Crumbs for Oliver Twist: Resolving the Conflict Between Tax and Support Claims in Bankruptcy

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CRUMBS FOR OLIVER TWIST: RESOLVING THE CONFLICT BETWEEN TAX AND SUPPORT CLAIMS IN BANKRUPTCY

Michelle Arnopol Cecil*

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I. INTRODUCTION

In his classic 1837 literary masterpiece, Oliver Twist, Charles Dickens powerfully portrayed the difficult life of a young boy trying to survive amidst the wretchedness and despair of Victorian London’s dark underside. The novel was set against the backdrop of the Poor Laws Amendment Act of 1834, which forced both working and nonworking poor in need of public assistance to live in conditions of deplorable misery in special institutions called workhouses, where the government could support them more cheaply than outside. The Poor Laws also provided that fathers had no legal obligation to support their illegitimate children, placing financial responsibility for these children solely on their mothers. In Oliver Twist, Dickens was, above all, expressing his view that protecting the innocent children was society’s most important endeavor. Over 150 years later and on a different continent, Congress continues to struggle with the

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1 CHARLES DICKENS, OLIVER TWIST (Fred Kaplan ed., W.W. Norton & Co. 1993) (1846). Oliver Twist first appeared as a serial in the weekly magazine, Bentley’s Miscellany, from 1837 to 1839. It was published as a book in 1838, 1839, and again in 1840. The third edition of Oliver Twist was published in 1841 and then, in 1846, Dickens completed a substantially revised edition of the book that “represents the author’s final wishes in regard to the text.” Fred Kaplan, Preface to DICKENS, supra at x.

2 Poor Laws Amendment Act of 1834, 4 & 5 Will. 4, ch. 76 (Eng.). For a comprehensive examination of the policies underlying the Poor Laws, see 10 SIDNEY & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW POLICY 1-20 (1963).


4 See Poor Laws Amendment Act of 1834, 4 & 5 Will. 4, ch. 76, §§ 69, 72 (Eng.); see also DICKENS, supra note 1, at 367-69, 372.

5 Fred Kaplan, Preface to DICKENS, supra note 1, at x.
same issue of how a civilized society can best protect families from the hardships and despair of welfare.  

In 1994, Congress attempted to address one aspect of this vast problem when it passed the Bankruptcy Reform Act of 1994. A primary policy objective of this sweeping bankruptcy reform legislation was to protect spouses and children from being forced onto welfare or into bankruptcy by ensuring that debtors seeking bankruptcy relief nevertheless satisfied their alimony and child support obligations. Yet, as this article demonstrates, Congress failed miserably in its attempt to achieve this lofty goal. Why is this so?


The plight of vast numbers of American children entitled to but not receiving adequate support by noncustodial parents has not failed to attract the attention of Congress. The economic disadvantage experienced by some former spouses of bankruptcy debtors has likewise created an impetus for change. Congress’s response to these perceived inequities was part of the Bankruptcy Reform Act of 1994.

8 This article’s references to a “spouse” of the debtor are intended to include both current spouses, who are separated from the debtor and entitled to receive support in connection with a separation agreement, and former spouses, who are either divorced or permanently separated from the debtor and are entitled to receive alimony, maintenance, or support under a divorce decree or separate maintenance agreement. See, e.g., 11 U.S.C. § 523(a)(5) (1994 & Supp. II 1996). In addition, although empirical evidence suggests that women are far more often the recipients of support payments than men, and thus are more likely to find themselves in the role of creditors in a bankruptcy proceeding, see, e.g., Peter C. Alexander, Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy, 43 CATH. U. L. REV. 351, 368 (1994), this article attempts to discuss the issues raised herein in gender-neutral language because both the issues and the resolution of them remain the same irrespective of the gender of the debtor and creditor in bankruptcy. It should be noted, however, that several sources discussed in this article have not adopted a similar gender-neutral position.

9 See 140 CONG. REC. H10773 (daily ed. Oct. 4, 1994) (statement of Rep. Slaughter) (“I have heard heartbreaking stories from single parents who . . . find themselves forced to fight for their rightful level of child support. With no other
One of the philosophical underpinnings of federal legislation is that it is the product of careful deliberation and debate between the two houses of Congress.\(^\text{10}\) Yet no bankruptcy scholar or practitioner would argue that the Bankruptcy Reform Act of 1994 was the product of such a process. Instead, the Act resulted from haste and only superficial debate.\(^\text{11}\) In fact, the House and Senate together deliberated for less than three minutes on this major piece of bankruptcy reform legislation.\(^\text{12}\) It is no wonder, then, that the Act created more uncertainty than it answered.

The Act began as Senate Bill 540,\(^\text{13}\) introduced by Senator Howell Heflin, Chair of the Committee on Courts and Administrative

\[\text{recourse}, \text{these families often turn to welfare to provide the child support the absent parent ought to be responsible for. H.R. 5116 takes an important first step in breaking this tragic cycle by strengthening current bankruptcy law and enforcing tougher measures for child support and alimony collection.};\]

\[\text{see also H.R. REP. NO. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363 (The Act "is intended to provide greater protection for alimony, maintenance, and support obligations owing to a spouse, former spouse or child of a debtor in bankruptcy. The Committee believes that a debtor should not use the protection of a bankruptcy filing in order to avoid legitimate marital and child support obligations."}).\]

\[\text{See, e.g., Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L. REV. 1503, 1527 (1990) ("[T]he deliberative process offers time for reflection, exposure to competing needs, and occasions for transforming preferences. Public debate among those of equal status and eloquence thus ultimately leads to realization of the common good."}); see also THE FEDERALIST No. 62 (James Madison); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 68-70 (1997).}\]

\[\text{One commentator described the legislation's enactment as "a model of haste." Charles E. Falk, Tax Aspects and Strategies After the Bankruptcy Reform Act of 1994, 36 TAX MGMT. MEMORANDUM 103, 103 (1995). Another noted bankruptcy scholar argued that the legislation should not be enacted because "Congress needs to have a more thorough and deliberate process to study bankruptcy reform." Bankruptcy Reform: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong. 12 (1994) (statement of Kenneth N. Klee, Chairman of the Legislation Committee of the National Bankruptcy Conference).}\]


\[\text{S. 540, 103d Cong. (1993).}\]
Practice, on March 10, 1993.\textsuperscript{14} The Senate Judiciary Committee then held two days of hearings on Senate Bill 540, on March 31, 1993, and August 2, 1993.\textsuperscript{15} The bill was brought before the entire Senate on April 21, 1994, and was passed by unanimous voice vote.\textsuperscript{16} Senate Bill 540 was then sent to the House of Representatives, where it languished for over five months.\textsuperscript{17}

Finally, on September 28, 1994, just one week before the end of the congressional session, the chair of the House Judiciary Committee, Jack Brooks, together with two other ranking House members, introduced their own version of Senate Bill 540, designated as House Bill 5116.\textsuperscript{18} This major bankruptcy reform bill was referred to the Subcommittee on Economic and Commercial Law on the morning of September 28th, marked up, and voted out of committee that same afternoon.\textsuperscript{19} That evening, staff from both the House and Senate Judiciary Committees reached a compromise on the two versions


\textsuperscript{19} See H.R. REP. NO. 103-883, at 68; see also 140 CONG. REc. D1155 (daily ed. Sept. 28, 1994).
of the bankruptcy bill, and this compromise bill was unanimously voted out of the full House Judiciary Committee early on Thursday, September 29th, less than one day after the proposed legislation was first considered by a House committee. On the weekend following this initial committee action, a flurry of activity on the compromise bill ensued between key members of the House and Senate Judiciary Committees. This compromise of House Bill 5116 was brought to the House floor on October 4th, and passed by unanimous voice vote on October 5th, under suspension of formal rules. The Senate then passed House Bill 5116 by unanimous consent on October 6, 1994, and the bill was signed into law by President Clinton on October 22, 1994.

What is clear from this brief history of the passage of the Bankruptcy Reform Act of 1994 is that standard procedures were continually ignored during the legislative process. For example, the House failed to hold a single hearing on House Bill 5116, an omission unheard of for such a significant piece of legislation. In addi-

26 See, e.g., Robin Charlow, Judicial Review, Equal Protection and the Problem with Plebiscites, 79 CORNELL L. REV. 527, 535 (1994) (“The legislative system is characterized by the opportunity for deliberation, including discussion and debate, time for reflection on and refinement of one’s position, and exposure to the views and concerns of others.”); Eule, supra note 10, at 1555 (“Legislative hearings and the testimony of various interest groups widen the legislator’s horizon.”)
tion, it suspended formal rules when it brought the bill to the House floor for a final vote.  

Most glaring, perhaps, is the absence of a conference committee formally established to resolve the differences between the two bills and report the compromises back to both chambers through a conference report. Instead, the bill was preconferencesed so that it could be considered and enacted before the regular session ended.  

As a result of these blatant irregularities in the process, there is an alarming paucity of legislative history, including no conference committee report, on this major piece of bankruptcy reform legislation. As discussed below, this article takes the position that these procedural irregularities contributed to a significant internal conflict between the tax and support provisions in the legislation, a conflict that threatens to undermine a primary policy objective of the Act itself.

One of the hallmarks of the Bankruptcy Reform Act of 1994 was its concerted effort to afford greater protection to alimony, maintenance, and child support claimants in an individual debtor’s bankruptcy proceeding.  

To that end, the Act amended eight separate subsections of the Bankruptcy Code. A cornerstone of the legis-

27 See H.R. REP. No. 103-883, at 68.  
tion was the provision elevating support obligations above tax claims by treating support as a seventh priority claim in a debtor's bankruptcy proceeding. This amendment, which has been called "the most sweeping change in bankruptcy law, as it relates to domestic relations, since passage of the Bankruptcy Reform Act of 1898," relegated tax claims to eighty priority status, to be paid only after support obligations were satisfied in full. As Congress indicated in the Act's legislative history, "[b]y closing loopholes in the bankruptcy code that allow debtors to avoid these [support] obligations, we are sending a strong message that we will no longer tolerate deadbeat parents."

In a separate section of the 1994 Act, Congress added a seemingly unrelated provision to the Bankruptcy Code. This amendment allows the federal government to assess income taxes against a debtor (allowing the establishment of paternity without violating the automatic stay); 11 U.S.C. § 362(b)(2)(A)(ii) (permitting a spouse to establish or modify an order for alimony, maintenance, or support); 11 U.S.C. § 507(a)(7) (treating support obligations as seventh priority claims in a debtor's bankruptcy proceeding); 11 U.S.C. § 522(f)(1)(A) (stating that a debtor cannot avoid a judicial lien securing an alimony, maintenance, or support debt); 11 U.S.C. § 523(a)(15) (treating property settlement obligations as nondischargeable debts under certain circumstances); 11 U.S.C. § 523(c)(1) (providing that creditors attempting to have their property settlement obligations deemed nondischargeable must seek a determination from the bankruptcy court); 11 U.S.C. § 547(c)(7) (establishing that support payments cannot be avoided as preferential transfers).

See McGarity, supra note 7, at A11 ("This new Section 507(a)(7) requires payment of such [support] debts ahead of priority taxes."); Kathy M. Kristof, What the New Bankruptcy Law Means to You: Reform Act Creates a New Debt Category That Can’t Be Erased and Protects Ex-Spouses, Children, CHI. TRIB., Nov. 23, 1994, at C3 (the Act "gives payment of child support and alimony greater ‘priority,’ allowing these debts to be paid even before the Internal Revenue Service can collect past-due taxes.").


See McGarity, supra note 7, at A11; see also infra notes 102-06 and accompanying text.

in bankruptcy and issue a notice of tax deficiency and demand for payment to the debtor without violating the Code's automatic stay provisions. The stated purpose underlying this provision is that the tax assessment process is merely clerical in nature, and often results in inadvertent violations of the automatic stay. Yet this automatic stay exception is not merely a matter of administrative convenience, as its proponents led Congress to believe. Indeed, the provision has profound substantive ramifications as well.

As Part III of this article clearly demonstrates, tax assessment, together with notice and demand for payment, automatically create a statutory tax lien in favor of the government by operation of law. The tax lien attaches to all of the debtor's property, including property acquired after the debtor files his bankruptcy petition. Recognizing the enormous economic advantages that a tax lien affords, Congress provided in the 1994 Act that the lien could attach only to property that would be revested in the debtor. Thus, this provision allows the Internal Revenue Service (the "Service") to convert its federal income tax claim from unsecured to secured status during the bankruptcy proceeding without violating the automatic stay, at least with respect to the debtor's exempt and post-petition property.

