
Lauren Sylvester

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REDEFINING DISPOSABLE INCOME IN CHAPTER 13 PLANS: MOVING FORWARD INTO A "NEW ERA IN THE HISTORY OF BANKRUPTCY LAW"  

LAUREN SYLVESTER*

I. INTRODUCTION

"The system was not broken." 2 But as the amount of bankruptcies began to dramatically rise in the early 1980s, more and more creditors began to argue that the system was, in fact, broken. 3 Congress attempted to repair that broken system by enacting the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). 4

The goal of BAPCPA was two-fold: create uniform standards in the bankruptcy process and limit judicial discretion. 5 Still, the overwhelming attitude of both debtors and bankruptcy judges was that the system was not broken. 6 With many open disputes concerning BAPCPA and its application, judges and debtors seem to be longing for the old days. The question now is whether courts can see beyond the past and accept the realities of a new era in bankruptcy law.

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5. See generally Christopher Frost, Plain Meaning and Unintended Results Under BAPCPA: In re Kagenveama, 28 No. 8 BANKR. L. LETTER 1 (Aug. 2008) (explaining the goals of the BAPCPA and how they comport with courts' interpretation of the statute).

6. In re Alexander, 344 B.R. at 752. See also In re Austin, 372 B.R. 668, 679-80 (Bankr. D. Vt. 2007) (explaining that although the BAPCPA may have unfortunate consequences for some, by departing from pre-BAPCPA policies, courts must still apply the statute as intended and written by Congress).
Part II of this Comment will give a brief history of United States bankruptcy law, describe the basics of BAPCPA and Chapter 13 bankruptcy, and explain the incorporation of the new "means test" into Chapter 13. Part III will focus on just one of the many current disputes under BAPCPA: the interpretation of "projected disposable income" and "disposable income" under Section 1325(b).7 This section will also analyze two distinct views on the correct interpretation of these terms and weigh how these views comport with Congress' purpose behind BAPCPA. Finally, Part IV will propose an amendment to Section 1325(b) that reconciles rules of statutory interpretation with the legislative history and policy behind BAPCPA in order to solve the issue of calculating projected disposable income. This amendment will change the definition of disposable income to a percentage of the debtor's income.

II. BACKGROUND

A. A Brief History of Bankruptcy in the United States

The Constitution explicitly gives Congress the power to enact uniform bankruptcy laws.8 Early bankruptcy laws treated debtors as wrongdoers or criminals—imprisonment or even death for those declaring bankruptcy was commonplace in the 1700s.9 The late 1700s and 1800s marked a shift in bankruptcy laws, where debtors began to be perceived as unfortunate, rather than criminal.10 This shift in perception resulted in a series of laws that were passed and repealed along with economic busts and booms.11

7. 11 U.S.C. § 1325(b)(1)(B) (2006). Section 1325(b)(1)(B) provides that all "projected disposable income... will be applied to make payments to unsecured creditors under the plan." Id. Section 1325(b)(2) defines the term disposable income as "current monthly income... less amounts reasonably necessary to be expended." Id. § 1325(b)(2). Section 1325(b)(3) defines amounts reasonably necessary to be expended as "determined in accordance with... section 707(b)(2)." Id. § 1325(b)(3). In other words, these expenses are the same expenses laid out in the means test. See generally 11 U.S.C. § 707(b)(2)(2006).

8. U.S. CONST. art. 1, § 8, cl. 4. This section gives Congress the power to "establish... uniform Laws on the subject of Bankruptcies throughout the United States." Id.


10. Tabb, supra note 9, at 28.

Finally, the first bankruptcy law with lasting power was enacted in 1898, which stayed in effect until repealed by the Bankruptcy Reform Act of 1978. Both of these laws had basic policies that ultimately favored debtors.  

1. Modern Consumer Bankruptcy

The 1978 Code and the 2005 BAPCPA both provide for two main forms of bankruptcy relief: Chapter 7 and Chapter 13. Under Chapter 7, a debtor discharges pre-petition debts in return for a relinquishment of non-exempt assets. The overwhelming majority of cases filed under Chapter 7 are “no asset” cases where unsecured creditors receive no payment at all for debts owed.  

On the other hand, under Chapter 13, a debtor must repay a portion of debt with future earnings pursuant to a court-approved plan. While there are certain benefits of choosing to file under Chapter 13, the dramatic increase in bankruptcies has been in Chapter 7 filings.

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12. See Hubler, supra note 3, at 315 (explaining that this first “fully modern bankruptcy act” recognized the public interest in granting a discharge to “honest but unfortunate debtors”); see also F. REGIS NOEL, HISTORY OF THE BANKRUPTCY LAW 200 (William S. Hein & Co., Inc. 2002) (1919) (providing a history of bankruptcy and its perception in society). Noel described the state of bankruptcy by stating that “[w]hile all concede that as long as men barter, bankruptcy will be one of the evils of society, it is now regarded, not as a crime, but as a misfortune, not as a disgrace, but as a malady which needs the soothing remedy of sympathy and encouragement.” Id.

13. See Landry & Mardis, supra note 9, at 95 (explaining that no amendment to the Bankruptcy Code had altered the underlying policy in favor of debtors until the 2005 BAPCPA, which represented a shift away from a policy favoring debtors, toward one that favored creditors); see generally Robert J. Landry, III, An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?, 3 RUTGERS BUS. L.J. 2 (2006) (claiming that the BAPCPA represents a fundamental change in the philosophy which has underlined American bankruptcy law since the advent of the first act in 1898; namely, that debtors are fundamentally honest but unfortunate, as opposed to abusers of the bankruptcy process).


16. WARREN & WESTBROOK, supra note 11, at 121.


18. See id. at 329-31 (explaining that incentives to file under Chapter 13 include: additional non-exempt property can be retained, additional debts can be discharged that cannot be discharged in Chapter 7, and debtors can enjoy more favorable treatment by creditors in credit ratings and willingness to lend); see also Administrative Office of the U.S. Courts, http://www.uscourts.gov/bnkrcpystats/bankruptcystats.htm (last visited Nov. 9, 2009) (reporting statistics on the number of bankruptcy petitions filed, including the percentage filed under Chapter 7, as opposed to Chapter 13).
2. The Credit Industry Pushes for Reform

Beginning in the 1960s, the credit industry intensified their push for reforming the Bankruptcy Code (the "Code"). Credit companies wanted a mandate for debtors to use Chapter 13 instead of Chapter 7, so that they would receive a greater payout. This push laid the groundwork for the 1984 amendment to the 1978 Code, which provided for dismissal or conversion to Chapter 13 if granting a discharge would be a "substantial abuse of the system." But the credit industry continued to lobby for further reforms, still viewing the Code as too debtor friendly.

B. The 2005 BAPCPA: "A Long Time Coming"

When Senator Hatch addressed the Senate before the BAPCPA was signed in 2005, he said, "[t]his bankruptcy bill has been a long time coming," and it had. In the late 1990s, the number of bankruptcies rose dramatically. In 1998, bankruptcy

20. See id. (explaining that credit companies began petitioning for forced Chapter 13 bankruptcy for certain debtors); see also David A. Moss & Gibbs A. Johnson, The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?, 73 AM. BANKR. L.J. 311, 320-21 (titling this point in the history of American bankruptcy law as the "Second Consumer Bankruptcy Crisis and Death of a Stigma").
21. See 11 U.S.C. § 707(b) (2000) (amended 2005) (providing for dismissal if granting relief constituted a "substantial abuse" of the system); see also Coulson, supra note 19, at 468 (describing how creditor lobbying led to the introduction of the "substantial abuse" regime); Rafael I. Pardo, Eliminating the Judicial Function in Consumer Bankruptcy, 81 AM. BANKR. L.J. 471, 476 (2007) (noting that the "substantial abuse" test was added into the code in 1984, despite the 1978 Code's legislative history directly rejecting the idea that the debtor's ability to repay could be used as a basis for dismissing a Chapter 7 case); Hubler, supra note 3, at 317-20 (describing how lobbying efforts by the credit industry led Congress to include the "substantial abuse" test in the amended Bankruptcy Code of 1978). The "substantial abuse" test allowed judges to dismiss the case or transfer a Chapter 7 case to Chapter 13 if the judge determined that allowing a debtor to liquidate would be a "substantial abuse" of the system. Id. at 319.
22. See Paul M. Black & Michael J. Herbert, Bankcard's Revenge: A Critique of the 1984 Consumer Credit Amendments to the Bankruptcy Code, 19 U. RICH. L. REV. 845, 845 (1985) (explaining that the 1978 Code was seen as favoring bankrupts and was "branded a debtor's paradise practically beckoning borrowers to shed their debts painlessly and needlessly"); see also Hubler, supra note 3, at 318-19 (describing the credit industry's push for reform, seeking to limit access to Chapter 7 and mandate Chapter 13 for some debtors).
24. See Landry, supra note 13, at 1 (explaining that before President Bush took office there was not enough support to pass a major reform of the
filings exceeded one million for the first time in United States history.\textsuperscript{25} Creditors became increasingly concerned with debtors liquidating under Chapter 7 and abusing the bankruptcy system.\textsuperscript{26} In response, in 1994 the National Bankruptcy Review Commission was established, and the coming years were peppered with several attempts to amend the Code.\textsuperscript{27} In 2000, the 106th Congress passed a major bankruptcy reform bill similar to the future BAPCPA, however, President Clinton vetoed the bill.\textsuperscript{28}

