a)(4); *see, e.g.*, Hamilton v. Lanning, 560 U.S. 505, 508 (2010).

if the debtor's property were liquidated.[29] If the debtor successfully completes all plan payments, she receives a discharge of most categories of debt provided for under the plan and thus exits bankruptcy keeping all of her property.[30]

A. Debt Adjustment Under Chapter 13

This section will explain the three core components of any debt adjustment bankruptcy—the bankruptcy estate, the automatic stay, and the plan of reorganization. The section begins with chapter 13 of the Code. Chapter 13 is the oldest of the three forms of debt adjustment bankruptcy and is overwhelmingly the most commonly resorted to by debtors.[31] Hundreds of thousands of debtors file chapter 13 petitions each year; at most a few hundred family farmers reorganize annually under chapter 12.[32] For that reason, the vast majority of decisions analyzing the lifespan of the bankruptcy estate arise out of chapter 13 cases. After discussing the estate, stay, and plan in the context of chapter 13, this section will show that each of these features is replicated in both chapter 12 of the Code and subchapter V of chapter 11.

1. The Chapter 13 Estate and the Automatic Stay

One essential feature of chapter 13 cases is the estate. The filing of a bankruptcy petition, whether under chapter 7 or chapter 13 of the Code, creates a bankruptcy estate.[33] The estate is a fictitious legal entity that takes title to the debtor's property and subjects it to bankruptcy court jurisdiction, supervision, and protection. In a chapter 7 case, the estate is composed of "all legal or equitable interests of the debtor in property as of the commencement of the case."[34] Those are the assets that the chapter 7 trustee may marshal and distribute to the debtor's prepetition creditors. In a chapter 7 case, therefore, the debtor turns over all of his property, except for property protected by a federal or state law exemption,[35] to the trustee at the time the bankruptcy petition is filed.[36] In a chapter 13 case, the estate comprises not only property the debtor owns "as of

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[29] *See* 11 U.S.C. §§ 1325(a)(4), 1225(a)(4), 1191(a)–(b).

[30] *Id.* §§ 1328, 1228, 1192.

[31] Greene, Patel & Porter, *supra* note 2, at 1032.

[32] *Id.*; Lowdermilk, *supra* note 12, at 179–80 n. 6 (collecting data).

[33] 11 U.S.C. §§ 541, 1306.

[34] *Id.* § 541(a)(1).

[35] *Id.* § 522(b)(1) (providing that "[n]otwithstanding section 541," an individual debtor may exempt certain property from the bankruptcy estate); *see also id.* § 522(d) (listing federal exemptions); *id.* § 522(b)(3) (incorporating state law exemptions).

[36] *Id.* § 704(a)(1).

the commencement of the case,"[37] but also "all property . . . that the debtor acquires . . . before the case is closed, dismissed, or converted . . . whichever occurs first,"[38] and "earnings from services performed by the debtor after the commencement of the case, but before the case is closed, dismissed, or converted."[39] Unlike in chapter 7, however, the chapter 13 debtor remains in possession of all property of the estate,[40] and has limited rights to use and deal with that property.[41]

At the same time as the bankruptcy petition is filed and the estate is created, the automatic stay goes into effect.[42] The automatic stay "gives the debtor a breathing spell" from the collection efforts of prepetition creditors.[43] To serve that goal, the automatic stay prohibits, inter alia: "the commencement or continuation" of any "action or proceeding against the debtor that was or could have been commenced before the commencement of the case . . . or to recover a claim against the debtor that arose before the commencement of the case;"[44] the enforcement of a judgment obtained prepetition;[45] any act to create, perfect, or enforce a lien securing a prepetition claim;[46] and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case."[47]

The automatic stay plays a second critical role, preserving the bankruptcy estate so that assets remain available to be distributed to creditors or otherwise to be disposed of in accordance with bankruptcy principles.[48] The key provision through which this goal is implemented is section 362(a)(3) of the Code. That subsection prohibits "any act to obtain possession of property of the estate … or to exercise control over property of the estate;"[49] a companion subsection prohibits acts to create, perfect, or enforce a lien against property of the estate.[50] The most important effect of these subsections is to extend the automatic stay to

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37 *Id.* § 541(a)(1).
38 *Id.* § 1306(a)(1).
39 *Id.* § 1306(a)(2).
40 *Id.* § 1306(b).
41 *See In re* Seely, 492 B.R. 284, 290 (Bankr. C.D. Cal. 2013); *In re* Pisculli, 426 B.R. 52, 65–66 (E.D.N.Y. 2010); 8 COLLIER ON BANKRUPTCY ¶ 1303.02 (16th ed. 2020).
42 11 U.S.C. § 362(a).
43 *See* Kimbrell v. Brown, 651 F.3d 752, 755 (7th Cir. 2011).
44 11 U.S.C. § 362(a)(1).
45 *Id.* § 362(a)(2).
46 *Id.* § 362(a)(5).
47 *Id.* § 362(a)(6).
48 *See* 3 COLLIER ON BANKRUPTCY ¶ 362.03 (16th ed. 2020).
49 11 U.S.C. § 362(a)(3).
50 *Id.* § 362(a)(4).

a debtor's postpetition creditors. Prepetition creditors are already barred by the remaining provisions of section 362(a) from taking steps to collect on their claims. The stay of acts against the estate is treated somewhat differently by the Code than the remaining provisions of the automatic stay.[51] The Code provides that the stay, as created by these provisions, "continues until such property is no longer property of the estate. . . ."[52] The stay against other types of collection efforts continues until the case is closed or dismissed, or until the individual debtor receives a discharge.[53] A creditor may obtain relief from the automatic stay from the bankruptcy court for cause.[54] Nonetheless, the stay gives effect to a weighty bias in favor of preserving the status quo during bankruptcy cases, preventing creditors from disturbing that status quo without, at a minimum, subjecting their case for so doing to bankruptcy court scrutiny.[55]

Indeed, the protections of the automatic stay are remarkably comprehensive. They upend the way in which creditors deal with debtors. A landlord may be prohibited from taking steps to dispossess any tenant with an interest in the property they occupy—potentially even a tenant at sufferance or other occupant who, absent bankruptcy, could be evicted post-haste.[56] A municipal government whose ordinary practice is to impound the vehicles of residents who are delinquent on parking tickets will face sanctions if it knowingly boots the car of a chapter 13 debtor while the vehicle remains property of the estate.[57] The automatic stay is thus of enormous importance to prospective debtors. Because section 362(a)(3) of the Code ties the scope of the stay's protections, in part, to the extent of the bankruptcy estate, the reach of the chapter 13 estate itself is a question of great practical importance for chapter 13 debtors and their creditors.

Just as the Code protects the debtor by subjecting property subsumed into the bankruptcy estate to the automatic stay, it also constrains the debtor. Property of the estate is subject to the supervision of the bankruptcy court. The court must grant leave for any use or sale of estate property outside the ordinary course of business.[58] Section 1303 of the Code provides that, in chapter 13, the right to seek permission for such a use or sale of estate property belongs exclusively to

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51 *See id.* § 362(c)(1).

52 *Id.*

53 *Id.* § 362(c)(2).

54 *Id.* § 362(d)(1).

55 *See In re* Denby-Peterson, 941 F.3d 115, 126 (3d Cir. 2019).

56 *See* 3 COLLIER ON BANKRUPTCY ¶ 362.03[5] n. 46 and accompanying text (16th ed. 2020) (citing Convenient Food Mart v. Convenient Indus. Of Am., Inc., 968 F.2d 592, 594 (6th Cir. 1992); *In re* 48th Street Steakhouse, Inc., 835 F.2d 427, 430–31 (2d Cir. 1987)).

57 *See In re* Fisher, 198 B.R. 721, 722–23 (Bankr. N.D. Ill. 1996).

58 11 U.S.C. § 363; *see id.* § 1303.

the debtor and not to the chapter 13 trustee.[59] Nothing in chapter 13 explicitly authorizes most debtors to use property of the estate in the ordinary course to pay routine expenses,[60] but courts assume the debtor has that power.[61] At the beginning of the bankruptcy case all of the debtor's property is stripped from him and absorbed into the bankruptcy estate. Without the power to make ordinary course dispositions from the bankruptcy estate, the debtor would have no power to buy groceries, make rent, or pay other household expenses. Nonetheless, bankruptcy courts guard property of the estate, and may impose sanctions on debtors who too freely dispose of estate assets.[62]

The chapter 13 estate is vital in one more respect: the boundaries of the estate play a key role in determining the extent of bankruptcy court jurisdiction. Bankruptcy courts have jurisdiction over proceedings "arising under title 11, or arising in or related to cases under title 11."[63] The first two bases for jurisdiction involve different types of proceedings with some special relationship to bankruptcy.[64] The third, and broadest, basis for bankruptcy jurisdiction is "related to" jurisdiction. "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)[,] and which in any way impacts upon the handling and administration of the bankrupt estate."[65] Whether an asset remains within the bankruptcy estate therefore largely determines whether the bankruptcy court may exercise jurisdiction over disputes regarding that asset.[66] Finally, while

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59 *Id.* § 1303.

60 For business debtors in both chapter 11 and chapter 13, section 363(c) of the Code authorizes the trustee or debtor in possession to enter into transactions and use property of the estate in the ordinary course of business without court permission. Section 1304 grants the section 363(c) power to a chapter 13 debtor "engaged in business." *Id.* § 1304(b). There is thus a plausible negative inference that a non-commercial debtor does not have such powers—or at least, that the chapter 13 debtor cannot exercise them exclusively, independent of the trustee. There is no equivalent in chapter 13 of section 1107 of the Code, which provides a blanket authorization to the chapter 11 debtor to operate its business. *Id.* § 1107(a).

61 *E.g.*, *In re* Seely, 492 B.R. 284, 290 (Bankr. C.D. Cal. 2013); *In re* Pisculli, 426 B.R. 52, 66 (E.D.N.Y. 2010) (debtor may use estate property for "ordinary and necessary living expenses, provided such use is not in bad faith"); *see* 8 COLLIER ON BANKRUPTCY ¶ 1303.02 (16th ed. 2020).

62 *See, e.g.*, *In re Pisculli*, 426 B.R. at 59–66; *In re* Fatsis, 405 B.R. 1, 10–11 (B.A.P. 1st Cir. 2009).

63 28 U.S.C.A. § 1334(b); *see id.* § 157.

64 So-called "arising under" jurisdiction extends to rights created by the Code itself. *See* CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 195 n.6, 196 (3d Cir. 1999); *In re* Wilshire Courtyard, 729 F.3d 1279, 1285 (9th Cir. 2013). "Arising in" jurisdiction extends to proceedings that "would have no existence outside of a bankruptcy case." *In re Wilshire*, 729 F.3d at 1285; *see In re* Marcus Hook Dev. Park, Inc., 943 F.2d 261, 267 (3d Cir. 1991).

65 Pacor Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984).

66 *See In re* Fietz, 852 F.2d 455, 456–59 (9th Cir. 1988). In *Fietz*, Dale and Gloria, a former husband and wife held claims against the same defendant. *Id.* at 456. Gloria claimed that California's community property doctrine meant that both were swept into the estate created when Dale filed a chapter 13 bankruptcy case. *Id.* at 458. Gloria sought to assert her claim as a crossclaim in litigation before the bankruptcy court. *Id.* at 456. The

bankruptcy courts frequently exercise concurrent jurisdiction with other courts, the Judiciary Code provides that the bankruptcy forum has exclusive jurisdiction over property of the estate.[67]

2. *The Chapter 13 Plan*

The most significant feature of every chapter 13 case is the plan. Promptly after the initiation of a chapter 13 bankruptcy case, the debtor is required to file a plan.[68] Generally, a debtor is required to commit all of her projected disposable income to funding the plan, typically for a period of three to five years.[69] The plan must pay creditors at least as much as they would have received in a liquidation.[70] Where form chapter 13 plans are available, the plan proposed by the debtor must use the prescribed form.[71] The bankruptcy court will confirm the plan if it meets all of the requirements set forth in the Code.[72] The chapter 13 trustee distributes all funds received from the debtor to the creditors according to the terms of the confirmed plan.[73] Absent special circumstances, and excluding administrative expenses (which, in a chapter 13 case, typically comprise the debtor's attorneys' fees) only prepetition debts are included within a chapter 13 plan.[74] Postpetition creditors do not, therefore, as a general matter, receive distributions from the chapter 13 trustee.[75]

Ninth Circuit found, however, that Gloria's claim had passed out of the bankruptcy estate in Dale's chapter 13 bankruptcy case upon confirmation of the plan. *Id.* at 458. For that reason, although the bankruptcy court could decide Dale's claim, it was unable to exercise jurisdiction over Gloria's claim, and was required—notwithstanding Gloria's apparent preference for resolution of her claim in the bankruptcy court alongside Dale's—to grant a motion to dismiss that claim. *Id.* at 458–59.

67 28 U.S.C.A. § 1334(e)(1)–(2).

68 11 U.S.C. § 1321 (2019); FED. R. BANKR. P. 3015(b) ("If a plan is not filed with the petition, it shall be filed within 14 days thereafter.").

69 11 U.S.C. §§ 1322(a)(1), 1325(b)(1)(B).

70 *Id.* § 1325(a)(4).

71 FED. R. BANKR. P. 3015(c), 3015.1.

72 11 U.S.C. § 1325(a)(1).

73 *Id.* § 1326(c).

74 *Id.* § 1322(a)(4) (plan may provide for payments of unsecured claims); *id.* § 501(a) (creditor may file proof of claim); *id.* § 101(10)(A) ("creditor" means entity that has a claim against the debtor arising at the time of or before filing of the bankruptcy case); *but see id.* § 1305 (limited circumstances under which postpetition creditors may file proof of claim); *id.* § 1322(a)(6) (plan may provide for payments of proofs of claim filed pursuant to § 1305). Some chapter 13 plans also provide for "conduit payment" of the debtor's ongoing monthly mortgage payments by chapter 13 trustee. AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 184–88 (2019).

75 The Bankruptcy Court for the Western District of Pennsylvania described why that must be the case:

> Prepetition creditors are bound by the provisions of a confirmed plan whether or not the claim of such creditor is provided by the plan and whether or not such creditor has objected to, accepted or rejected the plan . . . . In sharp contrast, postpetition creditors cannot be forced to participate

Confirmation of a chapter 13 plan decisively reorders the debtor's legal relationships. The debtor and every creditor are bound by the terms of the confirmed plan.[76] In effect, the plan is a contract between the debtor and his prepetition creditors.[77] The plan is also a final judgment of the bankruptcy court.[78] The res judicata effect of a confirmed plan ensures that the "balance of interests" struck at confirmation persists thereafter.[79]

In addition to the relationships between debtor and creditors, the plan impacts the chapter 13 estate. Section 1327(b) of the Code provides that "[e]xcept as provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."[80] A companion provision, section 1322(b)(9), instructs that the chapter 13 plan proposed by the debtor shall "provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity."[81] The precise meaning of those provisions, as the next section will discuss, has perplexed the courts for many years. The best and simplest explanation is that the Code contemplates that the debtor will regain title to all of her property from the bankruptcy estate after confirmation—of course, the debtor is still required to make plan payments out of future income to the trustee to satisfy creditors' claims.

Following confirmation, the plan may be modified at the request of the debtor, the trustee, or an unsecured creditor because plan payments are calculated based on a debtor's projected disposable income and changed circumstances may necessitate an adjustment of payment amounts.[82] If the debtor completes the plan, she receives a discharge.[83]

> in a Chapter 13 plan, although they may elect to do so voluntarily [under section 1305].

In re Weisel, 400 B.R. 457, 472 (Bankr. W.D. Pa. 2009).

76 *Id.* § 1327(a).

77 *See In re* Murphy, 474 F.3d 143, 148 (4th Cir. 2007) ("A confirmed Chapter 13 plan is 'a new and binding contract, sanctioned by the court, between the debtors and their pre-confirmation creditor[s].'") (quoting *In re* Penrod, 169 B.R. 910, 916 (Bankr. N.D. Ind. 1994)); *In re* Harvey, 213 F.3d 318, 321 (7th Cir. 2000); *In re* Oparaji, 698 F.3d 231, 238 (5th Cir. 2012) (a chapter 13 plan is an "exchanged for bargain between the debtor and the debtor's creditors"); *In re* Forte, 341 B.R. 859, 869–70 (Bankr. N.D. Ill. 2005) (discussing "contract between a debtor and creditors formed by confirmation of the chapter 13 plan.").

78 United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 269 (2010).

79 *In re Harvey*, 213 F.3d at 321.

80 11 U.S.C. § 1327(b).

81 *Id.* § 1322(b)(9).

82 *Id.* § 1325(b).

83 *Id.* § 1328.

Chapter 13 provides meaningful benefits to debtors by providing opportunities for them to keep their houses, cars, or other valuable prepetition assets that might be subject to liquidation in a chapter 7 case.[84] The Supreme Court has explained this basic bargain:

> Proceedings under Chapter 13 can benefit debtors and creditors alike. Debtors are allowed to retain their assets, commonly their home or car. And creditors, entitled to a Chapter 13 debtor's "disposable" postpetition income, § 1325(b)(1), usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation.[85]

But chapter 13 remains entirely voluntary.[86] A chapter 13 debtor possesses a non-waivable right to convert a bankruptcy case to chapter 7 at any time (assuming eligibility to be a chapter 7 debtor)[87] or to dismiss the bankruptcy case outright.[88] Other parties in interest may also move for conversion or dismissal of the bankruptcy case for cause, including the chapter 13 trustee, if the debtor defaults on her obligations under the plan.[89]

B. The Debt Adjustment Bargain for Businesses

Chapter 12 and subchapter V both share key features of chapter 13. The bankruptcy estate subsumes all the debtor's property, both prepetition and postpetition.[90] The same provisions of the automatic stay apply to provide the debtor personally with comprehensive protection against any attempt to collect a prepetition debt. But this only protects property of the estate, and not the debtor herself, from interference by postpetition creditors or others.