Empirical studies estimate that unsecured creditors, including creditors entitled to priority treatment in bankruptcy, receive no

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36 For a comprehensive discussion of the tax assessment process, see infra notes 123-30 and accompanying text.
37 See infra notes 131-32 and accompanying text.
39 See S. REP. No. 103-368, at 43 (1993); see also infra notes 120-21 and accompanying text.
40 See I.R.C. §§ 6321-6322, 6331(a) (1994); see also infra notes 123-34 and accompanying text.
42 For a more detailed discussion of this limitation on the tax lien, see infra notes 117-19 and accompanying text.
43 See infra notes 67-69 and accompanying text for a discussion of the exemption process.
44 See 11 U.S.C. § 507 (1994); see also infra note 75 and accompanying text.
payment in over ninety percent of all consumer bankruptcy cases.  

Accordingly, in the vast majority of cases, creditors holding support claims will recognize no financial benefit from being afforded seventh priority status in bankruptcy. The only hope that these creditors, and all other unsecured creditors, have for satisfying their claims against the debtor is to have the claims declared to be nondischargeable debts in the bankruptcy proceeding.

Both tax and support claims are generally granted nondischargeability status in bankruptcy, and thus both types of debts can proceed against the debtor's post-petition and exempt property. Yet only the income tax creditor can create a lien on this property during the pendency of the bankruptcy proceeding without violating the automatic stay. Consequently, the tax debt will become a secured claim and will be satisfied out of the debtor's post-petition and exempt property before unsecured support claimants can receive any payment on their debts. This unfortunate result contravenes one of the principal goals of the Bankruptcy Reform Act of 1994, protecting spouses and children in a debtor's bankruptcy proceeding. It was permitted to occur because Congress failed to adhere to proper legislative procedures when it passed the 1994 Act. Accordingly, this article calls for the repeal of the Bankruptcy Code's provision permitting the government to assess a tax post-petition and convert from unsecured to secured status without violating the stay.

It is reasonable to question whether the issues addressed in this article continue to be relevant more than six years after the Bankruptcy Reform Act of 1994 was enacted. Consider, however, that in

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45 See TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 203 (1989); see also infra notes 191-92 and accompanying text.

46 The concept of nondischargeability is addressed infra notes 73-74 and accompanying text.

47 See infra Part III.

48 To the extent that a support claim is secured, it will either be paid in full during the bankruptcy proceeding or the bankruptcy trustee will abandon the property securing the claim to the creditor. In either case, the secured support claimant will not be forced to compete with tax claims at the conclusion of the proceeding. For a more comprehensive treatment of secured claims in bankruptcy, see infra notes 172-74 and accompanying text.
1999, recognizing that the country's bankruptcy system was "in a state of crisis," Congress once again attempted to pass bankruptcy reform legislation aimed, at least in part, at the same policy of enhancing the position of alimony and child support claimants in a debtor's bankruptcy proceeding. Both House Bill 833 and Senate Bill 625 would have elevated support claims from seventh to first priority status in bankruptcy. In an unrelated section of both bills, Congress established two new categories of nondischargeable debts that would have included a significant number of previously dischargeable credit card obligations. Critics of the proposed legislation in both houses of Congress argued that, because unsecured creditors rarely receive any payment in consumer bankruptcy proceedings, elevating support from a seventh to a first priority claim was meaningless. Moreover, these critics asserted that the legislation would force vulnerable spouses and children to compete with powerful credit card companies for the debtor's remaining assets after the conclusion of the bankruptcy proceeding, and that the weaker family creditors were bound to lose the battle. Precisely the same argu-

50 See id. at 10 (noting that support is "a lifeline for thousands of families struggling to maintain self-sufficiency.").
53 See H.R. REP. NO. 106-123(I), at 403 (1999) ("It is misleading to suggest that moving up to 'first priority' from 'seventh priority' makes a significant difference: the debts that have second through sixth priorities almost never appear in consumer cases."); see also S. REP. NO. 106-49, at 111 ("By moving domestic support obligations to first priority, the amendment displaces the expenses of administering the bankruptcy estate."); Letter from Charles J. Tabb, Professor of Law at the University of Illinois College of Law (together with 81 other commercial law professors) to Senators Orrin Hatch and Patrick Leahy, Ranking Members of the Senate Judiciary Committee 3 (Sept. 7, 1999) (on file with author) ("Changing the priority in distribution during bankruptcy will make a difference to women and children in less than 1% of the cases, and could actually result in reduced payments in some instances. The priority provision does not affect priority or collection rights after the bankruptcy case is over. Collecting after bankruptcy—not during bankruptcy—is often the significant issue for support recipients.").
54 See S. REP. NO. 106-49, at 110 ("The legislation effectively places spousal
ment should have been raised in opposition to the special interest provisions in the 1994 Act favoring the government over support claimants, but was not. It is now time to rectify this significant inequity between tax and support claims in the Bankruptcy Code.

This article is premised on the assumption that the congressional goal of preferring support claims over federal income tax claims is indeed a laudable one, based on three interrelated policy justifications. First, support claimants are unable to spread their risk of loss like the government is able to do by raising tax rates or increasing tax revenue from other sources. As three prominent bankruptcy scholars noted in their recent study of consumer bankruptcy entitled *The Fragile Middle Class: Americans in Debt*:55

Bankruptcy laws offer special protection to children and ex-spouses because they are unlike most other unsecured creditors, such as credit card issuers or finance companies. Children and ex-spouses cannot change high interest rates to cover their bankruptcy losses. They cannot decide to stop doing business with someone to control their credit risks. They cannot spread their risks by taking on hundreds of fathers or husbands, so that they are able to withstand the impact of having one of them file for bankruptcy. The special protection for alimony and child support is sol-

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55 See SULLIVAN ET AL., supra note 30.
idly entrenched in bankruptcy policy and reflected in the statutes.  

In addition to this risk of loss argument, there is a second strong policy justification for preferring spouses and children over the government in bankruptcy. Without significant mechanisms in place to preserve their system of support, these creditors are likely to be forced onto the welfare rolls or into bankruptcy, thereby both increasing the welfare burden on state and local governments and escalating the number of bankruptcy filings. By granting support claimants priority in bankruptcy over governmental tax claims, Congress has enabled these creditors to help themselves and avoid the devastating psychological impact of welfare.

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56 Id. at 177.

57 See e.g., Shaver v. Shaver, 736 F.2d 1314, 1316 n.3 (9th Cir. 1984) (one purpose behind the nondischargeability of support claims in bankruptcy is to protect society “from an increased welfare burden that may result if debtors could avoid their familial responsibilities by filing for bankruptcy.”); Madison Grose, Comment, Putative Spousal Support Rights and the Federal Bankruptcy Act, 25 UCLA L. REV. 96, 96-97 n.7 (1977) (“[B]roken families and an increased welfare burden on state and local governments would be a likely result of allowing bankrupts to discharge support obligations.”) (citing HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 441-42 (1968)); see also SULLIVAN ET AL., supra note 30, at 177; Veryl Victoria Miles, The Nondischargeability of Divorce-Based Debts in Bankruptcy: A Legislative Response to the Hardened Heart, 60 ALB. L. REV. 1171, 1205 (1997).

58 See, e.g., Philip Shuchman, The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States, COM. L.J., June-July 1983, at 288, 289 (“[A] possibly common cause of female-alone bankruptcy is the failure to get support and maintenance payments from separated and divorced spouses.”).

Finally, spouses and children are often unsophisticated creditors, unaware of possible avenues available to pursue their claims against the debtor.60 Moreover, even if family creditors are able to discover available methods for enforcing their claims, they often lack the financial ability to do so.61 Conversely, the government deals with financially troubled debtors and debtors in bankruptcy on a daily basis; as a result it can, and does, regularly avail itself of all legal mechanisms to satisfy its tax claims. These three interrelated policy justifications together form the basis for this article's contention that the goal of affording support claimants greater protection in a debtor's bankruptcy proceeding is a noble one that the bankruptcy laws should be designed to achieve.

Part II of this article outlines the statutory provisions governing the treatment of support and tax claims in bankruptcy, with specific emphasis on the changes made by the Bankruptcy Reform Act of 1994. Part III then dissects the anatomy of a tax lien, including how it arises, the property to which it attaches, and the relative priority afforded tax liens vis-a-vis competing secured claims of other creditors. Finally, Part IV explores the conflict between tax and support claims in bankruptcy occasioned by the 1994 Act. It concludes that the only way to further the Act's underlying policy of protecting spouses and children in a debtor's bankruptcy proceeding is to repeal

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60 As one author states, "there is considerable empirical work suggesting that women are generally less aware than men of the legal options available to them." See Karen Gross, Re-Vision of the Bankruptcy System: New Images of Individual Debtors, 88 Mich. L. Rev. 1506, 1536 (1990) (reviewing Teresa A. Sullivan et al., As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America (1989)).

61 Other reasons for protecting alimony and support claims in a debtor's bankruptcy proceeding generally (as opposed to vis-a-vis the government) include the fact that the dependent spouse "might lack the skills necessary to obtain a satisfactory level of employment or might be incapable of working at all. A spouse's entry into the job market might necessitate neglect of children, and the realities of sexual discrimination, such as lower wages and limited job opportunities, offer little assurance that the creditor-spouse's efforts would be rewarded." Grose, supra note 57, at 96-97 n.7; see also Shaver v. Shaver, 736 F.2d at 1316 n.3; Brian P. Rothenberg, Comment, The Dischargeability of Marital Obligations: Three Justifications for the Repeal of § 523(a)(15), 13 Bankr. Dev. J. 135, 140 n.21 (1996).
section 362(b)(9)(D) and eliminate one of the government's primary special interest provisions in the Bankruptcy Code.

II. THE TREATMENT OF SUPPORT AND TAX CLAIMS IN BANKRUPTCY: A STATUTORY FRAMEWORK

When an individual debtor files for bankruptcy protection under either chapter 7 or chapter 13 of the Bankruptcy Code, an estate is created by operation of law. The estate is comprised of all of the debtor's pre-petition property, with certain very limited excep-

62 Chapter 7 of the Bankruptcy Code is the general liquidation proceeding, in which a debtor gives up most of his pre-petition property in exchange for a discharge of his debts. The bankruptcy trustee sells the property and distributes the proceeds to the debtor's creditors in the order prescribed by the Bankruptcy Code. See 11 U.S.C. §§ 701-766 (1994).

63 Under chapter 13 of the Bankruptcy Code, generally referred to as the rehabilitation proceeding, the debtor retains her pre-petition property, but agrees to use her future earnings, usually for a three- to five-year period, to pay her creditors. At the end of this period, the debtor is generally discharged from her remaining debts. See 11 U.S.C. §§ 1301-1330 (1994).

64 Unless otherwise stated, references in this article to the "Bankruptcy Code" are to the Bankruptcy Code of 1978, as amended, 11 U.S.C. §§ 1-1330 (1994). Although individual debtors generally file for bankruptcy relief under either chapter 7 or chapter 13, the Supreme Court has held that they are also entitled to file a bankruptcy petition under chapter 11 of the Bankruptcy Code, which generally governs corporate reorganizations. See Toibb v. Radloff, 501 U.S. 157, 166 (1991). Because chapter 11 reorganizations are very time consuming and expensive relative to chapter 7 or chapter 13, however, it is a rare case in which an individual debtor would choose chapter 11 over the other two types of bankruptcy proceedings. See, e.g., H.R. REP. NO. 95-595, at 6 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5968 ("[t]he procedures of chapter 11 . . . are sufficiently burdensome that their use will only make sense in the business context, and not in the consumer context."). A recent empirical study, however, concluded that individuals owning businesses may be filing chapter 11 petitions in greater numbers than originally anticipated. See Elizabeth Warren & Jay L. Westbrook, Financial Characteristics of Businesses in Bankruptcy, 73 AM. BANKR. L.J. 499, 501 (1999) (authors found that individuals, not corporate entities, filed one-quarter of chapter 11 business bankruptcies). Nevertheless, because this study focused on business rather than consumer bankruptcies, the remainder of this article will proceed on the assumption that an individual debtor will avail himself of either chapter 7 or chapter 13 of the Bankruptcy Code, but not chapter 11.

The Bankruptcy Code then allows the debtor to designate certain estate property as exempt, and retain it for his fresh start after bankruptcy. Although the precise scope of bankruptcy exemptions is a hotly contested topic in bankruptcy circles, it is widely accepted


67 See H.R. REP. NO. 95-595, at 125 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6086 (the fresh start allows debtors “to get out from under the debilitating effects of too much debt . . . . The two most important aspects of the fresh start available under the Bankruptcy laws that are the provision of adequate property for a return to normal life, and the discharge, with the release from creditor collection attempts.”).

A debtor is generally entitled to select either the exemptions of the state in which he resides (together with exemptions established under federal nonbankruptcy laws and joint tenancy and tenancy by the entireties property exempt from the reach of creditors under nonbankruptcy law), see 11 U.S.C. § 522(b)(1), (2) (1994), or the federal exemptions set forth in § 522(d) of the Bankruptcy Code, whichever is more generous. States may, however, opt out of the federal bankruptcy exemption scheme, in which case the debtor must use the exemptions provided under the laws of the debtor’s state of residence. See 11 U.S.C. § 522(b)(1) (1994).

