

Justice Thomas Visits Chapman University School of Law

By Professor John Eastman

To the world, October 20, 1999 was a day not unlike many others in southern California. Sunny and warm. Some minor accidents on the freeways. Concerns about pending Y2K disruptions were beginning to take on some urgency. But nothing really of historical moment.

Except here, at Chapman Law School. For on that day, the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States, came to dedicate the new Donald P. Kennedy Law School building, which houses the four-year-old Chapman University School of Law. He did more than dedicate, of course, as anyone who has been fortunate enough to have the Justice visit their law school undoubtedly knows. He graced us with his presence, he honored us with his good will and humor, and, in effect, he consecrated this law school's mission of graduating ethical lawyers of distinction — lawyers truly committed to the higher aspirations of the law.

His dedication remarks are reprinted in the pages of this issue, as a reminder for those who were in attendance and an inspiration for future generations of law students who will embark upon their studies and legal career here at this law school. But the formal remarks do not begin to convey the full measure of the impact made by Justice Thomas during his visit. Earlier in the day, the Justice participated in an open forum with about 100 law students, during which he fielded a wide range of questions about the law and his career. Afterwards, many of the students — including several whom I suspect do not always agree with the positions taken by the Justice — commented to me about how personable he was, and how willing to engage the students.

During the dedication ceremony itself, Justice Thomas went out of his way to acknowledge the founding faculty of the law school, a group of people who really had shouldered a heavy burden in getting this law school established on a solid foundation. As Professor Judy Fischer, one of the founding members of the faculty, later remarked to me, that unexpected recognition brought tears to her eyes.

After the dedication ceremony, the Justice headed upstairs to the Dean's suite to catch his breath and get a glass of water. Before the water glass was empty, though, he was back on his feet, ready to meet with the students who had assembled in the hallway. For more than two hours, he visited individually with students, signed autographs, and had pictures taken. More than once I offered him the opportunity to leave, but he declined, stating that he just wanted to meet with the few students who were patiently waiting. Problem was that word of the impromptu chats had gotten out, and every couple of minutes another elevator full of students arrived to join those who were "patiently waiting" their turn. The Justice stayed until he had visited with each one.

And as we finally left, he turned to the crew who had been replenishing the hors d'oeuvres on a table near where he was standing, addressed them by name (having

learned their names earlier in the day when, upon his arrival at the law school, he walked over to the loading dock and introduced himself to the catering crew), and thanked them for all the work they had done that day, just as the evening before he had thanked the University trustees for the role they had played in establishing this law school. It was a fitting reminder of the fundamental equality of all mankind upon which this nation's legal institutions rest.

A more noble beginning to this law school's enterprise would be hard to script. I was fortunate to have served as a law clerk to Justice Thomas at the Supreme Court, and I am honored to have been among those to welcome him to our law school and delighted that the Chapman University community was able to witness first hand the Justice's warmth and depth of character. Let us commit ourselves to live up to the high moral purpose exemplified by Justice Thomas during his visit and described by him in the dedicatory address that follows.

Address by the Honorable Clarence Thomas
Associate Justice, Supreme Court of the United States
On the Occasion of the Dedication of the Donald P. Kennedy Hall
Chapman University School of Law

October 20, 1999

Mayor Coontz, Monsignor Sammon (my fellow Crusader), President Doti, Dean Williams, Members of the Board of Trustees, faculty, students, and my fellow members of the bench and bar, as well as staff and honored guests, and especially Don and Dodo Kennedy, whose generosity to Chapman University we honor today. It is a pleasure to be here with you. It is a great pleasure to be with you on this major milestone in the life of this young law school and, indeed, in the life of this not-so-young university. You have erected on this ground and in this place, around this "expensive" historic facade, a truly magnificent facility, dedicated to the study and the rule of law.

Some might think that the last thing we need in this country—this litigious country—is more lawyers. I have to admit that sometimes I myself—especially in June of each year when I am reviewing some of the 8,000 or so petitions that we receive—I, too, share that view. But, if you reflect for just a moment, you have to realize that the problem is not that we have too many lawyers. The problem is that we have too few lawyers truly dedicated to the higher aspirations of the law. Too few who understand that this great nation of ours is great and free precisely because it is devoted to the rule of law and not to the rule of men. Too few who view the education they receive in halls not unlike this one as something more than just a ticket to monetary riches. Too few who understand, as our nation's founders did, that when we submit the baser side of our human nature to the rule of noble law, we rise above our passions and partake, to some small degree, of the divine law.

So it is not just the prospect of graduating scores of new lawyers each year that makes this endeavor of yours worthy of praise, but the prospect of graduating ethical lawyers of distinction. And from what I have seen and continue to see on this trip, that prospect is especially strong here at Chapman. It is evident all around us today. Starting right behind me, it is evident in the way you built this law school, incorporating in its design this wonderfully beautiful facade, a piece of this community's history. That design, drafted by Architect David Martin with the approval and cooperation of the City of Orange and the historic commission, demonstrates that this law school is indeed rooted in this community. The law school will thus naturally draw substance from this community, and by all appearances it is a strong and ethical community.

Moving through the facade, this law school's strong prospect for noble success is evident in the high level of both talent and treasure that have gone in to this building. It might be that a good teacher can teach, and a good student can learn, under the most adverse of

conditions. Socrates, for example—from whose name we derive the quintessentially law school teaching method, the Socratic method, that law students like me learned to hate, but there are those who love it—Socrates himself taught in the agora, the marketplace. Just think how much better he might have been if he had the tools that you have here. It boggles the mind even to think of that possibility. But the facilities you have provided here are so well appointed and so well designed as to make such thoughts a reality.

The great prospects of this law school are also evident in the faculty. One generally does not give state-of-the-art tools to mediocre craftsman, and the faculty you have assembled here is anything but mediocre. Their law degrees come from Harvard and Chicago, Boalt Hall and Michigan, USC, UCLA, and Duke, to name just a few—top law schools, all of them. Paper credentials, though, alone do not guarantee a commitment to the higher aspirations of the law. So what is it about this faculty that generates such high hopes for educating ethical lawyers? I believe it is in the very newness of the school. Scholars of such distinction who would commit themselves to a law school even before there were students, before there were books, and before there was a building—as you heard, Sharon Nantell did such a thing, William Stallworth, Judy Fischer, Jeremy Miller, Sheryl Kramer, and Hugh Hewitt (whom I knew in Washington)—they all rolled up their sleeves, took upon themselves administrative duties that established faculties need not even contemplate, and all the while remained committed to instilling in their students the highest ethics of the legal profession. Now that is a committed faculty.

Moreover, they and their newer colleagues, including my former law clerk, John Eastman, more than most, invested their reputations as well as their talents in the success, the reputation and the future of this institution. That reputation, and hence theirs, will ultimately be a reflection of the lawyers they send out into the world.

But there is still more on which the high hopes of this law school is based. Looking out from the law school, one cannot help but notice that it is now an integral part of this university, a university committed to providing personalized education of distinction that will foster in its students a strong inner moral compass and that will help them develop a clear understanding of the contributions they can make to the common good and to this great nation.

And it is not just the Chapman University of today that fosters these ideals. I have learned a little about the history of this institution—a quite impressive history—since you invited me to participate in this dedication. From the very moment of this university's founding, deliberately timed to coincide with the inauguration of Abraham Lincoln as President of the United States, this institution has been committed to the highest ideals known in law, to the principles of human equality and dignity that found their greatest voice in this country's own Declaration of Independence. With such a foundation, and with the continuing commitment to those ideals by this university, this law school has a great destiny before it.

Let us dedicate the Donald P. Kennedy Hall, so that this law school may, in the words of Abraham Lincoln, complete the unfinished work, and let us pray that it, and we, be

dedicated to the great task remaining before us, that this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, and for the people shall not perish from the face of this earth. Thank you.

Another Way Of Thinking About Section 105(a) And Other Sources of Supplemental Law Under the Bankruptcy Code*

By
Steve H. Nickles**
David G. Epstein***

I. Introduction

We are involved in research exploring the wholesale authority of bankruptcy courts to supplement the provisions of the Bankruptcy Code. By supplement, we mean to make decisions or take actions that are not provided for in applicable, specific statutes. Such a decision or action is "supplemental law."

Our use of the phrase "supplemental law" and our research does not include either artful interpretation or exercises of discretion that a particular statute allows. We only consider the court's authority to decide or act beyond, or different from, statutory provisions on the basis of general authority apart from the provisions themselves.

Our principal focus is Bankruptcy Code section 105(a)¹, which we'll refer to simply as 105. It allows a bankruptcy court "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions"² of the Code. This section derives from the superseded Bankruptcy Act, section 2a(15)³, which allowed "courts of bankruptcy" to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of [the] act."⁴ Section 2a(15) was cited dozens of times in reported decisions under the old Bankruptcy Act. Section 105 of the Bankruptcy Code has been cited in thousands of reported cases as an authority to support a wide variety of judicial decisions and actions⁵.

Even in the early days of the Code, in 1982, Richard Levine, the first Director and Counsel, Executive Office for the United States Trustees, warned that on the basis of 105, courts "have begun to develop a concept of almost unlimited power."⁶ Ten years later, in 1992, Chaim Fortgang and Erin Enright, prominent New York bankruptcy practitioners, wrote that 105 "has developed into the 'catchall' provision of the Bankruptcy Code."⁷ This concept has now fully matured. Today, 105 is the authority behind an incredibly long list of powers now exercised by bankruptcy courts.

Lawyers now commonly stand on 105 whenever the Code fails clearly to support their clients' position. They often seem to interpret 105 as a boundless source of power that enables the bankruptcy judge to make up the law as she goes along and, in so doing, to go where no member of Congress has gone before. Some judges and lawyers believe that 105 enables a bankruptcy court to hang or

otherwise fit decisions within the framework of bankruptcy law whether or not the bankruptcy statutes accommodate the decisions.

In this article we discuss the role of 105 in bankruptcy law generally rather than in specific bankruptcy cases. We mention a few cases as examples. Mainly, we aim at 105. We work toward an understanding of this section that explains our view of the bottom issue that determines the proper role and use of 105 and also the proper role and use of supplemental law generally.

Our view of section 105 as a source of supplemental law is different from the view reflected by bankruptcy court decisions and actions. We do not believe that 105 authorizes "supplemental law." Indeed, we think 105 is largely, even completely, redundant. We also think that some present uses of 105 are of questionable constitutional validity.

Preliminarily, in order to focus clearly on section 105 and the scope of authority the section gives bankruptcy courts, we separate other possible sources of authority for bankruptcy courts to supplement the Bankruptcy Code. There are three such sources: (1) inherent power, (2) federal common law and (3) equitable nature of bankruptcy courts.

First, all courts have certain, inherent power. This power is real but small and limited to process closely related to the conduct of court and functioning process.

Next, we consider the power of bankruptcy courts to create federal common law. We also consider the courts' power on the basis of state law to supplement the Bankruptcy Code with principles of common law and equity, especially including the principles of traditional equity jurisprudence. These powers exist but are tightly, narrowly constrained. We conclude that they are not sources of very wide, general authority for applying supplemental law under the Bankruptcy Code.

Then we consider the legitimacy and meaning of the oft-quoted description of bankruptcy courts as "courts of equity." We trace the source and find the meaning of this description. It means that apart from state law and as a matter of federal law, bankruptcy courts can apply principles of equity jurisprudence. These principles are an ancient source of supplemental law, but the principles of equity jurisprudence are doctrinally limited by their own terms and are also situationally limited by any applicable statute that contradicts or restrains them. Moreover, these principles *do not* include any power simply to do what seems fair, i.e. to "do equity." Such a power requires a specific statutory license and even then is restrained by legislative purpose and judicial precedent.

Finally we get to 105 as a basis of wholesale authority for bankruptcy courts to supplement the provisions of the Bankruptcy Code. The end of our search is anticlimactic. At most, and depending on whom you believe, 105 merely restates the power given elsewhere for bankruptcy courts to issue necessary process and to

act as courts of equity in applying principles of equity jurisprudence. Section 105 is not itself a larger or wider or even different source of supplemental law.

Many cases dispute our conclusion. They apply 105 in many ways that are well beyond the limits of equity jurisprudence. These cases make law under 105 as if the section were a delegation of lawmaking power by Congress to the courts. This interpretation may be supported by good policy, but it is not supported by statutory language. Moreover, the Constitution forbids it. Indeed, the practice of bankruptcy courts making law in any non-proximately, legislatively guided sense is unconstitutional under any congressional grant of supplemental power to the courts. It is unconstitutional regardless of the statutory basis of the power and whether or not the judicial law fits perfectly within the scope of the delegated power.

II. Inherent Power (Procedural Common Law)

Federal district courts possess inherent authority to make procedural common law for the purpose of protecting "their proceedings and judgments in the course of discharging their traditional responsibilities."⁸ Presumably, bankruptcy courts derivatively share this authority. Enforcing compliance with court orders through the exercise of the contempt power is an obvious example of a court's inherent power.⁹

To a very small extent the courts' inherent authority is constitutionally protected. For the most part, however, this authority can be controlled or overridden by Congress. Indeed, even the Supreme Court is constitutionally limited in establishing federal rules of procedures. The role of the Court in promulgating and maintaining the federal rules is on the basis of a congressional delegation of authority in the Rules Enabling Act.¹⁰

The Rules Enabling Act limits the Court to making rules for practice and procedure only. Affecting substantive rights is flatly prohibited, and the meaning of "substantive rights" for this purpose may be growing.¹¹ Therefore, the courts' statutory authority to make procedural common law is shrinking. Also, the tiny inherent authority that the courts possess on their own is even more limited. It is not a source of meaningful supplemental law under the Bankruptcy Code.