Similarly, the decisive legal moment in both a chapter 12 case and a small business subchapter V case is the confirmation of the plan. The plan binds all parties to the case.[91] As in chapter 13, confirmation of the plan vests all property of the estate in the debtor.[92] The plan, and indeed the plan confirmation process, may look somewhat different from chapter to chapter. Chapter 13 cases involve off-the-shelf plans presented to the bankruptcy court on pre-approved forms, and

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84 *See* Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015).
85 *Id.*
86 *See id.*
87 11 U.S.C. § 1307(a), (g).
88 *Id.* § 1307(b).
89 *Id.* § 1307(c).
90 *Id.* §§ 1207(a), 1186(a). Section 1186 differs from sections 1306(a) and 1207 in one key respect, detailed later in this Article. *See infra* Part II.B.
91 11 U.S.C. § 1227(a).
92 *Id.* §§ 1227(b), 1141(d).

it appears that plans under subchapter V will follow this pattern,[93] while a chapter 12 plan may be individually drafted and include more bespoke provisions. Chapter 13 and 12 plans are always subject to streamlined procedures; creditors do not vote on confirmation of the plan, but merely have the right to object if they believe some provision of the plan to be unlawful or that the plan as a whole is not feasible.[94] Subchapter V contemplates that creditors will vote on plans, but provides that a plan may be confirmed without creditor approval if it meets the statutory requirements.[95]

In structure, however, plans remain—in respects material to this analysis—the same under all three types of debt adjustment bankruptcy. The chapter 12 and subchapter V debtor, like the chapter 13 debtor, commit their projected disposable income to the repayment of creditors. Because the debtor in these cases is a business, projected disposable income is defined as any income "not reasonably necessary to be expended . . . for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor."[96] The plan may last no longer than five years, but must pay creditors at least as much as they would have received in a liquidation of the debtor's prepetition property.[97] Just as in chapter 13, from the beginning of the case, the debtor remains in possession of estate property and, at least initially, must secure court permission to deal with that property outside of the ordinary course of business.[98] As in chapter 13, it is unresolved whether this court oversight continues after the debtor's plan is confirmed and payments are in progress, or whether instead the debtor has the right to deal with that property freely.

II. THE LIFESPAN OF THE BANKRUPTCY ESTATE

In each of these variants of the debt adjustment bankruptcy model, courts must determine the fate of the bankruptcy estate upon confirmation of a plan. Current law is fractured. That is the case even though no such dispute exists in other types of bankruptcy cases. This Section will explain the dispute over the lifespan of the bankruptcy estate in debt adjustment cases. Once again, it will begin with chapter 13 of the Code, before returning to look at the same dispute

[93] A standard form plan has been approved for use in subchapter V cases. U.S. COURTS, B 425A, PLAN OF REORGANIZATION FOR SMALL BUSINESSES UNDER CHAPTER 11 (2020), https://www.uscourts.gov/forms/small-business-forms/plan-reorganization-small-business-under-chapter-11.

[94] 11 U.S.C. §§ 1325, 1225.

[95] *See id.* § 1191.

[96] *Id.* § 1191(d); *see id.* § 1225(b)(2)(B) (same).

[97] *Id.* §§ 1129(a)(7), 1191, 1222, 1225.

[98] *Id.* §§ 1186(b), 1207(b); *see id.* 363(b).

in the context of chapter 12 and subchapter V of chapter 11. At its root, the question of the lifespan of the bankruptcy estate is one of statutory interpretation, and accordingly that is the primary focus of this Section. For that reason, it is perhaps helpful at the outset to say a few words on the vexed question of statutory interpretation in bankruptcy. Bankruptcy is, to some extent, its own world. Bankruptcy courts are well-known for preferring purposivist interpretations of the Code, and indeed, for creative decision-making that departs from the underlying statutory text entirely.[99] In effect, a popular narrative runs, bankruptcy courts update the Code in real time, allowing for innovations that facilitate efficient and successful reorganizations but that Congress can scarcely be said to have intended or provided for in its original 1978 enactment.[100] While purposivist interpretation has far from disappeared in the higher courts,[101] the focus on the statutory text, particularly in the Supreme Court, has become increasingly prominent.[102] Although a simplification, it is not wholly unfair to characterize the key dynamic of bankruptcy litigation as a push-pull between the creative policy-driven rulings of the bankruptcy courts and the cold shock of textualism that douses those courts in those rare cases in which a bankruptcy dispute reaches the summit of the legal system.[103]

This Article does not fully embrace either approach. It more closely aligns itself with a group of the Supreme Court's recent bankruptcy decisions that, although they may certainly be characterized as textualist decisions, are focused on a structural approach to the Code.[104] These decisions focus on the way the

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[99] *See generally* Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 1–5 (2006) (discussing the debate over purposivism and textualism in the bankruptcy context).

[100] *Id.* at 1–2 (listing "common[] if contested" practices which, lacking specific statutory authorization, bankruptcy courts have relied on equitable powers to approve).

[101] *See generally* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1275–78 (2020) (challenging the narrative that "purposivism is dead or dying"); Judge Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304–06 (2017) (detailing Justice Kagan's speech on Justice Scalia and his influence on the adoption of textualism by federal jurists).

[102] Krishnakumar, *supra* note 101, at 1277–78.

[103] The most forceful endorsement of textualism in a recent Supreme Court bankruptcy case was in *Siegel*, in which the Supreme Court admonished the bankruptcy court for exercising its broad statutory and inherent powers, and further held that it "may not contravene specific statutory provisions". Law v. Siegel, 571 U.S. 415, 421 (2014); *see also* Schwab v. Reilly, 560 U.S. 770, 778 (2010) ("We conclude that the Court of Appeals' approach fails to account for the text of the relevant Code provisions and misinterprets our decision in Taylor"); *but see* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 375–76 (2007).

[104] *See, e.g.*, Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652 (2019); Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017); *and* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012); *cf.* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 347–50 (1995) (describing a "holistic" approach to interpretation that "derives from examination of the statute's overall structure" and arguing that "[t]he structural approach is also textualist").

different provisions of the Code fit together, such that the resulting decision gives effect to a statutory scheme that makes sense of the Code as a whole. In each case, the Court takes the text of the statute seriously. But it also assumes that Congress, in enacting the Code, "ha[d] a rational plan, that statutes are meant to *work*,"[105] and thus, that understanding the Code means understanding the theories based on which it hangs together. So too does this Article. Presented in this Article is a theory of the bankruptcy estate in debt adjustment bankruptcy cases that I believe fits more neatly with the statutory text than any other proposed theory. Beyond that, however, this Article also presents a broader theory of how Congress intended debt adjustment bankruptcy to operate and identifies how the individual components of each debt adjustment bankruptcy case fit together to make a sensible whole.

A. The Life of the Chapter 13 Estate

That courts dispute the fate of the bankruptcy estate in chapter 13 cases might seem surprising. After all, bankruptcy courts have easily been able to reach consensus on the lifespan of the estate elsewhere. In chapter 7, any estate property is liquidated and distributed to creditors (or, if of inconsequential value, abandoned back to the debtor), after which the estate ceases to exist.[106] In the chapter 11 context, although the statute does not expressly say so, courts agree that plan confirmation presumptively terminates the estate.[107] In fact, chapter 11 specifies, in language that exactly parallels one of the provisions of chapter 13, that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all property of the estate in the debtor."[108] That provision is universally understood to mean that upon confirmation the bankruptcy estate ceases to exist, property may no longer enter it, and the property in the estate is either distributed to creditors under the plan or revested in the debtor.[109] In other words, the fate of the bankruptcy estate in chapter 7 and in traditional chapter 11 is uncontroversial.[110]

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105 *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 91 (2015).

106 *See* 11 U.S.C. § 727(b) (2019) (describing the effect of discharge).

107 *See, e.g.*, *In re* Hillis Motors, 997 F.2d 581, 587 (9th Cir. 1993); *In re* Resorts Int'l, Inc., 372 F.3d 154, 164–65 (3d Cir. 2004) (chapter 11 estate ceases to exist upon confirmation).

108 11 U.S.C. § 1141(b).

109 *See In re Resorts Int'l*, 372 F.3d at 164–165; *In re Hillis Motors*, 997 F.2d at 587 (pursuant to section 1141(b), "confirmation usually terminates the existence of the estate").

110 That does not mean that the business of bankruptcy is entirely done in chapter 11 cases upon confirmation. Sometimes assets may be transferred to a liquidating trust, so a trustee can continue the business of reducing them to cash in order to pay creditors even after the bankruptcy process itself is formally over. But it is the trust instruments, rather than the law of bankruptcy or the bankruptcy estate, that prescribes the trustee's

The same cannot be said for the fate of the bankruptcy estate in chapter 13. Rather, four theories have been advanced, each largely predicated on its own distinct understanding of the basic logic of chapter 13, and each presenting radically different consequences for the debtor, creditors, and the bankruptcy court during the post-confirmation period. In brief introduction, I will defend the estate termination theory: the notion that chapter 13 works exactly as in chapter 11. At plan confirmation, all property in the chapter 13 estate is transferred absolutely to the chapter 13 debtor and the estate terminates. Its polar opposite is the estate preservation theory, which states that no property is actually transferred out of the bankruptcy estate until the very end of the case. One intermediate approach is the estate reconciliation theory, which states that all property of the estate vests in the debtor at plan confirmation. Rather than terminating at plan confirmation, however, the estate continues to exist and is refilled with any property the debtor acquires thereafter, including all of the debtor's post-confirmation wages. Finally, the estate transformation theory, a similar intermediate approach, states that all property of the estate is transferred to the debtor at plan confirmation except for property that is necessary to the fulfilment of the chapter 13 plan.

Professor David Gray Carlson forcefully critiqued the estate preservation and estate reconciliation theories.[111] Carlson demonstrated how both theories do substantial violence to the language of the Code, and both fail as a matter of bankruptcy policy. Carlson defended a narrow version of the estate transformation approach, in which the estate is largely terminated at plan confirmation but continues to have authority over property that is actually paid by the chapter 13 debtor to the trustee pursuant to the plan. I am largely in agreement with Carlson's criticisms of the estate preservation and estate reconciliation theories, but I posit that Carlson does not go far enough. The simplest and most elegant theory of the chapter 13 estate is that it terminates in its entirety upon confirmation of the plan, absent some specific contrary court order. After reviewing the most substantial flaws in the estate preservation and estate reconciliation theories, this Section explains why the estate termination theory is preferable to the limited estate transformation theory proposed by Carlson.

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actions in such a case. *See infra* note 167 and accompanying text. The question, therefore, is whether the post-confirmation world in chapter 13 looks similar—with a debtor's continuing obligations governed not by bankruptcy law itself, but by non-bankruptcy principles according to some agreement hashed out during the bankruptcy case—or whether in chapter 13 the bankruptcy case itself, and the remit of bankruptcy law proper, in continues onward following confirmation.

[111] *See* Carlson, *supra* note 9, at 233–44.

1. *Estate Preservation*

The stakes are perhaps best illustrated by beginning with the most expansive theory of the chapter 13 estate—the so-called "estate preservation theory." This theory states that the chapter 13 estate survives plan confirmation and continues in full effect until the conclusion of the chapter 13 case, whether that means the completion of the debtor's chapter 13 plan payments followed by entry of a discharge, dismissal of the case, or conversion to chapter 7. Throughout that entire period, all of the debtor's property remains property of the chapter 13 estate, regardless of whether acquired before the bankruptcy petition was filed, during the pre-confirmation period, or after confirmation of the plan.

Section 362(a)(3) of the Code prohibits creditors from exercising control over property of the estate.[112] Therefore, under the estate preservation theory, all of the debtor's property is subject to the protection of the automatic stay not only vis-à-vis prepetition creditors provided for under the plan, but also against postpetition creditors for the entire up-to-five year period of the bankruptcy case. Even if the debtor fails to pay postpetition obligations as they become due, postpetition creditors may not look to estate property unless they first appear in the bankruptcy case and file a motion seeking permission to do so from the bankruptcy court.[113] The debtor is constrained from freely dealing with the property; at a minimum, he must seek court approval for any disposition of the property outside of the ordinary course of business.[114] The property may generate administrative expenses throughout that same period, entitled to priority payment.[115] And disputes regarding that property, at least in the first instance, are decided by the bankruptcy court.[116]

Forcing creditors to go to the bankruptcy court post-confirmation is opposite to what is required in a traditional chapter 11 case. Following confirmation, under the ordinary rules of chapter 11 the bankruptcy estate "ceases to exist"[117]

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[112] 11 U.S.C. § 362(a)(3) (2019).

[113] Precisely this question was at issue in the litigation giving rise to the Seventh Circuit's decision in *Steenes I*, 918 F.3d 554 (7th Cir. 2019). The debtors in that case took the position that the Bankruptcy Code enabled them to postpone making any payments towards any parking tickets they were issued after the date of filing of the bankruptcy case until completion of the chapter 13 plan; the City of Chicago, in the meantime, could not take its ordinary steps to respond to non-payment of tickets—ordinarily, immobilizing and impounding the debtors' vehicles—without first securing an order granting relief from stay from the bankruptcy court. *Id.* at 557–58.

[114] 11 U.S.C. § 363(b)(1).

[115] *Id.* § 503(b)(1)(A) (providing that "the actual, necessary costs and expenses of preserving the estate" may be entitled to administrative expense status.); *cf. Steenes II*, 942 F.3d 834, 836 (7th Cir. 2019).

[116] *See supra* notes 63–67 and accompanying text.

[117] *In re* Resort's Int'l, Inc., 372 F.3d 156, 165 (3d Cir. 2004).

absent a specific order from the bankruptcy court that preserves the estate for a limited purpose.[118] The estate preservation theory argues that chapter 13 must differ from traditional chapter 11 in order to remain faithful to the text of the Code, particularly section 1306. That provision states that "[p]roperty of the estate includes . . . earnings from services performed by the debtor after commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first."[119]

The apparent breadth of section 1306 has led some bankruptcy courts to conclude that throughout the bankruptcy case the chapter 13 estate must persist in its original form as a repository for all of the debtor's property. As one bankruptcy court observed:

> the clear language of § 1306 demonstrates that *confirmation* of a Chapter 13 plan is not relevant to determining whether property is or is not property of the estate. The relevant events in this determination are commencement of the case and either dismissal, closing or conversion of the case. If Congress had intended for confirmation to so drastically affect the expansive definition of property of the estate found in § 1306, it knew how to draft such a provision.[120]

Such an interpretation of the Code is hard to square with section 1327's direction that property of the estate "vests" in the debtor.[121] Courts adopting the estate preservation theory generally acknowledge that the ordinary meaning of "vesting" of estate property in the debtor is to transfer that property to the debtor and thus out of the bankruptcy estate.[122] But they conclude that "vest" must mean something else in the context of chapter 13.[123] "Vesting" is thus argued to mean a "fixing of rights" to property rather than a "transfer" of that property to the debtor.[124] Thus, as viewed by some courts, the debtor is vested with property of the estate after plan confirmation because he then acquires "authority . . . to propose a sale or encumbrance of estate property. . . ."[125] In the view of other

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118 *See, e.g.*, *In re* Neptune World Wide Moving, Inc., 111 B.R. 457, 462–63 (Bankr. S.D.N.Y. 1990).

119 11 U.S.C. § 1306(b).

120 *In re* Aneiro, 72 B.R. 424, 429 (Bankr. S.D. Cal. 1987).

121 11 U.S.C. § 1327(b)

122 *In re* Fisher, 198 B.R. 721, 733 (Bankr. N.D. Ill. 1996), *rev'd*, 203 B.R. 958 (N.D. Ill. 1997); *see* Security Bank of Marshalltown, Iowa v. Neiman, 1 F.3d 687, 691 (8th Cir. 1993) (acknowledging that the effect of plan confirmation in chapter 11 cases is to "vest" all property of the estate, transforming such property into property of the debtor).

123 *Neiman*, 1 F.3d at 691 ("We think that the opposing line of cases is 'premised upon the mistaken belief that revesting under § 1327(b) transforms property of the estate into property of the debtor.'") (quoting *In re Aneiro*, 72 B.R. at 428–29).

124 *In re Fisher*, 198 B.R. at 733.

125 *Id.*

courts, the debtor is vested with property of the estate after plan confirmation because the debtor is then acquires "the right to future of enjoyment of the assets in that estate" "once he faithfully completes his obligations under the plan and is entitled to the discharge."[126] In either case, the estate, however, remains intact after confirmation.[127]

Although the chief argument in favor of the estate preservation theory is that it is textually preferable, giving "full effect" to section 1306, bankruptcy courts have also advanced policy arguments in favor of a long-lived chapter 13 estate.[128] Fundamental to the position of those courts is the right of the chapter 13 debtor to convert his bankruptcy case to chapter 7.[129] When a debtor converts his bankruptcy case from chapter 13 to chapter 7, he agrees to permit liquidation of his property rather than continuing to repay his creditors over time from future income; property of the estate in the converted chapter 7 case consists of property, "as of the date of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion."[130] Nothing in the text of the Code, therefore, requires there to be an estate in existence at the time of conversion to provide assets for the chapter 7 trustee to liquidate.[131] Property that the debtor owned at the time of the original filing of his chapter 13 bankruptcy case becomes property of the estate in the converted chapter 7 case regardless of whether the chapter 13 estate exists at the time of conversion. But, because dispositions of estate property outside the ordinary

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126 Woodard v. Taco Bueno Restaurants, Inc., 2006 WL 3542693, at *26 (N.D. Tex. Dec. 8, 2006). The Bankruptcy Court for the District of New Jersey subscribes to a similar view:

> At confirmation, the "vesting" of property of the estate in the debtor, as provided in § 1327(b), means that the debtor's rights and interest in the property become fixed as of the confirmation of the plan, and are effected when the provisions of the debtor's Chapter 13 plan are satisfied. . . . The act of confirmation 'vests' all of the property of the estate in the debtor to allow the debtor to take the necessary steps to comply with the confirmed plan. The statute does not state that the event of confirmation changes the characterization of the property from property of the estate into property of the debtor. Instead, it merely confirms the debtor's ability to utilize property of the estate, notwithstanding that designation, in satisfaction of the debtor's obligations under the confirmed plan.

In re Tarby, 2012 WL 1390201, at *4 (Bankr. D.N.J. Apr. 20, 2012) (internal citations omitted).

127 *See In re Fisher*, 198 B.R. at 733.

128 *Id.* at 727–31.

129 *See, e.g.*, *id.* at 731.

130 11 U.S.C. § 348(f)(1)(A) (2019).