68 Bankruptcy scholars have offered a variety of proposed reforms to the present exemption scheme. See, e.g., The Honorable William H. Brown, Political and Ethical Considerations of Exemption Limitations—The “Opt-Out” as Child of the First and Parent of the Second, 71 AM. BANKR. L.J. 149, 215 (1997) (author proposes that the Bankruptcy Code’s opt-out provision be repealed, and replaced with federal exemptions, adjusted geographically to reflect cost-of-living differences); James B. Haines, Jr., Section 522’s Opt-Out Clause: Debtors’ Bankruptcy Exemptions in a Sorry State, 1983 ARIZ. ST. L.J. 1, 41-42 (1983) (author argues that states’ ability to opt out of the federal exemption scheme has crippled bankruptcy reform efforts; he proposes that Congress repeal the opt-out provision and establish a federal floor exemption); Judith Schenck Koffler, The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity, 58 N.Y.U. L. REV. 22, 104-05 (1983) (author posits that allowing states to enact disparate bankruptcy exemption schemes undermines the notion of uniformity envisioned by the Framers of the Constitution; she suggests revising the Bankruptcy Code to adopt federal exemptions having no reference to state exemption law); Richard E. Mendales, Rethinking Exemptions in Bankruptcy, 40 B.C. L. REV. 851, 867-69 (1999) (author proposes a uniform “umbrella” exemption amount for all debtors in bankruptcy); Michelle J. White, Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change, 65 U. CHI. L. REV. 685, 713. (1998) (as one alternative to the present exemption scheme, the author argues in favor of a $30,000 lump-sum exemption amount that debtors could apply to any property).
that the debtor should be able to exempt out of the bankruptcy estate enough property to provide the debtor and her dependents with a basic standard of living following bankruptcy.69

An individual debtor’s primary goal in filing for bankruptcy is to obtain a discharge70 of all debts that remain unpaid after the bankruptcy proceeding has concluded.71 “Although a relatively recent addition to bankruptcy law, the discharge has become firmly entrenched in the logic and lore of bankruptcy law and practice.”72 Yet while the policy justifications in favor of the debtor’s discharge are strong, competing policies suggest that a debtor should not be entitled to discharge certain debts in bankruptcy.73 Both support claims and federal income taxes fall within the categories of debts that are nondischargeable in an individual debtor’s bankruptcy proceeding.74 These claims are also entitled to priority payment status in bankruptcy, which allows them to be paid before other unsecured

69 See H.R. REP. No. 95-595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6087 (the historical purpose behind exemption laws is to provide a debtor “with the basic necessities of life so that even if his creditors levy on all of his non-exempt property, the debtor will not be left destitute and a public charge . . . . [T]here is a federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin his fresh start.”); see also Mendales, supra note 68, at 853 (“The substantive purpose of personal exemptions in bankruptcy is to ensure that individual debtors will not emerge from bankruptcy completely destitute, but rather with certain basic properties needed both to live from day to day and for quick reentry into normal economic life.”).


71 See H.R. REP. No. 95-595, at 125, 128 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6086, 6089; see also Grogan v. Garner, 498 U.S. 279, 286 (1991) (“[T]he central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’” (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))).


claimants receive any payment in the bankruptcy proceeding.\textsuperscript{75} Because an understanding of the scope of, and interrelationship between, these nondischargeability and priority provisions is necessary before exploring the tension between support and tax claims in bankruptcy, this article will next explore the treatment of each of these claims in the bankruptcy context.

\textbf{A. Alimony, Maintenance, and Support Claims}

Since the inception of this country’s bankruptcy laws, claims in the nature of alimony, maintenance, and support have been one of the principal categories of nondischargeable debts.\textsuperscript{76}

\textsuperscript{75} See 11 U.S.C. § 507(a)(7), (8) (1994). For a more complete discussion of these priority rules, see infra notes 86-93, 102-06 and accompanying text.

\textsuperscript{76} In Audubon v. Shufelt, 181 U.S. 575 (1901), the Supreme Court, relying in part on the reasoning espoused in Barclay v. Barclay, 56 N.E. 636, 637 (Ill. 1900), held that alimony, maintenance, and support claims were nondischargeable debts under the Bankruptcy Act of 1898. See Audubon v. Shufelt, 181 U.S. at 580; see also Wetmore v. Markoe, 196 U.S. 68, 73-77 (1904); Dunbar v. Dunbar, 190 U.S. 340, 351-53 (1903). In 1903, Congress amended the Bankruptcy Act of 1898 to clarify its earlier intention in the 1898 Act to make alimony, maintenance, and support nondischargeable in a debtor's bankruptcy proceeding. See Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 797, 798 (repealed 1978). The provision stated that all debts were dischargeable in bankruptcy except those that "are for alimony due or to become due, or for maintenance and support of wife or child." Id. Although one court struck down this provision in 1977 as a violation of the Equal Protection Clause, see Schiffman v. Wasserman (In re Wasserman), 13 Collier Bankr. Cas. 611 (MB) (D.R.I. 1977), Congress retained the nondischargeability of support obligations when it completely overhauled the bankruptcy laws one year later, using gender-neutral language. See 11 U.S.C. § 523(a)(5) (1994 & Supp. II 1996); H.R. REP. No. 95-595, at 129 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6090. Whether a particular debt will be considered to be in the nature of alimony, maintenance, or support is an issue to be determined not under state law, but rather under federal bankruptcy law. See S. REP. No. 95-989, at 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5865; H.R. REP. No. 95-595, at 364 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6320; see also Williams v. Williams (In re Williams), 703 F.2d 1055, 1056 (8th Cir. 1983). Subsequent cases have held, however, that state law should not be considered completely irrelevant in making this determination. See, e.g., Zaera v. Raff (In re Raff), 93 B.R. 41, 45 (Bankr. S.D.N.Y. 1988); Smith v. Billingsley (In re Billingsley), 93 B.R. 476, 477 (Bankr. N.D. Tex. 1987).
Congress and the courts have reasoned that the policy of protecting innocent spouses and children from being forced onto welfare as a result of the debtor’s bankruptcy outweigh the policy of discharging these debts in order to provide the debtor a fresh start following the bankruptcy proceeding. “Both the 1903 amendment to the 1898 Act and the common law which preceded it reflected the societal norm of the time that it was a man’s unavoidable duty to care for his wife and children, even after divorce.”

Bankruptcy laws have, however, historically made a strict distinction between support claims and property settlement obligations. While the former have always been granted nondischarge-
ability status as a matter of public policy, it was not until the Bankruptcy Reform Act of 1994 that property settlements were first granted nondischargeability status, but even then only under limited circumstances. Moreover, although most creditors holding nondis-

or support, on the one hand, or a property settlement, on the other. See, e.g., Friedkin v. Sternberg (In re Sternberg), 85 F.3d 1400, 1405-06 (9th Cir. 1996); Yeates v. Yeates (In re Yeates), 807 F.2d 874, 877-79 (10th Cir. 1986). To assist in making this decision, courts have developed a number of factors to use in assessing whether an obligation is in the nature of support or a property division, such as the parties' respective financial positions at the time the obligation was created, see Dennis v. Dennis (In re Dennis), 25 F.3d 274, 279 (5th Cir. 1994), cert. denied, 513 U.S. 1081 (1995), as well as how the parties have treated the obligation for tax purposes. See, e.g., Robb-Fulton v. Robb (In re Robb), 23 F.3d 895, 898-99 (4th Cir. 1994). For a complete discussion of the factors used by courts in making the support/property settlement distinction, see 4 COLLIER ON BANKRUPTCY ¶ 523.11[6] (Lawrence P. King ed., 15th ed. rev. 2000).

A number of scholars have recently argued that the Bankruptcy Code should not make a distinction between support obligations and property settlements. See, e.g., Catherine E. Vance, Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce, 45 BUFF. L. REV. 369, 432 (1997); see also Rothenberg, supra note 61, at 160. In fact, one leading bankruptcy treatise has categorized the distinction between support claims and property settlement obligations as "faint, irregular and blurred." 2 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 7-29, at 370 (1992). Another commentator has stated that support claims and property settlements are "a seamless web," and suggested that trying to distinguish between them is "a fruitless and harmful endeavor." Charles P. Kindregan, Jr., The Bankruptcy Reform Act and Its Effect on Family Law Proceedings, 28 SUFFOLK L. REV. 657, 660 (1994).

See, e.g., Bankruptcy Reform: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong. 42 (1994) (statement of Kenneth N. Klee, Chairman of the Legislation Committee of the National Bankruptcy Conference); see also Vance, supra note 81, at 387 ("It is manifestly unjust to say that, as a matter of policy, it is acceptable to reduce the creditor spouse's finances to the level of mere subsistence for the sake of permitting her former spouse to 'start afresh free from the obligations and responsibilities' of his indebtedness." (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).


Under 11 U.S.C. § 523(a)(15) (1994), property settlements are nondischargeable unless the debtor can establish either (i) that she does not have the ability to pay the property settlement obligation after providing for reasonable necessities for herself and her dependents (and, if she has a business, expenses for the operation of the business), or (ii) that the benefit that she would receive from having the obligation discharged outweighs the harm to her spouse, former spouse, or
chargeable claims cannot proceed against the debtor's exempt property after bankruptcy in order to collect their claims, creditors holding support claims (but not property settlement claims) are granted special status under the Bankruptcy Code and can seize the debtor's exempt property to satisfy their nondischargeable debts at the close of the bankruptcy proceeding.\(^8\)

Prior to 1994, the Bankruptcy Code did not afford support claims priority payment status. Therefore, other unsecured claims granted priority status under the Bankruptcy Code, such as taxes and administrative expenses of the bankruptcy estate, were paid in full before creditors holding support claims could receive any payment in a debtor's bankruptcy proceeding.\(^8\) As previously discussed, a primary congressional goal in enacting the Bankruptcy Reform Act of 1994 was to afford better protection to support claimants.\(^8\) The Act's legislative history is replete with examples of how debtors were

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8\(^{\text{See 11 U.S.C. § 522(c)(1) (1994).}}\)
abusing the bankruptcy system by "weaseling out of their child support obligations."88 Thus, one of the strongest protections afforded support claimants under the Act was to grant them seventh priority status in a debtor's bankruptcy proceeding.89 Because federal income tax claims had previously occupied seventh priority status, Congress deliberately placed support claimants ahead of the government, which held federal income tax claims against the debtor.90 Accordingly, although support claimants will receive nothing in a debtor's bankruptcy until higher priority claimants, such as administrative expenses of the debtor's bankruptcy estate, are paid,91 they will be

88 See Bankruptcy Reform: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong. 10 (1994) (statement of Rep. Schroeder); see also id. at 239 (statement of Rep. Schroeder) ("We think it is a very important principle that people cannot go into bankruptcy and shed their family responsibilities."); 140 CONG. REC. H10773 (daily ed. Oct. 4, 1994) (statement of Rep. Slaughter) ("I have heard heartbreaking stories from single parents who want nothing but the best for their children, but find themselves forced to fight for their rightful level of child support. With no other recourse, these families often turn to welfare to provide the child support the absent parent ought to be responsible for. H.R. 5116 takes an important first step in breaking this tragic cycle by strengthening current bankruptcy law and enforcing tougher measures for child support and alimony collection.").

89 Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 304, 108 Stat. 4106, 4132-33 (1994). It is important to note, however, that this priority status extends only to support claims, not property settlement obligations. Moreover, unlike the provisions governing nondischargeability of support claims, which have been amended to provide that the claims remain nondischargeable even if assigned to a governmental entity or assigned pursuant to the Social Security Act, § 507 contains no such provision. See 11 U.S.C. § 507(a)(7)(A) (1994). Thus, that section states that, if a support claim is assigned to another entity, either voluntarily or by operation of law, it is not entitled to seventh priority status in bankruptcy. See id. It is unclear whether this is merely a drafting error caused by the haste with which the Bankruptcy Reform Act of 1994 was passed, or is a substantive distinction between the Bankruptcy Code's nondischargeability and priority provisions. Nevertheless, § 507(a)(7), as currently drafted, offers no priority treatment to support claims being paid through governmental agencies (presumably done so to take advantage of state statutory provisions creating liens on the debtor's property for unpaid support, if the payments are to be made directly to the agency). See infra notes 216-17 and accompanying text.

90 See, e.g., Kristof, supra note 32, at C3.

paid in full before governmental tax claims and general unsecured creditors receive anything in the debtor's bankruptcy proceeding.

The Act's change regarding the priority status of support claims in bankruptcy has had a special impact on chapter 13 proceedings. Under section 1322 of the Bankruptcy Code, debtors filing for chapter 13 bankruptcy relief must provide in their rehabilitation plans for the full payment of priority claims. Accordingly, because support claims are now afforded priority status, they must be paid in full under a debtor's chapter 13 bankruptcy plan, making chapter 13 a less attractive option than chapter 7 for debtors having significant support obligations that are unpaid.