III. Making And Applying Substantive Common Law @

A. *As A Matter Of Federal Law @*

Everybody remembers from the first year of law school that there is no federal, *general*, substantive common law, especially not in diversity cases. *Erie*¹² and its progeny "so hold." We know this truth from the "canned briefs" we bought when we were first-year law students. Federal courts, unlike state courts, are not common-law courts¹³. Federal courts

"do not possess a general power to develop and apply their own rules of decision,"¹⁴ because:

As the general structure of the Constitution and the tenth amendment make clear, the framers anticipated that the federal government would exercise only specifically enumerated powers. All other powers were reserved to the states or the people. The federal judiciary, as a branch of the federal government, is also limited by this specific enumeration of powers. Thus, any assertion by the judiciary of a general power to make law would encroach upon the powers reserved to the states.¹⁵

On the other hand, *Erie* does not control in matters covered by federal statutes. In these matters it is possible, though not certainly clear, that federal courts enjoy some little room to make true federal common law.¹⁶

Moreover, federal courts make what we will call *interpretative* federal common law. Here we adopt Professor Field's rightly wide definition of federal common law, which is "any rule of federal law created by a court (usually * * * a federal court) when the substance of that rule is not clearly suggested by federal enactments -- constitutional or congressional."¹⁷ Making federal common law probably happens most often when federal courts interpret federal statutes by adding gloss or inferring a rule after finding that the statute permits the addition or inference, either generally or with respect to a particular matter or issue.

Bankruptcy courts are units of the district courts¹⁹. Presumably, therefore, bankruptcy courts share or derivatively enjoy the district courts' power of making federal common law. This power, which is separate from 105, enables bankruptcy courts legitimately to supplement the Code, if only interstitially, with substantive law.

In bankruptcy, however, the federal statutory and incorporated state law are very comprehensive, and any constitutional or policy reasons for looking to state law for filler are strong. While federal common law can sometimes trump otherwise applicable state law when the federal interest in doing so is sufficiently strong, the Supreme Court has clearly held that state law is not easily trumped by federal common law created by bankruptcy judges.²⁰

Also, the Supreme Court has been equally clear that the Code's literal language must be followed closely so that proper occasion for interpretative law is small.²¹ Very little room is therefore left for making federal common law under the Bankruptcy Code.

In any event, bankruptcy-made federal common law is not the sort of supplemental law that concerns us in this presentation. Bankruptcy judges

create federal common law, whatever the source or reference, under and within the bounds of the bankruptcy statute. Our concern is limited to judges' deciding or acting beyond, or different from, statutory provisions on the basis of general authority apart from the provisions themselves.

B. As A Matter Of State Law

Bankruptcy courts more often create state common law. It happens whenever the courts look to state law for substantive rights and liabilities of the debtor and other parties. These rights and liabilities are almost always governed by state law. In consulting state law for this purpose the bankruptcy courts make common law by interpreting applicable state statutes or by applying and developing pertinent state common law.

This state common law is not, however, the true supplemental law that interests us. The bankruptcy courts are applying and are constrained by specific statutes, or they are projecting common law that is also limited by state statutory law and by local precedent. Moreover, in creating state common law the bankruptcy courts are adding to state law on which the Bankruptcy Code operates rather than to the Code itself.

Sometimes an applicable state statute empowers courts to use, as a kind of supplemental law, state-law principles of common law and equity. The best example is Uniform Commercial Code section 1-103,²² which provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.²³

Bankruptcy courts applying local U.C.C. law will rely on 1-103 as authority to supplement the statute with principles of common law and equity. This process, too, is enabled and constrained by state law and does not add supplemental law to the Bankruptcy Code. Furthermore, the Bankruptcy Code can itself displace state law principles of common law and equity.²⁴

IV. *Bankruptcy Courts As Courts of Equity*

Separately, bankruptcy courts apply equitable principles to directly affect the Bankruptcy Code on the basis of the bankruptcy court's supposed (though foggy) status as a court of equity. Bankruptcy courts are commonly described as being or having the powers of "courts of equity."²⁵ Until recently, clear statutory support

existed for this status. No longer. Today, any such support is, at best, uncertain and vague.

The first federal bankruptcy law, the 1800 Act, gave bankruptcy jurisdiction to the district courts. The second law, the 1841 Act, also empowered the district courts to exercise this jurisdiction summarily in the nature of summary proceedings in equity. The district courts were thereby empowered to effectively act as equity courts for purposes of bankruptcy. The Supreme Court made clear that, absent this equitable jurisdiction power given by the 1841 Act, "the District Courts of the United States possess no equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them."²⁶

The district courts' equity power in bankruptcy matters was explicitly continued under the 1867 Act²⁷ and the 1898 Act. The critical language of the 1898 Act was the very first part – the introductory part -- of section 2:

[T]he district courts of the United States * * * are hereby made courts of bankruptcy, and are hereby invested * * * with such jurisdiction at law *and in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * . @

This language meant that "[a] bankruptcy court is a court of equity, ... guided by equitable doctrines and principles except in so far as they are inconsistent with the [bankruptcy statute]." ²⁸ To be a court of equity means "at least * * * that, in the exercise of the jurisdiction conferred upon it, it [the bankruptcy court] applies the principles and rules of equity jurisprudence."

More recently, in 1978, Congress enacted section 1481 of Title 28 which provided in pertinent part that "[a] bankruptcy court shall have the powers of a court of equity." However, when the provisions of title 28 relating to bankruptcy courts were amended in 1984 making the bankruptcy court a "unit" of the district court, section 1481 was repealed.²⁹ Accordingly, at present, nothing in the Bankruptcy Code or related statutes explicitly gives equity jurisdiction to bankruptcy courts that is different from or greater than the equity jurisdiction of a federal district court.³⁰

It is generally assumed, however, that, under the Code, bankruptcy courts are equity courts³¹ and can apply equitable principles and rules. Section 105(a) is sometimes cited as the basis for this status and power.³²

It is simply not true that 105 is the basis for equity jurisdiction of courts in bankruptcy. The legislative history of the section flatly reports that section 105(a) is "derived from"³³ Bankruptcy Act section 2a(15). Reconsider the language of section 2:

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such *jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act*, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to---(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however*, That an injunction to restrain a court may be issued by the judge only; make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act. (emphasis added).³⁴

The italicized prefatory language in section 2 is the statutory basis for bankruptcy courts' equitable power. Subsection 2a(15) did not itself give equity power to the bankruptcy courts. So, section 105, as the modern successor of only subsection 2a(15), cannot itself give the courts this power.

The congressional reports behind 105 also explain that "105 is similar in effect to the All Writs Statute, * * * under which the new bankruptcy courts are brought [separately] by amendment to 28 U.S.C. 451 [which defines the meaning of court for purposes of title 28]."³⁵ So, prior to 1984, when bankruptcy courts were separate courts, separate legislation brought them under the All Writs Statute.³⁶ Section 105 was redundant in this respect. Now, of course, the meaning of court in section 451 does not directly, explicitly include bankruptcy courts. So, the connection between 105 and the All Writs Statute is completely empty.

We believe that the All Writs Statute still applies to bankruptcy courts, but only indirectly or derivatively as units of the federal district courts. Still, the All Writs Statute is not a source of equity power or other supplemental law. It is a source of process only that must be closely related to fairly clear legislative intent.

Nevertheless, bankruptcy courts exercise equity power. The putative basis may be the doubtful authority of 105; the murky authority of the long-ago merger of law and equity in federal courts³⁷; unsubstantiated case authority; or something else or nothing whatsoever. The truth is that even without citing authority, bankruptcy courts act as courts of equity in the sense of acting as though they are empowered to apply equitable principles and rules.

Equitable principles and rules, however, are not a source of general authority to act beyond or different from the Bankruptcy Code. So, even if there is a real and lawful basis for bankruptcy judges to assume the role of equity chancellors, this role gives them little legitimate reason or room to add substantive, supplemental law to the Bankruptcy Code.

Equity does not empower the judge to create or depart from law in pursuit of conscience or morality. It is a subset of principles, rules, and remedies well constrained by hundreds of years of precedent that fairly precisely defines equity. The important principles of equity were long ago all developed:³⁸

[E]quity became a system of positive jurisprudence, peculiar indeed, and differing from the common law, but founded upon and contained in the mass of cases already decided. The Chancellor was no longer influenced by his own conscience * * *. [Also,] * * * there can be no more capricious enlargement according to the will of individual chancellors.³⁹

Although equitable principles can be adapted to novel conditions, "the broad and fruitful principles of equity have been established and cannot be changed by any judicial action."⁴⁰

Moreover, these concrete principles are only applied to aid law, not to contradict law or even add to law. The Supreme Court forcefully made this point in its recent decision, *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund, Inc.*⁴¹, holding that the equity jurisdiction conferred on federal courts by the 1789 Judiciary Act did not empower a court to freeze assets for the benefit of creditors. The Court stated:

We do not question the proposition that equity is flexible; but in the federal system, at least, the flexibility is confined within the broad boundaries of traditional, equitable relief. To accord a type of relief that has never been available before – and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent – is to invoke a "default rule," ... not of flexibility but of omnipotence.⁴²

Clearly, equitable principles are subordinate and subservient to all law⁴³, including statutory law. So, especially when federal courts apply comprehensive federal statutes, the use of equity is triggered by, and strictly limited by, the letter and clear sense of the statutes. As courts of equity, therefore, bankruptcy courts are not empowered to go beyond or depart from the Bankruptcy Code and create supplemental law.

V. Section 105(a)

Collier and other secondary sources have classified and criticized the cases construing section 105.⁴⁴ Some of these reported decisions seem premised on the implicit if not explicit interpretation of section 105 as a direct, fresh, independent grant of supplemental power to the bankruptcy courts.⁴⁵

Under this broad interpretation, 105(a) does not re-state inherent or equitable powers of courts elsewhere provided and otherwise limited. Rather, through 105(a), Congress separately delegated to bankruptcy courts the authority to act to the limits of a wholly independent meaning of 105(a).

Under this broad meaning, 105(a) could be interpreted as a basis of authority to fill in, extend, or retract the Bankruptcy Code in unprovided-for cases and unanticipated circumstances in ways that are beyond particular provisions but within the largest goals of bankruptcy. We can imagine appealing policy arguments that support giving bankruptcy courts such authority.

We believe that some uses of 105(a) can only be explained by interpreting and applying the statute this way. Good examples are partial discharge of student loans⁴⁶, substantive consolidation⁴⁷, payment of "necessary" unsecured claims early in a Chapter 11 case⁴⁸, and permanently stretching the discharge to protect non-debtors.⁴⁹

We do not say that these uses are bad bankruptcy policies. We do, however, say that such uses raise problems of statutory language and constitutional concepts.

The problems of statutory language are straight-forward. Section 105 is limited to orders that "carry out the provisions of this title." Congress could have used the word "policies" or the word "purposes" in section 105. It did not.⁵⁰

The problems of constitutional concepts are different and more subtle. The constitutional problem is not so much in Congress delegating wide powers to the courts through 105(a). The real problem is that in exercising such wide powers, the courts are making law to the extent of violating the constitutional separation of powers. It makes no difference that Congress may have desperately wanted, clearly intended, and explicitly provided for the courts to have such power. Congress cannot widen the constitutional limits of judicial power.

The division of authority between the three branches of the federal government is not exact or clear, but is flexible. Their responsibilities can permissibly overlap to a point. The overlap is constitutionally too great, that is, the separation of powers is offended, when the whole power of one branch is given to and exercised by another branch; when excessive authority is accumulated in a single branch; or when the authority and independence of one or another coordinate branch is undermined.⁵¹

With respect to the judicial branch the special concerns are law that "impermissibly threatens the institutional integrity of the Judicial Branch"⁵² or the assignment of "tasks that are more properly accomplished by [other] branches."⁵³ So, when the Congress delegates certain authority to the courts, the seemingly decisive issue in terms of separation of powers is whether the particular authority is more properly exercised by another branch.

It's a fuzzy scale generally that applies fully to law making. Courts cannot create law in the sense of exercising Article I legislative power. On the other hand and at the other extreme, applying and interpreting legislation are necessary and essential judicial functions. In a sense, applying and interpreting law creates law (albeit not "supplemental law"). In sum, the rule is probably that courts cannot make law "except in conjunction with the lawful exercise of * * * judicial power."⁵⁴

In judging the legality of a court's role under a statute, the separation-of-powers issue is whether, on a flexible, fuzzy scale, the role exceeds lawful exercise of judicial power under the statute and thus becomes unconstitutional law making. We think it depends in large part on the proximity between the court's "legislative" decisions under the statute and the clarity and precision of the policies expressed through the statute.

The issue is whether the court's decision is necessary to a fairly specific and certain statutory intention that drives and guides the judge's decision making and her related actions. It is not enough, for separation of powers, that the court's decision is compatible with relatively undefined or general legislative purposes, not even when these general purposes are clearly and forcefully expressed.

The likelihood of unconstitutional law-making by courts in applying statutes is directly related to the distance between the courts' decisions or actions under the statute and a well-defined congressional judgment about the matter behind the statute. The farther the stretch, the more likely judicial lawmaking is unconstitutional.

So, the ultimate question about partial discharge and all other judicial supplements to the Bankruptcy Code is whether they are too much of a legislatively projected reach from the statute to the decision. If so, the supplements may violate the Constitution even if they somehow satisfy the language of 105(a).