131 In a case of bad faith conversion from chapter 13 to chapter 7, the Bankruptcy Code *does* provide that property of the estate in the new chapter 7 case shall comprise whatever property existed in the chapter 13 estate at the time of conversion. *Id.* § 348(f)(2). As will be discussed below, this provision does cause some difficulties for the estate termination theory which this Article defends. *See infra* note 177 and accompanying text. The rarity of post-confirmation bad faith conversions from chapter 13 to chapter 7, and the availability of other remedies to address such bad faith when it occurs, help to alleviate these problems.

course require the bankruptcy court's approval pursuant to section 363 of the Code,[132] keeping property within the estate after conversion prevents the debtor from dissipating it while his chapter 13 case remains ongoing.[133] "[B]ecause of the continuing right of the debtor to convert a Chapter 13 case after plan confirmation, the role of the estate as a reserve source of creditor payments continues after confirmation . . . the estate itself must continue, subject to the protections of the Code, undiminished by the confirmation."[134]

Carlson's article comprehensively sets forth reasons for rejecting the estate preservation theory.[135] Most importantly, the estate preservation theory seems too implausible as a textual matter to pass muster. Describing the vesting of property of the estate as merely conferring upon the debtor a right to possession of such property, or to make dispositions of that property subject to bankruptcy court approval, does not give adequate meaning to the statutory language. The debtor already has each of those rights during the pre-confirmation period.[136] Section 1306(b) confirms the debtor's right to remain in possession of property of the estate at that time, and nothing in sections 363(b) or 1303 indicates that the right of a debtor to propose dispositions of property of the estate is one that comes into effect only after plan confirmation.[137] Moreover, the narrow reading of "vest" proposed by advocates of the estate preservation theory is entirely inconsistent with what that term is universally understood to mean when used elsewhere in the Code.[138] In short, "'vesting' is a clumsy way of saying 'transferring absolutely.' Otherwise, 'vesting' means nothing at all."[139]

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132 *See supra* note 13 and accompanying text.

133 The *Fisher* bankruptcy court recited the consequences that would follow from permitting an "emancipated" chapter 13 debtor post-confirmation to "treat property of the estate as if no bankruptcy had ever occurred." *In re Fisher*, 198 B.R. at 731. If that were the case,

> after confirmation, a Chapter 13 debtor could (1) sell any unencumbered assets, (2) expend funds outside the ordinary course, (3) incur any kind of credit, including credit secured by unencumbered assets, and (4) pay legal fees to bankruptcy counsel—all without notice to any party involved in the bankruptcy and with no opportunity for a court hearing. If the debtor were operating a business, there would be no need to report on its operation. And finally, postpetition creditors, like the City of Chicago in the present case, would be free to enforce claims against the debtor's property, again without any notice to parties involved in the bankruptcy.

Id.

134 *Id.* at 732.

135 Carlson, *supra* note 9, at 240–42.

136 *See supra* notes 58–62.

137 Carlson, *supra* note 9, at 241.

138 Carlson, *supra* note 9, at 242.

139 Carlson, *supra* note 9, at 242.

Nor is preserving the chapter 13 estate for the benefit of creditors in a future chapter 7 case sound policy. Such an approach is inconsistent with the fresh start—one of the most basic policies animating bankruptcy law—and the chapter 13 bargain. The chapter 13 debtor promises to devote all of his future disposable income to repayment of creditors in exchange for the right to retain the property he owns at the time he files for relief.[140] But under the estate preservation theory, he does not really "keep" that property. Instead, all of his property is subject to a five-year guardianship overseen by the bankruptcy court, not because such oversight is necessary to serve the purposes of his chapter 13 case, but as a safeguard in case he chooses to abandon chapter 13 and resort to chapter 7. Such oversight serves only to safeguard creditors against the substantially more remote possibility of a bad faith conversion. Because the converted chapter 7 estate, in most cases, encompasses only property that the debtor owned or possessed at the time the bankruptcy case was commenced, retaining all of the property that the debtor acquires after that time within the estate does not even serve the purpose of protecting creditors against an ordinary conversion.[141] The plain text of chapter 13 ensures that when a debtor completes his chapter 13 plan, the general body of creditors are better off than if he had originally pursued chapter 7 liquidation. Rejecting the estate preservation theory means imposing upon creditors some risk that, if the debtor later chooses to convert, they will receive less than they would have received in an earlier liquidation. But it is hardly unfair to require creditors to bear that risk. Those creditors also gained the benefit of the greater upside potential afforded by the debtor's decision to first attempt to seek relief under chapter 13.

2. *Estate Reconciliation*

The estate reconciliation theory attempts to grapple with the apparent inconsistency created by sections 1306 and 1327 of the Code more carefully than the estate preservation theory, although it too ultimately falls short.[142] The estate

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[140] *See* Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015) ("Proceedings under Chapter 13 can benefit debtors and creditors alike. Debtors are allowed to retain their assets, commonly their home or car.")

[141] 11 U.S.C. § 348 (2019).

[142] Courts that have adopted the estate reconciliation theory include the First Circuit, *Barbosa v. Solomon*, 235 F.3d 31, 35 (1st Cir. 2000), and the Eleventh Circuit, *In re Waldron*, 536 F.3d 1239 (11th Cir. 2008), as well as a substantial number of bankruptcy and district courts. *See also In re* Gonzales, 587 B.R. 363, 369 (Bankr. D.N.M. 2018) (noting the theory has "garnered a wide following" and citing cases); *In re* Wei-Fung Chang, 438 B.R. 77, 82–83 (Bankr. M.D. Pa. 2010); *In re* Powers, 435 B.R. 385, 389 (Bankr. N.D. Tex. 2010); *see generally* Peter Carpio & Jeffrey L. Cohen, *Modified Estate Transformation: When Does a Chapter 13 Estate Terminate*, 7 AM. BANKR. INST. L. REV. 213 (1999) (advocating for theory under label of modified estate transformation). The theory appears to have originated in the decision of the District Court for the Northern District of Illinois in *In re* Fisher, 203 B.R. 958 (N.D. Ill. 1997).

reconciliation theory acknowledges that to revest property of the estate in the debtor must mean to transfer that property to the debtor absolutely, such that the property exits the bankruptcy estate. [143] But it posits that revesting occurs only for property actually within the estate at the time the chapter 13 plan is confirmed.[144] Section 1327 means that at the time of plan confirmation, all of the property in the bankruptcy estate is transferred out of the estate and back to the debtor, leaving the bankruptcy estate empty. That property is no longer protected by the automatic stay, and the debtor may deal with it as he chooses. But section 1327 has no further effect after the time of plan confirmation. Section 1306 provides that the estate includes property acquired by the debtor at any time "before the case is closed, dismissed, or converted."[145] The estate reconciliation theory argues, therefore, that after confirmation the estate refills with property that the debtor acquires from the date of confirmation forward.[146] Any property that the debtor acquires from the day after the plan is confirmed until the time his bankruptcy case is concluded becomes property of the estate. The debtor must apply for court permission to use that property outside of the ordinary course of business, just as he was obligated to do for all of his prepetition property during the period before plan confirmation. And, as property of the estate, property acquired after plan confirmation is protected by the automatic stay. In the view of its progenitor, the Northern District of Illinois in *Fisher*, this interpretation "reconciles the text of the governing statutes without contradicting the language of any provision and without fatally undermining any important policy considerations."[147]

But the claim that the estate reconciliation theory resolves the textualist conundrum posed by sections 1306 and 1327 does not hold water. Section 1327 vests "*all* of the property of the estate" in the debtor.[148] Nothing in section 1327, nor in the provisions of section 541 and 1306 that set forth what assets shall comprise property of the estate, indicates that the time at which that property is acquired should have any effect on whether that property is property of the

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[143] *See In re Fisher*, 203 B.R. at 962; Carpio & Cohen, *supra* note 142, at 230 (arguing that "property vesting in the debtor is no longer 'property of the estate.'").

[144] *See, e.g.*, *In re Fisher*, 203 B.R. at 962; *Barbosa*, 235 F.3d at 36–37 (holding that "property of the estate *at the time of confirmation* vests in the debtors free and clear of any claims from the creditors") (emphasis added).

[145] 11 U.S.C. § 1306(a)(1) (2019).

[146] *In re Waldron*, 536 F.3d at 1243 ("As one court has explained, some property of the estate is vested in the debtor at confirmation, under section 1327(b), but property acquired later vests in the estate, under section 1306(a), until the case ends or is converted" (citing *In re Fisher*, 203 B.R. at 962); *see also Barbosa*, 235 F.3d at 36–37.

[147] *In re Fisher*, 203 B.R. at 964.

[148] 11 U.S.C. § 1327(b) (emphasis added).

estate. The estate reconciliation theory, therefore, continues, albeit only in part, to disregard the clear direction to revest the debtor with his property set forth in section 1327(b).

An occasional rejoinder to this critique is that section 1327(b) cannot, at the time of plan confirmation, vest the debtor with earnings or other property that he has not yet acquired.[149] In other words, "property acquired after confirmation is not subject to § 1327(b) because it was not in existence at confirmation. Therefore . . . § 1306(a) must place this property in the estate."[150] But that cannot be correct. The law frequently recognizes that interests in after-acquired property can be transferred.[151] There is no reason why confirmation of a plan that vests in the debtor all property of the estate cannot transfer to the debtor rights to those same after-acquired assets.

Although textually unsatisfying, the estate reconciliation theory's real flaws are practical in nature. It poses formidable administrative difficulties. Imagine a debtor who files for bankruptcy with a bank account into which his monthly wages are deposited. Any cash that accumulates in the bank account during the pre-confirmation period revests in the debtor upon confirmation and is no longer property of the estate. But income the debtor earns following confirmation *is* property of the estate. Months after confirmation, however, as money has been spent and deposited, it will be all but impossible for the bankruptcy court—let alone a financially unsophisticated debtor—to know which funds are the debtor's free and clear, and which are property of the bankruptcy estate. The distinction, of course, matters. The debtor who wants to make a down payment on a new car must take care to secure bankruptcy court approval before using estate property for such a transaction but is perfectly free to use his own funds for that purpose.[152]

At root, the estate reconciliation theory simply makes little sense.[153] Debtors in chapter 13 cases frequently file for relief because they hope to keep valuable

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149 *In re Waldron*, 536 F.3d at 1243 ("New assets that a debtor acquires unexpectedly after confirmation by definition do not exist at confirmation and cannot be returned to him then."); *In re* Wei-Fung Chang, 438 B.R. 77, 83 (Bankr. M.D. Pa. 2010).

150 *In re Wei-Fung Chang*, 438 B.R. at 83.

151 For example, a debtor can grant a security interest in assets it will acquire in the future—in other words, a "floating lien". *See* U.C.C. § 9-204.

152 *In re Wei-Fung Chang,* 438 B.R. at 83 (concluding that property acquired post-confirmation is property of the estate, but noting that "it is unrealistic to expect a Chapter 13 debtor, who may retain possession of his property and property of the estate for as long as five years, to keep track of how each asset is titled to ensure that he does not dispose of estate property without court approval").

153 *See* Carlson, *supra* note 9, at 250 ("[I]f the debtor buys a car after the confirmation of the plan, the car belongs to the bankruptcy estate. The debtor dares not sell the car without court permission pursuant to section

assets—typically a home or a vehicle.[154] Those assets are returned to the debtor free and clear within weeks or months of his bankruptcy filing, as soon as his chapter 13 plan is confirmed. Absent a windfall, those assets are likely to be far more valuable than anything the debtor acquires in the post-confirmation period, while he is devoting his disposable income to the repayment of creditors under the plan. The estate reconciliation theory, therefore, does not even succeed at protecting the debtor like the estate preservation theory does. Postpetition creditors are free to pursue the debtor's house, car, or other prepetition property. Even so, it deviates from the simple rule of traditional chapter 11 in retaining after-acquired assets captive within the bankruptcy estate. "The Christmas after confirmation is a sad one under this theory, as the [estate] scoops up all the presents under the tree."[155] That retention, however, serves no readily discernible purpose. The debtor's fresh start is frustrated by the continued shadow of the estate, but the debtor still likely does not enjoy meaningful protection from postpetition creditors. If any property is to remain in the bankruptcy estate following confirmation, it must be pursuant to some more carefully calibrated rationale.

3. *Estate Transformation*

A third collection of theories, here described under the umbrella term of "estate transformation", holds that confirmation of the chapter 13 plan serves to transfer property of the estate to the debtor except for a limited category of property somehow related to fulfilment of the chapter 13 plan. The version of this theory most often adopted by bankruptcy courts argues that property of the estate revests in the debtor upon plan confirmation, except for property that is necessary for execution of the plan. A debtor with total monthly wages of $3,000 and a monthly payment under his chapter 13 plan of $500 might receive $2,500 each month absolutely, while $500 each month becomes property of the estate upon payment to the debtor. At some point, courts adopting this approach

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363(b). But, the preconfirmation car could be sold post-confirmation without court permission."). Even greater confusion abounds if one concludes that proceeds of the sale of the pre-confirmation vehicle, as assets acquired by the debtor after confirmation, become property of the estate. Carlson, *supra* note 9, at 250. Under that view, the debtor obtains, in effect, the right to deal only with the "first generation" of property he owned at the time of confirmation, but as soon as he sells property or exchanges one asset for another, section 1306 captures the new property for the estate and prevents him from any further dealings without first seeking court permission.

154 Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015).

155 *See* Carlson, *supra* note 9, at 250.

included the Eleventh Circuit and bankruptcy courts within that jurisdiction,[156] and, on one reading of the leading opinion, the Seventh Circuit.[157]

This approach suffers from similar practical flaws to the estate reconciliation theory. The debtor may frequently face great difficulty in actually understanding which of the assets he possesses are property of the estate, and which are his absolutely. There are several reasons for the debtor's confusion.

First, the criterion of "necessity" to execution of the plan may itself be difficult to apply.[158] The debtor will need to understand whether the "necessary" funds are limited to the precise amount of his monthly plan payment, or whether the bankruptcy court may find that it is necessary to retain additional funds within the estate to ensure that the debtor's ability to make plan payments is not disturbed by some unexpected expense.

Second, as with the estate reconciliation theory, even assuming the debtor and bankruptcy court are able to calculate what proportion of the debtor's wages or other income are necessary to the fulfilment of the plan and thus remain in the estate, actually identifying the amount of estate property within the debtor's

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156 Telfair v. First Union Mortgage Corp., 216 F.3d 1333, 1340 (11th Cir. 2000); *In re* Jemison, 2007 WL 2669222, at *5 (Bankr. N.D. Ala. 2007). The Eleventh Circuit later largely abandoned this approach in favor of the estate reconciliation approach. *See In re* Waldron, 536 F.3d 1239, 1243 (11th Cir. 2008)

157 *In re* Heath, 115 F.3d 521, 522–24 (7th Cir. 1997). In *Heath*, Judge Posner wrote in a short and somewhat cryptic opinion that the combined effect of sections 1306 and 1327 of the Code was that "while the filing of the petition for bankruptcy places all of the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan." *Id.* These dicta are at least consistent with the estate transformation approach—although the opinion can also plausibly be read as concluding, consistent with the approach advocated by this Article, that the chapter 13 estate ordinarily terminates in its entirety upon confirmation, but may be preserved post-confirmation by means of a specific provision included in the plan or confirmation order only to include property necessary to fulfilment of the chapter 13 plan. *Id.* ("[C]onfirmation of a plan vests *all* of the property of the estate *in the debtor* unless the plan provides otherwise") (emphasis in original).

158 The Bankruptcy Court for the Eastern District of Virginia discussed the difficulty of applying the necessity criterion:

> There is also a practicable problem inherent in limiting the post-confirmation estate only to property necessary for the success of the chapter 13 plan. What property is necessary for the success of the chapter 13 plan? In a joint case, in the absence of a wage order under § 1325(c), which debtor's wages are protected by the automatic stay? In an individual case where the debtor holds more than one job, which paycheck is necessary for the success of the chapter 13 plan? Which one is not protected by the automatic stay and is subject to garnishment? There is nothing that distinguishes the debtor's paycheck from the co-debtor's paycheck or the debtor's primary paycheck from his secondary paycheck.

In re Reynard, 250 B.R. 241, 248 (Bankr. E.D. Va. 2000). The District Court for the Southern District of Georgia arrived at a similar result. *See* Thompson v. Quarles, 392 B.R. 517, 522 (S.D. Ga. 2008) ("[I]t is unclear when the new asset is 'necessary' to fund the 'plan' and whether the 'plan' is the original, previously confirmed plan, or a modified version of the confirmed plan that accounts for the value of the post-petition cause of action.").

possession at any given time will frequently be an insurmountable task. Funds necessary to make plan payments have no "independent identity" that makes them readily distinguishable from other funds belong to the debtor.[159] This variant of the estate transformation theory is viable only in a world in which the debtor's assets are not comingled and property necessary to the fulfilment of the plan is carefully segregated from all the debtor's other property. Needless to say, this ideal is unlikely to reflect the reality in which most chapter 13 debtors manage their affairs.

Carlson defends a slightly different version of the estate transformation theory. Adopting the label of the "divestment theory," Carlson proposes that the chapter 13 estate terminates upon confirmation except for "funds the debtor successfully transmits to the chapter 13 trustee for the benefit of creditors."[160] This theory narrows the scope of the post-confirmation estate even further. The chapter 13 estate does not include any of the debtor's post-confirmation wages or other income at the time those funds come into his hands. Rather, only at the time the debtor actually makes his chapter 13 plan payments are the funds transformed into property of the estate.[161]

Carlson's thesis is almost correct. Post-confirmation, property of the estate certainly does not encompass the debtor's prepetition property, or future income or other property that the debtor acquires and keeps postpetition. It also does not include, at least by default, that portion of the debtor's income that he intends to pay—or actually does pay—to the chapter 13 trustee. Carlson does not explain why he concludes that the chapter 13 estate post-confirmation must include funds in the hands of the chapter 13 trustee. Instead, it appears Carlson considers it self-evident that there must be some form of estate post-confirmation, and that the narrowest (and therefore most plausible) potential scope for such an estate is property actually in the hands of the chapter 13 trustee. Carlson's thesis, although more restrictive in scope than the alternatives discussed so far, ultimately fails to grapple with the question of why there must be a post-confirmation estate at all.