The final provision affecting support claims in bankruptcy is section 362, the automatic stay. When a debtor files a bankruptcy petition under either chapter 7 or 13 of the Bankruptcy Code, the automatic stay is created by operation of law and prevents creditors from taking any action against the debtor, his property, or property of the estate in an attempt to collect their debts. Although the scope of the automatic stay is quite broad, the Bankruptcy Code provides a number of exceptions to its application. For example, it is not a violation of the automatic stay for creditors holding support claims to receive less than full payment of their priority claim under a debtor's chapter 13 plan. See id. It is important to note that priority status is granted only to alimony, maintenance, and support claims, and not to property settlement claims. See 11 U.S.C. § 507(a)(7)(B) (1994). Thus, creditors have a great incentive to having their claims declared as support claims rather than as property settlements, and the trustee and debtors have an equal incentive to argue for the opposite result. See, e.g., Dewey v. Dewey (In re Dewey), 223 B.R. 559, 562-65 (10th Cir. BAP 1998); In re Lutzke, 223 B.R. 552, 553-55 (Bankr. D. Ore. 1998); In re Beverly, 196 B.R. 128, 130-33 (Bankr. W.D. Mo. 1996); In re Grady, 180 B.R. 461, 464-66 (Bankr. E.D. Va. 1995).

Penalties for violating the automatic stay against an individual debtor can include compensatory damages, attorney's fees, and, under appropriate circumstances, even punitive damages. See 11 U.S.C. § 362(h) (1994).
collect those claims from property that is not property of the estate during the pendency of the bankruptcy proceeding.\footnote{See 11 U.S.C. § 362(b)(2)(B) (1994) (The filing of a petition . . . does not operate as a stay . . . of the collection of alimony, maintenance, or support from property that is not property of the estate”). Because the debtor’s post-petition wages are property of the estate in a chapter 13 proceeding pursuant to 11 U.S.C. § 1306(a)(2) (1994), most courts have held that it is a violation of the automatic stay for a support creditor to garnish the debtor’s post-petition wages in an attempt to collect alimony and child support arrearages. See, e.g., In re Bunn, 170 B.R. 670, 673 (Bankr. D. Minn. 1994).} This exception generally allows support claimants to proceed against property acquired by the debtor post-petition, as well as her exempt property,\footnote{Although the statute is not absolutely clear that this exception allows a creditor to proceed against the debtor’s exempt property, the legislative history to the Bankruptcy Code specifically so states. See S. REP. No. 95-989, at 51 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5837; see also H.R. REP. No. 95-595, at 342 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6299. Moreover, cases have also held that the exemption applies both to the debtor’s post-petition property as well as her exempt property. See, e.g., In re Cole, 202 B.R. 356, 358-59 (Bankr. S.D.N.Y. 1996).} in an attempt to collect support claims after the filing of the debtor’s bankruptcy petition.\footnote{While the definition of a claim under § 101(5) of the Bankruptcy Code is broad enough to include post-petition alimony, maintenance, and support claims because the court order or judgment giving rise to those claims occurred pre-petition, the Bankruptcy Code contains special provisions that, when taken together, have the effect of treating these post-petition alimony, maintenance, and support claims as post-petition claims rather than pre-petition claims. See 11 U.S.C. §§ 101(5), 502(b)(5) (1994). Because post-petition claims can proceed against the debtor’s post-petition property without violating the automatic stay, § 362(b)(2)(B) of the Bankruptcy Code does no more than to allow support claims arising post-petition to do the same. In several cases, however, lower courts have held that § 362(b)(2)(B) also permits pre-petition alimony, maintenance, and support claimants to proceed against the debtor’s post-petition and exempt property during pendency of the bankruptcy proceeding without violating the stay. See, e.g., In re Cole, 202 B.R. at 358; Sinewitz v. Sinewitz (In re Sinewitz), 166 B.R. 786, 789 (Bankr. D. Mass. 1994); Rogers v. Overstreet (In re Rogers), 164 B.R. 382, 387 (Bankr. N.D. Ga. 1994).}

In a further attempt to bolster the ability of spouses and children to enforce their support claims in bankruptcy, the Bankruptcy Reform Act of 1994 also amended the Bankruptcy Code to allow

\footnote{In several cases, however, lower courts have held that § 362(b)(2)(B) also permits pre-petition alimony, maintenance, and support claimants to proceed against the debtor’s post-petition and exempt property during pendency of the bankruptcy proceeding without violating the stay. See, e.g., In re Cole, 202 B.R. at 358; Sinewitz v. Sinewitz (In re Sinewitz), 166 B.R. 786, 789 (Bankr. D. Mass. 1994); Rogers v. Overstreet (In re Rogers), 164 B.R. 382, 387 (Bankr. N.D. Ga. 1994).}
claimants to establish or modify support claims without violating the automatic stay. Whether this provision permits the creation of a lien as part of the establishment or modification of a support claim has not yet been determined.

**B. Tax Claims**

When an individual debtor files a bankruptcy petition, she often owes the federal government past income taxes. In fact, studies have estimated that nearly one in every five debtors lists income taxes as a significant unpaid debt. Thus, the treatment of tax

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100 A leading bankruptcy treatise suggests that this provision is not broad enough to exempt actions to enforce support obligations from the scope of the stay. See 3 COLLIER ON BANKRUPTCY ¶ 362.05[2] (Lawrence P. King ed., 15th ed. rev. 2000) (“Proceedings to enforce such [establishment or modification] orders are conspicuously omitted from that exception and continue to be stayed, except in cases in which they are criminal in nature and permitted by section 362(b)(1).”).

101 See, e.g., Shuchman, supra note 58, at 301-03 (the author estimated that approximately 16% of all cases surveyed included priority income tax claims as a significant debt); see also SULLIVAN ET AL., supra note 45, at 297 (in a massive study of consumer debtors filing for bankruptcy relief in 1981, the authors estimated that taxes represented approximately 13% of “reluctant debt,” comprised of debt held by creditors who did not initially seek a debtor-creditor relationship); Philip Shuchman, New Jersey Debtors 1982-1983: An Empirical Study, 15 SETON HALL L. REV. 541, 575 (1985) (the author suggested that approximately 13% of the 186 cases surveyed included income tax claims as one of the debtor’s priority debts); Warren & Westbrook, supra note 64, at 559 (the authors similarly found that approximately 20% of all business and consumer bankruptcies filed under chapter 11 of the Bankruptcy Code listed federal income taxes as a factor precipitating their bankruptcy filings). While this article refers to bankruptcy statistics from time to time in support of the arguments raised herein, it is important to note that there is a dearth of empirical evidence in the bankruptcy area, in large part because the government collects very few basic bankruptcy statistics. See, e.g., Warren & Westbrook, supra note 64, at 502, 506-07. Authors such as Elizabeth Warren and Jay Westbrook, however, have recently made great strides in rectifying this paucity of empirical data.

Although a debtor may have other unpaid tax debts when she files for bankruptcy, such as property taxes and employment taxes, this article focuses only on federal income tax claims. Thus, references in this article to tax claims and taxes
claims in an individual debtor's bankruptcy proceeding is an important aspect of the bankruptcy process.

After the Bankruptcy Reform Act of 1994 added support obligations as a seventh priority claim in bankruptcy, federal income taxes are now treated as an eighth priority claim, but only if they meet two technical requirements. First, the taxes must be due, with extensions, after three years before the filing of the debtor's bankruptcy petition. Second, the taxes must apply to a taxable year ending on or before the filing of the debtor's bankruptcy petition. The Bankruptcy Code also affords eighth priority status to...
taxes assessed within 240 days before the filing of the bankruptcy petition.\textsuperscript{105} The 240-day time period is tolled during any time period in which compromise negotiations are occurring between the taxpayer and the Internal Revenue Service (the "Service"), plus thirty days thereafter. This provision closes a loophole that had allowed a taxpayer to submit a compromise offer to the Service after assessment, engage in extended negotiations with the Service until the Service lost priority for the tax liability under the three-year rule discussed above, and then file for bankruptcy before the Service could take any steps to collect its tax claim.\textsuperscript{106}

Unsecured tax claims are also deemed nondischargeable in a debtor's bankruptcy proceeding, but only to the extent that they (i) qualify for priority status under section 507 of the Bankruptcy Code, as discussed in the preceding paragraph, or (ii) arise out of a tax return that was either not filed, filed late and at any time after two years before the filing of the debtor's bankruptcy petition, or fraudulently filed.\textsuperscript{107} Moreover, like support claimants, creditors holding nondischargeable federal income tax claims can also proceed against the debtor's exempt assets after bankruptcy in order to satisfy their claims.\textsuperscript{108}

If a debtor has filed for relief under chapter 13 of the Bankruptcy Code, taxes accorded eighth priority status in bankruptcy must be paid in full over the duration of the debtor's bankruptcy plan, usu-
ally three to five years.\textsuperscript{109} Therefore, because most tax claims are granted eighth priority status in bankruptcy, the debtor will be required to pay them in full over the life of her rehabilitation plan.\textsuperscript{110}

Although the Bankruptcy Code’s automatic stay provisions generally prevent the Service from taking any action post-petition to satisfy its tax claims, including creating a tax lien post-petition to secure a pre-petition tax claim, the Bankruptcy Reform Act of 1994 amended the automatic stay provisions to allow the federal government to take a number of actions post-petition with respect to tax claims without violating the automatic stay. First, the federal government can audit the debtor post-petition in order to establish a tax liability without violating the stay.\textsuperscript{111} It can also issue a notice of tax deficiency to the debtor.\textsuperscript{112} Third, the government can make a de-

\begin{footnotesize}
\begin{enumerate}
\item[110] For a complete discussion of taxes that are granted eighth priority status in bankruptcy, see supra notes 102-06 and accompanying text. It is important to note, however, that tax scholars have repeatedly voiced concern over a technical error in the chapter 13 tax provisions that allows the most undeserving debtors to discharge taxes arising out of fraudulently filed returns and returns that were never filed without being required to pay them in full over the life of their rehabilitation plans. As one commentator explains, “Section 1328(a) does not except 523(a)(1) taxes from discharge because priority taxes must be paid in full through the plan prior to discharge. However, section 523(a)(1)(B) and (C), arising under the most egregious of circumstances, are not treated as priority taxes under section 507(a)(8). The statutory structure works well in chapter 7 but fails miserably in chapter 13.” Steven J. Csontos et al., Congress’s Role in Bankruptcy Tax Policy: A Roundtable Discussion, 3 AM. BANKR. INST. L. REV. 257, 287 (1995) (remarks of the Honorable Polly Higdon). As a solution to this problem, several scholars have proposed that taxes falling under 11 U.S.C. § 523(a)(1)(B) or (C) (1994) should be nondischargeable in chapter 13. See Williams & Ogier, supra note 72, at 340-41; Jack F. Williams, National Bankruptcy Review Commission Tax Recommendations: Individual Debtors, Priorities and Discharge, 14 BANKR. DEV. J. 1, 70 (1997). It is interesting to note that, had it passed, the Bankruptcy Reform Act of 2000 would have made such fraudulent taxes nondischargeable in chapter 13. See H.R. 2415, 106th Cong. § 707 (2000).
\end{enumerate}
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mand for the debtor's tax returns without violating the stay. Finally, and most importantly, the government can assess a tax against the debtor and issue a notice and demand for payment to the debtor without violating the stay.

As discussed in Part III, these actions are effective to create a tax lien against the debtor. Recognizing this possibility, Congress also amended the Bankruptcy Code to provide that any tax lien resulting from the government's actions during the pendency of the bankruptcy proceeding will be effective only if the tax deficiency for

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114 Section 505 of the Bankruptcy Code provides that the bankruptcy court enjoys the power to determine the amount or legality of a tax, subject to certain limited exceptions, even if the tax has not yet been assessed. See 11 U.S.C. § 505(c) (1994). Thus, even before the Bankruptcy Reform Act of 1994 was enacted, the Service could assess a tax against the debtor under certain very limited circumstances without violating the stay. Notwithstanding this provision, however, no tax lien would arise after such assessment because § 505 does not authorize the Service to issue a notice and demand letter, which is one of the prerequisites for the creation of a tax lien. See infra notes 131-32 and accompanying text.


The filing of a petition . . . does not operate as a stay . . . [of] the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

which the tax lien arose is a nondischargeable debt under the Bankruptcy Code. Moreover, even in such cases, the tax lien will attach only to property that will be revested in the debtor. Accordingly, the Service can create a tax lien during the pendency of the bankruptcy proceeding without violating the automatic stay; however, the lien will attach only to the debtor’s exempt property and property that the debtor acquires post-petition. The legislative history to the Bankruptcy Reform Act of 1994 provides that the purpose underlying the assessment exception is merely to avoid any unnecessary interference with the assessment of taxes, which is simply a clerical process that often results in inadvertent violations of the automatic stay. It also states that the exception is not intended to change the priority of any tax claim.