Congress adopted the view that the increase in consumer bankruptcy filings was due to debtors abusing the system, including: lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system.\textsuperscript{29} When President Bush came into office, Congress found the support for BAPCPA it needed.\textsuperscript{30}

\begin{footnotesize}
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\item[25.] H.R. REP. NO. 109-31, pt. 1, at 3-4 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 98; see also Landry, supra note 13, at 5 (noting that at least ten percent of all American households have gone through the bankruptcy system).
\item[26.] See Stephan Labaton, Bankruptcy Bill Set for Passage; Victory for Bush, N.Y. TIMES, Mar. 9, 2005, at A1 (naming the main lobbying forces for the 2005 BAPCPA as a coalition, including: Visa, Mastercard, the American Bankers Association, MBNA America, Capital One, Citicorp, The Ford Motor Credit Company, and the General Motors Acceptance Corporation). Beginning in 1989, this coalition spent more than forty million dollars in political fundraising and millions more in lobbying efforts. Id. One commentator noted that "[t]he bankruptcy bill was written by and for credit card companies." Paul Krugman, The Debt-Peonage Society, N.Y. TIMES, Mar. 8, 2005, at A23. Krugman analogizes the BAPCPA to the debt peonage society after the Civil War in which debtors had to work for their creditors to pay down their debts. Id. Krugman claims that the bill "won't get us back to those bad old days all by itself, but it's a significant step in that direction." Id.
\item[27.] See generally Susan Jensen, A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 AM. BANKR. L.J. 48 (providing a legislative history of BAPCPA from the creation of the National Bankruptcy Review Commission in 1994, to BAPCPA's review and passage in the 108th and 109th Congresses); see also H.R. REP. NO. 109-31, pt. 1, at 6 (explaining that Congress considered proposed reforms to the Code for nearly eight years).
\item[28.] Charles Jordan Tabb, The Death of Consumer Bankruptcy in the United States?, 18 BANKR. DEV. J. 1, 1-2 (2001); see also Labaton, supra note 26, at A1 (calling BAPCPA a "thinly disguised gift to banks and credit card companies," which critics contend are responsible for the high rate of bankruptcy by promoting predatory credit lending).
\item[29.] H.R. REP. NO. 109-31, pt. 1, at 2; see also 151 CONG. REC. S2459-01, S2459 (describing how BAPCPA was a response to abusive filings and how the means test would remedy the abuse by restricting access to Chapter 7 for those with high incomes).
\item[30.] White House Press Release, 2005 U.S.C.C.A.N. S7 Statement by President of the United States, Statement of President George W. Bush upon
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Upon signing the bill, President Bush declared that this “common sense” reform would ensure that Americans had access to affordable credit.\textsuperscript{31}

There was criticism, however, that the credit companies, who lobbied for these changes, inundated the recently bankrupt with credit card offers so that debtors would accumulate more debt.\textsuperscript{32} In addition, many scholars argued that the increase in the consumer credit market led to the change, rather than abuse of the system.\textsuperscript{33} These dissenters did not see the BAPCPA as a common sense decision; rather, they saw it as a measure which failed to solve the true underlying problems leading to bankruptcy: unemployment, inadequate health insurance, failing small businesses, and natural disasters.\textsuperscript{34}

Whether properly addressing the cause of skyrocketing bankruptcy filings or not, BAPCPA went into effect in October of 2005.\textsuperscript{35} Some of the new requirements included additional calculations, additional documentations, and reduced discretion for both judges and debtors in choosing between a Chapter 7

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\textsuperscript{31} Signing S. 256, 57 (Apr. 20, 2005).
\textsuperscript{32} Id.
\textsuperscript{34} \textit{See} Henry J. Sommer, \textit{Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?}, 27 \textit{Hofstra L. Rev.} 33, 36-38 (1998) (explaining that bankruptcy filings are a symptom of too much debt, not the cause). Sommer makes an analogy to tobacco use, explaining that people who smoke are not making a good decision but “no one suggests closing the cancer wards.” \textit{Id.} at 41-42. Abuses of the bankruptcy system are episodic, not systemic, and increases in filings are a symptom of societal problems, not abuse. Stephan Labaton, \textit{House Passes Bankruptcy Bill; Overhaul Now Awaits President’s Signature}, \textit{N.Y. Times}, Apr. 15, 2005, at C5. The BAPCPA was “a “victory for Bush . . . [a] setback for civil rights, labor and consumer organizations.” \textit{Id.}
\textsuperscript{35} \textit{See} Elizabeth Warren, \textit{Show Me the Money}, \textit{N.Y. Times}, Oct. 24, 2005, at A21 (discussing the huge number of bankruptcy bills pending after hurricanes, including three new bankruptcy bills pending due to Hurricane Katrina). Warren states that “because those problems aren’t going away any time soon, the need to restore common sense to the bankruptcy system will not go away either.” \textit{Id.} After Katrina, lawmakers suggested relief from the strict new bankruptcy code provisions, but House Republicans rejected any exemption for the victims. Mary Williams Walsh & Riva D. Atlas, \textit{Storm Victims May Face Curbs on Bankruptcy}, \textit{N.Y. Times}, Sept. 27, 2005, at A1. When Congress initially agreed to making a more strict Code, however, “no one had the victims of Hurricane Katrina in mind.” \textit{Id.} The article also reported a finding that “bankruptcy filings usually reach a peak two to three years after a hurricane.” \textit{Id.} Wisconsin congressman F. James Sensenbrenner Jr., a sponsor of the bankruptcy law, stated that those who lost the fight against the new rule should “get over it”. Editorial, \textit{Congress and Katrina, A Bankrupt Law}, \textit{N.Y. Times}, Oct. 3, 2005, at A20. What most bankruptcies have in common is a huge setback beyond the debtors’ control. \textit{Id.}

liquidation and Chapter 13 plan.\textsuperscript{36} BAPCPA was an attempt to reconcile the clash between competing ideals: the right to a fresh start and personal responsibility for incurring debt.\textsuperscript{37} The idea behind the reform was simple—any debtor who can pay, must pay.\textsuperscript{38}

C. The Means Test

The most important and telling change in the Code was Congress' promulgation of the rigid "means test," which was considered the cure for the systemic abuse of the bankruptcy system.\textsuperscript{39} The means test created a formula designed to weed out the feared abusers of the bankruptcy system.\textsuperscript{40} If a debtor "fails" the means test, he is pushed from Chapter 7 liquidation into a Chapter 13 payout plan.\textsuperscript{41} In addition, Congress incorporated the means test into Chapter 13 to define "projected disposable income," the consequences of which is the focus of this Comment.

The means test was the end result of creditors' forty-year lobbying effort to preference Chapter 13 plans, under which debtors would be forced to make payments on debts over time.\textsuperscript{42} Congress accepted this position, despite research showing that Chapter 13 plans had poor success rates, often paying out nothing to unsecured creditors.\textsuperscript{43} Under BAPCPA's means test, debtors

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  \item 36. Evans & Lewis, supra note 15, at 332-38.
  \item 37. See Leslie Eaton, The Nation: Debt's Honor; Bankruptcy, the American Morality Tale, N.Y. TIMES, Mar. 13, 2005, at A1 (indicating that the BAPCPA tried to reconcile the interests of credit card lobbyists with the "fresh start" philosophy of American bankruptcy law).
  \item 38. Id.
  \item 39. See Pardo, supra note 21, at 472 (calling the means test the "panacea" for abuse and describing it as a formulaic approach by which courts presume abuse for debtors who seem to be able to pay past debts with future income); see also Erwin Chemerinsky, Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 AM. BANKR. L.J. 571, 571 (citing H.R. Rep. No. 109-31, pt. 1) (stating that the purpose of BAPCPA is "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors").
  \item 40. See 151 CONG. REC. S2459-01, S2459 (describing how the means test will allow stricter access to Chapter 7 for those with high incomes); see also Official Bankruptcy Form 22A, available at http://www.uscourts.gov/rules/BK_Forms_08_Official/B_022A_0108f.pdf (laying out the entire means test in worksheet form).
  \item 41. See 11 U.S.C. § 707 (2006) (codifying the means test and providing for "dismissal of a case or conversion to a case under [C]hapter . . . 13").
  \item 42. Tabb, supra note 28, at 9.
must affirmatively show that they qualify for relief under Chapter 7. Proponents of the means test defend it as an effort to encourage debtors to accept the consequences of their behavior and force them to attempt to pay debts within their means.

Failing the means test indicates a “presumption of abuse” under the BAPCPA. This presumption drastically changed the perspective of bankruptcy and represented a stringent standard, eliminating the judicial discretion inherent in the “substantial abuse” standard used in the 1978 Code.

1. Current Monthly Income

“Current monthly income” (“CMI”) is the first calculation under the means test. A debtor calculates CMI by averaging all sources of income over the six months prior to filing for bankruptcy. Many commentators have criticized this approach to calculating income, which is not always current, not always receive anything). The Commission cites reasons for failure, including repeated financial difficulties, health emergencies, and “unrealistic plans that are “doomed from the inception.” Id. at 234. The Commission blatantly states that Chapter 13 “does not guarantee meaningful repayment to unsecured creditors.” Id.