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159 *In re* Petruccelli, 113 B.R. 5, 16–17 (Bankr. S.D. Cal. 1990); *In re Reynard*, 250 B.R. at 248 ("Money is fungible.").

160 Carlson, *supra* note 9, at 233.

161 In many districts, chapter 13 plans operate pursuant to wage garnishment orders which instruct the debtor's employer to turn over the portion of the debtor's wages necessary to fund the plan directly to the chapter 13 trustee. *See* Greene, Patel & Porter, *supra* note 2, at 1066–67 (discussing differences in local practice as to employee wage orders). In such districts, there may be little practical difference in the way that Carlson's conception of the estate transformation theory operates compared to that described by the Eleventh Circuit in its *Telfair* decision and perhaps also contemplated by the Seventh Circuit in *Heath*.

Although Carlson rejects the label, it is fair to say that his theory does involve a "transformation" in the nature of the estate. Adopting Carlson's view, prior to confirmation, the estate chiefly comprises property in the hands of the debtor. At that time, the estate serves as a device limiting the debtor's ability to deal with that property (while protecting the property from postpetition creditors who might wish to pursue it). Following confirmation, property is within the bankruptcy estate only when it is in the hands of the trustee. The purpose of retaining an estate of such limited scope is unclear. And nothing in the Code alludes to or purports to provide for such a transformation. The thesis rests, at best, uneasily with the statutory provisions at issue. Unlike the distinction between pre-confirmation and post-confirmation property made by the estate reconciliation theory, the distinction between property in the hands of the debtor and property in the hands of the trustee cannot be traced back to section 1327(b). If anything, because section 1306(b) of the Code contemplates that the debtor shall remain in possession of property of the estate, Carlson's divestment theory reverses the scheme contemplated by the Code.[162]

Other courts, advocating for a variety of theories of chapter 13, have argued that the chapter 13 estate must survive confirmation in some form in order for the trustee to perform her duties. Defending the broader estate transformation theory, one bankruptcy court observed that:

> If there is no existing estate upon confirmation, then what does the Chapter 13 Trustee administer? If there is no estate over which the Chapter 13 Trustee has control, then that Trustee is nothing more than an officious intermeddler. Even 11 U.S.C. § 704(9), (made applicable to Chapter 13 Trustees by 11 U.S.C. § 1302(b)(1)), provides that the Trustee shall "... make a final report and file a final account of the administration of the *estate* [emphasis added] with the court." There must be an "estate" upon and after confirmation, and that estate

[162] One potential textual hook for the divestment theory is section 1322(a)(1) of the Code. 11 U.S.C. 1322(a)(1) (2019). That section provides that the portion of the debtor's future income necessary to fulfil the plan shall be submitted "to the supervision and control of the trustee." *Id.* Potentially, that section could be construed to provide a basis for a transformation in the estate at confirmation to include property necessary to the fulfilment of the plan. That reading of section 1322(a)(1), however, misreads the Code. Nothing in section 1322(a)(1) specifies that the property identified must remain in—or become a part of—the bankruptcy estate. Rather, section 1322 quite clearly contemplates that non-estate property may be involved in the post-confirmation payment of creditors. *Id.* § 1322. Section 1322(b)(9) speaks, without qualification, of property of the estate revesting upon plan confirmation. Section 1322(b)(8), meanwhile, provides that claims against the debtor may be paid "from property of the estate or property of the debtor"—from which follows the inference that there is no necessary connection between plan payments and the estate. *Id.*

> consists of the property and future earnings of the debtor dedicated to fulfillment of the Chapter 13 Plan.[163]

Carlson criticized the notion that the existence of an estate requires identifying any property in the hands of the debtor post-confirmation as property of the estate.[164] In effect, however, Carlson's article concludes that the property in the hands of the trustee belongs in the estate for the same reason: there must be an estate somewhere after confirmation in order for the trustee to do her job.[165] But there is no need for a bankruptcy estate to source the chapter 13 trustee's obligations. Rather, her obligations in the post-confirmation world come from the same source as those of every other party to the bankruptcy case: the plan. It is the plan that directs how much she should collect each month from the debtor, and to whom she should pay those funds. Thus, from the inception of the Code, the trustee's role in the post-confirmation world has been described as that of a "disbursing agent."[166] The Bankruptcy Rules similarly describe the trustee's role in collecting and distributing funds to creditors in accordance with the plan, again without reference to a surviving bankruptcy estate.[167]

Indeed, chapter 11 already offers an analog. Frequently, parties to a commercial chapter 11 case will have agreed upon a basic scheme of distribution before the assets to be distributed among creditors have been reduced to cash or otherwise become ready for distribution. The chapter 11 estate might, for example, possess a valuable cause of action against a third party which has not yet been litigated to judgment or settlement. Alternatively, the plan might contemplate that an unprofitable line of business will be liquidated, and the cash realized thereby distributed to creditors, without the debtor-in-possession having completed the process of selling off assets. For many years, a common solution in such cases has been to confirm a chapter 11 plan that transfers the assets in question to a trust.[168] The estate, as is usual in chapter 11 cases, still terminates upon plan confirmation, but a litigation or liquidating trustee is appointed to administer the new trust. The plan will specify how proceeds of the trust are to

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163 *In re* Root, 61 B.R. 984, 985 (Bankr. D. Colo. 1986).

164 Carlson, *supra* note 9, at 274.

165 Carlson, *supra* note 9, at 273–74.

166 H.R. REP. NO. 95-595, at 430 (1977) ("After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay it, or part of it, to the trustee, who will serve as the disbursing agent under 1326."); 8 COLLIER ON BANKRUPTCY ¶ 1326 (16th ed. 2020) (similar).

167 FED. R BANKR. P. 3021 ("Except as provided in Rule 3020(e), after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed claims under Rule 3003(c)(5) that have been allowed.").

168 *See generally* David Kuney, *Liquidation Trusts and the Quagmire of Postconfirmation Jurisdiction: The Case of the Disappearing Estate*, 14 J. BANKR. L. & PRAC. 6 ART. 3 (2005) (discussing considerations and the issue of bankruptcy court jurisdiction for liquidating trust cases).

be distributed. The source of that trustee's obligations is not, therefore, bankruptcy law governing administration of the bankruptcy estate. It is the chapter 11 plan itself, together with any documents drafted and executed pursuant to the plan that establish and regulate the trust in more detail. In sum, it is already commonplace in chapter 11, following plan confirmation, for a trustee to administer a corpus of property that is not part of the bankruptcy estate. Chapter 13 should be no different.

To the extent there is any uncertainty regarding the detail of the trustee's post-confirmation obligations, agency law can fill in the gaps.[169] Why the drafters of the Code chose to liken the trustee to a "disbursing agent" is not entirely clear; the general common law of agency does not identify a disbursing agent as a category of agent with distinct or specific obligations.[170] But the duties of a chapter 13 trustee are like enough to at least one familiar category of agent to supply any legal rules necessary to elucidate the trustee's role. The Second Restatement of the Law of Agency describes an "escrow holder" as a person who receives:

> money . . . delivered to . . . the holder [] by another and which the holder contracts to retain until the happening or non-happening of an event; if the event happens, or fails to happen, before a specified time, the escrow is to be delivered to a third person; otherwise he is to return it to the depositor.[171]

So too the chapter 13 trustee retains money paid by the chapter 13 debtor until plan confirmation,[172] following which she begins distribution of funds on hands to creditors in accordance with the terms of the confirmed plan. Upon other triggering events—principally dismissal or conversion of the case—the trustee instead returns funds currently on hand to the debtor.[173] Since it is also generally understood that the chapter 13 trustee is a fiduciary,[174] the law of fiduciary duties can similarly provide the detail necessary for the trustee to understand her duties without post-confirmation reference to the concept of the bankruptcy estate.

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[169] The Code retains "long-established" and "familiar" common law principles except to the extent disturbed for some statutory purpose. *See* Isbrandtsen v. Johnson, 343 U.S. 779, 783 (1952).

[170] Neither the Second nor the Third Restatements of the Law of Agency use the term. *See* RESTATEMENT (SECOND) OF AGENCY (AM. L. INST. 1958); *See* RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006).

[171] RESTATEMENT (SECOND) OF AGENCY: AGENT OR ESCROW HOLDER § 14D cmt. a. (AM. L. INST. 1958).

[172] 11 U.S.C. § 1326(a) (2019).

[173] *See* Harris v. Viegelahn, 135 S. Ct. 1829 (2015) (holding that conversion terminates the services of the chapter 13 trustee and thus requires her to return any funds on hand at that time to the debtor).

[174] *See, e.g.*, *In re* Gutierrez, 309 B.R. 488, 499 n. 20–21 (Bankr. W.D. Tex. 2004); *In re* Morgan, 353 B.R. 599, 605 (E.D. Ark. 2006); *In re* DiRuzzo, 513 B.R. 422, 429 (Bankr. D.R.I. 2014).

Precisely identifying the best common law analog to the chapter 13 trustee is not the focus of this Article. The point is that multiple sources of law—the law of contracts, since the confirmed plan is recognized by all to be a contract; the law of fiduciary duties; and the law of agency and escrow—supply the principles necessary to define the trustee's task and resolve any uncertainties about how she is to perform it. The estate is an unnecessary concept post-confirmation. And no courts or commentators have successfully explained what benefits are gained by straining the statutory language to insist that the estate remains open, by default, as to the narrow category of property necessary to or actually used for the fulfilment of the plan, while other property of the estate revests in the debtor. The estate transformation and divestment theories, therefore, also do not successfully account for the structure of chapter 13.

4. Estate Termination

The best theory of chapter 13, then, is this: following confirmation of a plan, absent some contrary provision of the plan or confirmation order, the estate simply terminates. Chapter 13 operates no differently than chapter 11 in this regard—a conclusion that makes sense, given that chapter 13 is the "'personal reorganization' counterpart to the better-known Chapter 11."[175] All property within the estate at the time of plan confirmation revests in the debtor, and no additional property enters the bankruptcy estate thereafter. In the chapter 11 context, courts have not hesitated to conclude that the overall structure of the Code makes clear that the bankruptcy estate terminates upon confirmation. Although only a limited number of courts have adopted this approach in chapter 13, it best fits with the statutory text and structure in that context also.[176]

The estate termination theory is strongly supported by the legislative history. The drafters of the Code did not comment on the lifespan of the chapter 13 estate in the sections of the legislative history specifically discussing sections 1306 and 1327 of the Code—as, indeed, they similarly did not comment on the lifespan of the chapter 11 estate in discussing section 1141. Legislative history does, however, address the lifespan of the chapter 13 estate when considering whether

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175 *In re* Heath, 115 F.3d 521, 522 (7th Cir. 1997); *see also* 8 COLLIER ON BANKRUPTCY ¶1300.01 (16th ed. 2020) (chapter 13 is "quite similar to chapter 11, with which it shares many concepts").

176 *See, e.g.*, *In re* Jones, 420 B.R. 506, 515 (B.A.P. 9th Cir. 2009) (adopting estate termination approach); *see also In re* Petruccelli, 113 B.R. 5, 16–17 (Bankr. S.D. Cal. 1990); *In re* Sihabouth, 2014 Bankr. LEXIS 2870, at *7–8 (B.A.P. 9th Cir. 2014); *In re* Matthews, 2017 Bankr. LEXIS 117, at *15–16 (Bankr. D. Idaho 2017); *In re* Clark, 2015 Bankr. LEXIS 3564, at *9 (Bankr. E.D. Cal. 2015); *In re* Dagen, 386 B.R. 777, 782 (Bankr. D. Colo. 2008); *In re* Toth, 193 B.R. 992, 996 (Bankr. N.D. Ga. 1996), *overruled by In re* Waldron, 536 F.3d 1239 (11th Cir. 2008) *and* Telfair v. First Union Mortgage Corp., 216 F.3d 1333 (11th Cir. 2000).

that estate should be treated as a separate taxable entity from the debtor. That was thought to be unnecessary, because the chapter 13 estate was expected to be short-lived. The House Judiciary Committee report explained that "[t]he administrative reality [is] that most Chapter 13 estates will only remain open for 1 or 2 months until confirmation of the plan at which time section 1327(b) of title 11 will almost always revest title to property of the estate in the debtor."[177] Thus, the House report concluded, "[t]he duration of a chapter 13 case is so short that there is no reason to impose a duty to pay taxes on the trustee."[178] The legislative history demonstrates a contemporary understanding that revesting property of the estate in the debtor meant the closing of the estate, and *not* merely a grant of a right of possession of property of the estate or the transformation of the estate into some other form. All the available evidence suggests, therefore, that Congress anticipated that the chapter 13 estate would terminate upon confirmation of the plan.[179]

Not all the consequences of estate termination may be welcome for every debtor and creditor. As I have explained, estate termination frees the debtor to deal with her property as she chooses. But it also frees postpetition creditors to

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[177] H.R. REP. NO. 95-595, at 276, *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6233.

[178] *Id.* at 277. It is clear that by "duration of a chapter 13 case," the House report meant the time until a plan is confirmed, not the time until plan payments are completed and the debtor receives a discharge. The committee understood that plan payments were likely to continue for a number of years after the commencement of the bankruptcy case. *See id.* at 276. Rather, it viewed the chapter 13 case as giving the debtor a brief "breathing spell in which to reach an arrangement with creditors," noting that this period would be short because "[t]he plan is filed very rapidly." *Id.*

[179] To be sure, even the most persuasive interpretation of the Code, the "estate termination" model has its imperfections. The chief anomaly created by the estate termination model relates to section 348(f) of the Code, which governs conversions by a debtor from a chapter 13 case to chapter 7 case that occur in bad faith. Normally, when a debtor converts a case from chapter 13 to chapter 7, the estate in the new chapter 7 case comprises only property that was contained in the estate at the time the bankruptcy case was originally filed. 11 U.S.C. § 348(f)(1)(A) (2019). Even though section 1306 means that, prior to confirmation, property acquired after the bankruptcy filing is added to the estate, that property is not included in the chapter 7 estate. In a case of bad faith conversion, the Code provides that the "property of the estate in the converted case shall consist of property of the estate as of the date of conversion." *Id*. § 348(f)(2). Prior to confirmation, that simply serves to render all of the debtor's property, whether acquired prepetition or postpetition, property of the new chapter 7 estate. Post-confirmation, under the estate termination theory, however, there may be *no* property within the chapter 13 estate. It seems clear that Congress intended, in a case of bad faith conversion, that all of the debtor's property, whenever acquired, should be part of the new chapter 7 estate. Section 348(f) was added to the Bankruptcy Code in 1994, after at least some courts had adopted a practice of maintaining all property within the estate throughout the chapter 7 case. *See*, *e.g.*, Security Bank of Marshalltown v. Neiman, 1 F.3d 687, 690–91 (8th Cir. 1993). The anomaly created here, however, is not a grave one. Confirmation of a chapter 13 plan requires a determination from the bankruptcy court that the chapter 13 case has been proceeding in good faith. 11 U.S.C. § 1325(a)(3). It seems unlikely that a debtor who had previously proposed and been performing under a plan good faith will subsequently affect a bad faith conversion. And in any event, the bankruptcy court always retains the power to sanction a debtor for bad faith conduct by dismissing the case or denying the debtor a discharge. *Id.* §§ 707(3)(a), 727.

pursue the debtor's assets without first seeking court permission. For some of the debtor's new creditors, this will be of little effect. Ordinary unsecured creditors will likely need to invoke some other court process before they have any opportunity to force repayment of a debt—for example, by getting a judgment against the debtor in state court and securing a wage garnishment order. But a new secured creditor of the debtor will be able to exercise ordinary self-help remedies: for example, if the debtor who bought a truck post-confirmation and falls behind on his payments will find that the auto lender can repossess the truck just as it would have outside of bankruptcy.

Other creditors may have similar self-help remedies. The Seventh Circuit in its *Steenes* decisions was faced with the question of whether the city of Chicago, in cases in which it was a postpetition creditor of the debtor, could exercise its ordinary remedies of towing and impounding a city resident's vehicle based on unpaid traffic fines.[180] The Seventh Circuit found that the City should, in future cases, be free do to so because the chapter 13 estate should not extend to include the debtor's property post-confirmation.[181] Securing exactly this kind of protection, though, is central to many defenses of preservation of the estate; it is for that reason, in jurisdictions where the debtor may choose what theory of the estate to adopt, that debtors are routinely advised to keep property within the estate—a recommendation that has been echoed by one prominent former bankruptcy judge in his leading treatise on chapter 13.[182]

5. *A Defense of Estate Termination*

A defense of estate termination may proceed along two lines. First, even conceding that the broader policy goal animating this recommendation, of enhancing the success rate of chapter 13 or other debt adjustment bankruptcy cases, is a worthy one, preserving the estate is likely not as effective in securing that goal as many of its defenders suppose. The protection is at root more a procedural than a substantive one. There are likely to be other, better ways of promoting success in debt adjustment bankruptcy. Second, even that limited

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[180] *See Steenes I*, 918 F.3d 554, 556–57 (7th Cir. 2019); *Steenes II*, 942 F.3d 834, 836 (7th Cir. 2019).

[181] *Steenes I*, 918 F.3d at 558.

[182] Former Judge Lundin noted:

> The debtor is best positioned to defend the problems created by § 1327(b) by always including in the plan a provision continuing the estate and overcoming the vesting effect of § 1327(b) until completion of payments under the plan. Coupled with the expanded definition of estate property in § 1306, this puts the debtor in the strongest position to argue that the stay continues to protect all property and income after confirmation.