The requirement that the underlying tax debt be a nondischargeable debt under the Bankruptcy Code was not contained in the original Senate version of the bill. See S. 540, 103d Cong. § 114 (1993). The original language in Senate Bill 540 was that the tax lien “shall not take effect until the property is no longer property of the estate.” Id. This language might have suggested that a tax lien created during the bankruptcy proceeding could attach to property transferred to other creditors out of the debtor’s bankruptcy estate. Thus House Bill 5116 amended this language to reflect the intention of Congress that only property that was transferred out of the estate or in some way revested in the debtor was eligible for this automatic stay exception. See H.R. 5116, 103d Cong. § 116 (1994).

For a discussion of the exemption process, see supra notes 67-69 and accompanying text.

As one official with the Tax Division of the Department of Justice explained during a roundtable discussion of bankruptcy tax policy:

The automatic stay relief for assessment of taxes was at the top of the list that the IRS and the Tax Division had put together. It was one that we thought did not necessarily involve the most money of the issues that were on our list. But, from the standpoint of administrative importance, it was certainly the top issue. The IRS computer is a key to the assessment of a tax liability. With the prohibition on assessment, it meant that the IRS had to manually track all of these accounts. They had trouble with posting payments to the accounts. They had trouble with determining when the stay was lifted so that the time for assessment was no longer suspended . . . . It created all sorts of headaches for the IRS and, I’m sure, for other taxing authorities . . . .
III. ANATOMY OF A TAX LIEN

The federal government has at its disposal a powerful tool to insure the collection of federal income taxes: the tax lien. Because the Service can create a tax lien during bankruptcy, it can convert its claim from unsecured to secured status during the proceeding. Thus, it is important to understand both the scope and priority of the federal tax lien before exploring the inherent conflict between tax and support claims in bankruptcy.

A federal tax lien arises automatically by operation of law upon the occurrence of three events. First, the Service must make a valid assessment of the tax. The Service can assess a tax in one of three ways. If a taxpayer files a return in which she admits a tax liability, but does not pay the full amount of that tax liability, assessment occurs when a representative of the Service records the tax liability in its regional service center.

The second, and most common, method of assessment arises out of an audit. Generally, the Service initiates an audit when it believes that the taxpayer has understated his tax liability. In an audit, the Service examines the taxpayer’s books and records. If it finds a deficiency, the taxpayer can admit to the deficiency, in which case assessment occurs when a representative of the Service records the tax liability in its regional service center.

The second, and most common, method of assessment arises out of an audit. Generally, the Service initiates an audit when it believes that the taxpayer has understated his tax liability. In an audit, the Service examines the taxpayer’s books and records. If it finds a deficiency, the taxpayer can admit to the deficiency, in which case assessment occurs when a representative of the Service records the tax liability in its regional service center. Conversely, if the taxpayer refuses to accept the tax deficiency, assessment procedures become more complex. The Service will first notify the tax-

very happy to see that Congress took our advice on that issue and adopted the amendment.

Csontos et al., supra note 110, at 262 (footnotes omitted) (remarks of Steven J. Csontos).

121 See S. REP. NO. 103-168, at 43.
122 For a comprehensive examination of the federal tax lien, see Cecil, supra note 106, at 158-59 to 158-129. The history of the tax lien is addressed in Morgan D. King & Jonathan H. Moss, Avoiding Tax Liens on Personal Property in Bankruptcy: A Look at the Interplay Between the Bona Fide Purchaser Provisions of the Tax and Bankruptcy Codes, 31 CAL. WESTERN L. REV. 1, 6-7 (1994).
payer in writing of its finding of a tax deficiency, allowing the taxpayer a thirty-day period either to request an informal conference regarding the findings or to appeal them to the Appellate Division of the Internal Revenue Service under a formal procedure.\textsuperscript{126} Finally, if the parties cannot resolve their dispute either through an informal conference or at the formal Appellate Division hearing, the Service will then issue a notice, called a ninety-day letter, to the taxpayer, allowing the taxpayer ninety days after mailing to appeal the Service’s deficiency to the Tax Court.\textsuperscript{127} If the taxpayer does not appeal the decision in a timely fashion, the Service will assess the tax at the time that the appeals process ends. If, on the other hand, the taxpayer files a timely petition with the Tax Court, assessment is generally postponed until the Tax Court renders its final decision.\textsuperscript{128}

Although the most common method for assessing a tax is through the audit procedure described above, the Service has a third method by which it can make an assessment under special circumstances. The procedure, called a jeopardy assessment, can be used by the Service if it can establish that it will be unduly prejudiced by delaying assessment (and the creation of a tax lien, as discussed below) until the taxpayer utilizes all review procedures available to challenge the Service’s tax deficiency.\textsuperscript{129} Extraordinary circumstances giving rise to a jeopardy assessment might include the taxpayer’s concealment or removal of property, the taxpayer’s attempts to evade


\textsuperscript{127} See I.R.C. §§ 6212-6213 (West 1998 & West Supp. 2000); Treas. Reg. § 301.6212-1(a) (as amended in 1995). This 90-day period is extended to 150 days if the notice of deficiency is mailed to a person residing outside of the United States. See I.R.C. § 6213(a) (West 1988 & West Supp. 2000).

\textsuperscript{128} See I.R.C. § 6213(a) (West 1988 & West Supp. 2000); see also Cole v. United States, 863 F.2d 34, 35 (9th Cir. 1988). For a general discussion of the Tax Court petition process, see MCQUEEN & WILLIAMS, supra note 126, § 2:5.

\textsuperscript{129} See I.R.C. §§ 6861-6862 (1994).
the Service by leaving the country, or the imminent insolvency or bankruptcy of the taxpayer. 130

After the Service has made an assessment of an income tax deficiency through one of these three methods, the second step that it must take to create a tax lien is commonly referred to as the notice and demand letter. The Service must send a notice of its assessment to the taxpayer, no later than sixty days after it has assessed the tax, 131 establishing the amount of the tax deficiency and demanding payment. 132

The third requirement necessary to establish a valid tax lien is merely a waiting period. If the taxpayer neglects or refuses to pay the tax deficiency within ten days of the notice and demand, a tax lien arises automatically and relates back to the date of assessment. 133 Because the Service is not required to file or perfect the tax lien in order to validate it, oftentimes the taxpayer will not even know of its existence; hence the lien is often referred to as a secret lien because only the Service knows of it. 134

A. Scope and Duration of the Tax Lien

When a tax lien arises, it attaches to all property of the taxpayer, including realty and personalty. 135 Moreover, the federal tax

131 Id.
132 See I.R.C. § 6303(b) (1994).
133 See I.R.C. §§ 6321-6322, 6331(a) (1994); see also MICHAEL SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 14.05 (2d ed. 1991).
135 See I.R.C. § 6321 (1994). The Supreme Court has held that state law is determinative of whether property is owned by the taxpayer for purposes of the federal tax lien. See Aquilino v. United States, 363 U.S. 509, 512-13 (1960); United States v. Bess, 357 U.S. 51, 55 (1958). The Supreme Court also held, however, that even though state law determines a taxpayer’s rights to property, federal law then governs the priority accorded competing liens. “This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes.” Aquilino, 363 U.S. at 514.
lien also embraces the taxpayer's "rights to property." Accordingly, the tax lien attaches to causes of action that the taxpayer might have against a third party, even if those causes of action have not yet been reduced to judgment. Similarly, the lien embraces life estates, future interests, joint tenancy property, and tenancies in common property. Because the lien embraces a taxpayer's rights to property, it has been held to attach to after-acquired property (property acquired after the lien arises).

In addition, lower courts have established that, although state law is determinative of a taxpayer's property rights, it is federal law that establishes whether a taxpayer can renounce those property rights for tax lien purposes. See, e.g., In re Adler, 869 F. Supp. 1021, 1026 (E.D.N.Y. 1994).

136 See I.R.C. § 6321 (1994). A recent Supreme Court decision addressed whether a taxpayer's rights under state law rose to the level of "rights to property." See Drye v. United States, 120 S. Ct. 474, 478 (1999). In Drye, the Court concluded that the determination should be based on "the breadth of the control the [taxpayer] could exercise over the property." Drye, 120 S. Ct. at 483 (quoting Morgan v. Commissioner, 309 U.S. 78, 83 (1940)). For an indepth discussion of Drye, see Steve R. Johnson, After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-By-the-Entireties Interests, 75 IND. L.J. 1163 (2000).

137 See, e.g., United States v. Stonehill, 83 F.3d 1156, 1160 (9th Cir.), cert. denied, 519 U.S. 992 (1996); see also Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc., 767 F.2d 464, 466 (8th Cir. 1985).

138 See United States v. Grimm, 865 F. Supp. 1303, 1310 (N.D. Ind. 1994); see also United States v. Trilling, 328 F.2d 699, 702-03 (7th Cir. 1964). It should be noted, however, the federal tax lien does not apply to tenancies by the entirety unless both the husband and wife are jointly liable for the tax lien, in which case it attaches to the entire interest of both parties. See Tony Thorton Auction Serv., Inc. v. United States, 791 F.2d 635, 637 (8th Cir. 1986); Whittaker v. Kavanagh, 100 F. Supp. 918, 920 (E.D. Mich. 1951). For a more complete discussion of the tenancy by the entireties issue, see Cecil, supra note 106, at 158-65 n.37.

139 See Treas. Reg. § 301.6321-1 (as amended in 1978); see also Glass City Bank v. United States, 326 U.S. 265, 267-68 (1945); State Bank of Fraser v. United States, 861 F.2d 954, 963 (6th Cir. 1988). The lien also embraces the taxpayer's property even if it is in the hands of a third person. In fact, after receiving actual notice of the tax lien, the third person can be liable for conversion if he takes any action that might impair the government's interest in the property. See United States v. Allen, 207 F. Supp. 545, 546-47 (E.D. Wash. 1962). Moreover, property subject to a federal income tax lien remains encumbered by the lien even after it is transferred to a third party, such as a purchaser. See United States v. Bess, 357 U.S. 51, 57 (1958).
Finally, and most importantly for purposes of this article, the federal tax lien embraces property of the taxpayer that is exempt from levy by creditors under either state or federal law.\textsuperscript{140} Thus, in \textit{United States v. Bess},\textsuperscript{141} the Supreme Court held that the lien attached to the cash surrender value in a taxpayer’s life insurance policy, despite the fact that the surrender value was exempt property under New Jersey law, outside the reach of creditors.\textsuperscript{142} Similarly, the Eighth Circuit found that the federal tax lien overrode the taxpayer’s homestead exemption under state law,\textsuperscript{143} and a number of other courts have held that the federal tax lien also overrides state wage exemptions; accordingly, the tax lien embraces a taxpayer’s full wages.\textsuperscript{144} There are a meager set of federal exemptions provided by the Tax Code, such as school books and wearing apparel, which are exempt from levy and sale by the Service; however, the tax lien still attaches to this exempt property.\textsuperscript{145}

The tax lien, once established, remains in effect until the taxpayer satisfies the liability or the liability becomes unenforceable due to the lapse of time.\textsuperscript{146} The Service generally has ten years after it has assessed a tax to begin collection proceedings against the taxpayer.\textsuperscript{147} The Service can toll or extend this ten-year limitations period under certain circumstances, such as when the taxpayer is in bankruptcy and the bankruptcy court controls the taxpayer’s assets.\textsuperscript{148}

\begin{footnotes}
\item[141] 357 U.S. 51 (1958).
\item[142] \textit{Id.} at 57.
\item[143] See \textit{United States v. Heasley}, 283 F.2d 422, 427 (8th Cir. 1960); see also \textit{Pate v. United States}, 949 F.2d 1059, 1061 (10th Cir. 1991).
\item[146] See I.R.C. § 6322 (1994).
\item[147] See I.R.C. § 6502(a) (1994). The Tax Code provides that collection proceedings can be commenced either by initiating a proceeding in court or by levying upon the taxpayer’s property. \textit{Id.}
\item[148] See I.R.C. § 6503(b) (1994) (the statute is tolled for the duration of the period when the assets are controlled by the court and for six months thereafter).
\end{footnotes}
or while the taxpayer is outside the United States for at least six months.\textsuperscript{149}

\textbf{B. Priority of the Tax Lien}

Generally the "first in time, first in right" doctrine is used in determining whether a federal tax lien has priority over other competing liens.\textsuperscript{150} Accordingly, a federal tax lien that arises first in time will take priority over any subsequent liens.

As with every tax rule, however, there are several exceptions to the "first in time, first in right" doctrine. First, certain types of liens that arise after the federal tax lien can prevail over it unless the tax lien is properly filed before the subsequent lien arises.\textsuperscript{151} There are strict statutory requirements that the Service must follow in order to file its tax lien properly. For example, notice of the tax lien must be filed in a specifically-designated office in the state in which real property is located.\textsuperscript{152} For personalty, the Service must file its notice of tax lien in a designated office located in the taxpayer's state of residence.\textsuperscript{153} A properly filed tax lien is effective for ten years and thirty days after the tax has been assessed.\textsuperscript{154}

\textsuperscript{149} See I.R.C. § 6503(c) (1994). Section 6503 establishes a comprehensive list of circumstances under which the ten-year limitations period will be suspended by the court. See I.R.C. § 6503 (1994).