44. Landry & Mardis, supra note 9, at 105.
45. See A. Mechele Dickerson, Bankruptcy Reform: Does the End Justify the Means?, 75 AM. BANKR. L.J. 243, 244 (2001) (explaining that the reform could potentially discourage those who deserve relief from filing or prevent the needy from discharging their debts). The push for a “means test” may represent a shift in the public’s perception concerning entitlement programs and the public's view of recipients of public benefits. Id.
46. See 11 U.S.C. § 707(b)(2)(A)(i) (2006) (providing that the court should “presume abuse exists if” the debtor fails to pass the means test); see also Official Bankruptcy Form 22A, supra note 40 (requiring practitioners to check one of two boxes: “[t]he presumption arises” or “[t]he presumption does not arise”).
47. Pardo, supra note 21, at 473-77 (contrasting the judicial discretion inherent in the 1978 Code with the BAPCPA). Under the 1978 Code, a judge had discretion to determine that a debtor was abusing the system, and could dismiss or convert the case to a Chapter 13 bankruptcy. Id. at 478-79. Under BAPCPA, the credit lobby took this even further to provide a test by which the system could presume abuse and force a debtor into Chapter 13. Id.
48. 11 U.S.C. § 707(b)(2)(A)(1). Section 101 defines the term current monthly income as, “the average monthly income from all sources that the debtor receives ... without regard to whether such income is taxable income, derived during the 6-month period” prior to filing. 11 U.S.C. § 101(10A)(A) (2006). Income includes all income paid to the debtor or household payments to dependents but excludes income from Social Security and payments to war crimes and victims of terrorism. 11 U.S.C. § 101(10A)(B).
monthly, and not always even income.\textsuperscript{50}

If a debtor's CMI multiplied by twelve is at or below the state median for the same-size household, the debtor may essentially forego the rest of the means test and file under Chapter 7.\textsuperscript{51} If, on the other hand, a debtor is above the state median, then the rest of the means test must be completed to determine if a "presumption of abuse arises."\textsuperscript{52}

2. Standard IRS Deductions

After determining CMI, a debtor who is above the median income can deduct standard expenses that have been determined by the Internal Revenue Service ("IRS").\textsuperscript{53} These include "National Expenses," "Local Expenses," and "Other Expenses."\textsuperscript{54} The guidelines are incorporated into BAPCPA to determine allowable expenses of above-median income debtors in Chapter 7 and Chapter 13 bankruptcies.\textsuperscript{55} In Chapter 13 cases, the expenses are deducted from CMI to determine the "disposable income" of a

\textsuperscript{50} See Philip S. Hurak, Comment, Issues with the Title 11 \S 101(10A) Definition of "Current Monthly Income": It's Not Current, Not Monthly, and Not Always Income, 32 U. DAYTON L. REV. 177, 179-81 (2006) (noting issues with calculating CMI within the six months prior to filing, including: lost employment in the last six months, decrease in wages, or irregular sources of income); see also Richard I. Aaron, Special Issue: Equal Access to Justice, Access to Justice: Consumer Bankruptcy, 2006 UTAH. L. REV. 925, 942 (2006) (explaining that 101(10A) reflects gross income by stating, "without regard to whether such income is taxable income," however, the "debtor receives" language suggests net income).

\textsuperscript{51} See generally 11 U.S.C. \S 707(b).

\textsuperscript{52} 11 U.S.C. \S 707(b)(2)(A)(i).

\textsuperscript{53} 11 U.S.C. \S 707(b)(2)(A)(ii)(I). This section explains expense deductions, stating that, "the debtor's monthly expenses [are] specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the IRS for the area in which the debtor resides, as in effect on the date of the order for relief." Id. The IRS deductions are outlined in the official forms. See generally Official Bankruptcy Form 22A, supra note 40, at Part V; Official Bankruptcy Form 22C, supra note 49, at Part IV.

\textsuperscript{54} 11 U.S.C. \S 707(b)(2)(A)(ii)(I); see also Official Bankruptcy Form 22A, supra note 40, at Part V (directing a debtor whose current monthly income is higher than median to deduct IRS expenses to determine if the presumption arises).

\textsuperscript{55} 11 U.S.C. \S 707(b)(2)(A)(ii)(I); see also IRS Restructuring and Reform Act of 1998, P.L. 105-206, 112 Stat. 685 (outlining the standards used by the IRS); 26 U.S.C. \S 7122(d)(1) (2006) (laying out the standards which are incorporated into BAPCPA); Clifford J. White III & David A. Levine, BAPCPA Implementation Update: Changes to the Official Means Test Forms and IRS Standards Effective Jan. 1, 27 AM. BANKR. INST. J. 18, 18 (2008) (listing the changes to BAPCPA, including the addition of out-of-pocket health care costs to national expenses, cell phone usage expenses to local expenses, and greater expenses for vehicle ownership to local standards).
debtor with CMI greater than the state median.\textsuperscript{56} While BAPCPA uses the IRS guidelines for similar purposes, the IRS originally published these guidelines solely for evaluating payment plans for delinquent taxpayers.\textsuperscript{57} The standards alone have led to much controversy, including their incorporation into Chapter 13.\textsuperscript{58}

D. Calculating Projected Disposable Income for Above-Median Income Debtors in Chapter 13

Chapter 13 uses CMI much like Chapter 7, differentiating between above and below-median income debtors.\textsuperscript{59} Both above and below-median income debtors are required to apply all their "projected disposable income" over the life of a plan for it to be confirmed.\textsuperscript{60} However, Section 1325 provides that above-median

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  \item \textsuperscript{56} See 11 U.S.C. § 1325(b)(2) (2006) (providing that "disposable income" is "current monthly income received by the debtor... less amounts reasonably necessary to be expended"); see also 11 U.S.C. § 1325(b)(3) (defining "amounts reasonably necessary to be expended" as "determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)"); 11 U.S.C. § 707(b)(2) (laying out IRS standards that are deducted from "current monthly income"); Official Bankruptcy Form 22C, supra note 49, at Part IV (directing an above-median income Chapter 13 debtor to deduct IRS expenses from income).
  \item \textsuperscript{57} See Matthew Stephenson & Kristin Hickman, The Administrative Law of Borrowed Regulations: Legal Questions Regarding the Bankruptcy Law's Incorporation of IRS Standards, 2008 No. 1 NORTON BANKR. L. ADVISER 1 (2008) (explaining that the IRS standards were developed to encourage uniformity in evaluating installment agreement proposals for IRS delinquents). Incorporating these standards into BAPCPA not only limits discretion, but also has administrative law implications as to what extent bankruptcy courts defer to IRS interpretations of these standards, and what happens when the IRS modifies the standards. \textit{Id.}
  \item \textsuperscript{58} See Hon. Keith M. Lundin, The IRS Sneezes and the Advisory Committee on Bankruptcy Rules Catches Cold, 2007 No. 11 NORTON BANKR. L. ADVISER 2 (2007) (questioning whether the IRS Manual, which comments on the standards, should be incorporated into the BAPCPA, even though not stated within). These standards are not rules that are familiar to lawyers and courts, and the rules represent a "broken foundation for fundamental aspects of consumer bankruptcy." \textit{Id.} Furthermore, it is unclear what the result should be under BAPCPA when the IRS revises its standards. \textit{Id. Compare Case Summary, No "Means Test" Deduction for Vehicle Owned Outright, WEST. BANKR. NEWSL., July 25, 2007, at 14 (reporting on a case of first impression where a Washington court held that the debtor could not deduct IRS standard ownership expense for a vehicle she owned outright), and Featured Article, Debtors Could Deduct Car Ownership Expenses, WEST. BANKR. NEWSL., Apr. 18, 2007, at 2 (reporting that a Wisconsin court ruled that the debtors could deduct IRS standard ownership expenses, even though they owned their car outright and had no monthly payments).}
  \item \textsuperscript{59} 11 U.S.C. § 1325(b)(3). Here, the Code defines "amounts reasonably necessary to be expended" differently depending on whether a debtor's CMI is below or above state median. \textit{Id.}
  \item \textsuperscript{60} 11 U.S.C. § 1325(b)(1)(B). "[A]ll of the "debtor's projected disposable income to be received... will be applied to make payments" under the plan.
income debtors not only use CMI, but also IRS expense deductions to calculate disposable income. A Chapter 13 filer calculates CMI and subtracts the applicable IRS expenses in order to determine the amount that the debtor will have available to pay out to creditors. In addition, CMI determines whether the length of the payout plan or "applicable commitment period" will be three or five years.

A problem arises when an above-median income debtor's disposable income calculation results in an abnormally large or small number. When faced with a debtor with a zero or negative disposable income, some courts have decided not to apply the definition of disposable income from Section 1325, instead considering other factors not written into the Code. Courts are now struggling with yet another unsolved puzzle of BAPCPA: can the plain meaning of Section 1325 permit such an interpretation?

III. ANALYSIS

This Section will analyze the two basic approaches that courts take when interpreting "disposable income" and "projected disposable income." This Section will also determine how these approaches comport with rules of statutory interpretation. Finally, this Section will evaluate the other considerations that courts make when giving meaning to Section 1325: legislative history, policy, and judicial function.

A. Two Divergent Views: "The Interpretive Divide"

Courts have interpreted many portions of BAPCPA in a contradictory manner, what has been called an "interpretive divide." In analyzing Section 1325, there are two main

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*Id.* Both above and below median debtors begin the disposable income calculation with CMI. 11 U.S.C. § 1325(b)(2).

61. See 11 U.S.C. § 1325(b)(2) (defining "disposable income"); see also 11 U.S.C. § 1325(b)(3) (providing a definition for expense deduction pursuant to IRS Expenses laid out in 707(b)(2)); Official Bankruptcy Form 22C, supra note 49 (laying out the calculations for Chapter 13 debtors in worksheet form).


63. See 11 U.S.C. § 1325(b)(4) (defining "applicable commitment period"); see also Official Bankruptcy Form 22C, supra note 49 (providing a worksheet calculation for commitment period). Chapter 13 debtors are directed to check one of two boxes: "[t]he applicable commitment period is 3 years" or "[t]he applicable commitment period is 5 years." *Id.*


65. See *id.* (describing the issue of abnormally high, low, or negative number under BAPCPA and proposing an amendment that makes the means test calculation a starting point for determining "disposable income").