Keith M. Lundin, LUNDIN ON CHAPTER 13 § 113.11, at ¶ 3 (2020).

protection, absent the exceptional facts that I describe in Section II.B.2 below, seems inconsistent with the logic and structure of debt adjustment bankruptcy law.

a. Stay Relief and Administrative Expenses

As to the first point, the protection against postpetition creditors provided by sheltering assets within the estate is not absolute. Unpaid postpetition creditors may seek a remedy from the bankruptcy court. Most clearly, those creditors have the right to seek relief from the automatic stay, which will free the creditor to take any actions that would be permissible under state law, just as if the estate had terminated at plan confirmation.[183] Stay relief may be granted for cause—a standard which is likely met in a case in which a debtor is using estate property in a way that generates obligations to postpetition creditors that she is not meeting.[184] Perhaps more controversially, the Seventh Circuit ruled in *Steenes II* that unpaid postpetition creditors may, at least in some circumstances, be entitled to an administrative expense, affording them the right not just to be paid in the bankruptcy case, but to receive priority treatment as against the debtor's prepetition general unsecured creditors.[185]

Here is how the administrative expense theory works. The Code entitles creditors who meet the actual and necessary costs and expenses of preserving the estate to receive a priority claim for reimbursement.[186] In a debt adjustment bankruptcy, such a priority claim is typically paid from the debtor's regular plan payments, diminishing the funds available to pay prepetition creditors. Administrative expenses must be paid in full before the debtor may be deemed to have completed the plan and receive a discharge.[187] In a traditional chapter 11 case, it has long been recognized that involuntary creditors of the bankruptcy estate are entitled to such administrative expenses.[188] Without this rule of

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[183] 11 U.S.C. § 362(d).

[184] Relief from the automatic stay, therefore, was the alternative remedy for postpetition creditors highlighted by the lower courts and by the chapter 13 trustee in the *Steenes* litigation as a better alternative to prohibiting debtors from preserving property within the estate or granting administrative expenses. City of Chicago v. Marshall, 281 F. Supp. 3d 702, 705 (N.D. Ill. 2017), *rev'd by Steenes II*, 942 F.3d 834 (7th Cir. 2019); Response Brief of Trustee-Appellee Marilyn O. Marshall at 20–23, *Steenes I*, No. 17-3630 (7th Cir. May 14, 2018). In cases in which the debtor has resorted to the protections of the automatic stay in bad faith, both the District Court and the trustee in *Steenes* suggested that the case might be dismissed entirely. *Id.*

[185] *Steenes II*, 942 F.3d at 839 (7th Cir. 2019).

[186] 11 U.S.C. §§ 503(b)(1)(A), 507(b).

[187] *Id.* § 1322(a)(2). Section 1328(b) allows for a hardship discharge where the debtor is unable to complete a plan "due to circumstances for which [she] should not justly be held accountable" and she has already paid to unsecured creditors at least as much as they would have received in a chapter 7 liquidation. *Id.* § 1328(b).

[188] *See* Reading Co. v. Brown, 391 U.S. 471, 482–83 (1968); *Steenes II*, 942 F.3d at 836.

traditional chapter 11, a debtor with a pending bankruptcy case that pollutes its surrounding neighborhood might resort to bankruptcy to avoid or defer liability for clean-up costs.[189] Tort creditors and other similar postpetition creditors of the estate would be turned into involuntary financiers of the bankruptcy case as the debtor used the bankruptcy to avoid meeting its obligations to them while resolving its liabilities to prepetition creditors. Intermittently, the same reasoning has been applied to chapter 13.[190] The logic of this analysis is hard to deny. If—and only if—a debtor's property remains within the bankruptcy estate, then the costs of maintaining that property become costs of preserving the bankruptcy estate. When such costs are necessary or are involuntarily imposed upon creditors—such as the unpaid traffic tickets in *Steenes II*—there is a fair argument that they should qualify as administrative expenses.

Exactly how persuasive this conclusion may be is not the focus of this Article. It is not essential that the *Steenes II* administrative expense ruling hold true to conclude that the potential protection of the expanded estate is qualified because creditors will always have the right to seek relief from stay. And there are perhaps textual reasons—and certainly policy reasons—to be wary of the administrative expense analysis. On a textual level, allowing postpetition creditors administrative expenses in chapter 13 cases (even if not in other forms of debt adjustment bankruptcy) sits uneasily with section 1305, which provides a less favorable mechanism by which some postpetition creditors may seek to participate in the bankruptcy case.[191] On a policy level, granting an administrative expense is a significantly more heavy-handed remedy than granting relief from stay. It does the very opposite of what this Article argues should be the norm in the post-confirmation world—it expands, rather than minimizes, the footprint of the bankruptcy court because the court becomes responsible for ensuring that the debtor's postpetition creditors are paid. Moreover, while estate termination refuses to allow the debtor ordinarily to use the bankruptcy case as a shield against postpetition creditors, it does not actually take sides in those disputes over payment between the debtor and creditors.[192] It

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[189] In *Reading*, an employee of the debtor started a fire that damaged a neighboring property. *Reading Co.*, 391 U.S. at 473.

[190] *Compare Steenes II*, 942 F.3d at 837–39 (concluding that *Reading* controls in chapter 13 just as in chapter 11), *with In re* Haynes, 569 B.R. 733, 739 (Bankr. N.D. Ill. 2017) *overruled by Steenes II*, 942 F.3d 834 (7th Cir. 2019) (rejecting the administrative expense argument arguing that Chicago "does not cite one opinion that applies *Reading v. Brown* in a Chapter 13 case.").

[191] *But see Steenes II*, 942 F.3d at 838. The best rejoinder to this argument may be that Congress did not anticipate that postpetition creditors would routinely hold administrative expense claims precisely because it did not anticipate that the estate would routinely outlast plan confirmation.

[192] The exception to this principle is when a postpetition creditor chooses to participate in the bankruptcy case pursuant to section 1305 of the Code, in which case it accepts payment on the same terms as other general

leaves all such disputes, and the legality of any actions creditors might take in connection therewith, to state law and ordinary non-bankruptcy processes. Allowing postpetition creditors administrative expense claims instead puts bankruptcy's thumb on the scales in favor of the postpetition creditor.

For purposes of this Article's analysis, the key insight is simply that the decision to keep property within the estate to protect against postpetition creditors is far from a sure one. Although my preference in cases in which property has been preserved within the estate and a postpetition creditor has gone unpaid would be to grant relief from stay rather than allow an administrative claim, the debtor is subject to attack along either pathway. Thus, the real effect of preserving property within the estate is a procedural rather than a substantive one. What the debtor really gains is an opportunity to have the validity of the postpetition creditor's claim tested in the bankruptcy court before any money or property is transferred to that creditor. As discussed below in Section III.B.2, there are some cases where this additional procedural hurdle may be justified. But in many cases, it is likely inconsistent with the structure of debt adjustment bankruptcy law.

b. The Place of Postpetition Expenses in Bankruptcy

The basic assumption of debt adjustment bankruptcy is that debtors can afford to pay current expenses as they come due. Debt adjustment bankruptcy commits only disposable income to the plan—what the debtor has left to repay creditors with after subtracting allowable expenses from income. A debtor who cannot afford to pay current expenses is not a good candidate for debt adjustment bankruptcy. Indeed, bankruptcy will necessarily fail to rehabilitate such a debtor financially, as new unpaid debts mount up even as old debts are paid under the plan. It is true that many debtors may face unexpected new expenses some way into a debt adjustment bankruptcy case. This problem is most keenly identifiable in chapter 13; commentators investigating the low success rate of chapter 13 plans have found that many chapter 13 cases fail for precisely this reason.[193] It is plausible that allowing the debtor to defer paying postpetition creditors might allow them more space to keep making plan payments and thus complete their cases. But this is inequitable to postpetition creditors who are by default excluded from the plan. And because, as discussed in the preceding Section, the key effect of preserving the estate is to erect a procedural hurdle rather than a

unsecured creditors and, in exchange for this immediate partial payment, at least runs the risk that the unpaid balance of its claims will be discharged. *See* Keith M. Lundin, LUNDIN ON CHAPTER 13 § 158.6, at ¶ 2 (2020).

193 *See* Greene, Patel & Porter, *supra* note 2, at 1063–64.

substantive barrier in front of postpetition creditors, the greatest impact of estate preservation may be to discourage postpetition creditors from pursuing debts that are too small to justify the additional costs of enforcement.[194]

There are likely better ways to respond to this important problem. One possibility is to permit liberal modification of chapter 13 plans by debtors, allowing the debtor to reduce their monthly payment to prepetition creditors when faced with some new financial shock.[195] Concomitantly, reducing the trustee or creditor's ability to seek modification to increase plan payments may allow the debtor to build up additional financial resources.[196] Some bankruptcy courts, when calculating a debtor's monthly disposable income, recognize as one of the permissible expenses that chapter 13 debtors may deduct from their gross income a regular contribution to an emergency savings fund;[197] recent reform proposals have suggested standardizing that practice.[198] Under chapters 13 and 12, the bankruptcy court may approve a "hardship discharge" for debtors whose failure to complete the plan is due "to circumstances for which the debtor should not justly be held accountable. . . ."[199] As a result, bankruptcy courts should consider more frequently resorting to this rarely deployed safety valve.[200]

B. The Life of the Bankruptcy Estate in Chapter 12 and Small Business Cases

The estate termination theory also holds in chapter 12 and subchapter V. First, in chapter 12, the language of the statute is identical in all respects. Section 1227 of the Code, like section 1327, vests all property of the estate in the debtor at plan confirmation.[201] There is no reason to believe that vesting property of the estate means anything different in chapter 12 than in chapter 13—or the traditional understanding of chapter 11 which, in turn, informs the estate

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194 In oral argument in *Steenes I*, Judge Easterbrook suggested that one potential consequence of preserving the estate would be to make after-the-fact collection of de minimis expenses relating to operating a vehicle—such as a toll that is not paid at the time a car is driven on a toll road—practically uncollectable so long as the vehicle remains in a chapter 13 bankruptcy estate. Oral Argument at 32:33–34:59, *Steenes I*, 918 F.3d 554 (7th Cir. Sept. 12, 2018) (No. 17-3630), http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=17&casenumber=3630&listCase=List+case%28s%29.

195 *See* 11 U.S.C. § 1329 (2019).

196 Indeed, subchapter V does precisely this for small business debtors; only the debtor, and not the trustee or creditors, may propose modifications to a confirmed plan. *Id.* § 1193(b).

197 AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 173 (2019).

198 *Id.* at 171–72.

199 11 U.S.C. § 1328(b). The debtor must already have paid creditors at least as much as they would have received in a liquidation, and the bankruptcy court must also make a finding that the debtor's problems cannot be resolved by modification of the plan. *Id.*; *see id.* § 1228(b).

200 *See* Lawrence Ponoroff, *Rethinking Chapter 13*, 69 ARIZ. L. REV. 1, 43–44 (2017).

201 11 U.S.C. § 1227(b).

termination theory in chapter 13. For that reason, the few courts that have considered the lifespan of the bankruptcy estate specifically within the context of chapter 12 have stressed the influence of chapter 13 on their analysis.[202] Indeed, the Supreme Court has explained that "because chapter 12 was modeled on chapter 13, and because so many of the provisions are identical, chapter 13 cases construing provisions corresponding to chapter 12 provisions may be relied on as authority in chapter 12 cases."[203] Whatever conclusion is reached regarding the lifespan of the bankruptcy estate in chapter 13, it must hold for chapter 12 also.

Only in subchapter V are there any difficulties in reaching this conclusion. This is perhaps counterintuitive. The notion that property of the chapter 13 or 12 estate vests in the debtor upon confirmation, terminating the estate, is informed by the understanding of traditional chapter 11. Exactly the same statutory provision that prescribes vesting of the estate in the debtor in traditional chapter 11 cases applies in subchapter V.[204] At first glance, this same result should hold: for subchapter V cases, the bankruptcy estate will terminate at plan confirmation.

Section 1186 of subchapter V, however, obstructs this conclusion. In large part, this section tracks the sections of chapter 12 and 13 that explain that property of the estate comprises not just property that the debtor owns as of the bankruptcy filing, but also property acquired afterwards.[205] I have explained why the broad language of these sections does not justify the conclusion that the estate nevertheless remains in existence after confirmation of the plan.[206] Section 1186 adds an additional gloss to this language; it provides that "*[i]f a plan is confirmed under section 1191(b) of this title*," property of the estate shall include property acquired after the commencement of the case.[207] Because the extensive words regarding the scope of the bankruptcy estate are said to apply only "if a plan is confirmed," the most natural reading of the text appears to be that the expansive subchapter V estate must exist after confirmation—indeed, that it *only*

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[202] *See, e.g.*, *In re* Knudsen, 356 B.R. 480, 490 (Bankr. N.D. Iowa 2006) (adopting the estate preservation theory in chapter 12, citing chapter 13 cases); *In re* LaRosa Greenhouse, LLP, 565 B.R. 304, 311–12 (Bankr. D.N.J. 2017) (same); *In re* Smith, 514 B.R. 464, 468–72 (Bankr. N.D. Tex. 2014) (adopting a hybrid view of the estate, citing chapter 13 cases); *In re* Daugherty, 117 B.R. 515, 518 (Bankr. D. Neb. 1990) (adopting estate termination, discussing chapters 12 and 13 together).

[203] Hall v. United States, 566 U.S. 506, 516 (2012) (internal citations omitted).

[204] 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.").

[205] *Id.* §§ 1306, 1207.

[206] *See supra* Section II.A.1.

[207] 11 U.S.C. § 1186(a)(1) (emphasis added).

exists post-confirmation, rather than from the beginning of the bankruptcy case. In other words, of the various theories of the lifespan of the bankruptcy estate, section 1186 of subchapter V seems most compatible with an incomplete theory of estate preservation. Judge Paul Bonapfel, in one of the few extended commentaries on SBRA published to date, reaches exactly this conclusion.[208]

Yet it seems unlikely that this is what Congress intended. The legislative history of the SBRA is minimal. The relevant section of the House report simply repeats the statutory language.[209] Nothing suggests an intention to resolve a multi-decade circuit split over this question of statutory interpretation. Even less plausible is that Congress would resolve this split in a way that tracks no pre-existing rule. Section 1186 is different to its counterparts in chapters 12 and 13, because as drafted, it appears to speak only to the period after confirmation of the plan. No pre-existing theory of the estate in debt adjustment bankruptcies has argued that the expanded estate comes into being only following plan confirmation. It seems unlikely that Congress intended to create a new and different working model of the debt adjustment bankruptcy estate. What is more probable is that Congress intended simply to duplicate the law as it exists under chapters 12 and 13. In that case, the statement that the expanded estate applies "if a plan is confirmed" reflects the fact that small business debtors have a choice how to proceed within chapter 11. Small business debtors may elect to proceed under the rules for traditional chapter 11, confirming a plan that is subject to all the usual requirements for a corporate reorganization, or they may choose the more streamlined procedures created by subchapter V. Congress's likely intention, therefore, was to implement a separation among small business debtors, segregating those proceeding under the new subchapter V provisions from those proceeding under traditional chapter 11. I believe Congress sought to subject the former, but not the latter, to the same expanded bankruptcy estate that is applicable to chapter 12 and 13 debtors, without deciding the precise content of that estate.

It remains unclear how bankruptcy courts should implement section 1186. Taken literally, there is little to justify the statutory scheme that Judge Bonapfel describes, in which an expanded estate comes into being only at the moment that the debtor confirms a plan. That approach gets precisely backward the policy rationale discussed above: that close supervision of the debtor's affairs is justified immediately after the bankruptcy case has begun, and it is unclear what the debtor's obligations to its creditors will be, but that the debtor should be able

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[208] Bonapfel, *supra* note 26, at 626–27.

[209] H.R. REP. NO. 116-171, at 6 (2019), *as reprinted in* 2019 WL 3401849.

to enjoy a fresh start once its plan is confirmed and has embarked upon repayments. And in contemplating that property will move into the estate while the case is ongoing, this approach imports the most serious problem that affects the estate reconciliation theory; it may be difficult for the debtor to know exactly what property it has the right to deal with freely at any given time.

Indeed, the policy arguments against preservation of the estate post-confirmation are even stronger for business debtors than for consumer debtors under chapter 13. Depending upon a debtor's business model, a requirement that a business debtor appears in court to seek permission before making any other than ordinary sale or purchase, or other use of estate property, may prove burdensome. A business may acquire or dispose of assets with substantial value—such as equipment or real property—with greater frequency than a consumer. In some chapter 12 cases, debtors have been required to litigate pursuant to section 363(b) whether they may sell land or other property post-confirmation.[210] Since the section 363 standard is typically deferential to a debtor's business judgment, requiring litigation over such decisions hardly seems like an efficient use of resources. In similar fashion, because the Code regulates the payment of attorneys' fees out of the bankruptcy estate, a small business debtor who becomes involved in litigation during its bankruptcy case on a matter entirely separate from the conduct of the bankruptcy may nonetheless be required to submit its attorneys' fees to the bankruptcy court for approval.[211] Nor is it a convincing argument that a business should enjoy enhanced protection from its postpetition creditors. I have argued that the Code should not shelter a consumer from a postpetition creditor that she cannot afford to pay in order to give her a chance to pay prepetition creditors and earn a discharge.[212] But there is certainly a plausible equity-based argument for assisting consumers in securing a fresh start in this way. A business, in contrast, should not be able to seek the aid of the bankruptcy courts in externalizing its financial problems upon postpetition creditors.

The better view, therefore, is that section 1186 should not be read to have committed Congress to any particular theory of the bankruptcy estate in subchapter V. The estate termination theory should prevail there, as elsewhere, because it is the theory that best accounts for the structure of debt adjustment bankruptcies and the policy considerations that underlie them. Bankruptcy

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[210] *See In re* McLendon, 506 B.R. 243, 246 (Bankr. N.D. Miss. 2013).

[211] *See In re* LaRosa Greenhouse, 565 B.R. 304, 312 (Bankr. D.N.J. 2017) (bankruptcy court approval required for fees for post-confirmation services provided by attorney in chapter 12 case); *In re* Brandenburger, 145 B.R. 624, 629–30 (Bankr. D.S.D. 1992) (similar).

[212] *See supra* page 6.

courts may be able to reach this outcome by concluding that section 1186 must still be read together with the Code's mandate that, unless the plan states otherwise, confirmation vests property of the estate in the debtor. In a case in which the plan purports to preserve the estate, then section 1186 will tell the debtor what property is contained therein. The greatest certainty, though, would come from clarification from Congress. Perhaps more feasible is an amendment of section 1186 that does not tip the scales towards any one of the pre-existing theories of the estate.[213] Congress might also choose to resolve the dispute for all forms of debt adjustment bankruptcy. In either case, subchapter V would be best served by application of the estate termination theory.