It's possible, too, that such supplements are not saved by having roots in traditional equity jurisprudence. Remember: we are not completely sure if, why, and to which extent bankruptcy courts are courts of equity. We are sure that even if they are fully courts of equity, this status gives little reason or room for making supplemental law. Also, it is never been entirely clear how far the Constitution permits the judicial branch, either on its own or through congressional grant, to exercise equitable power, but we cannot imagine that any such authority trumps Article I of the Constitution. Courts cannot exercise Article I legislative power directly through 105 or any other statute or indirectly through equity.

VI. Conclusion

For more than thirty years and in thousands of reported cases, bankruptcy judges and lawyers have thought about section 105. They have thought about 105 in terms of statutory interpretation, in terms of legislative history, in terms of other reported decisions, in terms of bankruptcy policy, in terms of doing equity. We recognize that these cases are of real importance and value to the bench and bar, which is why we are developing a Web site that collects all of these cases and also collects other supplemental law authorities.

We suggest, however, that from now on, judges and lawyers should also think of 105 in constitutional terms. We join the call of Professor Robert F. Nagel of the University of Colorado Law School who, writing more than 20 years ago about the limits of federal courts' equitable remedies generally, urged: "[l]egal commentators and courts should begin the potentially constructive business of deciding how separation of powers applies to the scope of equitable relief in particular cases."⁵⁵

Finally, we suggest that judges and lawyers also think of section 105 in musical terms when deciding how the section fits within the whole of the Bankruptcy Code. We join the lament of the Oak Ridge Boys in their gospel classic, *Rhythm Guitar*:

Nobody wants to play rhythm guitar behind Jesus.
It seems like everybody wants to be the lead singer in the band
I know it's hard to get a beat on what's divine
When everybody's pushing toward the head of the line
I don't think that its working out at all the way He planned.

We suggest that, musically and constitutionally, section 105 is at most a rhythm guitar.⁵⁶

* This article was prepared for a panel discussion at the 1999 Annual Meeting of the National Conference of Bankruptcy Judges.

** C. C. Hope Chair in Financial Services and Law, Wake Forest University. Steve Nickles is grateful for the support of Wake Forest University and the Hope family.

*** Charles E. Tweedy Jr. Chair in Law, University of Alabama. David Epstein, by nature an ungrateful sort, acknowledges the support of the University of Alabama School of Law Foundation and the Tweedy family, and the earlier support of his partners at King & Spalding, which enables him and his family to live really well. David Epstein also is grateful to Steve Nickles for doing all of the work on this article and to Alabama colleagues such as Tony Freyer, Susan Hamill, Jerry Hoffman, Wythe Holt, and Ken Randall for their critical and/or encouraging comments and suggestions. Since David Epstein ignored all of their suggestions, Steve Nickles bears full responsibility for any errors in this paper.

1. 11 U.S.C. § 105(a) (1999).

2. Id.

3. Bankr. Act § 2a(15); 11 U.S.C. § 12(a)(15) (repealed).

4. Id.

5. To state the obvious [or at least what is obvious to us old timers] there were fewer bankruptcy cases and virtually no reports of the decisions of bankruptcy judges under the Bankruptcy Act.

6. Richard L. Levine, An Enhanced Conception of the Bankruptcy Judge: From Case Administrator to Unbiased Adjudicator, 84 W. VA. L. REV. 637, 653 (1982).

7. Chaim J. Fortgang and Erin Enright, "Carry Out the Provisions" and Section 105, at 3, (Paper presented at New York University Law School Workshop on Bankruptcy and Business Reorganization (1992)).
8. *Degen v. United States*, 517 U.S. 820, 823, 116 S. Ct. 1777, 1780, 135 L. Ed. 2d 102 (1996).
9. See *In re McLean Indus.*, 68 B.R. 690, 695 (Bankr. S.D.N.Y. 1986) ("All courts . . . have inherent contempt powers to enforce compliance with their lawful orders."). But cf. *Kellogg v. Chester*, 71 B.R. 36, 37 (Bankr. N.D. Tex. 1986) ("[S]ection 105 in the first instance grants to bankruptcy courts the power to issue final orders of contempt insofar as such orders are necessary or appropriate to carry out the provisions of title 11.").
10. 28 U.S.C. § 2072 (1994).
11. See generally Leslie M. Kelleher, Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously, 74 NOTRE DAME L. REV. 47 (1998).
12. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[t]here is no federal general common law").
13. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).
14. *Id.*
15. Thomas W. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 13-14 (1985).
16. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 60 (5th ed. 1994).
17. Martha Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881, 890 (1986). Cf. Martin Redish, Federal Common Law and American Political Theory: A Response to Professor Weinberg, 83 NW. U.L. REV. 853, 857 (1989) ("When a court engages in statutory interpretation, it asks 'What did the legislature intend?' When it creates common law, it asks 'what is the best policy choice?'").
18. Defining federal common law so broadly, especially including interpretation, is not uncommon. In fact, it is accepted. See Martha Field, *supra* note 17, at 890-92; Thomas W. Merrill, *supra* note 15, at 4-5.
19. 28 U.S.C. § 151 (1999).
20. *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 918 (1979).
21. See generally Robert K. Rasmussen, A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases, 71 WASH. U. L.Q. 535 (1993); Adam James Wiensch, Note, The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law, 79 GEO. L.J. 1831, 1859 et seq. (1991).
22. U.C.C. § 1-103.
23. *Id.*
24. *In re Omegas Group, Inc.*, 16 F.3d 1443, 1452-53 (6th Cir. 1994) (State-law imposing constructive trust on property debtor obtained by fraud is inconsistent with goals of bankruptcy and is displaced by bankruptcy law.).
25. E.g., *Local Loan v. Hunt*, 292 U.S. 234, 240, 54 S.Ct. 695, 697 (1934) ("But otherwise courts of bankruptcy are essentially courts of equity and their proceedings inherently proceedings in equity."); *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus., Inc.*, 229 B.R. 860, 871 (Bankr. S.D. Fla. 1999) ("Section 105(a)'s broad statutory directive that bankruptcy courts shall have the power to issue any order necessary to effectuate a Chapter 11 plan is consistent with the general understanding that these tribunals are courts of equity.").
26. *Ex Parte, The City Bank of New Orleans in the Matter of William Christy*, 44 U.S. 292, 311-12 (1845).
27. The Bankruptcy Act of 1867 again designated the district courts as courts of bankruptcy but did not expressly provide for them to act in equity. It was implicit that in bankruptcy, the district courts acted as courts of equity.
28. *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455, 60 S. Ct. 1044, 1053 (1940) (citing Bankruptcy Act § 2).
29. See *Industrial Tool Distrib., Inc.*, 55 B.R. 746, 749 fn.6 (Bankr. N.D. Ga. 1985).
30. Cf. Robert A. Greenfield, The National Bankruptcy Conference's Position on the Court System Under the Bankruptcy Amendments and Federal Judgeship Act of 1984 and Suggestions for Rules Promulgation, 23 HARV. J. ON LEGIS. 358, 360 (1986).
31. E.g. *United States v. Energy Resources, Inc.*, 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L. Ed. 2d 580 (1990); *In re Nikoloutsos*, 199 F.3d 233, 236 (5th Cir. 2000); But for a very recent, thoughtful, very rare cautionary view, see generally Honorable Marcia A. Krieger, "The Bankruptcy Court Is a Court of Equity": What Does That Mean?, 50 S.C. L. REV. 275 (1999).
32. Section 105 has been cited (probably wrongly) as independent authority for using supplemental equitable principles in bankruptcy. *In re Momentum Mfg. Corp.*, 25 F.3d 1132 (2d Cir. 1994) (Section 105 supports bankruptcy court applying the doctrine of equitable estoppel.); *In re Lapiana*, 909 F.2d 221 (7th

Cir. 1990) (Bankruptcy rights are subject to well-recognized equitable defenses, such as estoppel; and the courts possibly can create new equitable defenses.).

33. S. REP. NO. 95-989, at 51 (1978), reprinted in U.S.C.C.A.N. 5787, 5837; H.R. REP. NO. 95-595, at 342 (1978), reprinted in U.S.C.C.A.N. 5963, 6298.

34. Bankr. Act § 2a(15); 11 U.S.C. § 12(a)(15) (repealed).

35. H.R. REP. NO. 95-595 (1977).

36. 28 U.S.C. § 1651 (1994).

37. The district courts, and presumably the bankruptcy courts operating as units of the district courts, "have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States." 28 U.S.C. § 1331 (1999). Because of the merger of law and equity in federal courts, some people interpret "civil actions" in section 1331 to encompass traditional equity jurisdiction. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 147 n.173 (1998).

38. 1 POMEROY, *EQUITY JURISPRUDENCE* § 59, at 75 (Spencer Symons, 5th ed. 1941).

39. *Id.* at 75-76.

40. *Id.* § 60, at 78.

41. 527 U.S. 308 (1999).

42. *Id.* at 333.

43. Admittedly, though, distinguishing equity from common law is very artificial in that the worlds are largely merged by procedure and also by judicial legislation that has absorbed much of the former into the latter. For present purposes, distinguishing equity from common law is also pointless because there is no general, federal common law and also because we are entirely interested in the exercise of equitable powers within and under statutes.

44. E.g., 2 COLLIER ON BANKRUPTCY 105.01[2] (15th ed. 1999); Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487 (1988).

45. E.g., *In re Morgan*, 182 F.3d 775 (11th Cir. 1999) (tolling of priority period); *In re Brown*, 239 B.R. 204 (Bankr. S. D. Cal. 1999) (partial discharge of student loan).

46. See generally Cara A. Morea, Note, *Student Loan Discharge in Bankruptcy-It Is Time for a Unified Equitable Approach*, 7 AM. BANKR. INST. L. REV. 193 (1998).

47. See generally Mary Elizabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381 (1998).

48. See generally CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 11.12 (1997).

49. See generally Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959 (1997).

50. Some courts, however, seem to use the words "provisions" and "purposes" interchangeably. E.g., *In re Gurny*, 192 B.R. 529, 539 (B.A.P. 9th Cir. 1996); *In re Simmons*, 224 B.R. 879, 884 (Bankr. N.D. Ill. 1998). See also *In re Offshore Diving and Salvaging, Inc.*, 1999 WL 961763 (E.D. La 1999) ("This court agrees that recognizing equitable power to toll Section 507 under § 105(a) does not violate any Bankruptcy Code provision or policy and is in fact consistent with Congressional policy. Accordingly, the Court affirms the bankruptcy court's determination that Section 105(a) is broad enough to provide for equitable tolling of the priority period in 507(a).").

51. *Mistretta v. United States*, 488 U.S. 361, 381, 109 S. Ct. 647, 659, 102 L. Ed. 2d 714, 786 (1989).

52. *Id.* at 383.

53. *Id.*

54. *Id.* at 417 (Scalia, J., dissenting).

55. Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 724 (1978).

56. While we both agree that section 105 corresponds to a rhythm guitar, at least one of the authors is ill-equipped to identify what corresponds to Jesus.

3 Chap. L. Rev. 21

Chapman Law Review

Spring 2000

Bankruptcy Symposium

INTRODUCTION TO THE ARTICLES PRESENTED BY THREE RISING STARS IN BANKRUPTCY SCHOLARSHIP

The Honorable [Samuel L. Bufford](#)^{a1}

Copyright (c) 2000 Chapman Law Review; The Honorable Samuel L. Bufford

Bankruptcy law is one of the fundamental legal structures necessary to the functioning of a market economy. In the common law tradition of the United States and England, bankruptcy law dates back to 1542.¹ Bankruptcy law's origins are even more ancient, with roots extending back to at least to the Hammurabi Code² and the Law of Moses.³ In the transition to market economies and Western-style legal systems in Central and Eastern Europe, the development of a viable bankruptcy law is one of the first priorities.⁴ Thus, the United States bankruptcy law⁵ that forms the background for this symposium is central to the economy and commercial life in the United States.

The Chapman Law Review's Bankruptcy Symposium seeks to facilitate discussion among young bankruptcy scholars, and between these scholars and the local bankruptcy community, students, faculty and distinguished scholars. These scholars have engaged in research in important and exciting areas of bankruptcy law. In addition, the symposium provides a forum for these scholars to present papers which will make a substantial contribution to bankruptcy scholarship.

***22** In my judgment, these aspirations have been admirably met. Professor David Epstein and I spent an entire day with these young scholars, discussing their work and insights with the Chapman community. The discussion highlighted several insights into bankruptcy law and policy, which will animate further discussion on this subject.

In the remainder of this introduction, I comment briefly on the distinctive contributions that each of these papers makes to bankruptcy scholarship, and begin the further discussion of these issues.

I. Professor Frederick Tung's Paper

Professor Frederick Tung's paper addresses a distinctive problem for a future claims representative (FCR) that arises only in mass tort bankruptcy cases. Professor Tung's position is that this agent has a distinct disadvantage

because she has no principal to whom she is responsible. Instead, she is responsible to the bankruptcy judge who appointed her. Professor Tung posits that this fact raises additional, unique problems for mass tort cases.

A. Mass Tort Bankruptcy Cases Generally

Mass tort cases are rare in the bankruptcy system. During some 14 years as a bankruptcy judge, I have handled more than 75,000 bankruptcy cases, including more than 2,500 chapter 11 cases. However, I have never presided over a mass tort case, nor will most bankruptcy judges. Indeed, one could almost make a short list of all the mass tort cases: A.H. Robins, Dow Corning, UNR, Piper Aircraft, and the asbestos cases (Johns-Manville, Eagle Picher and Amatex).

Nonetheless, mass tort bankruptcy cases are extremely important, because of their massive size. They typically consume significant amounts of judicial time and resources. Administration costs of mass tort bankruptcy are equally astronomical. A mass tort case concentrates in a single forum thousands, perhaps hundreds of thousands, of separate litigation actions that would otherwise consume large amounts of financial, legal and judicial resources in many jurisdictions cumulatively.