\textsuperscript{150} See United States v. McDermott, 507 U.S. 447 (1993). Courts have held, however, that although federal law determines which liens are first in time, state common law should be used by the federal courts in determining the status of liens created in that state. See, e.g., Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1235 (1st Cir. 1996).


\textsuperscript{153} See I.R.C. § 6323(f)(1)(A)(ii), (2)(B) (1994). It is important to note that once the notice of tax lien has been filed, it continues in effect even if the taxpayer changes his state of residence. See Treas. Reg. § 301.6323(f)-1(e) Example (1)
The four categories of interests that will prevail over a prior unfiled tax lien are those of purchasers, mechanic’s lien holders, holders of security interests, and judgment lien creditors.\textsuperscript{155} For purposes of this article, only the latter two categories of interests might be applicable to a spouse holding a claim for unpaid alimony or support. For example, as a part of a divorce agreement, a wife may voluntarily grant her husband a security interest in certain of her property to secure the promise to pay future alimony or support. Under such an agreement, the husband would be the holder of a security interest and could prevail over a prior unfiled tax lien in bankruptcy. Similarly, if a wife agrees to pay a husband alimony or support as part of the couple’s divorce agreement, and fails to do so, the husband could make a claim in a court of competent jurisdiction against the wife for unpaid alimony or support. A judgment rendered by the court against the wife generally gives rise to a judgment lien in favor of the husband under state law. Accordingly, the husband would become a judgment lien creditor and could defeat a prior unfiled tax lien in a priority dispute.\textsuperscript{156} Thus, unless a spouse holding an unpaid alimony or support claim in the other spouse’s bankruptcy can establish himself as a judgment lien creditor or the holder of a security interest, then a prior tax lien will take priority over his interest and he will be able to satisfy his claim only out of property remaining after the tax lien has been satisfied.

\begin{footnotesize}
\footnotesize
\begin{enumerate}
\item See I.R.C. § 6323(g)(3)(A) (1994).
\item See I.R.C. § 6323(a) (1994). The Code defines a purchaser as a person acquiring a property interest for full and adequate consideration, but only if that interest is valid against later purchasers under local law. See I.R.C. § 6323(h)(6) (1994). A mechanic’s lien arises with respect to real property when labor, services, and/or materials are furnished to construct or improve that property. See I.R.C. § 6323(h)(2) (1994).
\item Regulations define a judgment lien creditor as “a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money.” Treas. Reg. § 301.6323(h)-1(g) (1976). A judgment lien will only defeat a prior unfiled tax lien if the amount of the lien, the property subject to it, the lienor’s identity can be established. See United States v. Acri, 348 U.S. 211, 214 (1955).
\end{enumerate}
\end{footnotesize}
The second broad exception to the "first in time, first in right" principle is the judicially-created choateness doctrine. First espoused by the Supreme Court in *United States v. Security Trust & Savings Bank*, the doctrine provides that even if a private lien is perfected, it will not take priority over a subsequent tax lien unless the private lien is choate. A lien is deemed to be choate only if the lienor's identity, the property subject to the lien, and the amount of the lien can be established with reasonable accuracy.

The choateness doctrine is generally effective to defeat a lien on after-acquired property. The seminal Supreme Court applying the choateness doctrine vividly illustrates its application to defeat liens on after-acquired property. In *United States v. McDermott*, the government assessed an income tax deficiency against the taxpayers in 1986 and, at the time of assessment, a tax lien was created in favor of the government on all of the taxpayer's property, including property acquired after the lien arose. A year later, in 1987, a bank received a judgment against the taxpayers and, in accordance with state law, obtained a judgment lien on their real property located in the county rendering the judgment, including the taxpayer's after-

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159 See United States v. Pioneer Am. Ins. Co., 374 U.S. 84, 89 (1963); *United States v. City of New Britain*, 347 U.S. 81, 84 (1954). For a more complete discussion of how courts have defined the judicially-created choateness doctrine, see Cecil, supra note 106, at 158-76 to 158-77.
160 See, e.g., *Rice Inv. Co. v. United States*, 625 F.2d 565, 572 (5th Cir. 1980). The doctrine can also operate to defeat a lien securing the repayment of future disbursements or advances by a creditor. See, e.g., *United States v. R. F. Ball Constr. Co., Inc.*, 355 U.S. 587, 587 (1958). This type of lien, however, is not likely to arise in a situation involving support claims of a spouse or child of the debtor and, therefore, will not be addressed in this article. An indepth discussion of the cases applying the choateness doctrine can be found in Cecil, supra note 106, at 158-77 to 158-80.
acquired property. Several months after the bank’s judgment was rendered, the government filed its notice of tax lien. Thereafter, the taxpayers acquired real property in the county of the bank’s judgment, and the issue arose as to whether the bank or the government was entitled to priority with respect to their liens against that property. The Supreme Court first held that, because the bank had acquired the status of judgment lien creditor when the lower court issued its judgment and created a judgment lien, the federal tax lien would only have priority over the bank’s judgment lien after the government filed the notice of tax lien pursuant to section 6323(a) of the Code.\(^{162}\) The Court then held, however, that the federal tax lien was entitled to priority over the judgment lien because the judgment lien was held to be inchoate until the taxpayers acquired the real property to which the lien attached, and that acquisition occurred after the tax lien was properly filed.\(^{163}\) Accordingly, under the choateness doctrine, a private lien remains inchoate until property subject to the lien is acquired, while a tax lien receives priority when it is filed.\(^{164}\)

Thus, assume that a spouse acquires a judgment lien against the debtor to secure the enforcement of unpaid alimony, maintenance, or support, and the state in which the judgment is rendered grants the spouse a judgment lien on the debtor’s real property located in the county of judgment (a common state statutory provision). If the government files its income tax lien thereafter, the tax lien will have priority over the spouse’s judgment lien to the extent that the debtor acquires real property after the tax lien is filed, pursuant to the choateness doctrine. Conversely, if a spouse acquires a judgment lien against the debtor, then property is acquired by the debtor, and thereafter the government files its tax lien, the judgment lien will take priority over the tax lien because it will be deemed to be choate when the debtor later acquires the property, which occurs prior to the filing of the tax lien.\(^{165}\) In sum, the judicially-created choateness doctrine

\(^{162}\) Id. at 449.

\(^{163}\) Id. at 455.


\(^{165}\) Although the choateness doctrine is a judicially-established doctrine, there are two statutory exceptions to its application. The first, which applies only to
gives a special priority to the government’s income tax liens, even when competing liens arise first in time and would otherwise be granted priority over the tax lien. As the following section amply illustrates, the choateness doctrine is but one of the powerful tools available to the government in a debtor’s bankruptcy proceeding to defeat the legitimate interests of the debtor’s spouse and children.

IV. THE TENSION BETWEEN TAX AND SUPPORT CLAIMS IN BANKRUPTCY: A PROPOSAL FOR CHANGE

Empirical studies have estimated that nearly twenty-five percent of individual debtors seeking bankruptcy protection identify family problems, such as obligations to pay support, as a cause of their bankruptcy. Yet despite the fact that there are a significant number of creditors holding support claims that must compete with federal income tax claims for limited assets in a debtor’s bankruptcy proceeding, no bankruptcy or tax scholar has attempted to examine the tension between these two types of claims in bankruptcy. This undertaking becomes especially important in light of the massive changes to the treatment of both federal income tax claims and support claims resulting from the Bankruptcy Reform Act of 1994. Thus, the section that follows will attempt to explore this uncertain interplay between both unsecured and secured tax and support claims under the Bankruptcy Code, with particular emphasis on the complex future advances clauses, provides that if a security interest is properly perfected before the filing of a tax lien, any advances made by the creditor under the security agreement within 45 days after the filing of the tax lien will be protected by the security interest and will defeat the lien. See I.R.C.§ 6323(d) (1994). Because family law agreements do not usually contain future advances clauses, this statutory exception is irrelevant in the case of most, if not all, support claims. The second statutory exception, applicable to after-acquired property clauses as well as future advances clauses, gives special protection to security interests arising out of certain commercial financing transactions. See I.R.C. § 6323(c) (1994). Again, because support agreements are not considered commercial financing transactions, this statutory exception will also be inapplicable for purposes of this article.

interrelationship and inherent conflict between these two types of claims occasioned by the 1994 Act.

A. Harmonizing the Priority Rules in Bankruptcy

The interplay between tax and support claims in an individual debtor's bankruptcy proceeding under the Bankruptcy Code's priority rules will depend upon three unrelated factors: (1) whether the debtor has filed a chapter 7 or chapter 13 bankruptcy petition; (2) whether the government's tax claims against the debtor are secured or unsecured; and (3) whether the debtor's support claims are secured or unsecured. Table 1 below illustrates that there are four possible combinations of unsecured and secured tax and support claims in bankruptcy. The Table summarizes the treatment of such claims under the bankruptcy priority rules in both chapter 7 and chapter 13 proceedings, and then each of these four possible permutations is considered separately in the discussion that follows.
## TABLE 1167
SUMMARY OF PRIORITY RULES

<table>
<thead>
<tr>
<th>TYPE OF CLAIMS</th>
<th>CHAPTER 7</th>
<th>CHAPTER 13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support Claim Secured/ Tax Claim Secured168</td>
<td>Both paid in full (with interest only if claims are oversecured) under § 506(a)</td>
<td>Both paid in full (with interest) under §1325(a)(5)(B)(ii)</td>
</tr>
<tr>
<td>Support Claim Secured/ Tax Claim Unsecured169</td>
<td>Support paid in full under § 506(a); taxes given eighth priority under § 507(a)(8)</td>
<td>Support paid in full (with interest) under §1325(a)(5)(B)(ii); taxes paid in full (without interest) under § 1322(a)(2)</td>
</tr>
<tr>
<td>Support Claim Unsecured/ Tax Claim Unsecured170</td>
<td>Support paid as a seventh priority unsecured claim; taxes paid as an eight priority claim only after support is paid in full under § 507(a)(7)(8)</td>
<td>Both paid in full (without interest) under § 1322(a)(2)</td>
</tr>
<tr>
<td>Support Claim Unsecured/ Tax Claim Secured171</td>
<td>Support claim paid as a seventh priority unsecured claim, reducing tax claim to unsecured status under § 724</td>
<td>Support paid in full (without interest) under § 1322(a)(2); taxes paid in full (with interest) under §1325(a)(5)(B)(ii)</td>
</tr>
</tbody>
</table>

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168 For a complete discussion of this category of claim, see infra notes 172-75 and accompanying text.

169 See infra notes 176-79 and accompanying text.

170 This category of claimants is discussed infra notes 180-83 and accompanying text.

171 See infra notes 184-86 and accompanying text.
1. Both Support and Tax Claims Secured

In a bankruptcy proceeding, a creditor holding a valid security interest is treated as having an allowed secured claim up to the value of the collateral securing the indebtedness, and an unsecured claim to the extent that the outstanding indebtedness exceeds the value of the collateral. In a chapter 7 proceeding, the trustee will either provide for full payment of all allowed secured claims, or, as is more often the case, will abandon the secured property to the creditor, and the creditor will then satisfy its claim by selling the property.

Similarly, in a chapter 13 proceeding, although the debtor retains all of his property in bankruptcy, including secured property, the debtor’s rehabilitation plan must provide for the full payment of all allowed secured claims, together with interest on those claims, over the life of the plan. The Bankruptcy Reform Act of 1994 did

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174 Although this treatment of secured claims is not expressly provided for in the Bankruptcy Code, it is nevertheless a well established principle of bankruptcy law. See, e.g., Williams, supra note 100, at 38-39.

In chapter 7, a creditor is also entitled to post-petition interest on its allowed secured claim at the rate provided for in the contract creating the indebtedness, but only up to the value of the collateral. See 11 U.S.C. § 506(b) (1994). For example, assume that the debtor owes a creditor $5,000 on a loan secured by the debtor’s car, that the value of the car is $6,000, and that the contract between the debtor and creditor provides for interest at 12% annually on the unpaid balance of the loan. The creditor will have an allowed secured claim of $5,000, and is entitled to interest at the contract rate of 1% per month on the $5,000 claim from the date of the debtor’s bankruptcy filing until the date that the claim is paid; however, interest stops accruing after it reaches $1,000.


Courts are divided over the interest rate to which the creditor is entitled on its secured claim over the life of the plan. Some courts have held that the existing contract rate between the debtor and creditor is appropriate, see In re Smith, 4 B.R.
nothing to alter this treatment of secured claims in either chapter 7 or chapter 13 proceedings. Thus, both before and after the 1994 Act, if both tax and support claims are secured, they will be satisfied in full in the debtor's bankruptcy proceeding irrespective of whether the debtor files her petition under chapter 7 or chapter 13 of the Bankruptcy Code.