III. EXTENDING THE LIFE OF THE BANKRUPTCY ESTATE

The conclusion that the estate termination theory is more persuasive than other theories of debt adjustment bankruptcy does not fully resolve questions regarding the fate of the bankruptcy estate upon confirmation of a debt adjustment plan. Rather, the estate termination theory sets forth a default rule. The Code contemplates, however, that there will be circumstances when courts or debtors may depart from the statutory default. Section 1327(b) of the Code provides that property revests in the debtor "[e]xcept as otherwise provided in the plan or in the order confirming the plan."[214] Section 1322(b)(9) provides that the plan shall provide for vesting of property of the estate in the debtor or another entity "on confirmation of the plan or at later time."[215] Chapter 12 and chapter 11 contain largely parallel provisions.[216]

Notwithstanding the disagreement regarding the default rule those provisions establish, courts and commentators, with a few exceptions, have presumed that these provisions grant a largely free choice—whether to debtors, to bankruptcy courts, or to both—to adopt a different vesting rule, if the default rule is not to their liking.[217] Thus bankruptcy courts routinely confirm plans that

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[213] Congress might delete the reference to plan confirmation in section 1186, and instead state that the expanded definition of property of the estate shall apply in any case in which the debtor elects to proceed under subchapter V. Since an expanded estate, with the closer supervision of the debtor that it brings, is most important at the beginning of a case, Congress could also require a small business debtor promptly to declare after commencing the case its intention to proceed either under subchapter V or traditional chapter 11, engaging as quickly as possible the expanded bankruptcy estate contemplated by section 1186.

[214] 11 U.S.C. § 1327(b) (2019).

[215] *Id.* § 1322(b)(9)

[216] *Id.* §§ 1227(b), 1222(b)(1), 1141(d). Subchapter V contains no analog to §1322(b)(9)'s direction that the plan shall explain in whom property of the estate shall vest.

[217] Indeed, Carlson suggests that the text of the Code "specifically invites just this." Carlson, *supra* note 9, at 244–46.

provide that the bankruptcy estate shall not terminate upon confirmation. Instead, revesting property of the estate is delayed until a later time—typically, the end of the bankruptcy case. In essence, debtors and bankruptcy courts are thought to be empowered to adopt an entirely different theory of the estate and its purposes to suit individual cases.

The better view is that the presumption that all property of the estate revests upon plan confirmation cannot be so lightly dispensed with. Instead, the default rule is sticky. Before a plan providing for continuation of the estate may be approved, the bankruptcy court must find that preserving the estate serves a valid bankruptcy purpose. Typically, that will require a showing by the debtor that keeping property in the bankruptcy estate is necessary to the fulfilment of the plan. The pathbreaking decision suggesting such an approach is the Seventh Circuit's opinion in *In re Heath*.[218] As previously noted, *Heath* is somewhat unclear in its view of the default rule of revesting upon confirmation of a chapter 13 plan.[219] The Seventh Circuit's description of the chapter 13 estate as "return[ing] so much of that property to the debtor's control as is not necessary to the fulfillment of the plan" could be read either to adopt the estate transformation or the estate termination theories.[220] Regardless, *Heath* did clearly argue, albeit in brief dicta, that property necessary to the fulfillment of the plan represented an upper limit on the contents of the estate post-confirmation. *Heath* suggested that it would be an abuse of the bankruptcy court's discretion to confirm a plan or sculpt the terms of a confirmation order to provide that any additional property remained in the chapter 13 estate.[221]

The Seventh Circuit recently reiterated its conclusions from *Heath* in *Steenes I*.[222] At the time of the *Steenes I* decision, the form confirmation order used in every chapter 13 bankruptcy case in the Northern District of Illinois incorporated a delayed revesting provision even broader than that at issue in *Heath*. The *Steenes I* form confirmation order provided that all of the debtor's property should remain in the estate until the conclusion of the bankruptcy case.[223] In essence, the bankruptcy court adopted the estate preservation theory, not as a matter of statutory interpretation, but instead via local rule superimposed

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[218] *In re* Heath, 115 F.3d 521, 522–24 (7th Cir. 1997).

[219] *Id.*

[220] *Id.* at 524.

[221] *Id.* ("It would presumably be an abuse of discretion for the bankruptcy court to confirm a plan that retained more of the property in the hands of the trustee than was reasonably necessary to fulfill the plan, though we need not decide that in this case.").

[222] *Steenes I*, 918 F.3d 554, 557 (7th Cir. 2019).

[223] *Id.* at 556.

over the Code's ordinary default rules. The Seventh Circuit characterized this as a reversal of the Code's "presumptive[] return[] [of] the estate's property to the debtor."[224] But that kind of blanket reversal was illegitimate: "[i]t is hard to see how the court could justify routinely doing the opposite of what the statute provides."[225] Although it gave little explanation for the form such an order might take, or the reasons that might be required to support it, the Seventh Circuit made clear that "a case-specific order, supported by good case-specific reasons" would be necessary before property may be retained in the bankruptcy estate post-confirmation.[226]

This conclusion was subsequently reiterated in *In re Cherry*.[227] In *Cherry*, it was the debtor, rather than the bankruptcy court, that sought to include within the plan a provision preserving the estate.[228] Just as in *Steenes I*, however, the preservation of the estate was not supported by any explanation or any findings by the bankruptcy court; rather, the court asserted that it was the debtor's right to choose what theory of chapter 13 to implement.[229] The Seventh Circuit disagreed; any time the debtor (or the bankruptcy court) wants to depart from the default rule, the debtor has to provide adequate reasons to justify this choice.[230] The alternative allowed for the subversion of the ordinary statutory scheme without appropriate justification.[231]

The Seventh Circuit has it right. The Seventh Circuit's approach to plan or confirmation order provisions that deviate from the default rule of estate termination and preserve the bankruptcy estate states the correct rule of the bankruptcy estate in debt adjustment cases—although it requires further elucidation. This Section will explain that the power to propose a plan provision that delays revesting of property of the estate belongs to the debtor in a debt adjustment case, and not to the bankruptcy court. Consistent with bankruptcy law that is well-established in other contexts, a provision delaying revesting should be approved only when it serves some valid bankruptcy purpose. The principle that the broad and general powers of bankruptcy may only be exercised in service of a valid bankruptcy purpose is deeply rooted; indeed, it has been commented upon in positive fashion (although not expressly adopted) by the

224 *Id.*
225 *Id.* at 557.
226 *Id.*
227 *In re* Cherry, 963 F.3d 717, 718 (7th Cir. 2020).
228 *See id.*
229 *Id.*
230 *Id.* at 719.
231 *Id.*

Supreme Court.[232] Ordinarily, establishing a valid bankruptcy purpose will require the debtor to meet the standard set forth in *Heath*: a showing that retention of property within the estate is necessary to fulfilment of the plan.

A. The Holder of the Power to Delay Revesting

There is considerable lack of clarity as to whether the power to propose departures from the default rule of revesting—whatever that default rule is assumed to be—belongs to the debtor or the bankruptcy court. One hint is found in chapter 13, which uses highly standardized forms. The new national model chapter 13 plan, effective as of December 2017,[233] but only adopted by roughly a dozen bankruptcy courts, appears on its face to grant that choice to debtors.[234] Part 7 of the model plan instructs the debtor to choose from three options: property of the estate will vest in the debtor upon plan confirmation; property of the estate will vest upon entry of the discharge; or some other alternative that the debtor specifies.[235] The relevant Committee Note, however, jettisons any clarity that might be provided by the text of the model plan by stating that the debtor's choice "is subject to a contrary court order under Code § 1327(b)."[236] Consistent with that approach, some bankruptcy courts in chapter 13 cases have used form plans or confirmation orders that make the revesting choice for debtors.[237] And when debtors have attempted to depart from a court's preferred choice,

232 Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 985 (2017).

233 U.S. COURTS, OFFICIAL FORM 113, available at http://www.uscourts.gov/forms/individual-debtors/chapter-13-plan.

234 Bankruptcy courts that have not adopted the national model plan use their own standardized forms. Daniel Gill, *No Thanks: Most Districts Opt Out of National Chapter 13 Plan*, BLOOMBERG LAW (Dec. 1, 2017), https://www.bna.com/no-thanks-districts-n73014472651/.

235 *See* U.S. COURTS, OFFICIAL FORM 113, available at http://www.uscourts.gov/forms/individual-debtors/chapter-13-plan.

236 U.S. COURTS, COMMITTEE NOTES ON OFFICIAL FORM 113, Part 7, available at http://www.uscourts.gov/sites/default/files/b_113_cn_0.pdf.

237 *See, e.g.*, *In re* Henneghan, 2009 Bankr. LEXIS 2553, at *4 n. 1 (Bankr. D.D.C. 2009) ("In this district, this vexing issue [of whether, by default, the estate terminates on confirmation] is largely moot because, since several years ago, the court's usual chapter 13 confirmation order routinely postpones vesting under § 1327(b) until the entry of the discharge order."); *In re* Boyd, 2020 Bankr. LEXIS 1954, at *33 (Bankr. D.S.C. 2020) (concluding that the Seventh Circuit correctly stated the default rule of estate termination in chapter 13, but that "[t]his District has opted out of the § 1327(b) and (c) vesting provisions", and explaining that neighboring bankruptcy courts in the Western and Middle Districts of North Carolina have done similarly); U.S. COURTS, LBF-M CHAPTER 13 PLAN, U.S. Bankruptcy Court for the District of Maryland ¶ 8, available at https://www.mdb.uscourts.gov/sites/default/files/LBF_M_1217_0.pdf, ("Title to the Debtor's property shall revest in the Debtor when the Debtor is granted a discharge pursuant to 11 U.S.C. § 1328 . . ."); U.S. COURTS, FORM BTXN222 – CHAPTER 13 PLAN, U.S. Bankruptcy Court for the Southern District of Texas at p. 11 (effective July 1, 2017), available at https://www.txnb.uscourts.gov/forms/btxn222-chapter-13-plan-new-form-effective-712017 ("Property of the estate shall not vest in the Debtor until such time as a discharge is granted or the Case is dismissed or closed without discharge.").

bankruptcy judges have not been slow to rein the debtor in. One bankruptcy court, therefore, observed that:

> the Bankruptcy Code provides [debtors] with no absolute right to vesting of property prior to discharge, and, if the Court orders otherwise, property of the estate does not vest in them upon confirmation. In the instant case, the Court ordered otherwise, consistent with practice in this jurisdiction for the past five years. The orders of confirmation were not inconsistent with their right to propose plan provisions, including vesting. The Court, however, is not required to confirm a plan which calls for vesting under the provisions of § 1327(b), particularly in view of the First Circuit's decision in *Barbosa v. Solomon*.[238]

Another bankruptcy court, relying on section 1327(b)'s provision, concluded that the Code "clearly reserves in the bankruptcy court the power to determine when property of the estate shall vest in the debtor, so the latter half of § 1327(b) works as a gap-filler for when the confirmation order or the plan does not treat this issue."[239]

It is hard to justify replacing the default rule of estate termination with their own different and preferred approach to revesting property of the estate, as some bankruptcy courts have.[240] To the extent that the Code provides any discretion to depart from that presumption of revesting, that discretion must belong to the debtor, not the bankruptcy court. Courts that make that decision for all debtors that come before them are making an essentially legislative judgment. In effect, chapter 13 is transmuted into a dramatically different statute on a district-by-district basis. It is certainly true that divergent local practices have been a persistent feature of the law of chapter 13 for many years.[241] But differences in varying mechanics of chapter 13—such as whether chapter 13 plans are funded by direct payments of the debtor or via wage garnishment orders,[242] or whether routine confirmation hearings are presided over by the bankruptcy judge or the

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[238] *In re* Smith, 334 B.R. 26, 39 (Bankr. D. Mass. 2005). *Barbosa* adopted the estate reconciliation approach, but noted as to the debtor's prepetition property that "in spite of the 'vesting' provided by section 1327 of the Code, until all payments due under the plan are made, both the trustee and the unsecured creditors have an interest in the preservation of the debtor's financial situation." Barbosa v. Solomon, 235 F.3d 31, 36–37 (1st Cir. 2000).

[239] *In re* Moore, 312 B.R. 902, 908 (Bankr. N.D. Ala. 2004).

[240] *See In re Boyd*, 2020 Bankr. LEXIS 1954, at *35.

[241] *See* Greene, Patel & Porter, *supra* note 2, at 1034–35 (describing scholarship on "local legal culture" and chapter 13, beginning with the 1994 article from Sullivan, Warren, and Westbrook) (citing to Teresa Sullivan, Elizabeth Warren & Jay Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801 (1994)).

[242] *See* Greene, Patel & Porter, *supra* note 2, at 1036.

chapter 13 trustee[243]—should not provide a basis for varying basic structural principles of bankruptcy law. Nor, as debt adjustment bankruptcies are made available to new classes of debtors, is there reason to conclude that Congress intended such fundamental differences based solely on the debtor's location.

Even setting aside such structural concerns, I do not believe that bankruptcy courts should make the revesting choice for debtors. At root, those courts who do deviate from the norms of traditional chapter 11 do so for paternalistic reasons. Yet a debtor who commences a bankruptcy case should never be in doubt about whether he will recover full rights to all his property once he has struck his bargain with prepetition creditors, and thus has secured court approval for a plan. As Section II explains, adopting any different revesting rule may seriously constrains the debtor's ability to deal with his own property; regardless of how diligent he is in making his plan payments, he may still be precluded from buying a car, selling investment property, or even taking a vacation, without first securing trustee or court approval. The Seventh Circuit in *Heath* may have overstated the case in observing that the five-year guardianship effected by preserving the entire bankruptcy estate would reduce "[t]he legal situation of the debtor … to that of a child, a mental incompetent, or a married woman in the era of coverture."[244] But bankruptcy courts are nonetheless well aware that some debtors chafe at restrictions imposed upon their management of their own post-confirmation affairs.[245] The highly paternalistic view of courts that impose estate preservation upon chapter 13 debtors against their wishes implies that courts must be "gatekeepers" of chapter 13 debtors' affairs. This is unlikely to promote successful reorganizations in chapter 13. Chapter 13 is, after all, entirely voluntary, and over-intrusive management of individual debtors' lives may simply prompt the debtor to dismiss their bankruptcy case.[246] Any discretion provided to the bankruptcy court should not include the ability to impose such constraints upon a debtor against his wishes.[247]

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[243] Professor Melissa Jacoby has described this practice of some courts in past work. Melissa Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMPLE L. REV. 875, 887–89 (2015).

[244] *In re* Heath, 115 F.3d 521, 523 (7th Cir. 1997).

[245] *See In re* Ward, 546 B.R. 667, 679 (Bankr. N.D. Tex. 2016) (ordering debtor to return vehicle she had purchased post-confirmation with post-confirming earnings and observing that "this court believes that the Chapter 13 trustee and court are required to be gatekeepers on post-confirmation activities, to some extent, such as a Chapter 13 debtor's desire to purchase a car during her case.").

[246] Thus, in the *Ward* bankruptcy, the court expected that the debtor would voluntarily dismiss her bankruptcy case in light of the court's ruling that the debtor was required to return a vehicle purchased with property of the estate. *Id.* at 681. Apparently viewing that outcome as unsatisfactory, the bankruptcy court ordered that, should the debtor do so, she would be subject to a 180-day bar before the case could be refiled. *Id.*

[247] Carlson similarly concludes that "the confirmation order must achieve what the debtor legitimately wants, free of coercion by the court or trustee." Carlson, *supra* note 9, at 246.

The argument against forcing a delay in revesting upon a debtor is even stronger in business cases outside the context of chapter 13. Requiring debtors frequently to resort to the bankruptcy court may impose costs that the debtor is not well placed to bear.[248] Each interaction with the bankruptcy court will cost both time, as it waits for court approval, and money, as it pays for attorneys to represent it before the court. The case for paternalistic oversight of its affairs is also weaker than with a consumer debtor. Small businesses are already subject to extensive regulatory oversight which does not need to be supplemented by long-term bankruptcy court scrutiny. Moreover, to the extent that a bankruptcy court believes a business's prospects to be so poor that it cannot survive unless its affairs are overseen by the court in this way, it is likely that the business is a poor candidate for reorganization in the first place. Rather than confirming a plan that holds the business's assets in the estate, the bankruptcy court should consider whether business's assets would be put to better use if they were transferred or sold and a new manager allowed to take over.[249]

B. *The Scope of the Power to Delay Revesting*

Any discretion created by the Code to delay revesting of property of the estate, properly understood, belongs to debtors, not judges. Next at issue is the extent of that discretion: Is it an unqualified discretion that permits the debtor to choose, in each individual case, the revesting rule that suits him best? Or may the default presumptive rule that property of the estate revests in the debtor upon plan confirmation be disturbed only under more limited circumstances?

1. *Valid Bankruptcy Purpose*

The discretion of the debtor must be limited. A debt adjustment plan may not retain property within the estate unless doing so serves some appropriate purpose consistent with the goals of bankruptcy. The notion that broad and general discretionary powers contained with the Code may be exercised only for an appropriate purpose is long rooted.[250] The bankruptcy process affords debtors

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[248] *See In re* McLendon, 506 B.R. 243 (Bankr. N.D. Miss. 2013); *In re* LaRosa Greenhouse, 565 B.R. 304, 311 (Bankr. D.N.J. 2017) (bankruptcy court approval required for fees for post-confirmation services provided by attorney in chapter 12 case); *In re* Brandenburger, 145 B.R. 624 (Bankr. D.S.D. 1992) (similar).

[249] The bankruptcy court should confirm a plan only if it is feasible—that is, it does not believe the plan will likely be followed by liquidation or a later reorganization. 11 U.S.C. § 1129(a)(11) (2019).