This consolidation of litigation emphasizes the necessity of a workable bankruptcy system for mass torts cases. No other procedure for centralizing such large numbers of cases exists, when these potential/actual suits may be filed in any jurisdiction in the United States, in either federal or state court.⁶ Exclusively, bankruptcy *23 law can bring large numbers of cases filed in numerous state courts into a single collective proceeding. Further, the procedure imposes an automatic stay on all of those cases pending in other jurisdictions around the country. No other procedure provides for a centralized system of collecting assets and administering claims to minimize the transaction costs. No other procedure has the power to bring all of the relevant assets to bear to solve the mass tort problem before the magnitude of the claims is determined. No other procedure has the power to restructure the finances of the tortfeasor to assure the just resolution of all of the mass tort claims. No other procedure has the power to resolve multitudes of tort liabilities without trying on its merits each claim that is not settled. No other procedure has nearly the power to encourage settlement of large numbers of claims in a reasonable time frame. No other procedure has the power to free assets of the mass tortfeasor to continue in business free and clear of the mass tort claims.

The bankruptcy system provides tools for dealing with mass torts that are far more efficient, albeit not perfect, for administration of such suits than any available alternatives. Thus, the development of concepts and rules for handling mass tort cases is invaluable when such cases are filed.

Professor Tung limits his paper to certain types of mass tort cases. In particular, he limits his analysis to cases involving temporally segregated causal occurrences from manifestation of damages. In some cases the delay in manifestation results from a delay in the development of symptoms, as in the asbestos, Dalkon Shield and breast implant cases. In other cases, such as Piper Aircraft, products manufactured by the debtor may cause injury long after they have entered into the stream of commerce.

These kinds of mass tort bankruptcy cases will surely continue to be filed in the future.⁷ In addition to the recurrence of cases like those that we have already seen, yet-unimagined occurrences which will precede the

suffering will give rise to more mass tort bankruptcies.

***24 B. Tort Claims in Bankruptcy**

Tort claimants, as a general rule, tend to get less than their share of assets due them in a bankruptcy case. Tort claimants wrestle with the unliquidated character of their claims, while claimants with greater priority, such as contract claimants, argue that their claims entitle them to recovery. Contract claimants typically contend as a matter of policy that they have supplied the cash, or goods, or services, with a definite market value, for which they deserve payment. In contrast, tort claimants do not provide cash, goods, services, or even anything of value.

Additionally, contract claimants argue that tort claims, both present and future, tend to be vastly inflated, and should not be given credibility, and thus bargaining power, commensurate with their size. Only when a settlement is reached, or a judgment affirmed, can a definite amount be attached to a tort claim. Mass tort claims are usually unliquidated, and thus uncertain. While bankruptcy law provides for the estimation of unliquidated claims, the procedures for conducting such an estimation are undeveloped; often, neither the parties, nor the judges, know how to correctly estimate the value of these claims. Finally, the punitive damages that frequently accompany tort recoveries must be subordinated to most other claims,⁸ resulting in a typically valueless punitive damages component expressed in a reorganization plan.

C. Future Claimants

Future claimants are in a more precarious position. These potential claimants must compete with present tort claimants, whose claims are usually a large part of the unsecured debt in a mass tort bankruptcy case. These existing claims may be sufficient to eliminate the entire equity of the firm.

However, these future claimants may constitute a substantial class, whose injuries either have not yet occurred or have not yet manifested. Clearly, identification of the members of this class, at the time of the bankruptcy filing, is impossible to determine. Typically, contract creditors want to exclude claimants from sharing in the assets of a bankruptcy estate or being part of the reorganization plan.

In an attempt to deal with these problems, the bankruptcy system has developed a process of appointing a special legal representative *25 who serves as the FCR for the future claimants.⁹ A trust fund is set aside for the future claimants, a payment mechanism is established, and a channeling injunction is issued to prohibit future claimants from pursuing any claims except those against the fund.¹⁰

Professor Tung contends that under this system future claimants are likely to receive proportionally less compensation in a reorganization. Equal treatment with the other unsecured creditors, whether the debtor is liquidating or reorganizing, would seem more appropriate. However, future claimants typically get nothing at all.¹¹

Professor Tung finds two constraints on the function of the FCR in a mass tort case bankruptcy which may impair her ability to effectively represent the interests of future claimants. First, he finds that the FCR is beholden to the presiding judge, rather than a client, for appointment, employment of professional assistance, and receipt of compensation for services.¹² Second, the FCR is constrained by the norms of large case participation, which promote a deal rather than the obstruction of the confirmation of a consensual reorganization plan. Both of these factors, in Professor Tung's view, may lead the FCR to be less effective than an agent for an existing claimant.

D. The Agency Problem

Professor Tung focuses on the difficulties encountered in effective representation of future claimants in the bankruptcy process. He points out that future claimants could easily be the dominant creditor group,¹³ and could have a legitimate claim to a majority ownership of the reorganized firm.¹⁴ At the same time, if they are not given sufficient notice of the bankruptcy case, their claims *26 against the debtor cannot be barred, and the debtor cannot dispose of its liability to them in the bankruptcy case.¹⁵ Finally, the contingency of the future claims and their temporal dispersion makes them difficult to quantify.¹⁶

The heart of Professor Tung's paper lies in his discussion of the agency problems of the FCR. The future claimants cannot choose their own agent, because their identity is unknown.¹⁷ The future claimants thus have no ability to select an agent who will best represent them. In addition, they cannot fire the agent if the agent's representation is less than adequate.¹⁸ Instead, the judge, or the U.S. Trustee, chooses the FCR, and determines the terms of her appointment.¹⁹ Typically, the FCR is appointed at the request of the debtor and other stakeholders. The debtor and stakeholders' interests lie in maximizing their own recoveries in the bankruptcy resolution.²⁰

A chapter 11 reorganization is fundamentally an exercise in the negotiation of benefits by each of the stakeholders. In consequence, the success of the FCR is largely determined by her negotiating skill. Professor Tung argues, however, that because the FCR has no principals, she finds it more difficult to bargain effectively for the class of future claimants. Thus, the FCR has a unique negotiating handicap: while she can bluster, she has the least credible threat to defect.²¹

This contention may not be entirely correct. It is very difficult, if not impossible, to confirm a plan of reorganization over the objection of an FCR. This may put the FCR in a stronger bargaining position than the other parties. An FCR may not be subject to cramdown in case there is not a consensual plan.²² If a plan provides an insufficient share of the assets to provide for the future claimants, the FCR will oppose a plan, and it can proceed only under the cramdown provision. Opposition by the FCR may be sufficient to doom such a plan.²³

In addition, Professor Tung contends that a mass tort case is a "megabankruptcy," and that such cases have their own culture and group norms.²⁴ One of the most important norms of this group is that a megabankruptcy case requires that a plan be confirmed, *27 and that the plan be a consensual plan.²⁵ In addition, social norms require

that everyone at the bargaining table receive a share, which includes creditor classes giving up a share to equity. According to Professor Tung, the future claims fund is the easiest source for such a share.²⁶

I agree with Professor Tung that equity must be given a share to facilitate a consensual plan. I am informed that the value of obtaining equity's consent to a plan is approximately a 15% share in the reorganized debtor. However, I am less inclined than Professor Tung to expect that this share is likely to come from the fund for future claimants. I think that the share for future claimants tends to be less than they should receive. However, I think that the primary problem for fully funding a proportionate share for the future claimants lies in the difficulty in valuing their claims.

E. Role of the Bankruptcy Judge

While lacking a traditional principal, the FCR is actually under the control of the judge. The performance of the FCR is dominated by the judge, who controls both the FCR's retention of professionals, and the fees paid to both her and her hired professionals.²⁷

Professor Tung asserts that the judge's interest in a mass tort case lies mainly in promoting her prestige and reputation. These factors are at issue much more in a mass tort case because it will normally be the largest and most important of the judge's entire judicial career.²⁸ Thus the judge is very interested in achieving a successful reorganization.²⁹ This goal is more important than the zealous representation of the rights of future claimants.³⁰ In consequence, the judge may choose an FCR who is more likely to go along with a plan than to fight for the rights of the future claimants.³¹

I respectfully disagree with Professor Tung's description of the role of the bankruptcy judge in a mass tort case. My experience is that judges are not particularly invested in the success of reorganizations.³² In fact, some 73% of chapter 11 cases do not *28 lead to the confirmation of a plan of reorganization:³³ a substantial majority are either converted to chapter 7 or dismissed. The parties in interest, not the judge, are principally responsible for determining whether a business is worth more dead or alive. The parties will conclude whether a negotiated plan which distributes assets is preferable to the statutory plan in chapter 7.

Furthermore, bankruptcy judges rarely appoint an FCR. While the Bankruptcy Code and rules are silent on the issue, bankruptcy courts usually turn to the U.S. Trustee for the selection of an FCR, subject to confirmation by the court.³⁴ Where the U.S. Trustee selects the FCR, the bankruptcy judge is less likely to feel any investment in the outcome of the efforts of the FCR.

II. Professor Todd Zywicki's Paper

In his article, Professor Todd Zywicki performs a great service in pulling together a substantial body of economic studies that bear on the economics of credit cards.³⁵ These studies are published in disparate sources that are generally difficult to find. Professor Zywicki analyzes these studies to determine what they collectively teach us about credit card debt, and its relation to consumer bankruptcy cases. I comment here on a few of his points.

A. The Changing Role of Credit Cards

The role of credit cards in the United States economy has changed quite dramatically in the last twenty years, and has become far more extensive. Credit cards now play several roles in the economy that they did not play in the past. First, credit cards now serve as a transactional medium, where they have replaced checks and cash. Second, credit cards have shifted the risk of providing credit from individual merchants to third-party credit card issuers. Third, credit cards provide lending functions for consumers, by permitting them to make purchases and to pay when they are able. Fourth, credit cards are utilized extensively to finance business debt, due to their convenience over traditional methods *29 of business credit. This change in the use and structure of credit cards raises concerns about credit card issuer profitability.

B. The Level of Credit Card Profits

Are credit card profits too high? Professor Zywicki's response is unclear. While he devotes substantial attention to explaining how credit card interest rates may reasonably vary substantially from rates for other loans, he never explicitly states whether his explanation explains the variance.

I think that Professor Zywicki does not believe he needs to answer this question directly. He holds the standard economist's view that unreasonably high profits last only for a short term, absent barriers to entry. If the players in a market are making unusual profits, they will quickly attract competitors desiring to share the profits, who will drive the profit level down to a competitive level.³⁶ In the medium term, this strategy by competitors will make any market competitive, unless barriers to entering the market exist.³⁷

Professor Zywicki argues that the barriers to entry in the credit card market are indeed low. He notes that the principal players in this market today did not have a substantial market share even a few years ago; thus demonstrating market competitiveness. In the long run, credit card interest rates will reflect the credit risks that issuers underwrite and the costs of doing business in this particular market.

However, this test may be too blunt. In their Horizontal Merger Guidelines, the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) use a much more delicate measure. For evaluating horizontal mergers, they consider a market competitive if a single seller who raises its prices by 5% would lose enough sales to make the price increase unprofitable.³⁸ For example, if the market rate for credit card interest is 18.0%, this market is competitive only if a credit card issuer who raises its rates to 18.9% (a 5% increase) would lose enough business that the rate increase would be unprofitable.

Further, the Antitrust Division and the FTC measure the concentration of a market by using the Herfindahl-Hirschman Index (HHI) of market concentration.³⁹ "The HHI is calculated by summing the squares of the individual market shares of all the participants." *30 ⁴⁰ A market with an HHI of less than 1000 is considered unconcentrated; an HHI between 1000 and 1800 is moderately concentrated, and an HHI exceeding 1800 is highly concentrated.⁴¹

Professor Zywicki does not give us the market shares for the major players in the credit card market, and I do not know where such data can be found.⁴² For example, if a player has a 40% share of the market, then the market would be highly concentrated.⁴³ If two players each have a 20% share of the credit card market, then the market likely would qualify as moderately concentrated.⁴⁴ However, if no issuer controls over 10% of the market, then it will likely qualify as an unconcentrated market, absent entry barriers.⁴⁵

However, the credit card market has a substantial entry barrier. The barrier is marketing: the role of the billions of direct mail credit card solicitations and millions of hours of credit card marketing.⁴⁶ A credit card issuer that cannot send out large quantities of credit card solicitations and make millions of telemarketing calls, or who is not willing to take on this expense, may lose its customers to those who do. Even at a response rate of one percent, those who send out large numbers of credit card solicitations may slowly, if not quickly, take market share away from any issuer who does not match this solicitation rate. Even “affinity” credit cards require substantial marketing efforts.

C. Does Too Much Credit Card Debt Cause High Rates of Bankruptcy Filings?

Professor Zywicki contends that high levels of credit card debt do not cause high rates of consumer bankruptcy filings. I am inclined to agree. Cases clearly exist where debtors have gone on a spending spree, and run up credit card balances with the intent to discharge these debts in bankruptcy. However, my experience in *31 handling more than 75,000 bankruptcy cases is that these cases are unusual, and perhaps even rare.

Sullivan, Warren & Westbrook have documented the causes of consumer bankruptcy.⁴⁷ The principal causes are divorce,⁴⁸ job loss,⁴⁹ injury and illness.⁵⁰

Imprudent credit card charges may play a role in consumer bankruptcies. Undisciplined credit card spending may push a consumer debtor over the brink, so that she is no longer able to pay her debts and thus concludes that she needs bankruptcy relief. In a typical scenario, the debtor takes on credit card debt at a manageable level, given the debtor’s income and expenses. Then she suffers an economic catastrophe--she loses her job, gets a divorce, becomes ill or is injured. At this point, she is no longer able to service the credit card debt.