The first camp advocates that the disposable income calculation is merely a "starting point," while the second camp claims that this "historical" income (means test) calculation is the only consideration for determining disposable income.68

1. The "Starting Point" Approach

The first of the divergent views and the self-proclaimed "majority view" is the "starting point" or "forward-looking" approach.69 Under this view, courts have determined that "projected disposable income" has a broader meaning than "disposable income" defined in Section 1325(b)(2).70 Most of these courts see the means test calculation as the starting point or floor from which to calculate projected disposable income.71 The Starting Point courts, therefore, believe that BAPCPA did not remove judicial discretion in determining disposable income.72

The Starting Point proponents include many "sub-camps" with different views of what should be considered looking forward.73 For example, some courts claim that the means test calculation creates a rebuttable presumption that can be overcome with evidence of changed circumstances.74 Other courts advocate using IRS schedules I and J, in addition to Form B22C, to calculate disposable income.75 The numerous variations in

67. See In re McCarty, 376 B.R. 819, 823 (Bankr. N.D. Ohio 2007) (noting that there are two main "camps" when considering the issue of disposable income); In re LaPlana, 363 B.R. 259, 264 (Bankr. M.D. Fla. 2007) (stating that "two approaches have evolved" in evaluating projected disposable income).

68. In re McCarty, 376 B.R. at 823-25.

69. See In re Grant, 364 B.R. 656, 664 (Bankr. E.D. Tenn. 2007) (describing the "forward looking" approach as the "majority view"); see also In re Meek, 370 B.R. 294, 301 (Bankr. D. Idaho 2007) (calling this approach the "flexible" approach).

70. In re LaPlana, 363 B.R. at 265.

71. In re Grant, 364 B.R. at 667 (claiming that Form B22C is the starting point for determining "projected disposable income"); In re Briscoe, 374 B.R. 1, 13 (Bankr. D.D.C. 2007) (stating that "most courts" concluded that Form 22C is only a starting point).

72. In re Grant, 364 B.R. at 667.


74. See In re May, 381 B.R. 498, 506-07 (Bankr. W.D. Pa. 2008) (claiming that "a "rebuttable presumption inherently arises using the figures set forth on Form 22C as a starting point"); see also In re Meek, 370 B.R. at 303 (providing a list of other courts which adhere to the rebuttable presumption approach); Brief for the United States as Amicus Curiae Supporting Reversal at 18, In re Kagenevama, 541 F.3d 868 (9th Cir. 2008) (arguing for a method where the historical number is "presumptively applied" and then adjusted for changes in income).

75. See In re Plumb, 373 B.R. 429, 436 (Bankr. W.D.N.C. 2007) (stating
interpretation create doubt about the validity of this approach.  

2. The "Historical" Approach

The second camp, called the "Historical approach," takes the position that projected disposable income must be calculated solely as laid out in the means test. In other words, projected disposable income is merely the disposable income calculation from Section 1325(b), "projected" over the "applicable commitment period" or plan length. Thus, the Historical approach courts claim that BAPCPA removed judicial discretion in calculating disposable income in any other way than as defined in Section 1325.

B. Statutory Interpretation: Fitting a "Square Peg" into a "Round Hole"

Both camps ground their interpretation of the term "projected disposable income" in principles of statutory interpretation. But the rules and norms of statutory interpretation alone often spark debate; one academic cleverly wrote:

My brother Foster's penchant for finding holes in statutes reminds one of the story told by and ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my brother feels about statutes; the more holes they have in them the better he likes them. In short, he doesn't like statutes.

that debtors must also take into consideration Schedule I and J; see also In re Edmunds, 350 B.R. 636, 649-50 (Bankr. D.S.C. 2006) (recognizing a court's desire to consider income and expenses indicated on Schedules I and J or other evidence).

76. Compare In re May, 381 B.R. at 508 (explaining that the hybrid approach "looks to Schedule I for income and Form 22C for expenses), with In re Reis, 377 B.R. 777, 786 (Bankr. D.N.H. 2007) (claiming that the court must project both expenses and income), and In re Gonzales, 388 B.R. 292, 299 (Bankr. S.D. Tex. 2008) (asserting that there are five components of "projected disposable income" and laying out a flowchart for analyzing them).

77. In re Alexander, 344 B.R. at 749-50; In re Kolb, 366 B.R. 802, 811-12 (Bankr. S.D. Ohio 2007); see also In re Meek, 370 B.R. at 301 (calling this the "mathematic" approach); In re Purdy, 373 B.R. 142, 150 (Bankr. N.D. Fla. 2007) (describing this approach as the "literal" approach).

78. In re Austin, 372 B.R. at 679; see also In re Kagenveama, 541 F.3d 868, 871-72 (9th Cir. 2008) (calling this the "most natural reading of the statute").

79. Waldron & Berman, supra note 73, at 213.

80. Id. at 224.

81. Lon Fuller, The Case of the Speluncean Explorers, HARV. L. REV. 616, 634 (1949). In the hypothetical The Case of the Speluncean Explorers, the court is tasked with determining whether trapped cave explorers violated a murder statute stating that "[w]hoever shall willfully take the life of another shall be punished by death" when they killed and ate a fellow spelunker to survive. Id. at 616-19.
Basic statutory interpretation begins with the statute as written, or its plain meaning, and only goes beyond this if the results are ambiguous or absurd. On the other hand, "courts should not attempt to fit the square peg of ambiguity into the round hole of plain meaning." 

Perhaps the two camps interpreting Section 1325 are employing both errors of interpretation: finding holes in the statute where there are none, and attempting to fit the square peg of "projected disposable income" into the round hole of plain meaning.

1. Plain Meaning Under the Starting Point Approach

Courts following the Starting Point approach claim that the Historical approach fails to fully acknowledge the word "projected," which must be given meaning. These courts point out that "projected" is, by definition, future-oriented. The Starting Point courts cite many different dictionary definitions for the word "projected," including "to plan, figure or estimate for the future and; to throw or cast forward." Thus, under this approach, courts may consider changes in circumstances, including increases and decreases in income and expenses when calculating projected disposable income.

Some have suggested that the Historical approach fails to give meaning to two other statutory phrases: "to be received" and "will be applied to make payments." In an amicus curiae brief, the United States argued that all of these statutory phrases are future-oriented and that using the means test alone gives only a

82. See Waldron & Berman, supra note 73, at 195 (laying out the standard approach to statutory interpretation, in which courts look at the language of the statute, dictionary definitions, and additional sources beyond the statute only if the result is ambiguous or absurd).
83. Id. at 213.
84. In re Purdy, 373 B.R. at 146; see also In re Grant, 364 B.R. at 666 (reasoning that the alternative approach "would effectively serve to judicially write those terms out of the statute").
85. In re LaPlana, 363 B.R. at 265. The opinion also provides a list of courts agreeing with the forward-looking approach. Id.
86. In re May, 381 B.R. at 506; see also In re Briscoe, 374 B.R. at 13 (quoting OXFORD ENGLISH DICTIONARY vol. XII at 599 (2d ed. 1989)) (defining "projected" as “[p]redicted; calculated or forecast[ed] on the basis of current trends or data”); Brief for the United States as Amicus Curiae Supporting Reversal, supra note 74, at 14 (quoting WEBSTER’S THIRD NEW INT'L DICTIONARY 1813 (1993)) (defining the term “projected” as “planned for future execution: contrived, proposed,” as “[projected] outlays for new plant and equipment”).
87. In re LaPlana, 363 B.R. at 266; In re Purdy, 373 B.R. at 146-47; In re May, 381 B.R. at 505-06; In re Grant, 364 B.R. at 664-65.
88. Brief for the United States as Amicus Curiae Supporting Reversal, supra note 74, at 15-16.
“deemed or hypothetical” calculation of disposable income.\textsuperscript{89}

In addition, Starting Point courts utilize the canons of interpretation to point out that when Congress includes specific language in one part of a statute but omits it in the other, its actions are “intentional and purposeful.”\textsuperscript{90} Using this reasoning, these courts argue that the future-oriented projected disposable income cannot be the same as the historical-oriented disposable income.\textsuperscript{91} In their view, the language is “irreconcilable” with the alternative approach, which effectively writes the word “projected” out of the statute.\textsuperscript{92}

2. Plain Meaning Under the Historical Approach

The Historical approach, on the other hand, notes that the definition of “disposable income” provided in Section 1325 must have some meaning in interpreting the term “projected disposable income.”\textsuperscript{93} The term “disposable income” is used in only two places in Section 1325: Section 1325(b)(1)(b), providing for projected disposable income to be applied to the plan, and Section 1325(b)(2), defining disposable income.\textsuperscript{94} This approach argues that if disposable income is not linked to “projected disposable income” then disposable income would be a “floating definition with no apparent purpose.”\textsuperscript{95} Instead, disposable income clearly provides a formula for calculating projected disposable income.\textsuperscript{96}

\textsuperscript{89} Id. at 13-16. “These are more than mere policy objections to the bankruptcy court’s interpretation; they are critical textual flaws.” Id. at 15.

\textsuperscript{90} In re Mary, 381 B.R. at 506.

\textsuperscript{91} Id.; see also In re Guzman, 345 B.R. 640, 645 (Bankr. E.D. Wis. 2006) (calling Form B22C a “rear view mirror” and Schedules I and J a “crystal ball”).

\textsuperscript{92} In re Grant, 364 B.R. at 665-66; see also Kibbe v. Sumski (In re Kibbe), 361 B.R. 302, 312 (B.A.P. 9th Cir. 2007) (calling the historical-looking “disposable income” and forward-looking “projected” income “irreconcilable”); In re Spurgeon, 378 B.R. 197, 204 (Bankr. E.D. Tenn. 2007) (describing this as an “illogical comparison of future expenses and past income”).