[250] Nor is the principle that discretion conferred by the text of a statute comes with constraints and may be exercised only for appropriate purposes limited to bankruptcy. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 89 n. 1, 95 (1989) (for statutes stating that court "may" allow attorneys' fees, "that discretion is not without limit" and fees ordinarily "should" be allowed to a prevailing party to give effect to the purposes behind the statute); United States v. Olano, 507 U.S. 725, 735–36 (1993) (FED. R. CRIM. P. 52(b), allowing for plain error review of

a great deal of flexibility, including the ability to craft plans or other schema incorporating a wide range of provisions crafted to suit a debtor's individual circumstances. Rather than conclude that discretion-conferring provisions allow the debtor unconstrained freedom to reorder their affairs, courts conclude that the Code's provisions may only be used in a manner consistent with the broader statutory scheme and that reflect a valid bankruptcy purpose. Most prominently, this principle was recently reaffirmed by the Supreme Court in *Jevic*.[251] The issue in *Jevic* was whether distributions to creditors on account of their prepetition claims deviated from the ordinary scheme of priorities applicable to a chapter 11 plan.[252] The Supreme Court tacitly approved some categories of such distributions—such as orders entered early in chapter 11 cases that permit the debtor to pay the prepetition wage claims of its employees, or claims of prepetition vendors whose continued business is vital to the company—on the theory that such distributions serve "significant Code-related objectives."[253] The priority-violating distributions at issue in *Jevic*, however, were impermissible because they did not serve a proper bankruptcy purpose.[254]

Lower court decisions have set forth similar principles. The Seventh Circuit's decision in *In re Sadler*—a decision cited approvingly by the Supreme Court in *Jevic*—interpreted the scope of the flexibility conferred upon debtors by section 349, the provision governing the effect of a dismissal of a bankruptcy case. [255] The debtors in *Sadler*, who ran a family farm, defaulted on a loan, causing a creditor to file suit and obtain a prejudgment attachment against their crops.[256] The debtors subsequently filed a chapter 13 bankruptcy case; during

a criminal judgment, "is permissive not mandatory" but exercise of discretion must be "guide[d]" and errors "should" be corrected if they seriously affect the fairness of a proceeding); Price v. Pelka, 690 F.3d 98, 101 ("The language of section 1988 is permissive, therefore, an award of attorneys' fees is discretionary. . . . Although the language of section 1977 is permissive, the court must exercise its discretion consistent with the congressional purpose underlying the statute."); Travelers Ins. Co. v. La. Farm Bur. Fed., Inc., 996 F.2d 774, 778 (5th Cir. 1993) (discretion to decide whether or not to dismiss a declaratory judgment action is "broad [but] not unfettered" and may not be exercised "on the basis of whim or personal disinclination" but must instead "address[] and balance[] the purposes of the Declaratory Judgment Act and the factors relevant to the abstention doctrine"); Serco Servs. Co. v. Kelley Co., 51 F.3d 1037, 1039 (Fed. Cir. 1995) (similar); Speed v. JMA Energy Co., 872 F.3d 1122, 1128 (10th Cir. 2017) (finding that the district court's discretion pursuant to Class Action Fairness Act to decline to exercise jurisdiction over a class action is not unfettered but must be guided by statutory factors).

[251] Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973 (2017).

[252] *Id.* at 978.

[253] *Id.* at 985.

[254] *Id.* at 985–86 (violation of priority rules lacked "any significant offsetting bankruptcy-related justification").

[255] *In re* Sadler, 935 F.2d 918, 918–21 (1991); *Jevic*, 137 S. Ct. at 985 (quoting *In re Sadler*, 935 F.2d at 918–21).

[256] *In re Sadler*, 935 F.2d at 919.

that case, the bankruptcy court entered an order avoiding the prejudgment lien.[257] After the Sadler's bankruptcy case had been proceeding for some months, chapter 12 of the Code, which was specifically designed to promote the reorganization of family farms, went into effect.[258] The Sadlers believed they would be better off in chapter 12, but the Code—as it existed at that time—prohibited conversion from chapter 13 to chapter 12.[259] Instead the Sadlers dismissed their chapter 13 case and filed a new chapter 12 bankruptcy case. Concurrently, they successfully moved the bankruptcy court to enter an order keeping in effect the avoidance of the lien, even though dismissal would normally unwind such avoidance actions.[260] To be sure, the Code expressly contemplates flexibility in such circumstances: the ordinary effects of dismissal, including the vacatur of orders avoiding liens, may be modified "for cause."[261] But "'[c]ause' under § 349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason."[262] In short, the flexibility inherent in the Code may be exercised only to serve an appropriate purpose.

Nor, in this case, does the requirement for a valid bankruptcy purpose lack support from the text of the Code. Each form of debt adjustment bankruptcy provides a textual hook for this requirement in mandating that a plan must be proposed in good faith.[263] It has been established in chapter 11 that the good faith standard requires the showing of a valid bankruptcy purpose. Any chapter 11 case, for example, is subject to dismissal if not filed in good faith.[264] Again, leading decisions interpreting that requirement make clear that the core of that inquiry is whether the bankruptcy petition serves a valid bankruptcy purpose.[265] And chapter 11's parallel to section 1325(a)(3), section 1129(a)(3) (which governs both traditional chapter 11 plans and debt adjustment plans under subchapter V), has similarly been held to require that a proposed chapter 11 plan "will fairly achieve a result consistent with the objectives and purposes of the

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257 *Id.*

258 *Id.*

259 *Id.* at 920.

260 *Id.* at 919.

261 11 U.S.C. § 349(b) (2019).

262 *In re Sadler*, 935 F.3d at 921.

263 11 U.S.C. §§ 1325(a)(3), 1225(a)(3), 1129(a)(3).

264 *In re* SGL Carbon Corp., 200 F.3d 154, 159–62 (3d Cir. 1999).

265 *Id.* at 165–66 (lack of good faith where "absence of a valid reorganizational purpose"); *see In re* 15375 Memorial Corp., 589 F.3d 605, 618–19 (3d Cir. 2009) (affirming dismissal of petitions because "Debtors were not seeking Chapter 11 protection of a valid bankruptcy purpose, but instead were using the filings as a litigation tactic"); *see also* Carolin Corp. v. Miller, 886 F.2d 693, 701 (4th Cir. 1989) ("overall aim" of good faith inquiry must be "to determine whether the purposes of the Code would be furthered by permitting the Chapter 11 petitioner to proceed").

Bankruptcy Code."[266] Courts will thus decline to confirm chapter 11 plans that contain provisions not appropriately directed toward a valid bankruptcy purpose.[267]

In addition to finding both deep roots in bankruptcy jurisprudence and an appropriate textual hook, there are good policy reasons for identifying a valid bankruptcy purpose requirement before property may be retained within the estate post-confirmation. The Code unambiguously provides for close supervision and protection of property of the estate in the pre-confirmation world.[268] Until the debtor confirms a debt adjustment plan, his assets are preserved within the bankruptcy estate for the benefit of creditors. The automatic stay serves to protect those assets, and bankruptcy court and trustee supervision prevents the debtor from dissipating them.[269] Meanwhile, disputes regarding those assets are funneled into the bankruptcy court for resolution. Once the debtor has confirmed a plan, a bargain has been struck with creditors.[270] Thus, in the post-confirmation world, bankruptcy court control over all of the debtor's assets is not required. The debtor's obligations to prepetition creditors extend only to meeting his obligations under the plan. The bankruptcy court's jurisdiction, in turn, is appropriately limited to supervising and enforcing the terms of the plan.[271]

To follow the principle of cases like *Jevic* and *Sadler*, the bankruptcy court must come up with some other valid bankruptcy purpose before it may conclude that property may be preserved within the bankruptcy estate. And it appears, given the limited jurisdiction of the bankruptcy court, that no such valid

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[266] *In re* Combustion Eng'g, Inc., 391 F.3d 190, 247 (3d Cir. 2004); *see In re* Vill. at Camp Bowie I, L.P., 710 F.3d 239, 247 (5th Cir. 2013) (good faith requirement met where plan "proposed with the legitimate and honest purpose to reorganize").

[267] *See, e.g.*, *In re* GAC Storage Lansing, LLC, 465 B.R. 174, 201–02 (Bankr. N.D. Ill. 2013) (plan's improper purpose to secure injunction protecting non-debtor guarantor rather than maximize debtor's value meant not proposed in good faith); *In re* Noll, 172 B.R. 122, 124 (Bankr. M.D. Fla. 1994) (plan not proposed in good faith based on inclusion of economically unjustifiable release of debtor's claims against creditor); *In re* UVAS Farming Corp., 91 B.R. 579, 581 (Bankr. D.N.M. 1988).

[268] *See* 11 U.S.C. § 541 (2019).

[269] *Id.* §§ 362, 363.

[270] *See In re* Murphy, 474 F.3d 143, 148 (4th Cir. 2007) ("A confirmed Chapter 13 plan is 'a new and binding contract, sanctioned by the court, between the debtors and their pre-confirmation creditor[s].'") (quoting *In re* Penrod, 169 B.R. 910, 916 (Bankr. N.D. Ind.1994)); *In re* Harvey, 213 F.3d 318, 321 (7th Cir. 2000); *In re* Oparaji, 698 F.3d 231, 238 (5th Cir. 2012) (finding a chapter 13 plan is an "exchanged for bargain between the debtor and the debtor's creditors"); *In re* Forte, 341 B.R. 859, 869–70 (Bankr. N.D. Ill. 2005) (discussing "contract between a debtor and creditors formed by confirmation of the chapter 13 plan.").

[271] *In re* Craig's Stores of Tex., Inc., 266 F.3d 388, 390 (5th Cir. 2001) (holding in chapter 11 case that "[a]fter a debtor's reorganization plan has been confirmed, the debtor's estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.").

bankruptcy purpose is served by delaying the revesting of all estate property until the conclusion of the bankruptcy estate. Rather, the effects of such a delay in revesting are inconsistent with the proper working of bankruptcy law. On the one hand, as we have seen, delaying revesting vitiates the fresh start that the debtor would otherwise obtain upon plan confirmation by continuing to subject all of the debtor's financial affairs to bankruptcy court supervision until the completion of the debtor's plan payments. On the other hand, delaying the revesting of all property of the estate contravenes the Code by providing a debtor with unwarranted protection from postpetition creditors. When the revesting of property of the estate is delayed, that property continues to be subject to the automatic stay as provided for by section 362(a)(3) of the Code, prohibiting acts to exercise control over property of the estate. Indeed, debtors in chapter 13 cases have been recommended to delay revesting to engage this protection.[272] The *Steenes* and *Cherry* litigation concerned precisely this: debtors who sought to delay revesting of property of the estate to protect the city of Chicago from enforcing postpetition traffic penalties by towing the debtors' cars.[273]

Expanding the automatic stay in this manner is inconsistent with the structure of the Code. Although the Code carefully regulates the relationship between a debtor and his prepetition creditors throughout the bankruptcy case, it does not seek to protect debtors from their postpetition creditors. The

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[272] *See supra* notes 178–180, 220–229 and accompanying text.

[273] *Steenes I*, 918 F.3d 554, 558 (7th Cir. 2019); *In re* Cherry, 963 F.3d 717, 719 (7th Cir. 2020). Chicago's practices in enforcing its traffic enforcement laws have been harshly criticized. *See, e.g.*, Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PRO PUBLICA (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/. I do not write this Article to defend the City's choices in enforcing its traffic laws; indeed, Chicago itself has recognized that many of its historic practices require reform. *See generally Driven into Debt: How Tickets Burden the Poor*, PRO PUBLICA, https://www.propublica.org/series/driven-into-debt (last accessed Nov. 1, 2020) (collecting articles describing reforms to Chicago's traffic laws and policies). Regarding the broader debate over Chicago's traffic debt, I make only one point in this Article: that debtors cannot, at least by default, use the automatic stay in a pending bankruptcy case to shield a car from actions the City wants to take to enforce a ticket issued after the commencement of the bankruptcy case. There may be special cases in which such protection is justified, but likely not every case will qualify, and the protection of the stay should not apply as a matter of course. *See In re* Heath, 115 F.3d 521, 524 (7th Cir. 1997); *In re Cherry*, 963 F.3d at 719; *Steenes I*, 918 F.3d at 558. To be sure, that may harm some individual debtors. As I have explained, my normative view of debt adjustment bankruptcy assumes that debtors must pay all their ordinary go-forward expenses while they remain in bankruptcy. *Supra* notes 191–192 and accompanying text. The moral force of that argument is diminished in cases in which debtors are subject to unjust debt collection efforts of any type. Thus, to the extent that debtors in Chicago—or elsewhere—seek relief from unfair or heavy-handed traffic enforcement, chapter 13 may seem like a lifeline that may save their cars. But using bankruptcy in this way has to be, at a minimum, a second-best solution to reform or regulation of the underlying debt collection practices. In addition to being legally questionable, for the reasons I have outlined, it is not clear that debtors actually end up better off; temporarily unenforceable postpetition traffic fines and penalties will continue to pile up during the bankruptcy case and will likely mean that the debtor loses her car as soon as the case is over. *See Steenes I*, 918 F.3d at 558.

automatic stay, for example, enjoins "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case," but does not enjoin postpetition creditors from taking such actions.[274] Nor is the stay intended to insulate debtors from collection efforts made by postpetition creditors. Absent special circumstances, postpetition creditors are not provided for by a debt adjustment plan.[275] The debtor is expected to meet his obligations to postpetition creditors in the ordinary course throughout the period in which he is making his payments under the plan to repay prepetition creditors. That also is implicit in the Code's structure: the debtor commits only his projected disposable income to the plan (and may modify the plan if his disposable income changes post-confirmation). Calculation of a debtor's disposable income takes account of the debtor's expected postpetition expenses.[276] Preserving property within the bankruptcy estate, however, prevents postpetition creditors from actually seeking to collect on their claims and is in contravention to the statutory scheme.[277] Notably, Carlson has criticized theories of chapter 13 that preserve the chapter 13 estate by default precisely because they serve to expand the automatic stay and inhibit collection attempts by postpetition creditors.[278] For exactly the same reason, a debtor in a debt adjustment case should not be permitted to elect to preserve the estate, in an attempt to secure stay protection at the expense of his postpetition creditors.

There is a further troubling effect to permitting debtors to delay the revesting of property of the estate until discharge, dismissal, or conversion of the case. Because the extent of the bankruptcy court's jurisdiction is largely tied to the scope of the bankruptcy estate, preserving the estate for the life of the plan vastly expands bankruptcy court jurisdiction.[279] Courts have warned against this

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274 11 U.S.C. § 362(a)(6) (2019).

275 Section 1305(a)(1) allows tax creditors to file proofs of claim, and thus be paid under the plan, for taxes that fall due while the case is pending. *Id.* § 1305(a)(1). Section 1305(a)(2) allows postpetition creditors to file proofs of claim if they hold consumer debts against the debtor personally for property or services necessary for the debtor's performance under the plan. *Id.* § 1305(a)(2). There is no analog in chapter 12 or subchapter V.

276 *Id.* §§ 1325(b)(2), 1225(b)(2), 1191(d).

277 The Bankruptcy Court for the Northern District of Alabama reached a similar conclusion:

> If postpetition creditors can reach only debtors individually, but not property and wages that remain vested in the estate, then these creditors have no meaningful remedy while the case is pending unless they first obtain relief from the stay to pursue property of the estate before commencing state law collection remedies. Such a two-step process gives debtors, who leave all their property in the bankruptcy estate, unwarranted stay protection, and it imposes additional collection expenses and delays on postpetition creditors.

In re Jemison, 2007 Bankr. LEXIS 3107, at *7–9 (Bankr. N.D. Ala. 2007).

278 Carlson, *supra* note 9, at 247–48.

279 *Supra* pages 15–16 (discussing how bankruptcy court jurisdiction and the scope of the estate are intertwined).

outcome in chapter 11. The alternative is to "funnel virtually all litigation affecting [reorganized debtors] into a single federal forum."[280] A chapter 11 debtor is expected, post-confirmation, to "go about its business without further supervision or approval. The firm also is without the protection of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens."[281]

There is no reason to treat debtors in debt adjustment cases differently from those proceeding under traditional chapter 11. It is as untenable for bankruptcy jurisdiction to extend to all of the debtor's property post-confirmation in a chapter 13, chapter 12, or subchapter V case as it is for bankruptcy jurisdiction to extend to a traditional chapter 11 debtor's post-confirmation affairs. As Judge Posner explained in *Heath*, that would render the bankruptcy court the arbiter of "the dispute with the corner grocer."[282] One bankruptcy court forcefully rejected this possibility:

> [T]he retention of all property in the estate during the life of a case is not practical, and . . . would confer jurisdiction on the bankruptcy court and entangle it in even the pettiest of controversies and immerse the court in the day-to-day lives of debtors. For example, do the debtors in these cases intend for the Court to hear a dispute with the neighborhood grocer if the debtor is overcharged for an apple?[283]

Debtors certainly possess a degree of flexibility to shape the post-confirmation estate in a debt adjustment bankruptcy. But flexibility provided by the Code is not the same thing as license. A debtor's powers and privileges in bankruptcy must be exercised in good faith. The meaning of the good faith requirement—an overarching principle of bankruptcy generally—is that provisions incorporated in the plan must serve a valid bankruptcy purpose. That requirement governs provisions purporting to delay revesting of the estate, just as it does any other provision of the plan. And that requirement will substantially limit the circumstances in which revesting may be delayed.

2. *Necessity to Fulfillment of the Plan*

As the Seventh Circuit in *Heath* proposed, demonstrating a valid bankruptcy purpose for preserving the estate post-confirmation requires a showing that

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[280] *In re* Boston Reg'l Med. Ctr., 410 F.3d 100, 106 (1st Cir. 2005).

[281] Pettibone Corp. v. Easley, 935 F.2d 120, 122 (7th Cir. 1991).

[282] *In re* Heath, 115 F.3d 521, 523 (7th Cir. 1997).

[283] *In re* Jemison, 2007 Bankr. LEXIS 3107, at *20–21 (Bankr. N.D. Ala. 2007) (striking from chapter 13 plan provision that delayed revesting of all property of the estate).

property to be retained within the estate is necessary to the fulfillment of the plan.[284] The plan is the central feature of the post-confirmation world, and the key source of the debtor's obligations while the case remains pending. To the extent the debtor wishes to secure for himself or his property additional protections beyond those ordinarily afforded by the Code, those protections must be justified by their effect upon the debtor's ability to meet his plan obligations.