Sometimes the debtor uses credit card borrowings to try to bridge the gap until the economic catastrophe is overcome. If this effort is unsuccessful, the credit card issuer is likely to charge bankruptcy abuse. However, the line of credit issued when the account was opened is an invitation to use it when needed.⁵¹

III. Professor Gebbia-Pinetti’s Paper

Professor Gebbia-Pinetti’s paper is a fascinating, valuable, and insightful study in statutory interpretation as conducted by the United States Supreme Court. Her study is distinctive in three ways: it is an empirical study of every Bankruptcy Code decision the Supreme Court has issued; it examines the Court’s methods, not merely its holdings; and it examines and compares each separate opinion, majority, concurrence and dissent, rather than simply focusing on the methods used in the majority opinions. The statute that she chooses for her study is the United States Bankruptcy Code. Since it went into effect on October 1, 1979, the Code has given rise to forty-

eight decisions by the Court beginning in 1982. In carrying out her analysis, Professor Gebbia-Pinetti examines each of the Supreme Court opinions at issue, including the concurring and the dissenting opinions.

***32** Professor Gebbia-Pinetti uses a two-step system for her analysis. First, she catalogs the various methods of statutory interpretation the Court uses in the forty-eight decisions, to determine which method or combination of methods of statutory interpretation the Court utilizes in each opinion. Second, she examines the results of this analysis, to look for patterns of statutory interpretation by the Supreme Court.

Professor Gebbia-Pinetti's purpose is to determine whether, for purely statutory interpretation, the Supreme Court's opinions reveal either (1) a consistent interpretive method or (2) consistent patterns of interpretation.⁵² Furthermore, what Professor Gebbia-Pinetti hopes to do, but leaves for another day, is to use an analysis of the unique characteristics of the Bankruptcy Code and overarching principles and theories of statutory interpretation to critique the Court's chosen methods for interpreting the Bankruptcy Code.⁵³ Additionally, this study fits into a larger context of debate, which has been raging for at least twenty years among judges, practitioners, and scholars of law and other disciplines (such as philosophy, linguistics, and political science), on interpretive models and interpretive methods for statutory analysis. The proper methods of statutory interpretation have stimulated substantial literature, and there are several schools of thought on the issue.⁵⁴

A. Results

Professor Gebbia-Pinetti finds that the Supreme Court generally decides bankruptcy cases based upon principles of statutory interpretation, rather than on substantive bankruptcy policy.⁵⁵ Although half of the forty-eight cases that she analyzes were decided without dissent, these opinions do not disclose a consistent interpretive method. At the same time, apart from constitutional questions and conflicts with other statutes, most of the separate opinions are founded on disputes as to interpretive method.⁵⁶ In particular, these disputes center on two canons of interpretation: the "plain meaning" canon and the "pre-Code" canon. The pre-Code canon suggests a discriminate use of the plain meaning canon for practices under the Bankruptcy Code which vary widely from established practices under the Bankruptcy Act.⁵⁷

***33** Professor Gebbia-Pinetti concludes that the Supreme Court Justices disagree among themselves as to the proper method for interpreting the Bankruptcy Code.⁵⁸ She finds Justice Scalia and Justice Thomas at one pole, favoring a textual approach as the primary method of statutory interpretation for the Bankruptcy Code. Conversely, she finds Justice Stevens at the other pole favoring a more flexible interpretative model. In between, she finds the other Justices, who tend to be less textual than Justices Thomas and Scalia, but not so flexible as Justice Stevens.⁵⁹ The method of interpretation utilized in a particular case turns, at least in part, on the identity of the Justice who writes the majority, or unanimous, opinion.

The complete absence of Supreme Court opinions deciding bankruptcy cases on policy grounds is surprising. Published bankruptcy opinions in the lower courts, including the courts of appeals, often rest on policy grounds. Furthermore, much of the bankruptcy scholarship in recent years is based on policy analysis and arguments. Professor Gebbia-Pinetti leaves this suggestive issue also for another day.

Additionally, the Supreme Court does not rely heavily on congressional intent in interpreting the Bankruptcy Code. For example, even in *Fidelity Financial Services, Inc. v. Fink*,⁶⁰ where the Supreme Court based a bankruptcy decision on the intent of Congress, the unanimous opinion authored by Justice Souter found the intent in the text, structure and history of the provision at issue, and not in legislative history.⁶¹ The Supreme Court is apparently very reluctant to use legislative history to interpret the Bankruptcy Code. Instead, the Court, especially since Justice Scalia joined, is more apt to consult text, structure and broad history rather than specific statements in the legislative history.

I believe this reluctance to base statutory interpretation on congressional legislative history is sometimes well placed. The quality of legislative history is uneven: sometimes it is written by congressional staffers after the fact, where part of the purpose is to correct legislative deficiencies, or even to adopt positions that Congress refused to take.

However, the legislative history of the Bankruptcy Code is one of the best examples of legislative history, and is routinely consulted by lower courts and scholars, as well as practicing attorneys, as a reasonably authoritative guide to interpreting the Bankruptcy Code.

***34 B. Scope of the Study**

Although her study provides valuable data concerning Bankruptcy Code interpretation, Professor Gebbia-Pinetti cautions that her study alone is not a comprehensive examination of every aspect of Bankruptcy Code interpretation. Other topics that merit examination include (i) whether the interpretive methods employed by the lower courts differ from the methods employed by the Supreme Court in bankruptcy cases, and, if so, how the constraints of precedent affect lower courts' interpretive methods; (ii) the extent to which the use of conflicting interpretive methods causes splits among the courts in bankruptcy cases; and (iii) the binding or persuasive effect of rationale and interpretive method.

Indeed, Professor Gebbia-Pinetti will chair a panel of scholars, practitioners, and judges who will explore these and other topics further in a program entitled "Everything You Always Wanted to Know About Interpreting the Bankruptcy Code," at the 2001 concurrent annual meeting of the American Bar Association Business Bankruptcy Committee and the National Conference of Bankruptcy Judges.

Building on the insightful analysis of Bankruptcy Code interpretation at the United States Supreme Court that Professor Gebbia-Pinetti has given, I outline here my own views of the differences in interpretive methods that appear in the lower courts. These comments go beyond the scope of Professor Gebbia-Pinetti's paper. However, her paper's excellent description of interpretive methods utilized by the Supreme Court makes it much easier to articulate these differences that appear at the lower court level.

1. Statutory Interpretation in the Lower Courts

In order to determine how lower courts interpret the Bankruptcy Code, we should look at the written opinions and other decisions of the lower courts. There are several important differences between judicial reasoning in

statutory construction cases by the Supreme Court and such reasoning by a lower court. These differences make the reasoning process at the Supreme Court different in important respects from that by the lower courts.

In my experience as a judge, the task of a lower court, in a statutory interpretation case, is to decide each case that comes before it on the facts of the individual case,⁶² according to the applicable *35 law as the court can discern it, based on appropriate methods of statutory interpretation. These methods include all of those used by the Supreme Court, although only some may be applied in a particular case, some are not utilized by the Supreme Court at all. The lower courts are, of course, obligated to follow the teachings of the Supreme Court. Yet, one of the most important results of Professor Gebbia-Pinetti's study shows a vast dichotomy exists between the Supreme Court's approach and that of the lower courts, and indeed, of commentators.

2. The Role of Precedent

Perhaps the most important difference between the Supreme Court and lower courts is that the Supreme Court is not bound by the precedents of any higher court. Indeed, the Supreme Court is also not bound by its own precedents. The general approach of the Supreme Court to precedent is therefore quite different from that of the lower courts. For the most part, the Supreme Court devotes its attention to its own precedents, and gives little consideration to the published opinions of lower courts.

However, the lower courts are frequently bound by precedents in making their decisions. The reasoning of a lower court must include a consideration of such binding precedents. Usually the binding precedents come from a higher court with appellate jurisdiction over the lower court making the decision. In addition, for at least some circuit courts, binding precedents include prior decisions of the same court.⁶³ In a published opinion, the reasoning of a lower court must take account of the relevant binding precedents, and show how the decision in the case at issue is consistent with them.

Non-binding published decisions of other courts also have precedential value in the lower courts. In a bankruptcy court, for example, the published opinions of other bankruptcy courts are entitled to deference, the published opinions of district courts are entitled to great deference, and the published opinions of courts of appeals of other circuits are entitled to very great deference. In contrast, such deference to an opinion of another court is almost unknown in the Supreme Court.

*36 Furthermore, a non-binding decision of a circuit court receives special consideration in a different circuit. A circuit court will not normally take a position contrary to that of another circuit without giving substantial consideration to whether its decision will create, or extend, a split of the circuits.

3. Practices Under Bankruptcy Act

One of the most important grounds for interpretation of the Bankruptcy Code in the Supreme Court is the practice under the Bankruptcy Act, which was repealed in 1978.⁶⁴ The Supreme Court's inconsistent treatment of practice under the Bankruptcy Act as a basis for interpreting the Code, in Professor Gebbia-Pinetti's view, may leave lawyers with insufficient guidance on this issue.⁶⁵ However, practices under the Bankruptcy Act are rarely important in the lower courts. The bankruptcy courts have handled some 15 million cases under the Code.

Published decisions under the Code fill more than 240 volumes of the West Bankruptcy Reporter.⁶⁶ The circuit courts and bankruptcy appellate panels have published thousands of opinions interpreting various provisions of the Code. Only an occasional reported opinion at the trial or intermediate appellate level considers pre-Code law, and only a rare opinion considers that law important in deciding a new case.

The Supreme Court turns to pre-Code practice in interpreting the Code only because, as pointed out *supra*, it refuses to be informed by the wealth of case law interpreting the Code at the lower court level. The Supreme Court should base its Bankruptcy Code interpretation on practice under the Code as reported in lower court published opinions, rather than on pre-Code practice under a quite different statute.

4. Functional Analysis

Professor Gebbia-Pinetti notes the lack of functional analysis in Supreme Court decisions interpreting the Bankruptcy Code.⁶⁷ There may be a good reason for the lack of functional analysis by the Supreme Court. Most of the Supreme Court Justices are entirely lacking in substantial bankruptcy practice experience. Their law clerks have come straight from law school and prior clerkships, and likewise lack bankruptcy practice experience. *37 Functional analysis of bankruptcy statutory provisions may be beyond the expertise of the Supreme Court.

C. What Difference Does Interpretive Method Make?

Many legal scholars think that a court's choice of an interpretive method in a particular case is quite important.⁶⁸ I disagree. .

1. Results of Varying Interpretive Methods

Scholars have charged that the Supreme Court's use of varying interpretive methods in Bankruptcy Code interpretation produces undesirable results. Professor Gebbia-Pinetti summarizes the criticisms:

[T]he Court's use of [varying] interpretive methods undermines predictability and stability, increases costs, ignores congressional intent, impairs bankruptcy law by preventing the Court from developing a coherent bankruptcy policy and jurisprudence, leaves the lower courts with inadequate guidance concerning how to interpret the Bankruptcy Code, and contributes to confusion and split decisions among the lower courts.⁶⁹

Indeed, one could posit the opposite view on most of these charges: that the method of reasoning adopted in a Supreme Court decision does not affect the outcome at all; that it does not affect the predictability or stability of the law; that it does not impair the development of bankruptcy policy and jurisprudence; and, that it does not lead to confusion or split decisions among the lower courts.⁷⁰ I leave the development of these arguments for another day.

One of these complaints is accurate. Where statutory interpretation is based on plain meaning, congressional intent is disregarded. This interpretation is premised on the view that Congress enacted the statute, not its intent.

If the statute and the intent diverge, the statutory language must govern. If Congress made a mistake, according to this view, then Congress, not the courts, should fix the error. This position, in my view, merits credence. In fact, I utilize this method quite often for deciding the easy cases that come to my court. However, these are not cases in which I would write an opinion for publication.

***38** However, the Supreme Court's utilization of a consistent method of interpreting the Bankruptcy Code might not give useful guidance to the lower courts. As explained in more detail [infra](#),⁷¹ a method of statutory interpretation adopted by the Supreme Court is not binding on lower courts. Thus, its impact is, at best, only persuasive.

My perspective is different than Professor Gebbia-Pinetti's. I believe that when a Supreme Court Justice signs onto an opinion, the Justice agrees with the result in the particular case, and with the rule of law on which it is based. The Justice may not agree that the reasoning in the opinion is the best way to explain the result, but likely the Justice agrees that the reasoning in the opinion is a suitable way to explain it. The Justice may take the view that, if she were writing the opinion herself, she might use a different interpretive method to arrive at the same result.

I believe some Supreme Court Justices agree with this view. Others, notably Justice Scalia and Justice Thomas, frequently do not. In the federal appellate courts generally, I believe that this view is often adopted. Indeed, an appellate judge may be charged with a lack of collegiality if the judge refuses to accede to this viewpoint.

An analogy may help illustrate my view. In the days of the Roman Empire it was said that all roads led to Rome. Thus whichever road one took, one arrived at the same place. "Rome" in my analogy includes both the result and the applicable rule for arriving at the result (the ratio decidendi). The method of statutory interpretation may be different, just as the road leading to Rome may be different. For many Justices in many Supreme Court cases, as well as for lower appellate court judges, I suggest that this analogy explains why they sign onto opinions that differ in interpretive method from what a Justice or judge might write herself.