\textsuperscript{93} See In re Austin, 372 B.R. at 677-78 (noting that the only phrase that is defined in quotes in that in Section 1325 is “disposable income”); see also Brief for the United States as Amicus Curiae Supporting Reversal, supra note 74, at 19 (admitting that because disposable income is only used in two places, the definition must have some meaning). “Congress may well have expected” that the historical calculation would be larger and “the fact that this is often not the case does not authorize a court to ignore the statutory definition all together.” Id. at 20.

\textsuperscript{94} See In re Kagenweama, 541 F.3d at 872-73 (explaining that because it is used only in two places the opposite view “would render as surplusage the definition ‘disposable income’ found in § 1325(b)(2)” and that there “can be no reason for § 1325(b)(2) to exist other than to define the term ‘disposable income’”).

\textsuperscript{95} In re Alexander, 344 B.R. at 749.

\textsuperscript{96} See Brief of the National Association of Consumer Bankruptcy Attorneys at 4, In re Kagenweama, 541 F.3d 868 (2006) available at
Furthermore, Historical courts deny failing to give the term “projected” meaning.\textsuperscript{97} Instead, they claim projected means the same thing as it did pre-BAPCPA; disposable income is to be projected over the “applicable commitment period” or plan length.\textsuperscript{98} In this view, the term “projected” is merely an adjective modifying disposable income.\textsuperscript{99}

Not only do Historical courts claim that they give meaning to the word “projected,” but they also claim that Starting Point courts “strain” and “distort” the meaning of the word “projected.”\textsuperscript{100} Thus, Historical courts note that the statute is not ambiguous, and using the test laid out in Section 1325 is not absurd.\textsuperscript{101}

In addition, this approach counters the rebuttable presumption method by pointing out that there is no test in Section 1325 that creates a rebuttable presumption by its plain meaning.\textsuperscript{102} The 2005 amendments show that Congress knew how to create a rebuttable presumption when it did so with the “presumption of abuse” standard used in the means test.\textsuperscript{103}

\textsuperscript{97} In re Austin, 372 B.R. at 675.

\textsuperscript{98} See In re Brady, 361 B.R. 765, 772 (Bankr. D.N.J. 2007) (explaining how the term “projected” has the same meaning as it did pre-BAPCPA since that section was not amended). There was no amendment to the phrase “projected disposable income,” only the addition of the definition of “disposable income.” Id.

\textsuperscript{99} In re Austin, 372 B.R. at 675. If Congress meant “projected disposable income” to mean something different from ‘disposable income” projected into the future, it could have indicated this by including those three words in quotation marks to signal “a separate phrase with a separate meaning.” Id. at 677.

\textsuperscript{100} See id. at 678 (stating that the other decisions “strain and distort the meaning of ‘projected’ beyond the common understanding of that word”); see also In re Alexander, 344 B.R. at 752 (claiming that courts under the opposite view were “fixing on isolated words such as . . . ‘projected’ and inflating their meaning beyond justification”); In re Hanks, 362 B.R. 494, 499 (Bankr. D. Utah 2007) (noting that “one word clearly should not be elevated in importance so as to gut an entire statutory scheme enacted by Congress”).

\textsuperscript{101} See In re Austin, 372 B.R. at 679 (explaining that differences of opinion based on policy of BAPCPA “do(es) not make the statute ambiguous or the results absurd”); see also In re Kagenveama, 541 F.3d at 875 (stating that the plain text of 1325(b) is not absurd); In re Alexander, 344 B.R. at 747 (stating that they would not call the statute absurd just because “it leads to results that are not aligned with the old law”); In re Hanks, 362 B.R. at 502 (noting that “a harsh or even illogical result is not the same thing as an absurd result”).

\textsuperscript{102} In re Kagenveama, 541 F.3d at 875; Brief of NACBA, supra note 96, at 10-11.

\textsuperscript{103} See In re Kagenveama, 541 F.3d at 875 (pointing out that Congress knows how to create a presumption, and could have included one, but chose not to); see also Brief of NACBA, supra note 96, at 11 (stating that “[t]he 2005 amendments to the Code make clear that Congress knew how to create a presumption”).
Historical courts also argue against a position that incorporates IRS Schedules I and J, as some Starting Point courts propose. First, the statute states that expense amounts "shall" (or must) be determined according to the means test. In addition, Historical courts argue that incorporating IRS Schedules I and J is contrary to the plain meaning of the statute since Section 1325 explicitly excludes from income items that are included on Schedule I as income. This result, unlike the result of using historical data to determine income, is absurd under the plain language of the statute.

C. Beyond Plain Meaning: Legislative History, Policy, and the Judicial Function

Despite the claim that both viewpoints use a plain meaning approach, both camps also look to legislative history, policy, and the role of the judiciary to support their positions.

1. Legislative History, Policy, and the Judicial Function

Starting Point courts support their view of projected disposable income by noting that Congress intended to ensure that debtors able to repay their debts do so. They focus on BAPCPA

104. In re McCarty, 376 B.R. 819, 825 (Bankr. N.D. Ohio 2007). In addition, these courts note that Congress specifically excluded information that is included on I and J, contradicting the notion that they should be incorporated.

105. See In re Farrar-Johnson, 353 B.R. 224, 228-29 (Bankr. N.D. Ill. 2006) (stating that "what the debtor lists as expenses on his Schedule J, outrageous or not, is beside the point"); see also Brief of NACBA, supra note 96, at 9-11 (noting that the word "shall" demonstrates the statute, as amended by Congress, "now requires" the projection of a number determined in accordance with Section 1325(b)(2)).

106. Brief of NACBA, supra note 96, at 15-16; see also In re McCarty, 376 B.R. at 825 (noting that Schedules I and J were used to calculate "projected disposable income" pre-BAPCPA and "the court is not free to ignore revised section 1325(b)"). The court explicitly excluded certain items reflected on forms I and J such as child support payments. Id. at 825.

107. Brief of NACBA, supra note 96, at 12, 14 (noting that the results under the alternative views would be absurd).

108. See In re Grant, 364 B.R. at 661 (citing Rubin v. United States, 449 U.S. 424 (1981)) (explaining that when a statute is unambiguous, the first canon of interpretation "is also the last" and "judicial inquiry is complete"). Thus, if the statute is, as the courts argue, unambiguous, they would have no need to support their positions with these arguments.

109. See In re Briscoe, 374 B.R. at 16, 17 (stating that since either interpretation "must do violence to the 'plain meaning,' Congress' intent to make those who can afford to pay, pay, should be effectuated"); see also In re Spurgeon, 378 B.R. at 203 (claiming that Congress meant to increase disposable income in general to increase payments on unsecured claims); 151 CONG. REC. S2459-01, S2470 (illustrating Congress' intent to increase payout
as a response to the concern that some debtors were abusing the system.\textsuperscript{110}

These courts emphasize their view with both indications of congressional intent and underlying policy objectives.\textsuperscript{111} Courts using the Starting Point view defend this method by noting that it is "consistent with the aims and objectives of BAPCPA," which intended Chapter 13 to "be malleable" and to provide a "realistic determination" of ability to pay.\textsuperscript{112} Similarly, courts that incorporate IRS Schedules I and J seem to think that these documents are somehow more realistic and provide a "financial reality" different from Form 22C.\textsuperscript{113}

Finally, many Starting Point courts look to judicial function, arguing that the "rigid" and "mechanical" means test does not comport with the discretionary role of courts.\textsuperscript{114} They criticize relying on the means test to calculate disposable income as being a "mechanical test devoid of discretion or even common sense."\textsuperscript{115}

In some cases, the courts seem to use reverse logic in arguing that if the plain language of the statute is "absurd," then the statute as written cannot be what Congress intended it to mean.\textsuperscript{116} This alone seems to reflect a heightened judicial role in interpreting a statute. Thus, Starting Point courts highlight judicial discretion in conjunction with the "those who can pay, do" policy to support their position.

2. Legislative History, Policy, and Judicial Function Under the Historical Approach

Historical courts rely heavily on Congress' intentions to limit bankruptcy courts' discretion and adopt a more mechanical test to govern bankruptcy proceedings.\textsuperscript{117} The most convincing congressional intent argument under the Historical approach is
that Chapter 13 Trustees recognized the problem of interpretation early on and made their concerns known to Congress. The Trustees asked that the means test be a minimum or starting point for projected disposable income, but Congress did not incorporate any changes into the statute. This makes it difficult to argue that this was not the scheme enacted by Congress or that the results of applying the statute are somehow "absurd" or "unintended."

The Historical approach argues that Starting Point courts are reverting to pre-BAPCPA policies by looking at Schedules I and J, which was the method of determining disposable income before the amendment in 2005. Thus, Historical courts claim that the Starting Point approach acts to "impermissibly undermine policy choices made by Congress." One court even went so far as to discuss the purpose of an amendment saying, "[t]he obvious intent of the amendment is to change, not preserve, the way that disposable income is calculated."

Frequently, courts adopting the Historical viewpoint point out the flaws in the Starting Point approach, where policy considerations, such as "those who can pay, should," are used as "a basis to disregard the actual language of the enacted legislation." As one court said, "[w]hile this may constitute a dramatic change from pre-BAPCPA policy—and a point upon which reasonable


119. Id.

120. See In re McCarty, 376 B.R. at 823; (noting that Congress created a "strict mathematic model"); see also In re Farrar-Johnson, 353 B.R. at 229 (noting that letting Schedule J in "would undo what Congress sought to accomplish" in limiting judicial involvement and discretion); Brief of the United States as Amicus Curiae Supporting Reversal, supra note 74, at 18 (noting that a view that always incorporated Schedules I and J would be "as if Congress's rewriting of section 1325 were meant to accomplish nothing"). Here, the court recognized that there was no "statutory basis" for requiring courts to consider Schedules I and J, while still advocating a flexible approach to determining "projected disposable income." Id.