On this issue, the Seventh Circuit's decisions in *Steenes I* and *Cherry* do not provide helpful guidance. They observe that property may only be preserved within the estate for a "good, case-specific reason" without suggesting what kind of justification might suffice.[285] Implicit in the decisions seems to be that invoking the protection of the automatic stay will not count as a good reason for keeping property in the estate; the opinions describe the plans at issue as "sheltering scofflaws."[286] But it cannot be that a plan drafted to keep some property within the estate fails simply because the debtor's reason for preserving the estate is to secure the stay's protection. From the debtor's perspective, gaining the benefit of the stay as against postpetition creditors is really the only substantial benefit of keeping property within the estate. The other chief effect of preserving the estate is to require the debtor to seek court permission to make other-than-ordinary dispositions of assets; few debtors are likely to want to preserve the bankruptcy estate in order to impose that burden upon themselves.[287] If a finding that a debtor sought to secure the stay's protection were enough to doom a plan, then the ability for debtors to depart from the default rule would be read out of the Code entirely. There would be little, if anything, the debtor could propose that would meet the necessary hurdle.

Courts considering this question must therefore figure out for themselves what counts as a valid reason to preserve property within the bankruptcy estate. My suggestion is that the analysis should consider how compelling the debtor's reasons are for seeking this kind of special protection and for resorting to the bankruptcy court as a shield against postpetition creditors. As I discussed in Section II.A.5 above, the key protection provided by preserving the stay is procedural, rather than substantive. It affects the timing and forum of litigation over postpetition creditors' enforcement actions. In most cases, the debtor cannot secure absolute protection, because a bankruptcy court may grant unpaid postpetition creditors relief from the automatic stay or an administrative

[284] *In re Heath*, 115 F.3d at 524.

[285] *In re* Cherry, 963 F.3d 717, 719 (7th Cir. 2020).

[286] *Steenes I*, 918 F.3d 554, 558 (7th Cir. 2019).

[287] *See supra* pages 14–15 (discussing the role of the bankruptcy court for debtor's use of property post-confirmation).

expense. Meanwhile, it is not true that the debtor is entirely unprotected even in the absence of the estate. A debtor always has the right to challenge the validity of some collection effort in state court; for example, a debtor might sue an auto lender in state court that repossessed her car, arguing that the lender had miscalculated the balance due and the debtor had not really defaulted on the loan. The effect of preserving the estate is to funnel all such disputes into the bankruptcy court, and to ensure that they are resolved before, rather than after, postpetition creditors have taken some action to collect on unpaid debts. The best justification for preserving the stay is likely to come in cases in which this kind of after-the-fact challenge is insufficient, and it is essential to the debtor that any collection efforts are scrutinized in advance. In other words, the debtor should argue that collection efforts are likely to result in the immediate failure of the plan, such that the justifiability of the postpetition creditor's actions must be litigated in advance, rather than challenged after the fact in the ordinary course.

Precisely when such circumstances exist is likely to be a fact-dependent question. The standard appears clearly to be met if a plan provides that a specific piece of property will be liquidated to repay creditors. Once the property is gone, the debtor's ability to repay creditors vanishes, and the plan will fail. Before a postpetition creditor pulls the rug out from underneath the plan in this way, its claim and rights over the property ought to be subjected to appropriate review by the bankruptcy court (and the filing of a motion in the bankruptcy court may additionally prompt the debtor quickly to take steps toward working out this obligation). Similarly, if the debtor's ability to complete all plan payments is predicated on a specific piece of income generating property (such as a house from which the debtor receives rental income), that asset could be kept in the estate to ensure that the plan is not disrupted without appropriate cause.

To be sure, there will be some hard calls in implementing this standard. Debtors who seek broad post-confirmation protection from their postpetition creditors may argue that many of their key assets are necessary for them to continue making plan payments. Necessity, of course, is likely to be more clearly established in some cases than others. In a consumer case, a debtor who earns a major portion of her income driving a car for a ride-sharing service is likely to have a compelling argument that they cannot complete the plan without the vehicle, and thus should be able to justify retaining the vehicle within the bankruptcy estate. Other debtors may wish for the same protection for their vehicle simply because they drive it to and from work. The intention of this Article is not to require bankruptcy courts to hear extended testimony on such issues, or to make detailed findings of fact regarding, for example, how feasible it would be for a debtor who ordinarily drives to work instead to rely on public transit. Inquiries of this nature would be inconsistent with the “light touch” model of bankruptcy that I describe below, which seeks to minimize the debtor’s encounters with the bankruptcy court.[288]

Rather, I expect that a proposed plan will pass muster if it identifies a specific asset that is to remain in the estate and recites some reason, compelling on its face, why the loss of that asset could immediately jeopardize the bankruptcy. That claim would be supported by a sworn declaration or some other attestation by the debtor—the kind of minimal evidentiary showing that is already extremely common in bankruptcy practice. In most cases, creditors are unlikely to object to these plan provisions and no litigation of any kind will ensure. After all, extending the stay chiefly impacts the enforceability of debts that do not yet exist at the time of plan confirmation. In some cases, there will be creditors who are already present at the time of plan confirmation and thus able to object to a plan provision keeping an asset within the estate. That may occur when a debtor has incurred an obligation between the time of filing a bankruptcy case and the confirmation of a plan, or is a repeat obligor of a specific creditor, such that the likelihood of some new debt arising during the plan period gives the creditor standing to object the plan. In these few cases, the creditor may challenge the debtor’s recited reasons as to why keeping property in the estate is essential and, if it can supply evidence sufficient to controvert the debtor’s testimony, that objection may be resolved by the bankruptcy court at the confirmation hearing.

The key advantages of this approach are certainty and predictability. For the debtor whose property needs the additional protection provided by the automatic stay, or whose affairs for some reason require greater supervision, the estate may remain open post-confirmation. But that will be the case only where specific language in the plan so provides. Because the retention of property within the estate is not self-executing, as with the estate transformation theory, the plan and confirmation order may provide guidance to the debtor and creditors as to precisely what assets are in the estate, and permit all parties to the bankruptcy case to understand their rights in respect of those assets. The plan will also articulate the basis for retention of property within the estate. Creditors who have grounds to challenge the debtor’s decision in that respect will have the opportunity to raise that challenge at the time of plan confirmation and to force the debtor to justify his decision to depart from the default rule of revesting.

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[288] *See infra* Section IV.

IV. LIGHT-TOUCH BANKRUPTCY

To conclude, I will attempt to situate my view of the limited lifespan of the bankruptcy estate in a broader model of debt adjustment bankruptcy that I will call "light-touch bankruptcy." Light-touch bankruptcy law seeks to make bankruptcy cases as minimally burdensome for the debtor as possible. It assumes that the debtor will undertake the task of managing her own affairs, and thus seeks to afford her a financial "fresh start" at the earliest possible date. In so doing, the light-touch bankruptcy approach also attempts to make bankruptcy as simple and cheap as possible. One likely positive effect of this approach is to make bankruptcy cases easier to administer—a timely change given the expected waves of both business and consumer filings expected to follow the COVID-19 pandemic. From the perspective of the debtor, though, light-touch bankruptcy is very much conscious that debt adjustment bankruptcy exists as an alternative to a simple, speedy liquidation bankruptcy under chapter 7.[289] Debtors may emerge from chapter 7 proceedings after only a few short weeks or months immediately able to start a new financial life, freed of any restrictions attend to a bankruptcy filing, and unprotected by the bankruptcy court (save for the discharge of prepetition debt).[290] Debt adjustment bankruptcies, necessarily, take longer. But I posit that there is little need for them to be more intrusive for the debtor, or to presume that the debtor requires greater ongoing scrutiny or shielding from the bankruptcy court, than chapter 7 does. Light-touch bankruptcy, therefore, disagrees emphatically with bankruptcy courts that argue that their role is to be "gatekeepers on post-confirmation activities."[291]

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[289] Some chapter 13 debtors, of course, do not have the option of filing for bankruptcy under chapter 7. The means test created by Congress's 2005 bankruptcy reform legislation presumptively requires some above-median income debtors, who Congress believes to be most capable of repaying debts over time, to seek relief under chapter 13 rather than chapter 7. 11 U.S.C. § 707(b) (2019). I join with the many critics of the means test who have argued that it has largely failed to achieve what Congress wanted. *See* John Pottow et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 353 (2008). Perhaps more significantly, and certainly less justifiably, chapter 7 remains out of reach for many low income consumers that might benefit most from a speedy liquidation because consumer debtors' attorneys will typically require an upfront fee to file a chapter 7 case that is beyond the consumer debtor's means (while chapter 13 cases are often filed for no money down). *See* Pamela Foohey et al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055 (2017); Pamela Foohey, *Access to Consumer Bankruptcy*, 34 EMORY BANKR. DEV. J. 341, 360–63 (2018).

[290] A small business that files a chapter 7 or other liquidation proceeding, of course, does not emerge from bankruptcy with a fresh start. But the entrepreneur owner of the small business is nonetheless freed by the speedy windup of her old business immediately to start a new one—as many choose to do. *See* Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310, 2310–18, 2328–30 (2005).

[291] *In re* Ward, 546 B.R. 667, 679 (Bankr. N.D. Tex. 2016); *see supra* notes 243–244 and accompanying text.

Limiting the lifespan of the bankruptcy estate moves closer to a model of light-touch bankruptcy because it reduces the number of interactions between the debtor and the bankruptcy court. The shadow of the bankruptcy proceeding is reduced. Although it allows for exceptions, it assumes that once the debtor's plan is confirmed and his repayment obligations are crystallized, he will have no further recourse to the bankruptcy court. As this Article has explained, the debtor is not required to pay for an attorney to go into court on his behalf to seek permission to sell assets or make purchases, which the bankruptcy court may grant based on its view of whether the proposed transactions are financially wise or involve advantageous terms.[292] Even in cases in which the bankruptcy court approves the proposed transactions, the need for motions practice in such cases may cost a debtor hundreds of dollars on each occasion.[293] This Article proposes simply to do away with those costs in the post-confirmation world. Nor may the debtor ordinarily seek the aid of the bankruptcy court in disputes with new creditors that arise after the financial fresh start of plan confirmation. Although my view of the limited lifespan of the bankruptcy estate permits exceptions, presumptively the debtor must deal with those outside bankruptcy on the same terms as a consumer with no pending bankruptcy case, or a debtor already granted a chapter 7 discharge.

Light-touch bankruptcy, though, is broader than just the scope of the bankruptcy estate. Congress and the bankruptcy courts should be attentive to other ways that debt adjustment bankruptcy may be streamlined for debtors. To take a number of examples of what light-touch bankruptcy should mean: on an operational level, debt adjustment bankruptcy should continue the trend towards use of standardized forms that allow for cheaply prepared, off-the-shelf reorganization proceedings, and should, where possible, simplify filings that the debtor makes or receives after the earliest period of the bankruptcy case; bankruptcy courts should be skeptical of plan provisions, such as conduit mortgage payment plans, that take control of the debtor's ordinary financial affairs away from her;[294] and Congress should rigorously scrutinize mandates

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[292] *See In re Ward*, 546 B.R. at 680 (declining to approve debtor's purchase of a car because proposed financing terms were "onerous and unfavorable" notwithstanding "some anecdotal evidence that [the terms] might be customary in the industry for individuals in financial distress.").

[293] *See id.* (describing typical fees in the Northern District of Texas).

[294] These are plan provisions or local rules that provide that the debtor's ongoing monthly mortgage payment during the plan period is to be paid by the chapter 13 trustee (who may receive the funds, along with the remainder of the debtor's plan payments, either via a wage garnishment order or a direct payment from the debtor), rather than directly by the debtor herself to the mortgage holder.) Although relatively common and endorsed as a best practice by many bankruptcy judges and professionals, AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 184–87 (2019), one recent study suggested that they have no statistically significant impact one way or the other on plan completion rates. Greene, Patel & Porter, *supra*

such as the requirement in chapter 13 for credit counselling (before a bankruptcy case is commenced)[295] and personal financial management (before a discharge is granted)[296] to ensure these programs provide a sufficient benefit for debtors to justify the financial and time cost imposed upon debtors.[297] One welcome substantive change would be to amend the Code to change the rules for modification of confirmed plans in chapters 12 and 13 cases. Under current law, chapter 12 or 13 debtors may be brought back into bankruptcy court by a motion of the trustee or a creditor to modify the confirmed plan to increase the debtor's payments on the basis that her disposable income has increased in the period following plan confirmation.[298] Subchapter V has eliminated this possibility for small business debtors, permitting only the debtor to seek modification in order to reduce its plan payments.[299] Adopting that rule in chapters 12 and 13 not only permits the debtor to benefit from good fortune during the pendency of the case but also makes the plan period administratively more simple for both the debtor and trustee.[300]

Finally, while I do not claim that my model of bankruptcy follows necessarily from the insights that are at the heart of most recent bankruptcy scholarship, I note that light-touch bankruptcy is at least consistent with its most significant conclusions. Light-touch bankruptcy is normatively predicated on the notion that the substantial majority of debtors do not end up in bankruptcy because they are bad actors, or because they are unduly or unusually irresponsible in the management of their finances. Research beginning in the 1980s with the pathbreaking empirical work of Professors Elizabeth Warren, Jay Westbrook, and Theresa Sullivan has argued instead that bankruptcy is most

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note 2, at 1076.

295 11 U.S.C. § 109(h) (2019).

296 *Id.* §§ 111, 727(a)(11), 1328(g)(1).

297 Most debtors do not appear to find these courses helpful. *See generally* Michael D. Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 MARQ. L. REV. 391 (2013) ("only four out of the fifty-eight participants (6.90%) [] interviewed for this study found the mandated education courses helpful"); AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY 121–25 (2019) (noting widespread criticism of the utility of the pre-bankruptcy credit counseling requirement and proposing its elimination); *id.* at 125–26 (describing track record of debtor financial management course as "mixed at best," but not proposing repeal).

298 *See* 11 U.S.C. §§ 1229(a)(1), 1329(a)(1).

299 *Id.* § 1193.

300 Many of my suggestions for a new light-touch framework for debt-adjustment bankruptcy are consistent in theme with recent reform proposals, such as now-Senator Warren's bankruptcy reform plan to replace current chapter 7 and chapter 13 filing rules with a single, streamlined consumer bankruptcy filing process intended to make bankruptcy "simple, cheap, fast, and flexible." *Fixing our Bankruptcy System to Give People a Second Chance*, ELIZABETH WARREN, https://elizabethwarren.com/plans/bankruptcy-reform (last accessed Nov. 19, 2020).

frequently the product of unpredictable and frequently unavoidable financial setbacks, whether income shocks such as job losses or family separation, or expense shocks, such as medical treatment.[301] This research emphasizes that consumer bankruptcy in the United States frequently plays the role of social insurance, providing relief for financially distressed debtors that supplements that provided by more formal social insurance programs such as unemployment insurance or health insurance.[302] Bankruptcy law is not the resort for spendthrifts seeking to avoid paying too casually incurred debt; rather, it continues to carry very substantial social stigma, and many consumer debtors will suffer considerable financial hardship for long periods of time before turning to bankruptcy to address their problems.[303]

With this understanding of both of the purposes that bankruptcy law serves and of the types of debtors that most frequently end up in bankruptcy, a light-touch model of debt adjustment bankruptcy seems justifiable. Among consumer bankruptcy's gravest challenges today are barriers to access that prevent debtors from gaining effective relief. These are deep-rooted problems that do not admit of any easy solution. Even if the effect is felt only at the margins, simplifying and streamlining the bankruptcy process—and thus, potentially, making it cheaper—may do something to help promote wide access to bankruptcy. Meanwhile, given the profile of the typical chapter 13 debtor, it is at best questionable whether the potentially costly additional procedures that I have described add much value for debtors. There is little reason to believe that close scrutiny of consumer debtors by the bankruptcy courts is warranted as the price for admission to bankruptcy—and even less reason to suppose that to be the case for business debtors under other chapters of the Code.

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[301] TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 6 (Yale University Press 2020).

> The debtors in our sample include accountants and computer engineers, doctors and dentists, clerks and executives, salesclerks and librarians, teachers and entrepreneurs. They are middle class folks . . . the first to succumb to difficulties that also face many of their fellow citizens. . . They are a silent reminder that even the most secure family may be a job loss, a medical problem, or an out-of-control credit card away from financial catastrophe.

Id. at 6; *see also id.* at 75–107 (discussing job loss as a cause of bankruptcy); 141–71 (discussing medical expenses as a cause of bankruptcy); 172–98 (discussing divorce as a cause of bankruptcy).

[302] *See* Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 129–31 (2005) (describing various forms of the claim that bankruptcy law functions as social insurance).

[303] *See* Pamela Foohey, *Access to Consumer Bankruptcy*, 34 EMORY BANKR. DEV. J. 341, 347–57 (2018).

CONCLUSION

Since the first years of the modern Code, courts have been divided on the scope of the post-confirmation estate in chapter 13. A four-way fracture among courts and commentators has developed, with each theory reflecting radically different understandings of the structure of chapter 13. As Congress has expanded the availability of debt adjustment bankruptcy, the dispute over the fate of the bankruptcy estate has reached beyond chapter 13. Most recently, it has become of pressing concern to bankruptcy courts who must preside over new small business cases under subchapter V of chapter 11. As a matter of text, structure, and purpose, the estate termination theory is the most persuasive of the various accounts of the lifespan of the bankruptcy estate. The estate termination theory aligns debt adjustment bankruptcy with traditional chapter 11 and gives full and appropriate effect to the Code's direction that property of the estate vest in the debtor upon confirmation of the plan.

Having established that the estate presumptively terminates upon confirmation of a debt adjustment plan, it is necessary to consider under what circumstances the plan or confirmation order may deviate from the default rule and preserve the estate. The power to propose a delay in the revesting of property of the estate after confirmation belongs to the debtor, rather than to the bankruptcy court. But it is a limited power. A debtor must be able to point to some valid bankruptcy law purpose before property can be retained within the estate. The usual justifications for preserving the estate post-confirmation—in particular, securing the protection of the automatic stay against postpetition creditors—do not suffice. Instead, such property must be necessary to the fulfillment of the plan, the landmark of the post-confirmation world. This approach appropriately preserves the debtor's post-confirmation freedom of action, ensures that postpetition creditors have an avenue to enforce their own rights outside of the bankruptcy case, and prevents the bankruptcy court from exercising unlimited jurisdiction over the debtor's post-confirmation affairs. Adopting this theory of the estate in debt adjustment bankruptcy cases will help shift bankruptcy law toward a light-touch approach will minimize the need for the debtor to interact with the bankruptcy court, and finally, will make the bankruptcy process as a whole cheaper and less burdensome for debtors.