An opinion by a trial judge, in contrast, picks only a single road to Rome, because the only judge involved in the opinion is the author. However, a different trial judge might write a different opinion based on a different interpretive method arriving at the same result. Nonetheless, the two judges would agree both on the outcome and on the rule of law on which the outcome is based.

This analogy leaves unanswered how a Justice or judge decides that "Rome" is the proper destination in the first place. This is a complex issue, and is beyond the scope of this comment. How a Justice or judge arrives at a result for a particular case is a very different question from how the judge explains and justifies it, which is what is found in a written opinion.

***39** Does the choice of interpretive method lead to a different result in any of the Supreme Court bankruptcy cases? The answer is not clear. Professor Gebbia-Pinetti shows that there are twenty cases out of forty-eight where the dissent argues that the majority has adopted the wrong interpretive method, and that the result should

be different.⁷² However, the majority may have arrived at the same result using a different interpretive method, even the one argued for in the dissent. Thus the evidence is inconclusive on this issue.

2. Binding Force of Interpretive Method

The methods of statutory interpretation utilized by the Supreme Court do not bind lower courts. Lower courts are bound by the holdings of a higher court. The holding in a particular case is the particular rule, or rules, of law which, when applied to the facts of the particular case, lead to its outcome. For example, in *Norwest Bank Worthington v. Ahlers*⁷³ the Supreme Court held that “future labor, management, or expertise” does not constitute new “value” sufficient to qualify for the possible exception or corollary to the absolute priority rule codified in Section 1129 (b).⁷⁴ In contrast, the Court declined to decide in *Ahlers* whether the new value rule itself, first articulated in *Case v. Los Angeles Lumber Products Co.*,⁷⁵ continued to be viable under the Bankruptcy Code.⁷⁶

The holding in *Ahlers* that labor, experience and expertise do not qualify as new value (known as the “sweat equity” rule) is binding on lower courts. However, the method of reasoning that the Court used to arrive at its holding is not binding on lower courts. While lower courts may find the method of reasoning persuasive, they may not.

Indeed, federal trial and appellate courts traditionally have used a wide variety of methods of reasoning to arrive at their conclusions. These methods include all those Professor Gebbia-Pinetti discusses in her article, and others as well.

Methods of statutory interpretation are widely debated, and vary from judge to judge and from time to time. Changes in the future composition of the Court will likely result in different views of statutory interpretation. In addition, as Professor Gebbia-Pinetti points out, the same Justice may use different methods of interpretation from case to case, with no explanation for choosing one method over another on a particular occasion.

*40 D. Statutory Adjudication vs. Constitutional Adjudication

Finally, I should say a word about the contrast between statutory adjudication and constitutional adjudication. One of the principal roles of the United States Supreme Court is to serve as guardian of the United States Constitution. The Court is the final step in the judicial review of the constitutionality of either federal or state law.

There is a striking difference between statutory adjudication and constitutional adjudication at the level of the Supreme Court. Constitutional principles are painted in broad language, such as “the privileges or immunities of citizens of the United States,”⁷⁷ “the equal protection of the laws,”⁷⁸ and “the freedom of speech, or the press.”⁷⁹ These principles are elaborated in case law, often with no implementing legislation. In contrast, even an unannotated version of the Bankruptcy Code runs 164 pages.

Constitutional adjudication provides much more room for disagreement among the Supreme Court Justices, because the text is so much shorter and unlimiting. For the same reason, the Justices are much more likely to disagree as to the application of a constitutional provision in a particular case, and dissents are much more likely.

For an example of constitutional adjudication, consider the Supreme Court's recent Eleventh Amendment opinions,⁸⁰ each decided by a five-to-four majority. The Eleventh Amendment seems to have a plain meaning. However, none of the recent Eleventh Amendment decisions, beginning with the Seminole Tribe⁸¹ case, is supportable based on a "plain meaning." At the same time, none of these recent opinions, whether majority or dissenting, even argues for a plain meaning interpretation of the amendment.

IV. Conclusions

The foregoing comments only begin to touch on the important insights in the papers presented at this symposium. Each of the papers is important and makes a substantial contribution to bankruptcy scholarship. My comments in this introduction begin the further development of these insights.

Finally, it is important to recognize the valuable contributions that have been made by the organizers of this symposium. *41 Dean Parham Williams and Professor Denis Binder, faculty advisor to the Chapman Law Review, deserve special credit for developing the programs that made this symposium possible. Professor Danny Bogart conceived the idea for this symposium, and put much hard work into bringing it to fruition. In addition, the dedicated editors and staff of the Chapman Law Review have worked hard to put together the symposium and this law review issue. Special recognition goes to the Editor-in-Chief, Michelle L. Knowles, for her outstanding work and leadership in attending to all of the details that made the symposium go smoothly.

Footnotes

^{a1} United States Bankruptcy Judge, Central District of California.

¹ The first bankruptcy law in England came during the reign of Henry the VIII in 1542. See [An Act Against Such Persons as do Make Bankrupts, 34 & 35 Hen. 8](#), Ch. 4 (1542) (Eng). See generally Charles Jordan Tabb, [The Historical Evolution of the Bankruptcy Discharge, 65 Am. Bankr. L.J. 325, 329 n.21 \(1991\)](#). A more commonly known statute was enacted in the reign of Elizabeth I. See [An Act Touching Orders for Bankrupts, 13 Eliz., ch. 7 \(1570\) \(Eng.\)](#).

² See Chilperic Edwards, [Hammurabi Code and the Sinaitic Legislation § 117 \(3d ed. 1921\)](#) (providing for the discharge of a debt after the wife, son or daughter of the debtor has worked for the creditor for

three years). The commentary to this translation provides extensive notes on the provisions relating to debt and distraint. *Id.* at 76-77.

3
— Deuteronomy 15:1-5.

4
— See, e.g., Samuel L. Bufford, [Bankruptcy Law in European Countries Emerging from Communism: The Special Legal and Economic Challenges](#), 70 *Am. Bankr. L.J.* 459, 463-65 (1996).

5
— Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, [11 U.S.C. §§ 101-1330 \(1999\)](#), and to the Federal Rules of [Bankruptcy Procedure, Rules 1001-9036](#).

6
— The Judicial Panel on Multidistrict Litigation has the power to transfer federal court cases involving one or more common questions of fact to a single judge. See [28 U.S.C. § 1407 \(1999\)](#). However, the Panel does not have the power to transfer state court cases. [In re Celotex Corp. “Technifoam” Prods. Liab. Litig.](#), 68 *F.R.D.* 502, 504 n.2 (J.P.M.L. 1975). Furthermore, such a transfer is for pretrial purposes only; a case must be returned to its original venue for trial, absent consent of the parties. See [Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach](#), 523 *U.S.* 26, 40 (1998).

7
— For example, the tobacco companies are presently trying to amend tort law and to fashion settlements with state and federal governments to avoid mass claims that drive individual companies into bankruptcy. In addition, handgun manufacturers are already turning to the bankruptcy courts to deal with claims that their products are unreasonably unsafe and might cause actionable harm to large numbers of people who have not yet been shot.

8
— See § 726(a)(4). While this section does not apply strictly in a chapter 11 reorganization, the priorities in chapter 11 cases tend to be treated similarly to chapter 7, because § 1129(a)(7)(A)(ii) requires that a creditor voting against a plan receive as much as that creditor would receive in a chapter liquidation.

9
— Professor David Epstein, a panelist at this conference, was the FCR in the [Piper Aircraft case. Epstein v. Official Comm. of Unsecured Creditors](#), 58 *F.3d* 1573, 1574 (11th Cir. 1995); see [In re Piper Aircraft Corp.](#), 162 *B.R.* 619 (Bankr. S.D. Fla. 1994).

[10](#) See, e.g., [In re Eagle-Picher Indus., Inc.](#), 203 B.R. 256, 280 (Bankr. S.D. Ohio 1996). See also [In re Joint E.& S. Dists. Asbestos Litig.](#), 878 F. Supp. 473, 572 (E.D.N.Y. 1995).

[11](#) In contrast, future claimants under the Bankruptcy Act were not entitled to participate in the benefits, because their claims were not “provable,” i.e., they could be liquidated or estimated with reasonable certainty. See § 57(d), 11 U.S.C. § 93(d) (repealed 1978) (the Bankruptcy Act). In 1978, Congress repealed the Bankruptcy Act, effective October 1, 1979.

[12](#) See Fredrick Tung, The [Future Claims Representative in Mass Tort Bankruptcy](#), 3 Chap. L. Rev. 43, 67.

[13](#) [Id. at 54](#). Actually, Professor Tung says that the future claimants will be the dominant creditor group. However, this appears to be somewhat of an overstatement, because in some cases the victims with manifest illness or injury will exceed those not yet injured or suffering. For example, in the A.H. Robins and the Dow Corning cases, the future claimants may be a smaller group than those already suffering, because the product causing injury had been removed from the marketplace.

[14](#) [Id.](#)

[15](#) [Id. at 52](#).

[16](#) [Id. at 53](#).

[17](#) [Id. at 59-67](#).

[18](#) [Id. at 64](#).

[19](#) [Id.](#)

20 Id. at 61.

21 Id. at 75.

22 See § 1129(b).

23 At his oral presentation, Professor Epstein reported he believed, in the Piper Aircraft case, he could not be crammed down, which gave him substantial negotiating power. See Epstein, *supra* n. 9.

24 See Tung, *supra* note 12, at 73.

25 Id. at 74.

26 Id. at 75.

27 Id. at 67.

28 Id. at 69.

29 Id.

30 Id. at 70.

[31](#) In Professor Tung's view, only this consideration can explain the fact that the judge in the Robins case chose an FCR who was very junior and had very little experience, in a case where the other players were very seasoned large case attorneys. *Id.*

[32](#) Professor Tung points to the selection of a junior, inexperienced lawyer as the FCR in the A.H. Robins case as evidence that the judge in a mass tort case has an investment in the outcome. The case was unusual, however. It was handled largely by a district judge, not the bankruptcy judge. Notably, an FCR is typically chosen by the United States Trustee, not by the judge.

[33](#) This figure is calculated from data contained in Ed Flynn, *Who is Filing Chapter 11?*, *Amer. Bankr. Inst. J.*, Feb. 1999, at 30.

[34](#) This practice follows the procedure applicable to the appointment of a chapter 11 trustee or an examiner. See [11 U.S.C. § 1104 \(1999\)](#); [Fed. R. Bankr. P. 2007.1](#). The appointment process was different in the A.H. Robins case, because it was an early mass torts case and was filed before the adoption of the United States Trustee program (except in certain pilot districts).

[35](#) Professor Zywicki is also writing a companion piece on credit cards and bankruptcy, which has not yet been published.

[36](#) Paul A. Samuelson & William D. Nordhaus, *Economics* 136 (15th ed. 1995).

[37](#) Lawrence Anthony Sullivan, *Handbook of the Law of Antitrust* 114 (1977).

[38](#) U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Mergers Guidelines* § 1.5 (1997), <www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html>. There are a number of other analyses that the Department of Justice and the FTC perform to determine the competitiveness of a market. *Id.*

39 Id.

40 Id.

41 Id.

42 The only information that I have been able to find is that the top 10 credit card issuers had a 75.5% share of total receivables, apparently at the middle of 1999. See Credit Cards, 1999 Near-Term Prosperity; Long-Term Threats to Income (visited March 9, 2000) <<http://www.smrresearch.com/cc99.htm>>.

43 The HHI index calculation for the 40% market share alone would be 1600 (40×40).

44 The HHI index calculation for each of the two 20% market shares would be 800 ($20^2 + 20^2$). The squares of the market shares for the others likely would be at least another 200, which would make the total HHI index calculation exceed 1000.

45 If 10 market participants each controls 10% of the market, the HHI index for each participant is 100, and the total is 1000 ($10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2 + 10^2$). If the market distribution is more widely dispersed to any extent, the total cannot reach 1000.

46 See Charles A. Docter, Impact of Credit Card Use on Consumer Bankruptcies, Am. Bankr. Inst. J., Feb. 1998, at 1, 42.

47 Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, The Fragile Middle Class: Americans in Debt (Yale University Press, forthcoming 2000); see generally Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America (1989) [hereinafter As We Forgive Our Debtors].

48 As We Forgive Our Debtors, *supra* note 47, at 160 n.8; 181-82.

49 *Id.* at 8, 196.

50 *Id.* at 8, 166-77.

51 Professor Zywicki does not appear to quarrel with this analysis. He argues this realization is a fundamental feature of credit card lending, and that it is one of the important reasons why credit card interest rates have remained sticky.

52 See Karen M. Gebbia-Pinetti, [Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions](#), 3 *Chap. L. Rev.* 173, 180. [hereinafter *Interpreting the Bankruptcy Code*]

53 *Id.*

54 See generally Karen M. Gebbia-Pinetti, [Statutory Interpretation, Democratic Legitimacy and Legal-System Values](#), 21 *Seton Hall Legis. J.* 233, 234 & nn.1-2 (1997).

55 See Gebbia-Pinetti, *supra* note 52 at 97.

56 *Id.*

57 See Gebbia-Pinetti, at 274.

58 Id. at 294.

59 Id.

60 [522 U.S. 211 \(1998\)](#).

61 [Id. at 221](#).

62 Making findings of fact is another role of the trial court that is absent at the Supreme Court, and in any other appellate court. While fact finding is a very important task of the trial court, my comments focus only on the application of the law to the facts, a task which both the trial courts and the appellate courts perform.

63 In the Ninth Circuit, for example, a rule prohibits a three-judge panel from overruling prior precedent in the Circuit. Only an en banc panel has the authority to overrule such a prior decision. See [Fed. R. App. P. 35\(a\)\(1\)](#): (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions”). The Ninth Circuit Court rule regarding rehearings en banc (R. 35-1) states:

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc.