121. In re McCarty, 376 B.R. at 823; see also In re Kageneveama, 541 F.3d at 875 (stating that a court cannot unlink the terms projected disposable income and disposable income "simply to arrive at a more favorable result for unsecured creditors, especially when the plain text and precedent dictate the linkage of the two terms"); Brief of NACBA, supra note 96, at 17-18 (arguing that the opposite view would overturn policy decisions that meant to create a "consistent and appropriate method" to determine ability to pay. This decision also notes that Congress tried to balance the interests of secured and unsecured creditors. Id. at 18.

122. In re Greer, 388 B.R. 889, 893 (Bankr. C.D. Ill. 2008) (treating the calculation as a starting point "eviscerates the purpose and effect of the historical average").

123. Waldron & Berman, supra note 73, at 218.
minds may differ—it is well within the prerogative of our Legislative branch to make such changes. It is the role of the Judicial branch to carry them out."124 Thus, Historical courts highlight the role of the judiciary versus the role of the legislature.125 They frequently remind the Starting Point courts that it is not their "role to change Congress' intentional policy choices or save it from its inadvertent drafting errors."126

While this disagreement might be seen as simply one of many "interpretive divides," the projected disposable income calculation goes to the heart of a Chapter 13 plan, since the calculation determines what the debtor must pay.127 Here, controversy and lack of uniformity can lead to fundamental unfairness.128 Debtors in different courts might receive near-diametrically opposed treatment. In the case of Section 1325, Historical courts seem

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125. See In re Pak, 357 B.R. 549, 550 (Bankr. N.D. Cal. 2006) (stating that "[i]f Congress had wished to prevent such debtors from falling through the statutory cracks, it could have provided an express provision preventing them from doing so"); see also David W. Allard, The Means Test: Seeing Clearly the CMI, 26-1 AM. BANKR. INST. J. 12, 12 (2007) (noting that CMI, and income reported on Schedule I, are "two very different calculations"). Here, Allard questions whether IRS Schedules I and J can be considered for above-median debtors in Chapter 13. Id.
126. In re Hanks, 362 B.R. at 502 (explaining that "[i]t bears repeating that Congress' function is to legislate while the Court's function is to interpret and apply the law as written instead of a law that the Court might find more logical or reasonable"); see also In re McCarty, 376 B.R. at 823 (reasoning that "[w]hile there may be sound reasons to rewrite section 1325(b), it is not the role of this court to do so."). In this way, many courts seem to recognize that the new code is problematic but are unwilling to go beyond their judicial role. Id.
127. Lamie, 540 U.S. at 531.
128. Many commentators have discussed the lack of uniformity in the Bankruptcy Code. The Constitution gives Congress the power to enact "uniform laws on the subject of bankruptcy." U.S. CONST. art.1, §8 (emphasis added). However, there is still debate on how much uniformity is possible and whether it is even desirable. Some argue that the means test may violate the Constitution's uniformity clause. Erwin Chemerinsky, Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 AM. BANKR. L.J. 571, 592-94 (2005). Yet others have claimed that the means test attempted to fit debtors into a "one size fits all" test that is too uniform. Richard L. Wiener, Susan Block Lieb, Karen Gross & Corinne Baron-Donovan, Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy, 79 AM. BANKR. L.J. 453, 454 (2005); see also Melissa B. Jacoby, Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform, 79 AM. BANKR. L.J. 169, 177 (2005) (making the point that local legal culture does not allow bankruptcy law to be completely uniform). Specifically, Jacoby states that "it is never the case that the legal system of any country is uniform, unified, and able to cover the whole country like a smooth coat of paint." Id. at 176-77 (quoting Lawrence M. Friedman, Borders: On the Emerging Sociology of Transnational Law, 32 STAN. J. INT'L L. 65, 67 (1996)).
correct that courts must follow the law as written; "[s]tatutory interpretation may be an art, but it must not be artful." 129 The solution is to amend Section 1325.

IV. PROPOSAL

This Section will propose an amendment that changes the method of determining disposable income for above-median income debtors to a percentage-based requirement. Next, this Section will discuss how this amendment would accommodate congressional intent, policy, and the judicial role under BAPCPA. This proposal addresses these concerns, while highlighting the need to change attitudes about BAPCPA in order to successfully move forward in reforming the Code.

A. Solving the Disposable Income Problem

When President Clinton signed into law the Bankruptcy Reform Act of 1994, he charged the National Bankruptcy Review Commission with examining and critiquing the bankruptcy system and the Code. 130 The Commission recognized the problem of lack of success, lack of uniformity, and abuse of the Chapter 13 system. 131 Much of the Commission's findings revolved around

129. U.S. v. Parker, 376 F.2d 402, 408 (5th Cir. 1967). See Drobish, supra note 64, at 212-14. Some commentators have pointed to the "atrocious drafting" of the statute, but noted that Congress would have to fix these mistakes. See Henry J. Sommer, Trying to Make Sense out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," 79 AM. BANKR. L.J. 191, 192 (stating that "[t]he silver lining for consumer debtors is that the bill is so poorly drafted that it may not accomplish much of what its financial backers wanted to accomplish").

130. See The National Bankruptcy Review Commission Archive, http://govinfo.library.unt.edu/nbrc/facts.html (last visited Nov. 14, 2008) (providing facts on the establishment and make-up of the National Bankruptcy Review Commission). The Commission was established to investigate, study, and review the current Bankruptcy Code, and propose solutions to perceived problems. Id. The President, Congress, and Chief Justice selected the members, and the Commission was to submit a report no later than two years from the first meeting. Id.

131. NATIONAL BANKRUPTCY REVIEW COMMISSION, supra note 43, at 233-36. The Commissioners here explain that the hearings "were peppered with illustrations of the lack of uniformity." Id. at 235. The Commissioners made it clear that judicial discretion is important, but claimed that the non-uniformity was "more deeply rooted" so that debtors in similar circumstances would be subject to extremely different plans and requirements. Id. They described the difference from circuit to circuit as "so divergent that they alter the basic requirements of the Chapter 13 bargain." Id. The Commission also touched on the lack of plan success, often with no remedy at all available for the debtor, and the problems associated with "savvy debtors who can exploit some provisions to extraordinary advantage." Id. at 235. Their concerns are illustrative because although many claim that the views of the Commission
revitalizing the basic structure of Chapter 13, the “carrot and the stick.”

In many ways, Chapter 13 has always been a carrot and a stick system. The basic concept is for a debtor to pay back more to unsecured creditors and, in return, receive a greater discharge or “superdischarge” of debts that cannot be discharged under Chapter 7. But the carrot and stick method has been weakened since 1978. BAPCPA, whether intentionally or not, further weakened the carrot and stick structure and caused greater confusion with its new disposable income calculation. Solving disposable income requires solving just one portion of the weakened Chapter 13 system, the “stick.”

1. Strengthening the Stick

The stick portion of a Chapter 13 plan is at the heart of its success and asks the most important question: what will the debtor pay? The greatest obstacle of the disposable income test is whether it is an accurate gauge of what the debtor will have as income in the future. Above-median income debtors are not paying more to unsecured creditors. Therefore, the best way to

yielded to the concerns of the credit industry, the problems that the Commission highlights fit nicely with the policy behind BAPCPA and the means test.

132. See generally id. (addressing the need to strengthen both aspects of Chapter 13, encouraging debtors to file under 13 as opposed to 7, and allowing a greater payout to unsecured creditors).


135. See 151 Cong. rec. S2306-02, S2315 (noting that the bill attempts to promote Chapter 13 filings and, at the same time, limits the advantages to filing under Chapter 13). Feingold argued that BAPCPA “is a bill that is at war with itself.” Id.

136. See generally Scott F. Nurburg, Chapter 13 Project: Little Paid to Unsecureds, 26-MAR AM. BANKR. INST. J. 1 (2007) (providing an empirical study of how Chapter 13 has fared in fulfilling its two main purposes: a fresh start for debtors, and creditor repayment). This article also finds that debtors who are more reluctant to file and have a high debt-to-income ratio are more likely to have the determination to complete a plan. Id. at 55. In addition, the article notes the problem of repeat filers, which those who opposed BAPCPA doubted the reality of. Id. Repeat filers were found to be significantly less likely to complete plans. Id.; see also Henry K. Hilzibrand III, Unintended Consequences: BAPCPA and the New Disposable Income Test, 25-MAR AM. BANKR. INST. J. 14, 55 (2006) (noting that BAPCPA resulted in less payout to
ensure that Chapter 13 is successful in paying unsecured creditors is requiring above-median income debtors to pay back a set percentage of their unsecured debt.137

Courts would still differentiate between below and above-median income debtors via the means test. Under this percentage-based system, however, they would take a set percentage of their CMI to pay to unsecured creditors over the plan.138

This approach is not new; the Commission noted that some courts already used a percentage-based test, recommending a graduated percentage based on income.139 Rather than the graduated scheme proposed by the Commission, under this proposal, only above-median income debtors would use the percentage requirement which could then be graduated according to income or remain a fixed rate.

In order to keep the CMI calculation up-to-date, Chapter 13 debtors should be required to recalculate their CMI calculations every six months.140 Many have suggested for increased disclosure during plans,141 although it has been argued by some that requiring debtors to disclose tax forms annually may be unconstitutional.142 A continued flow of information would increase the accuracy of plan payout amounts for above-median debtors and account for changes in circumstances after filing.