2. Support Claim Secured/Tax Claim Unsecured

As discussed above, if a support claimant has a fully secured obligation in a debtor's chapter 7 bankruptcy proceeding, the claimant will be paid in full over the course of the proceeding, either by the trustee or through the sale of the collateral after the trustee abandons it to the secured creditor.176 Unsecured tax claims, on the other hand, will not fare as well as secured support claims in a chapter 7 proceeding. As an eighth priority unsecured creditor, a tax claimant will be paid out of property of the estate only after superior priority

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176 See 11 U.S.C. §§ 506(a), 554 (1994); see also supra notes 172-74 and accompanying text.
claims, such as administrative expenses and unsecured support claims, are paid in full.\footnote{See 11 U.S.C. § 507(a)(8) (1994); see also supra notes 102-06 and accompanying text.}

In a chapter 13 proceeding, the debtor must provide for full payment of secured support claims, together with interest on those claims, over the life of his rehabilitation plan.\footnote{For a more complete discussion of this concept, see supra note 175 and accompanying text; see also 11 U.S.C. § 1325(a)(5)(B)(ii) (1994).} Similarly, because tax claims will be priority claims in a debtor's chapter 13 bankruptcy proceeding, the debtor must also provide for full payment of those tax claims over the life of the plan, but without any provision for interest on those claims.\footnote{See 11 U.S.C. § 1322(a)(2) (1994); see also Csontos et al., supra note 110, at 287 ("[T]here is no discount factor provided for priority taxes paid over time in Chapter 13, unlike Chapter 11. There is no explanation in the legislative history for this. This is inequitable.") (footnotes omitted) (remarks of the Honorable Polly Higdon).} Accordingly, it is clear that, when a support claim is secured and a tax claim is unsecured in a debtor's bankruptcy proceeding, the support claim will receive preferential treatment for priority purposes irrespective of whether the proceeding is in chapter 7 or chapter 13.

3. Both Support & Tax Claims Unsecured

Under chapter 7, recall that support claims were granted a seventh priority under the Bankruptcy Reform Act of 1994, relegating federal income tax claims to eighth priority status.\footnote{See, e.g., Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 304, 108 Stat. 4106, 4132-33 (1994); see also supra notes 86-91 and accompanying text.} Thus, in accordance with congressional intent in passing the 1994 Act, unsecured support claimants will be paid in full before unsecured federal income tax claims receive anything in a debtor's chapter 7 bankruptcy proceeding, but only if the debtor has any property remaining in his bankruptcy estate to satisfy the claims of unsecured priority creditors after paying secured creditors in full. As will be discussed in section B, however, empirical studies have indicated that the vast majority of debtors have no assets to pay any unsecured creditors at
all in their individual bankruptcy proceedings; thus, support claimants’ higher priority status in bankruptcy often results in little real benefit to them. 181

In a chapter 13 bankruptcy proceeding, all priority claims must be paid in full over the life of the debtor’s rehabilitation plan. 182 Thus, because both support and tax claims are granted priority status under the Bankruptcy Code, the fact that support claims have a higher priority status than federal income tax claims is irrelevant, because both claims must be paid in full over the course of the debtor’s chapter 13 proceeding. 183

4. Support Claim Unsecured/Tax Claim Secured

Even if a tax claim is secured and a support claim is unsecured in a debtor’s bankruptcy proceeding, there are special priority rules in chapter 7 that will allow the unsecured support claim to be treated as superior to the secured tax claim. Under section 724 of the Bankruptcy Code, any priority claim that is superior to the priority afforded unsecured tax claims will defeat the tax lien. 184 Because

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181 See infra notes 191-92 and accompanying text.
183 It should be noted that, because taxes are granted priority status and, therefore, must be paid in full over the life of a chapter 13 bankruptcy plan, they are not granted nondischargeability status under 11 U.S.C. § 1328 (1994). Yet support claims, which are also granted priority status and must be paid in full over the life of the debtor’s chapter 13 bankruptcy plan, are also listed as nondischargeable debts pursuant to 11 U.S.C. § 1328(a)(2) (1994). It appears that this is merely a technical drafting error, likely caused by the haste with which the Bankruptcy Reform Act of 1994 was passed. See supra notes 11-29 and accompanying text. Thus, because support claims are now granted priority status and will be fully paid over the life of the debtor’s rehabilitation plan, they should not be included as nondischargeable debts under § 1328.
184 See 11 U.S.C. §724(b) (1994). This provision has been widely criticized by, and was the subject of extended debate by, the Tax Advisory Committee to the National Bankruptcy Review Commission, a committee formed in February, 1997 to consider proposed measures to reform the tax provisions of the Bankruptcy Code. See Williams, supra note 110, at 42. The Tax Advisory Committee recommended the repeal of § 724(b), but that recommendation was not adopted by the National Bankruptcy Review Commission. See id. at 42-44; see also Robin E. Phelan et al., A Sample of Key Tax Issues Being Considered (or Which Should be
support claims are now afforded a seventh priority in bankruptcy, they can trump the federal tax lien in full. Accordingly, by granting support claims a seventh priority, the Bankruptcy Reform Act of 1994 positioned support claims ahead of tax claims in a chapter 7 bankruptcy proceeding, irrespective of whether the tax claim is secured or unsecured.185

Unlike chapter 7, however, chapter 13 contains no special provision granting unsecured support claims priority over secured tax claims in bankruptcy. Accordingly, secured tax claims are treated like any other secured claim, and therefore the claims must be paid in full over the life of the debtor’s rehabilitation plan.186 Yet even though chapter 13 contains no special rules elevating unsecured support claims above secured tax claims, because priority claims must be paid in full over the life of the debtor’s chapter 13 rehabilitation plan, support claims will be treated much like secured tax claims in the chapter 13 plan, as the debtor must provide for full payment of such claims in the plan.187

Considered by the National Bankruptcy Review Commission, Norton Bankr. Law Adviser, Apr. 1994, at 1, 4-5.185 Unlike the preferential treatment afforded support claims in chapter 7, there are no provisions in chapter 11 allowing unsecured support claims to trump secured tax claims in a debtor’s chapter 11 proceeding. Because tax liens are treated like any other secured claim in chapter 11, courts will resort to the priority rules for tax liens discussed in Part III, supra. Accordingly, a secured tax claim will defeat an unsecured support claim in chapter 11. Moreover, even if the support claim is secured, the tax lien may still be granted priority treatment if it arose first in time or if the support claim is deemed inchoate. See supra notes 150-65 and accompanying text. This tension rarely arises, however, because few individual debtors avail themselves of chapter 11’s more expensive and time consuming bankruptcy provisions. But see Warren & Westbrook, supra note 64, at 501.


187 See supra notes 178-79 and accompanying text. The primary difference between the treatment of secured tax claims and unsecured support claims under a chapter 13 plan is that secured claims are entitled to interest over the life of the plan, while priority claims are not. See 11 U.S.C. §§1322(a)(2), 1325(a)(5)(B)(ii) (1994).
The foregoing discussion illustrates that, if a debtor files a chapter 13 bankruptcy petition, creditors holding both tax and support claims will be paid in full in the debtor’s bankruptcy proceeding, irrespective of whether they hold secured or unsecured claims. Because Congress has greatly expanded the list of priority claims in bankruptcy, however, a debtor must pay many more claims in full over the life of her rehabilitation plan. Accordingly, it is likely that debtors will find it more difficult to comply with the requirements for chapter 13 as a result of the changes made by the Bankruptcy Reform Act of 1994.188

The examples above also demonstrate that, although there will rarely be any significant difference between the treatment of tax and support claims in chapter 13, creditors holding support claims in chapter 7 will always fare at least as well, for priority purposes, as tax claimants as a result of the Bankruptcy Reform Act of 1994.189 Of course, this result is not surprising given that one of the primary congressional goals in enacting the 1994 Act was to elevate support obligations above tax claims in bankruptcy.190 What is surprising, however, is that one unrelated and seemingly insignificant provision enacted by Congress in the same legislation utterly defeats this laudable goal. The section that follows will explain how this unintended result was permitted to occur.


189 Thus, the remainder of this article will concentrate on chapter 7, rather than chapter 13, bankruptcies. This concentration on chapter 7 proceedings is amply warranted, however, because less than 30% of consumer bankruptcies are governed by chapter 13. See Mark Jickling, CRS Report for Congress--One Million Personal Bankruptcies a Year: Economic Implications and Policy Options 4 (1998). Therefore, the vast majority of consumer bankruptcies are governed by chapter 7 of the Bankruptcy Code. For an in-depth discussion of the problems facing debtors who convert their petitions from chapter 13 to chapter 7, see Robert J. Volpi, Comment, Property of the Bankruptcy Estate After a Conversion From Chapter 13 to Chapter 7: The Need for a Definite Answer, 68 Ind. L.J. 489 (1993).

190 See supra notes 32-35 and accompanying text.
B. Problems Inherent in the Bankruptcy Code’s Nondischargeability Rules

A massive empirical study of the causes and effects of consumer bankruptcy has concluded that nearly ninety percent of all chapter 7 consumer debtors are “no asset” debtors, meaning that they have no assets remaining in their bankruptcy estates after satisfying secured claims and taking their allowable bankruptcy exemptions.\(^{191}\) Thus, in the vast majority of consumer bankruptcy cases, unsecured creditors, including priority creditors, receive nothing in debtors’ bankruptcy proceedings.\(^{192}\) In these cases, the only hope that unsecured creditors have for receiving any payment on their claims is to have them classified as nondischargeable debts under section 523 of the Bankruptcy Code.

Recall that both tax and support claims are generally nondischargeable in a debtor’s bankruptcy proceeding;\(^{193}\) moreover, both types of claims also enjoy a special nondischargeability status because the claimants can proceed against the debtor’s exempt property in order to satisfy their claims.\(^{194}\) Inasmuch as tax and support claims occupy equal status under the Bankruptcy Code, the priority rules for such claims outside bankruptcy become critical. And herein

\(^{191}\) See Sullivan et al., supra note 45, at 203. The study demonstrates that over 90% of homeowners in chapter 7 are “no asset” debtors, and that over 87% of non-homeowners in chapter 7 are “no asset” debtors. See id. at 205. For an in-depth critique of this empirical study, see Gross, supra note 60, at 1506 passim.

Other studies confirm this 90% figure. See, e.g., Irving A. Breitowitz, New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of “Substantial Abuse,” 59 Am. Bankr. L.J. 327, 335 (pt. 1 1985) (“[F]or all practical purposes, the priority and distribution provisions of chapter 7 are virtually dead letter since, in over 90% of all cases, there are no assets available for distribution after exemptions are claimed.”) (footnotes omitted). Another study found that over 92% of chapter 7 proceedings were “no asset” cases. See Michael J. Herbert & Domenic E. Pacitti, Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987, 22 U. Rich. L. Rev. 303, 311 (1988)

\(^{192}\) See Sullivan et al., supra note 30, at 180 (in most cases the priority provision “gives the ex-spouse and children first crack at an empty box.”).

\(^{193}\) See supra notes 70-74 and accompanying text.

lies the rub. Because the federal government can convert its claim from unsecured to secured status (as to the debtor’s exempt property and property acquired post-petition)\textsuperscript{195} during the bankruptcy proceeding without violating the automatic stay pursuant to section 362(b)(9)(D) of the Bankruptcy Code,\textsuperscript{196} it will have priority over unsecured support claims with respect to the debtor’s exempt and post-petition property. Because this property offers the best hope for support creditors to satisfy their nondischargeable claims, and inasmuch as these claims rarely get satisfied out of property of the estate,\textsuperscript{197} the provision allowing the federal government to convert its status to that of a secured creditor without violating the stay ultimately places the government ahead of support claimants. This preferential position afforded governmental tax claims directly contravenes one of the express policy underpinnings of the Bankruptcy Reform Act of 1994 of protecting support claimants in a debtor’s bankruptcy proceeding.\textsuperscript{198} Moreover, because tax claims are often quite large, in part due to accrued interest and penalties,\textsuperscript{199} it is likely that there will be no exempt or post-petition property remaining to satisfy support creditors’ claims after taxes are satisfied in full. The section that follows attempts to remedy this significant problem.