64 [Pub. L. No. 95-598, Title IV, § 401\(a\)](#), 92 Stat. 2682 (1978) (the repealer provided: “the Bankruptcy Act [Act July 1, 1848, c.541, 30 Stat. 544, as amended] is repealed”).

65 See Gebbia-Pinetti, *supra* note 52, at 297.

66 The publication of West Bankruptcy Reporter coincided with the Bankruptcy Code’s taking effect. The first several volumes include some opinions in cases filed under the Act. These soon gave way to cases filed almost exclusively under the Code.

67 See Gebbia-Pinetti, *supra* note 52, at 274.

68 Professor Gebbia-Pinetti appears to agree with the view of these other scholars. However this point is not central to her paper.

69 Gebbia-Pinetti, *supra* note 52, at 176-77, and sources cited therein. While Professor Gebbia-Pinetti does not tell us whether she agrees with these charges, they provide the context for her study.

70 There clearly is one additional context where Professor Gebbia-Pinetti's results are very important. If a lawyer has a case pending before the United States Supreme Court, the article provides very useful information for choosing which arguments to make to the Court.

71 See text at notes p. 39, *infra*.

72 See Gebbia-Pinetti, *supra* note 52, at 273.

73 [485 U.S. 197 \(1988\)](#).

74 [Id. at 203](#).

75 [308 U.S. 106 \(1939\)](#).

76 See [Ahlers, 485 U.S. at 205, 206](#).

77 See [U.S. Const. amend. XIV, § 1](#).

78 Id.

79 Id. amend. I.

80 See [Kimel v. Florida Bd. of Regents](#), ___ U.S. ___, 120 S. Ct. 631 (2000); [Alden v. Maine](#), 527 U.S. 706 (1999); [College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.](#), 527 U.S. 666 (1999); [Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank](#), 527 U.S. 627 (1999); [Seminole Tribe of Fla. v. Florida](#), 517 U.S. 44 (1996).

81 [517 U.S. 44 \(1996\)](#).

3 CHAPLR 21

End of Document© 2013 Thomson Reuters. No claim to original U.S. Government Works.

The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry

*Frederick Tung**

Contents

I. Introduction

II. The Bankruptcy Model of Mass Tort Resolution

A. Bankruptcy Reorganization

B. The Mass Tort Debtor

C. An Uneasy Fit

1. Future Claimants' Participation

2. Other Problems

D. Conceptual Bankruptcy Prescription

E. Play in the Joints

III. The Future Claims Representative as Agent

A. Seeking an Agent

1. Underinclusiveness of the FCR Mechanism

2. Appointment of the FCR and the Commitment to Reorganize

B. Reducing Agency Costs

C. The Dominant Role of the Judge

1. What Does the Judge Maximize?

2. Expressing the Judge's Preferences

D. Legal Culture and Group Norms

IV. Tentative Conclusions and Further Inquiries

I. Introduction

Mass torts have become moved center stage in the courts, the academy, and the popular press. The plight of mass tort victims—asbestos victims, Dalkon shield users, breast implant recipients, among others—has become standard fare in the media, and courts and commentators have struggled for several decades attempting to craft just and workable solutions/resolutions of mass tort liabilities. The challenge is to save the business, restructuring its debts, while providing fair treatment to future claimants and achieving a final resolution of their rights against the business.

A "mass tort" problem arises when a company's product has been mass produced and widely distributed before the nature or extent of its harm-generating potential becomes evident. By the time the potential for harm is realized, large numbers of individuals have already been placed at risk through contact or exposure to the product. Many of these at-risk individuals will ultimately will suffer harm from this contact with the product and will look to the manufacturer for redress.¹ The magnitude of the potential liability may cause the manufacturer's demise.

Bankruptcy reorganization has emerged as one legal avenue to for resolving mass tort liability.² The challenge is to save the business, by restructuring its debts,

while providing fair treatment to future tort victims—"future claimants"—and achieving a final resolution of their rights against the business.³ Bankruptcy reorganization results in financial and perhaps economic restructuring of the debtor's business. Parties in interest negotiate over the fate of the business and the distribution of value among claimants.

At the center of this bankruptcy approach to mass tort resolution is the idea of the future claims representative (the "FCR"), a court-appointed agent named to represent then-nameless, faceless future victims of claimed tortious acts already committed by the corporate debtor. The FCR's mandate is to negotiate on behalf of future claimants, asserting their rights as creditors to their pro rata share of value in the reorganized company. This representational device makes possible the crafting of a comprehensive settlement in bankruptcy, one that includes future claimants and disposes of their rights, along with those of other claimants. The FCR device makes possible a sort of constructive participation by future claimants. They claimants, so that they may be bound to any resulting settlement.

While other aspects of the bankruptcy model have been vetted,⁴ this the FCR device has not received the careful scrutiny it deserves. The FCR is in essence an agent without a principal. She is not answerable to her ostensible beneficiaries. Indeed, the absence of the principal is the very circumstance requiring the invention of the device. Given the pressure on bankruptcy claimants to settle, to come to terms so that the debtor may reorganize, standard agency theory might and insights from social psychology may lead us to view the FCR device with some skepticism. One might understandably question whether this mechanism can be expected truly to provide zealous representation for future claimants, who do not choose and cannot monitor their agent. Moreover, their losses are not "vivid" but abstract and prospective,⁵ while the losses of competing claimants are real. While there all agency relationships entail costs.⁶ But the FCR mechanism is particularly problematic insofar as the principals may have enormous individual and collective stakes in the subject of the agency but a complete inability to assure the faithfulness of their agent.

The outcomes in several mass tort bankruptcies have received mixed reviews or worse with respect to future claimants' treatment and their ultimate recoveries.⁷ Assessing outcomes is no doubt a complicated affair, and multiple affair. Multiple plausible explanations exist for both negotiated and litigated decisions outcomes that in retrospect appear to have prejudiced future claimants' interests. This context suggests that an examination of the FCR mechanism is therefore timely.

This Article takes a preliminary step in the investigation. The bankruptcy model of mass tort resolution is still something of a moving target, and the handful of mass tort bankruptcies that have occurred provide only a small data set. In this Article, I sketch the contours of the agency problem. I describe the bankruptcy model, explaining how, where and why the agent might be tempted to shirk. I

raise a cautionary flag, suggesting lines of inquiry, hoping to sharpen the focus on issues of concern.

In Part II, I describe the bankruptcy model of mass tort resolution and the FCR's central role. In Part III, I provide an agency critique of the FCR mechanism. I identify influences that might distract the FCR from the goal of maximizing future claimants' recoveries in bankruptcy. In Part IV, I suggest further avenues of inquiry and conclude.

II. The Bankruptcy Model of Mass Tort Resolution

Conceptually, the bankruptcy model for approach to resolution of mass torts is conceptually no different from bankruptcy reorganization in other contexts. It comports with the general model of bankruptcy reorganization. Creditors negotiate with the debtor over the remaking of the firm, with a confirmed plan detailing the firm. A court-approved plan of reorganization details the structure of the reorganized entity and each creditor's share in the value of that entity. However, the contingent nature of future claimants' rights, their temporal dispersion, and inability to represent themselves make the standard bankruptcy model an uneasy fit. Future claimants cannot participate directly in the multilateral negotiation central to the Chapter 11 process. They cannot strategize and bluster in the hope of attaining a larger share of the fixed pie. They cannot claim their distributions upon plan confirmation, as do other creditors. To address these discontinuities, creative lawyers and judges devised mechanisms to allow the mass tort problem to be massaged into the bankruptcy mold.

However, the fit is not perfect. The mechanisms that enable future claimants' nominal participation in Chapter 11 have a fair bit of play in them. Whether that play works to the benefit or detriment of future claimants depends critically on the quality and zealousness of their representation. This Part describes the bankruptcy model, its mechanisms for inclusion of future claims, and the FCR's critical role.

A. *Bankruptcy Reorganization*

In bankruptcy reorganization, negotiation among the debtor and its creditors decides the fate of the business and the division of value among claimants. The product that emerges from this negotiation is a plan of reorganization, the blueprint for the debtor's restructuring. The plan adjusts the rights and obligations among the debtor and its creditors and equity holders. It may specify reduction of the interest rate or extension of the maturity of certain debt obligations. It may call for payment of some debts at a discount from their prepetition face amount. It may specify reduction of the interest rate or extension of the maturity of certain debt obligations. It may call for satisfaction of other debt obligations with the issuance of new equity by the reorganized entity. The plan may also specify operational changes. For instance, the debtor may be required to

sell unprofitable lines of business or consolidate certain operations. The ultimate goal of this financial and operational restructuring is to assure that the business that emerges from bankruptcy will be economically viable. Upon finding that a proposed plan meets all the requirements of the Bankruptcy Code, a court will confirm the plan, which then binds the debtor and all claimants.⁸

Because of the sheer number of claimants that may be involved in a reorganization and the relative inability of small claimants to participate in a cost-effective manner, unsecured creditors ordinarily negotiate through official representatives in the large cases.⁹ The Bankruptcy Code¹⁰ provides for the appointment of an official committee of Code contains few substantive requirements for any unsecured creditors,¹¹ which ordinarily will comprise the debtor's seven largest unsecured creditors willing to serve.¹² The committee is entitled to retain attorneys and other professionals,¹³ who are compensated—as are the debtor's professionals—from the bankruptcy estate.¹⁴ The Code further contemplates that additional committees may be fashioned, to the extent necessary to assure adequate representation of creditors or equity holders.¹⁵ Official committees and their counsel generally play significant roles in bankruptcy reorganization.

The Bankruptcy Code contains few substantive requirements for any reorganization plan.¹⁶ Instead, it provides a framework for multilateral bargaining. Negotiation over the division of value among claimants occurs, however, in the shadow of two fundamental distributional norms: absolute priority and equal treatment. Under the rule of absolute priority, a class of unsecured claims or interests is not entitled to any bankruptcy distribution unless and until each senior class either consents or is paid in full.¹⁷ The rule of equal treatment requires that similarly situated creditors receive equality of treatment: "Equality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property."¹⁸ These distributional norms, however, provide only the starting point for negotiation. The parties are free to—and generally do—agree to diverge from these norms. What any party ultimately receives in under a plan reorganization depends to a great extent on its negotiating skill and its ability to use its leverage under the Chapter 11 framework.

Creditor leverage in negotiation derives in large measure from creditor consent requirements for plan confirmation.¹⁹ Creditors vote by class. Their claims are classified under the plan, with only "substantially similar" claims allowed in the same class.²⁰ Classes whose rights are impaired under the plan are entitled to vote.²¹ Ordinarily, all impaired classes must approve a plan in order for it to be confirmed.²² If an impaired class of unsecured creditors disapproves a plan, then the plan may be confirmed

only if no class junior to that objecting class receives any distribution in bankruptcy.²³ In other words, creditor classes are entitled to insist on absolute priority in the bankruptcy distribution.

While this substantive rule of absolute priority tends to favor senior creditors, other aspects of the negotiation framework favor junior claimants. The debtor's management typically controls the negotiating agenda, since it initially enjoys "exclusivity"—the exclusive privilege of proposing a plan to the court.²⁴ In large public company reorganizations, the debtor will ordinarily also retain exclusivity for the duration of the case.²⁵ Because the debtor's management typically aligns with equity holders or junior creditors,²⁶ management will often use its agenda control to favor junior claimants, attempting to extract value from senior classes in favor of junior classes. Senior classes can either hold out—insisting on a better proposal from the debtor—or attempt to wrest control of the case from the debtor while threatening—or actually attempting—to have the debtor's exclusivity terminated in order to propose their own plans.²⁷ Or they may move for the debtor's liquidation or dismissal of the case.²⁸

The doomsday scenario for all parties—assuming there is going concern surplus—occurs when deadlock over the division of the surplus value results in the demise of the business and the debtor's piecemeal liquidation. This possibility of mutually assured destruction always lurks in the background, and collective avoidance of this worst case scenario is a primary goal of reorganization.²⁹ But the splitting of the fixed—and perhaps shrinking—pie depends to a great extent on each party's negotiating leverage, which turns in no small part on that party's willingness to threaten and perhaps force a piecemeal liquidation if its demands are not met.³⁰ As Professors Elizabeth Warren and Jay Westbrook have so aptly noted: "We can think of a Chapter 11 negotiation as taking place in a conference room with the debtor sitting in the window threatening to jump . . . while the creditors threaten to push."³¹

As a practical matter, reorganization of large firms is typically consensual. All impaired classes ultimately vote in favor of a plan proposed by the debtor.³² Senior classes agree to forego strict absolute priority, giving up value to junior claimants in order to achieve consensus.³³

This result, however, typically does not occur without significant skirmishing among the debtor and creditor factions.

B. The Mass Tort Debtor

Unlike most firms in bankruptcy, the mass tort debtor does not necessarily suffer current cash flow problems. It may be able to meet its current expenses.³⁴ However, it has a different problem.

Modern manufacturing and distribution enable widespread sale and use of a product long before its harm-generating potential becomes evident to the public.³⁵ The harm involved may also have a "long tail"—that is, the harm may not manifest for years or even decades after sale of the product to end users. The latency period for asbestos-related disease, for example, may run as long as forty years.³⁶ And the liability will not all mature at once, but progressively over time. In addition, the severity of the individual harms that ultimately manifest will vary depending on individual circumstances. While it is impossible to pinpoint how much time or how much liability, it becomes clear at a certain point that the aggregate liability will eventually will be staggering, and the manufacturer's survival is will be in doubt. This staggering liability, along with the sheer number of future victims and the temporal dispersion and varying severity of their future harms, are the hallmarks of the mass tort case.³⁷ These features make difficult the structuring of any final resolution of this future claims liability.