Under the percentage model, a Chapter 13 debtor could not receive the benefits of the superdischarge before completing the plan. Still, there remains the problem of Chapter 13 debtors who use the system to cure arrearages on secured debt with no intent to complete a plan, therefore paying nothing to unsecured creditors. The remedy for this issue is to require debtors to pay secured and unsecured creditors in conjunction, rather than frontloading secured debt payments.143 While there may be

unsecured creditors, even though they were the ones who pushed so long for reform.

137. NATIONAL BANKRUPTCY REVIEW COMMISSION, supra note 43, at 263-73.
138. This is similar to the suggestion by the Commission that debtors below a certain income level would only be required to make nominal payments. Id. at 268. Instead, this proposal uses the means test as a dividing line, maintaining the use of the means test in both Chapter 7 and Chapter 13 cases.
139. The Commission discussed but did not make a recommendation as to Section 707(b) incorporation of a means test. Id. at 272.
140. This alone could increase the relevancy and usefulness of the current monthly income calculation. Current monthly income in the Chapter 13 context would require a percentage of what the debtor actually did receive on average in the last six months. Instead of forcing a court to look into its "crystal ball" to somehow see the future.
141. See Jones & Shepard, supra note 133 (arguing that Chapter 13 plans should be reviewed annually, and modified if a debtor's income goes up or down).
143. NATIONAL BANKRUPTCY REVIEW COMMISSION, supra note 43, at 262-63.
concern about the ability of debtors to comply with this while attempting to cure arrearages, the plan could also provide a grace period for the debtor to begin catching up on these payments.

While this part of the structure is described as "the stick," it is an incentive in itself to complete plans. The desire to keep property and complete payments on secured debts would encourage debtors to budget and finish plan payments more carefully.144 This proposal only briefly touches on some other incentives and the other aspect of the Chapter 13 plan, the "carrot."

2. A Fatter Carrot

The carrot portion of this proposal goes beyond the scope of this Comment and is not integral to solving the projected disposable income problem. On the other hand, incentives to debtors filing under Chapter 13 may increase the success of these plans. One option is to change credit-reporting practices.145 Credit reports should reflect what chapter a debtor is filing under and the percentage of their unsecured debts that they will repay under in their Chapter 13 plan.146 Upon completion of a Chapter 13 plan (in this case of an above-median income debtor, five years), the bankruptcy should be removed from their report after one year.147 Unsecured creditors lobbied for nearly fifty years to get people into Chapter 13; this is a way for them to actively

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The Commission suggested distributing secured debt payments over the life of the plan. *Id.* at 262. The Commission did note, however, that this could increase the risk of plan failure. *Id.*

144. *Id.* at 269. The Commission also touched on the possibility that this could "complement efforts to improve debtors' budgeting practices, while they promote debtor autonomy in determining what expenses fit their budgets." *Id.* They also noted that this, in contrast with disposable income, does not provide a disincentive from the debtor to increase productivity. *Id.* Ultimately, this model would encourage a debtor to succeed and take advantage of a fresh start. *Id.*

145. *Id.* at 292-93. The Commission argued for changing these reporting practices, including adding and refining the information used in credit reporting. *Id.*

146. Arguments to change credit-reporting practices to reflect what chapter a debtor is filing under have been very common. *Id.*; see also ABI REFORM SUMMARY, *supra* note 134, app. G1.a at 8-9 (noting that bankruptcies should be reported by chapter, and the percentage repaid under Chapter 13 should be reported). The Commission takes the position that bankruptcy should be deleted from the report after plan completion and that finance education programs should also be recorded. *Id.*; see also Jones & Shepard, *supra* note 133 (proposing that credit reporting reflect plan completion, percentage of debt paid, and whether debt counseling/education was completed). The Fair Credit Reporting Act currently deletes bankruptcy report after 10 years. 15 U.S.C. § 1681(c) (2006).

147. This would allow removal from a credit report after six years under Chapter 13 rather than ten years under Chapter 7.
encourage individuals to file under this chapter.\textsuperscript{148}

Another possibility is to restore the "super" in the superdischarge.\textsuperscript{149} Options include restoring the ability to discharge certain tax debts and student loans.\textsuperscript{150} Government loans could remain non-dischargeable, but the code could allow discharge of private student loans with high-interest rates that are deemed predatory. Similarly, the tax discharge could be expanded to include taxes incurred beyond one year, as opposed to three.

B. Accomplishing the Dual Purpose of BAPCPA and Rethinking Our Approach to Judicial Function and Policy

1. Carrying out the Purpose of BAPCPA

While many suggest that Congress ignored the findings of the Commission in enacting BAPCPA, Congress at least attempted to address some of their concerns.\textsuperscript{151} The problem with the disposable income test as written is that it failed to accomplish the goals of BAPCPA. This amendment, while changing the disposable income test, achieves what Congress intended to accomplish under BAPCPA.\textsuperscript{152} Judicial discretion is limited, a bright-line and uniform rule is enacted, and unsecured creditors receive more of a payout.\textsuperscript{153}

\textsuperscript{148} In their 1996 report on the bankruptcy system, Visa noted the importance of better education and awareness about bankruptcy alternatives. Visa, \textsc{Consumer Bankruptcy: Bankruptcy Debtor Survey}, July 1996, http://www.abiworld.org/Content/NavigationMenu/Newsroom/BankruptcyResearchCenter/BankruptcyReportsResearchandTestimony/General/Bankruptcy_Debtor_SI.htm. Visa stated they initiated programs to promote consumer credit counseling and improve the accuracy of credit reports. \textit{Id.}

\textsuperscript{149} See \textsc{National Bankruptcy Review Commission, supra} note 43, at 288-91 (noting that the superdischarge is consistent with the Congressional intent of providing incentives for choosing Chapter 13).

\textsuperscript{150} See \textsc{ABI Reform Summary, supra} note 134, app. G-1.a at 7-8 (suggesting a restoration of the superdischarge for student loans and possibly some tax debts).

\textsuperscript{151} See sources cited \textit{supra} note 128 (explaining the various findings of the Commission). Many of these findings are the same concerns which led Congress to enact BAPCPA.

\textsuperscript{152} \textsc{National Bankruptcy Review Commission, supra} note 43, at 263-66. The Commission noted that the disposable income method falls short of the policy behind Chapter 13 in that it rewards debtors who "over-encumber their budgets." \textit{Id.} at 266. While analyzing the system's pre-means test, this criticism is also applicable to the means test system where debtors are able to deduct all payments on secured debts from their disposable income calculation.

\textsuperscript{153} The Commission noted that setting uniform standards for expenses would not necessarily accomplish the goals of limiting abuse and increasing payout. \textit{Id.} at 266-67. They noted that this would give debtors an "incentive to build budgets around the rules." \textit{Id.} at 267. This is the same issue of abuse
It is clear that other proposed solutions fail to achieve these three goals. Neither judicial approach, Starting Point or Historical, adequately effectuates congressional intent. Academicists and others grappling with the issue of calculating disposable income in Chapter 13 have recognized the need for an amendment, but their solutions do little to implement the purpose and policy of BAPCPA.

One suggestion is to effectively write the Starting Point approach into the Code. Treating the means test as a starting point for determining projected disposable income, however, represents a reversion to pre-BAPCPA practice and policies. Limiting judicial discretion in defining disposable income was one of the goals of the BAPCPA amendments. While using the means test as a starting point somewhat limits discretion, a zero or negative plan puts that floor at zero and results in an almost entirely discretionary payment calculation. Therefore, this solution does little to resolve the very issue posed in this article.

2. Judicial Discretion and Role under BAPCPA

While many judges, academics, and lawyers decried BAPCPA for limiting judicial discretion, discretion for judges cannot solve the disposable income problem. Neither CMI nor Schedules I and J could ever be true “crystal balls” that can tell the future. To the extent that any judge uses these tools alone to calculate that comes into play with the current means test.

154. Starting Point courts would merely be ignoring statutory language and congressional intent by reverting to pre-BAPCPA policies. See supra Part III.C.2 (describing the failings of the Starting Point approach). Historical Courts defer to Congress and the language it used in Section 1325, but the result is not what Congress intended. See supra Parts III.B.2, III.C.2 (describing the meaning that Historical Courts give to the statutory language and the unwillingness of Historical Courts to use pre-BAPCPA policies in interpreting Section 1325).

155. See Drobish, supra note 64, at 211-14 (proposing an amendment where the means test would act as a starting point from which to calculate disposable income for above-median income debtors). Drobish claims that this would “eradicate much of the uncertainty and injustices” found within the Bankruptcy Code. Id. at 214.

156. See supra note 120 (discussing how Starting Point courts use pre-BAPCPA policies in interpreting the Code).

157. See supra Part ILB (explaining how Congress intended to reduce judicial discretion when enacting BAPCPA).

158. See In re Guzman, 345 B.R. 640, 645 (Bankr. E.D. Wis. 2006) (calling Form B22C a "rear view mirror" and Schedules I and J a "crystal ball").

159. See Henry B. Hilderbrand, III, Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees, 79 AM. BANKR. J.L. 373, 389 (2005) (saying that, "[t]he disposable income test is, therefore, no longer a reliable means to gauge the debtor's ability to pay") (emphasis added). It is unclear, however, how the previous test was ever an accurate measure of future income.
disposable income, they are nothing more than fortune tellers.

Giving a judge the discretion to increase or decrease a debtor's projected disposable income does not somehow create a more accurate picture of where a debtor will be five, three, or even one year from filing bankruptcy. Future uncertainty is the most obvious failing point of Chapter 13 plans. A percentage-based system does not require judges to predict the future; it requires debtors to pay back a portion of what they actually earned.