\textsuperscript{196} As discussed supra notes 114-15 and accompanying text, as a result of amendments made to the Bankruptcy Code by the Bankruptcy Reform Act of 1994, the government can assess a tax and issue a notice and demand for payment to the debtor without violating the automatic stay. See 11 U.S.C. § 362(b)(9)(D) (1994). Because assessment, notice and demand, and a ten-day waiting period are the only steps necessary to create a tax lien on the debtor’s property, the government can convert its position from unsecured to secured status during the bankruptcy proceeding without violating the stay. Although the statute provides that the tax lien does not attach to property of the estate, the lien nevertheless attaches to the debtor’s exempt and post-petition property, which is the property that the government and support claimants will use to satisfy their nondischargeable debts.
\textsuperscript{197} See supra notes 191-92 and accompanying text.
\textsuperscript{198} For a more complete discussion of these policies, see supra notes 30-35 and accompanying text.
\textsuperscript{199} For a comprehensive discussion of the Internal Revenue Code’s interest and penalty provisions, see Saltzman, supra note 133, ¶ 6.01-7B.20.
C. A Proposal for Protecting Spouses and Children in Bankruptcy

Most bankruptcy scholars agree that the Bankruptcy Reform Act of 1994 is an extreme example of the legislative process gone awry. Not only did the House fail to hold a single hearing on the Act, but no conference committee was ever formed to resolve differences between the House and Senate versions of the bankruptcy reform legislation, and rules were continually ignored during the legislative process in an effort to pass the Act before the end of the congressional session.

What is clear from the legislative history of the Act is that one of the main goals that the legislators were attempting to further in the Act was to protect alimony, maintenance, and child support claimants in a debtor's bankruptcy proceeding.

H. R. 5116 gives added protection to child support and alimony payments in the event of a bankruptcy filing. It is incomprehensible that while many creditors can collect their fees, dependents, spouses and children have to wait and may never be included. H.R.5116 elevates child support from its current status as a general, unsecured debt to a formally prioritized debt. This important change will help insure that a custodial parent will not have to wait years to receive payment due. I have heard heartbreaking stories from single parents who want nothing but the best for their children, but find themselves forced to fight for their rightful level of child support. With no other recourse, these families often turn to welfare to provide the child support the absent parent ought to be responsible for. H.R. 5116 takes an important first step in breaking this tragic cycle by strengthening current bankruptcy law and enforcing tougher measures for child support and alimony collection.

Yet while Congress evidenced its strong intention to elevate support claims above tax claims in bankruptcy by giving them a

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200 See, e.g., Falk, supra note 11, at 103.
201 For a more comprehensive discussion of the history of the passage of the Bankruptcy Reform Act of 1994, see supra notes 13-25 and accompanying text.
202 See supra note 30 and accompanying text.
higher priority in the payment scheme, at the same time it passed a seemingly minor provision that will have the ultimate effect, in most instances, of placing federal tax claims ahead of support claims where it really matters: with respect to the debtor's exempt and post-petition property. Balancing the stated purpose behind Section 362(b)(9)(D), affording administrative ease to the Service in assessing taxes, against its unintended consequence of undermining one of the principal policies of the Bankruptcy Reform Act of 1994, there is no alternative but that the provision be repealed in its entirety. 204

Critics of this proposal might attempt to assert three arguments to defeat it. First, they could argue that, because the Bankruptcy Code permits support claims to be modified during the bankruptcy proceeding without violating the automatic stay, 205 unsecured support claimants have the same opportunity as the government to convert their claims from unsecured to secured status during the debtor's bankruptcy proceedings without running afoul of the stay. The response to this argument is twofold. First, there is no case law to support the contention that the automatic stay exception allowing for the "establishment or modification of an order for alimony, maintenance, or support" 206 is broad enough to permit the creation of a lien on the debtor's property as part of the court's establishment or modification order. 207 Yet even if one assumes that this modification exception is broad enough to permit a support creditor to convert from unsecured to secured status without violating the stay, domestic proceedings take a significantly longer period of time to complete than the procedures necessary to assess a tax and establish a lien on the debtor's property. Thus, it would become a race of the creditors

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204 This article assumes that the result of moving tax claims ahead of support claims in bankruptcy was an unintended consequence of a hurried legislative process. If, on the other hand, the provision was carefully crafted by the Service and foisted upon unwitting legislators, the Internal Revenue Service deserves far more credit for its intelligence than society gives it currently.


206 See id.

207 In fact, at least one bankruptcy treatise expressly states that this exception is not broad enough to allow for enforcement of the order. See 3 Collier on Bankruptcy ¶ 362.05[2] (Lawrence P. King ed., 15th ed. rev. 2000).
to determine which creditor establishes its lien first. Such a race would be the antithesis of the bankruptcy policy that promotes fair and equitable distribution of the debtor’s assets to all creditors.\textsuperscript{208}

Moreover, even if the support claimants are able to obtain their liens against the debtor’s property first, and therefore would generally defeat the later tax lien under the “first in time, first in right” doctrine,\textsuperscript{209} the tax lien might nevertheless have priority over the support liens to the extent that the support liens are deemed inchoate. Recall that, for tax lien priority purposes, a lien is deemed inchoate until the identity of the lienor, the property subject to the lien, and the amount of the lien can all be established with reasonable accuracy.\textsuperscript{210} Accordingly, a later-in-time tax lien will defeat an earlier support lien to the extent that the liens apply to property acquired by the debtor after the liens arise (after-acquired property).\textsuperscript{211}


\textsuperscript{209} For a comprehensive discussion of this doctrine, see supra notes 150-65 and accompanying text.


\textsuperscript{211} See supra notes 157-64 and accompanying text. It is important to note that, to the extent that support liens are not deemed inchoate, they might be able to arise subsequent to the tax lien and still defeat the tax lien if (1) the tax lien cannot be filed during the pendency of the bankruptcy proceeding because such filing would violate the automatic stay; and (2) the support liens are deemed to be judgment liens under I.R.C. § 6323(a) (1994). For a more comprehensive discussion of the priority afforded judgment liens over unfiled tax liens, see supra notes 155-56 and accompanying text; see also Cecil, supra note 106, at 158-72 to 158-76.

If a support lien takes priority over a tax lien because of the support claimant’s status as judgment lien creditor, the support lien cannot be avoided by the debtor, pursuant to 11 U.S.C. § 522(f)(1)(A) (1994), because one of the changes made by the Bankruptcy Reform Act of 1994 was the addition of a provision stating that a debtor cannot avoid a judicial lien to the extent that the lien secures a debt for alimony, maintenance, or support. See 11 U.S.C. § 522(f)(1)(A)(i) (1994). This provision is the statutory codification of the Supreme Court’s decision in Farrey v. Sanderfoot, 500 U.S. 291 (1991). See H.R. Rep. No. 103-835, at 54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363. It is important to note that, like the Bankruptcy Code’s priority and nondischargeability provisions, this exception to the lien avoidance rules creates a strict distinction between support claimants, who
The second criticism that might be waged against this article’s proposal is that, because support claims can be collected against property not property of the estate without violating the automatic stay, these claims can proceed against the debtor’s exempt property even during the pendency of the bankruptcy proceeding. Accordingly, critics will argue that these claims will be satisfied before the government’s tax claim, despite the government’s ability to create a tax lien without violating the automatic stay.

This criticism fails to recognize the important distinction between secured and unsecured claims under non-bankruptcy priority rules. For example, to the extent that the support claims are unsecured claims, then even if the support creditors levy against the debtor’s exempt and post-petition property during the bankruptcy proceeding, the government will nevertheless defeat their support claims if the government’s tax lien has already been created and attached to the debtor’s property. Thus, there is a small window of opportunity when support claimants can proceed against the debtor’s unencumbered exempt and post-petition property, before the Service has assessed its tax and sent a notice and demand for payment (thereby creating its tax lien). Yet even this small window of opportunity can avail themselves of the exception, and creditors holding property settlement claims, who cannot. For a discussion of this distinction, see White, supra note 84, at 626. This lien avoidance provision is not applicable, however, in cases in which the support claims are assigned to another entity, either voluntarily or by operation of law. See 11 U.S.C. § 522(f)(1)(A)(ii)(I) (1994).

Although there are several lower court decisions holding that the automatic stay exception enunciated in § 362(b)(2)(B) applies equally to support creditors’ pre- and post-petition claims, see In re Cole, 202 B.R. 356, 358 (Bankr. S.D.N.Y. 1996); Rogers v. Overstreet (In re Rogers), 164 B.R. 382, 387 (Bankr. N.D. Ga. 1994), this conclusion is certainly not free from doubt. Generally, even if creditors hold debts that will be nondischargeable in a debtor’s bankruptcy proceeding, they are nonetheless required to wait until the end of the bankruptcy proceeding before attempting to enforce their claims against the debtor’s post-petition property. Thus, it is arguable that only post-petition support claimants can collect their claims against the debtor’s exempt and post-petition property during the pendency of the case without violating the automatic stay.
portunity might evaporate if support claimants are required to wait until the debtor's exempt property is determined by the court before they levy on that property, because the exemption process is often not completed until well into the debtor's bankruptcy proceeding.\textsuperscript{215}

The final argument that might be posited against this article's proposal is that, at least with respect to child support obligations, the Child Support Enforcement Act of 1984 requires states to enact laws providing that liens will arise automatically when a debtor fails to make court-ordered child support payments on a timely basis.\textsuperscript{216}

\textsuperscript{215} Under the Federal Rules of Bankruptcy Procedure, the exemption process can take two months or more to complete. The filing of the debtor's petition commences the case, and commencement constitutes the order for relief. See 11 U.S.C. § 301 (1994). The debtor's exemption schedule must be filed with the court within 15 days after the filing of the petition. See Fed. R. Bankr. P. 1007(c). If the debtor fails to claim exemptions or to file the appropriate schedules, a dependent of the debtor may file a list of exemptions within 30 days after the debtor's time limitation has passed. See Fed. R. Bankr. P. 4003(a); see also 11 U.S.C. § 522(l) (1994). The United States trustee must call a meeting of the creditors to be held no fewer than 20 days and no greater than 40 days after the order for relief. See Fed. R. Bankr. P. 2003(a). If any creditor (or the bankruptcy trustee) has an objection to the exemptions claimed by the debtor or the debtor's dependent, these objections must be received within 30 days after the conclusion of the first meeting of creditors. See Fed. R. Bankr. P. 4003(b). Finally, if no objections are received within this 30-day period, the property automatically revests in the debtor as exempt property. See 11 U.S.C. § 522 (l) (1994). "Most courts have held that exemptions are finalized at the time that an objection to the exemption may no longer be filed." Henry J. Sommer & The Honorable Margaret D. McGarity, Collier Family Law and the Bankruptcy Code 5-37 (Lawrence P. King ed., 1995). Thus, the government has a significant amount of time during the bankruptcy proceeding to assess its tax against the debtor and establish a lien on the debtor's property before any property revests in the debtor as exempt property, thereby allowing the support claimants to proceed against it without violating the estate. Accordingly, any window of opportunity that support claimants might have in theory to levy on the debtor's property to satisfy their claims before the tax lien arises is unlikely to be available in practice.

liens must attach to both real and personal property of the debtor.\textsuperscript{217} Accordingly, critics might argue that the issues raised in this article are remote because unpaid child support obligations give rise to immediate liens under state law, and these liens would defeat subsequent tax liens under the "first in time, first in right" doctrine.\textsuperscript{218}

In response to this criticism, recall that liens arising from unpaid child support obligations are, by definition, inchoate with respect to property that the debtor acquires after the filing of the bankruptcy petition,\textsuperscript{219} and thus can be defeated by a tax lien created during the pendency of the bankruptcy proceeding.\textsuperscript{220} Moreover, although no case has yet addressed this issue, it is certainly arguable that the same reasoning would apply to defeat the child support lien with respect to the debtor's exempt property, because exempt property does not vest in the debtor (and thus is not acquired by him) until after the bankruptcy proceeding begins.\textsuperscript{221} Thus, the child support lien is not deemed to arise under the choateness doctrine until the debtor reacquires this exempt property in the bankruptcy proceeding. Finally, the Child Support Enforcement Act of 1984 has no application to alimony and maintenance claims; thus a large segment of support claims receives no benefit whatsoever from the Act.

V. CONCLUSION

Although Congress wanted the Bankruptcy Reform Act of 1994 to be known throughout history as "one of the most significant pieces of economic legislation to be considered by the House in [the


\textsuperscript{218} See supra notes 150-65 and accompanying text for a detailed examination of the "first in time, first in right" doctrine.

\textsuperscript{219} This is so because, under the choateness doctrine, the lien is not deemed to arise until the debtor acquires the property. See supra notes 160-65 and accompanying text.

\textsuperscript{220} To the extent that the lien attaches to property of the debtor's bankruptcy estate, the child support obligations would be secured claims. See supra notes 172-74 and accompanying text.

\textsuperscript{221} For a discussion of the timing of the exemption process, see supra note 215 and accompanying text.
103d] Congress," the Act’s hallmarks are instead poor draftsman-
ship and an utter disregard for the legislative process. As a result of
significant procedural irregularities in the process, there is an inher-
ent conflict between the tax and support provisions of the Act. This
conflict undermines one of the Act’s principal policy objectives: to
protect the alimony, maintenance, and child support claims of
spouses and children in a debtor’s bankruptcy proceeding. Eliminat-
ing this conflict by repealing one of the federal government’s special
interest provisions in the Bankruptcy Code will bring Congress one
step closer to achieving this laudable goal.

Brooks, sponsor of H.R. 5116).