Other attempts to solve the disposable income calculation reflect efforts to add judicial discretion into BAPCPA, although Congress clearly intended otherwise. One such attempt was brought up when debating the 2005 amendments before passage of BAPCPA. Senator Russ Feingold argued for inserting a "special circumstances" line on Form B22C and into Section 1325. The Senator claimed that this would eliminate problems with inflated or deflated income calculations when determining the disposable income requirement for above-median debtors. The idea was that a judge could decrease plan payout amounts based on these special circumstances in the interest of fairness or accuracy.

However, Form B22C now includes this line, and it is not clear that this will alleviate the problem. The "special circumstances" line is used to lower the income calculation, not to increase it. Thus, this solution might help those with artificially high income calculations, but it does nothing to solve the issue of above-median income Chapter 13 debtors with zero or negative income calculations. Moreover, this remedy highlights the problem with attempting to solve disposable income with increased judicial discretion. Courts often differ on what constitute special circumstances, exacerbating the lack of uniformity that comes along with the discretion that Congress sought to eliminate.

In addition, many commentators criticize BAPCPA for blurring administrative and judicial functions, arguing that the

160. These attempts came from the view that judicial discretion was the only way to ensure that disposable income calculations were fair and accurate. See supra Part III.C.1 (describing the Starting Point courts' approach to interpreting Section 1325).
161. 151 CONG. REC. S2306-02, S2315.
162. Id. Here, Senator Feingold argued that they should not import the means test without allowing for special circumstances adjustments. Id.
163. Id.
165. See id. (noting that debtors could use the new line to “deduct additional expenses not allowed under § 707(b)(2)(A)”).
166. See supra Part II.B. (explaining BAPCPA and the intent behind enacting it).
The means test has created more administrative work for judges.\textsuperscript{167} But a rigid test implicates a movement towards an administrative view of bankruptcy, which many of those same critics have espoused, hoping to set up a separate administrative agency to deal with bankruptcy issues where litigation is not necessary. BAPCPA may have blurred distinctions, but it could also be seen as a step closer to such a model.

A percentage-based income calculation could make the bankruptcy process less complicated and less expensive.\textsuperscript{168} In this way, this proposal provides a good method of moving towards a more administrative view of the bankruptcy system and a heightened involvement for the United States Trustee.\textsuperscript{169} The more judicial discretion written into the Code, the more judicial involvement implicated in what could be an increasingly administrative process.

### 3. Defending and Implementing BAPCPA Policy

Proposals for solving disposable income are hampered by the desire to ignore congressional intent and to ignore the policies providing the backdrop for BAPCPA. A percentage-based amendment to Section 1325 hopes to look past the animosity towards BAPCPA, resolving to limit the judicial discretion in determining what a plan pays to unsecured creditors and to ensure those creditors get more payout in Chapter 13.

Academics,\textsuperscript{170} professionals, judges, and debtors have painted a bleak picture of the new statutory scheme under BAPCPA.

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\textsuperscript{167} See Pardo, \textit{supra} note 21, at 488-94 (using models to show the blurring of administrative and judicial functions under BAPCPA). However, Pardo later points out that BAPCPA might be "an emerging and evolving reorientation away from the judicial character of bankruptcy law." \textit{Id.} at 494.

\textsuperscript{168} \textit{NATIONAL BANKRUPTCY REVIEW COMMISSION, supra} note 43, at 267. The Commission noted that this could actually make Chapter 13 simpler and provide for judicial resources to be allocated towards legal disputes. \textit{Id.}

\textsuperscript{169} See Pardo, \textit{supra} note 21, at 472 (explaining that, "[m]ore than anything else, the means test is a story about institutional design—that is, the manner in which Congress would like courts to function within the bankruptcy system"). "The means test evinces a deep mistrust of the pre-BAPCPA discretion that had been exercised by the bankruptcy judiciary in its gatekeeper role under the substantial abuse dismissal regime . . ." \textit{Id.} at 472-73. This article notes the concern of blurring the judicial and administrative functions; however, it does so by emphasizing the "persistence of judicial discretion under the abuse dismissal regime." \textit{Id.} at 479. This article makes a suggestion that many others do: courts should be relieved of handling administrative functions and an administrative agency should be empowered to handle matters that do not involve litigation. \textit{Id.} at 489.

\textsuperscript{170} See, \textit{e.g.}, Sommer, \textit{supra} note 129, at 191 (beginning his article by stating, "[f]rom its Orwellian title, an example of deceptive advertising if ever there was one"). The author notes that "[t]he silver lining . . . is that the bill is so poorly drafted that it may not accomplish much of what its financial backers wanted to accomplish." \textit{Id.} at 192.
Since 2005, many have claimed that Congress made it impossible to file for bankruptcy and that Congress has adopted a new "debtor's prison." Critics seem to denounce both the statutory drafting and the policy behind it.

The policy behind BAPCPA, however, is at least theoretically sound.\textsuperscript{171} While the means test makes theoretical sense, in practice it did not translate into Chapter 13 as intended.\textsuperscript{172} Making the disposable income requirement a percentage-based calculation embraces BAPCPA policy, rather than rebelling against it. A percentage requirement, like the means test, attempts to accomplish a bright-line rule that does not vary from courthouse to courthouse.\textsuperscript{173} While there may always be those who take advantage of the system and it may never achieve true uniformity, this proposal does justice to the policies underlying BAPCPA.\textsuperscript{174}

Whether driven by credit card companies or not, Congress attempted to enact a scheme where debtors who were able to pay off their debts would do so. The policy being that a debtor should have a minimal standard of living based on their location and family size. A percentage requirement has this same policy in mind. Congress has allowed debtors to deduct from their income payments for cars, cell phones, houses, health insurance, education expenses, and more.\textsuperscript{175} This is no debtor's prison.\textsuperscript{176}

\textsuperscript{171} U.S. TRUSTEE PROGRAM, SUGGESTIONS ON BEHALF OF U.S. TRUSTEE, app. F-3, at 6, available at http://govinfo.library.unt.edu/nbrc/reportcont.html (suggesting the introduction of tools for the United States Trustee to combat fraud and abuse in the bankruptcy code).

\textsuperscript{172} See NATIONAL BANKRUPTCY REVIEW COMMISSION, supra note 43, at 263-66 (advocating a percentage graduated by income). The Commission noted that a "disposable income" requirement has appeal to debtors and creditors alike because it seems that debtors will pay out whatever is excess in their budget, but the reality has been that often there is little or no payment to unsecured creditors. \textit{Id.} at 263. Furthermore, the Commission again points out the lack of uniformity under the test (although this is a pre-means test). \textit{Id.} at 264-65.

\textsuperscript{173} The means test is painted as a harsh anti-debtor mechanism, but there are many arguments that it is at least theoretically sound. See Hubler, supra note 3, at 329-38 (claiming that there are legal, social, and economic justifications for means testing). Hubler points to the legal justification of a universally applicable test, the social justification of a fresh start for only those in need, and the economic justification of promoting affordable and available credit. \textit{Id.} at 329, 331, 334; see also Dickerson, supra note 45, at 244 (explaining that the theory behind the means test is "theoretically sound because it is not irrational" to have debtors repay debts that are within their means).

\textsuperscript{174} See Jacoby, supra note 128, at 190 (pointing out that "day-to-day system players" are the ones who are "shaping the actual impact of statutory revisions"). On the other hand, Jacoby notes that her position is not a "sign of rebellion" and that she is "[r]eserving judgment about the impact of the bill." \textit{Id.}

\textsuperscript{175} See Official Bankruptcy Form 22C, supra note 49 (laying out these
Yet the bankruptcy system is also not mere charity or welfare. Percentage-based Chapter 13 plans would lead to greater success rates, which are empowering for both debtors and creditors. Giving debtors a fresh start and creditors fair treatment promotes lower-cost credit and entrepreneurial risk taking. For many years, these values have been a foundation of American society. In recent years, we have seen the vulnerability of that foundation and the tightening of credit markets. A percentage-based requirement responds to these changing concerns by more evenly balancing the hardships and risks of bankruptcy, a concept at the heart of United States bankruptcy policy.

V. CONCLUSION

Chapter 13 gives debtors an opportunity to keep their property and discharge more debt, but, in return, give back to unsecured creditors. While sound in policy, Chapter 13 is largely unsuccessful and BAPCPA has opened new loopholes. Now, more than ever, the viability and success of Chapter 13 should be a priority. With foreclosure now known to so many Americans, some have argued to give relief to homeowners in Chapter 13.117 BAPCPA has come to the forefront in a time of financial turmoil and uncertainty. A percentage-based plan requirement for above-median income debtors will make Chapter 13 plans both fair and successful.

The proposals and commentary on BAPCPA are clouded with judgment and pessimism. “The system was not broken. . . . [b]ut the court’s job is to interpret the new statute as clearly written, not to nostalgically preserve the past . . . .”178 Courts, debtors, academics, and professionals are all suffering from a nostalgia that hinders progress in reforming the Code, perfecting both the statutory language and scheme. It is now time to give up the nostalgia and move forward into a “new era in the history of bankruptcy law.”179

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1176. The United States has the most generous of debt forgiveness policies. See Rafael Efrat, Global Trends in Personal Bankruptcy, 76 AM. BANKR. L.J. 81, 88-89 (2002) (discussing the global prevalence of the fresh start policy, the broadest being in the United States).

1177. See, e.g., American Bankruptcy Institute, Sen. Durbin Makes the Case for Judicial Mortgage Modification in Chapter 13, 27-APR ALL BANKR. INST. J. 10 (2008) (providing excerpts from Senator Richard Durbin’s statements during Senate debate on legislation to allow judges to modify mortgages in Chapter 13). Senator Durbin is the lead Senate sponsor of the legislation. Id.