But without some comprehensive resolution, the firm faces a slow death, as future liabilities mature over time, punctuated by the firm's operational collapse.³⁸ As the cloud of future liability becomes darker and darker, financing becomes more and more difficult to obtain. Doubts about the continuing viability of the business grow. Customers and suppliers defect. Financing becomes be more and more difficult to obtain. The business gradually grinds to a halt.³⁹

Rather than wait for this slow death to overtake the business, the firm actively seeks a global solution to the overhanging future liabilities. Bankruptcy is an attractive option, provided that future claimants' rights may be adjudicated in bankruptcy. Asbestos, Dalkon shields, and silicone breast implants⁴⁰—among others—have generated long-tail tort liability sufficient to force their manufacturers into bankruptcy.

C. *An Uneasy Fit*

Future claims in mass tort cases present conceptual and practical problems for the bankruptcy process. Conceptually, future claims are meant to be treated just like other unsecured claims against the debtor in bankruptcy.⁴¹ They are meant to receive some distribution in bankruptcy in final settlement of their rights against the reorganizing firm. However, future claims do not easily fit into the multiparty bargaining regime for corporate reorganization.

I. Future Claimants' Participation

The first and most critical problem is the inability of future claimants to participate and protect their interests in the bankruptcy proceeding. Because their injuries have not manifested by the time of bankruptcy, future claimants may be impossible to identify or even describe except in general terms.⁴² Some may not even have been born at the time of the bankruptcy filing. Even identified, many may not come forward to participate in a proceeding whose potential effect on them is remote. It may be difficult to convince a potential future tort victim to invest resources today in a proceeding that will affect her, if ever, only years into the future.

Whether any type of notice would be meaningful in this situation is questionable.⁴³ If only a remote possibility of future injury exists for any given individual, then even personal notice of the bankruptcy may not be sufficient to satisfy constitutional due process requirements. The Supreme Court has noted in the class action context:

Many persons . . . may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out. . . . [W]e recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.⁴⁴

As a practical matter, then, the future claimant may have had no opportunity to assert her rights in bankruptcy. Foreclosing the rights of a creditor under these circumstances would raise serious due process concerns.

Providing due process—including adequate representation—for future claimants, however, may be critical to all parties with a stake in reorganization. From future claimants' perspective, as with other creditors, their rights and opportunities for recovery may be affected by the proceeding. In addition, future claimants as a group also have a special interest in the long-term viability of the business. Given the staggering amount of aggregate future claims liability that drives the debtor into bankruptcy, future claimants will likely be the dominant creditor group—at least in terms of their share of the debtor's overall liabilities. They may therefore be entitled to the lion's share of value in the reorganized debtor. They

may have a legitimate claim to majority ownership of the reorganized firm.⁴⁵ Future claimants as a group will therefore be vitally interested in the viability of the reorganized entity. They will be concerned that the operational and financial restructuring meant to occur in bankruptcy will be successful.

Other parties in interest also have a stake in assuring that due process is accorded to future claimants. A failure of due process would preclude the bankruptcy from affecting future claimants' legal rights. That of course would frustrate the primary purpose of the bankruptcy filing—to achieve a comprehensive and final settlement of all future claims liability.

2. *Other Problems*

Even assuming that due process protections for future claimants could be engineered, future claims raise other problems for bankruptcy reorganization. Future claims liability is by definition contingent. Its temporal dispersion makes its aggregate amount difficult to quantify in advance. Therefore, it is difficult to determine what future claimants' proportionate share of the reorganized debtor's value should be. Even if this aggregate figure could reliably be determined, the subsequent delivery of individual compensation presents problems. How can individual bankruptcy distributions be made to unknowns whose respective who will suffer injuries that will individually manifest for decades into the future? How will each future claim be liquidated when it matures? Once liquidated, where shall the future claimant—now injured—turn to collect her promised compensation?

D. *Conceptual Bankruptcy Prescription*

By fits and starts, lawyers and courts improvised solutions to these issues as they arose. Today, we can speak of a "traditional" approach.⁴⁶ To borrow Peter Schuck's phrase, an "institutional evolution" has occurred in the bankruptcy model of mass tort management.⁴⁷ To enable future claimants to participate in the plan negotiation process and other aspects of the bankruptcy proceeding, a special legal representative for future claimants—the FCR—is appointed.⁴⁸ Complex estimation proceedings are conducted in order to value future claims, thereby fixing the manufacturer's aggregate liability and ascertaining future claimants' collective share of value in the reorganized debtor.⁴⁹ That share of value is paid to future claimants in trust. A trust is created to hold and husband the assets set aside for future claimants.⁵⁰ A claims resolution facility is structured to streamline claims liquidation and disburse payments as future claims mature.⁵¹ A "channeling injunction" enjoins future claimants from

pursuing the reorganized debtor or any successor to the debtor's business or assets. Future claims are instead channeled to the designated payment trust, and the going concern is insulated from postbankruptcy suit by future claimants.⁵²

These improvisations received limited after-the-fact approval by Congress in 1994 with its adoption of the so-called Manville Amendments to the Bankruptcy Code,⁵³ named after the case that pioneered the basic structure of the traditional approach. With the Manville Amendments, Congress affirmed the practice of enjoining future claimants' pursuit of the reorganized debtor or certain third parties after plan confirmation, provided that certain provisions had been made for future claimants in the case—for example, appointment of a FCR⁵⁴ and establishment of a payment trust.⁵⁵ This Congressional blessing was specifically limited to asbestos cases.⁵⁶

More recently, the National Bankruptcy Review Commission has recommended legislation adopting a similar approach, which would apply not only to asbestos cases but would be available in all mass future claims liability situations.⁵⁷

E. Play in the Joints

This now-traditional approach to mass tort reorganization seems both elegant and straightforward conceptually. Ingenious devices are employed to bring future claimants into the bankruptcy process, enabling vindication of their rights as creditors while saving the business for the benefit of all parties in interest. Hidden in the details, however, are numerous issues affecting the fortunes of future claimants and others. There is play in the joints of this mass tort reorganization process. Whether future claimants or other competing claimants benefit from that play Quite of bit of slack lies buried in the system. How much of that slack gets taken up for the benefit or detriment of future claimants or other parties will depend in large partmeasure on the negotiating skills of their respective agents.

For instance, the process of estimating aggregate future claims liability is critical to determining the entitlement of future claimants—and other creditors—to their pro rata share of the value of the reorganized debtor. This process is basically a battle among competing experts, turning largely on statistical analysis based on various assumptions. If the assumptions are wrong, future claimants may suffer.⁵⁸ The Manville Trust ran out of assets after less than two years in operation and had to be restructured over six years of litigation.⁵⁹ Originally intended to pay all future claimants in full,⁶⁰ the restructured trust will pay only pro rata amounts, with an initial pro rata payment of 10%.⁶¹ During the course of Manville's bankruptcy, the estimated total number of claims was revised upward several times. By

the time of plan confirmation, the funding of the trust was based on an assumption of 100,000 claims at a present value of \$25,000 each.⁶² However, "[c]ircumstances quickly outstripped projections concerning the number of claims, the rate at which they were filed and their average value."⁶³

Given the uneasy mix of science and law, the range of expert estimates presented during the claim estimation process may be fairly broad. In *A.H. Robins*, five experts gave estimates of aggregate unliquidated Dalkon Shield claims liability ranging from \$800 million to \$7 billion,⁶⁴ a difference of 875% between the low and high estimates.

Now, the claim estimation mechanism in bankruptcy is not unique to mass tort cases. Bankruptcy courts resort to claim estimation whenever the ordinary course liquidation of a contingent or unliquidated claim would unduly delay administration of the case.⁶⁵ However, several aspects of mass tort cases make estimation especially tricky. Given the potential magnitude of the liability, the outcome may determine the proportionate shares of ownership of the reorganized debtor.⁶⁶ In addition, the number of individual claims and their temporal dispersion make estimation fairly speculative. In the face of these daunting factors, the court in *Dow Corning* basically refused to take on the task or even to establish estimation procedures.⁶⁷ Instead, the court left the entire fair distribution issue for the parties to negotiate.⁶⁸ Given this context, zealous representation and expert advice therefore seem imperative on all sides in order to assure that estimation—whether court-conducted or informally negotiated—does not work to the prejudice of particular claimants.⁶⁹

The structuring of a payment mechanism—a claims resolution facility and payment trust—is also no easy matter.⁷⁰ Different structures may tend to favor some interests over others. For example, at one point in the *Robins* bankruptcy, it was proposed that any money left in the Dalkon Shield claimants' trust after all claims had been paid would revert to reorganized *Robins*.⁷¹ That arrangement, of course, would have given the company incentive to push for a claim resolution structure and administration that would minimize payments to tort victims.⁷²

Some structures may favor early maturing future claims over later maturing ones or vice versa. There may be pressure to "lowball" early claims in order to preserve enough assets to pay later claims. While distributing assets fairly among future claimants is certainly a laudable goal, worthy end, there may be other motivations at work as well. For example, if the claim estimation process in a given case were controversial and the court's ultimate estimate of aggregate mass tort liability debatable, parties in interest or the court might care about legitimating the outcome

after the fact. One way to do that is to make sure the trust still has assets on the day the last future claim has been paid off.⁷³ If this happens, then arguably the court's estimate was "correct" and the bankruptcy process was fair to future claimants. This scenario is not merely hypothetical. The *A.H. Robins* court specifically retained postconfirmation jurisdiction to supervise the Dalkon Shield Claimants' Trust in order to "assure the accuracy of the Court's estimate."⁷⁴

Because of the play in the joints of the traditional model for mass tort bankruptcy, the FCR's role is critical. The quality and zeal of her representation determine the likelihood and amount of future claimants' recoveries. As important, because of the aggregate amount of claims she represents, she wields a heavy club. Given the dollar value of their claims in the mass tort context, future claimants are likely to be a major—and perhaps dominant—creditor group.⁷⁵ The FCR is potentially a major voice in the reorganization process, with potential leverage either to assure future claimants' future compensation or to scuttle a deal not to her liking. This critical role requires a careful look at the terms of the FCR's agency.

III. The Future Claims Representative as Agent

The FCR device enables future claimants to participate in mass tort reorganization, asserting their rights as creditors through their representative. Bankruptcy's binding effect on future claimants depends on this constructive participation. However, severe agency problems exist with the FCR mechanism. The fundamental—and unavoidable problem is that the purported principals play no part in choosing or monitoring their agent or even in deciding whether to retain one at all. Instead, other parties in interest—the debtor and other creditors—initiate the process, and the judge decides whether and whom to appoint,⁷⁶ as well as the terms of the agency. All these actors have interests that will conflict with those of future claimants.

Ultimately, the FCR mechanism may not assure zealous representation of future claimants' interests. The appointment process, judicial oversight of the FCR, and group pressure may discourage a FCR's zealous pursuit of future claimants' interests. The FCR has principals only as a conceptual matter. The terms and quality of the FCR's representation are not subject to oversight by her ostensible "clients." A significant potential exists, therefore, for divergence between the respective interests of principal and agent.

This Part first describes standard agency problems with the FCR device. It then discusses an institutional context that may inhibit the FCR's zealous advocacy for future claimants. In particular, the influence of the judge, the other lawyers involved in the mass tort case, appointment process, judicial oversight of the FCR, and the culture of consensual reorganization may

causetogether discourage a FCR's zealous pursuit of the FCR to compromise future claimants' interests.

A. *Seeking an Agent*

Before establishing a principal-agent arrangement, the principal must first decide whether to rely on an agent at all. An agent's interests will never perfectly coincide with those of her principal. The agent will always have some incentive either to shirk or to pursue her own interests instead of those of her principal. Despite this inevitable divergence of interests, relying on agents still makes sense in many contexts.⁷⁷ A principal will rely on retain an agent as long as the costs of doing so are less than the costs to the principal of acting on her own behalf. These latter costs include the principal's opportunity costs and the costs of developing any specialized skill or expertise she may need to accomplish her end. For example, a client may seek out legal representation even knowing that no attorney will advocate her position as zealously as she herself would herself would. It will typically be cheaper for the client to buy the lawyer's expertise—even discounted for the imperfections of the agency—than for the client to develop the skill set necessary to represent herself effectively.⁷⁸

Future claimants, of course, typically have little choice in this regard. They do not initiate appointment of a FCR. They may not even know of their stake in the bankruptcy. Even with full information concerning her risk of future harm and the possibility that the bankruptcy proceeding will affect her rights, a future claimant may rationally choose not to participate, either personally or through an agent. She runs only a *risk* of future harm, while the costs of her participation would be a certainty.⁷⁹ The expected value of participating would likely be negative.⁸⁰

The Unfortunately, the appointment of the FCR will typically occur at the instigation *not* of any ostensible principal, but at the behest of the debtor and other represented parties. Their purpose is to improve their own returns in bankruptcy by arranging a comprehensive settlement of future claims liability. This suggests the result-oriented nature of the FCR mechanism. It *is* a device to protect the rights represent the interests of future claimants, but not in all bankruptcies, and not even in all mass tort bankruptcies, but only in those cases in which *other* parties have an interest in securing representation for future claimants. The FCR's agency is an atypical one in this respect. Not only is she *not* selected by her ostensible principals, but the principals do not seek out the agency relationship. The principals have no say in the retention of the agent at all. Instead, appointment occurs at the behest of parties that *are already* represented in the case.⁸¹

This prompts several observations.

1. Underinclusiveness of the FCR Mechanism

As a group, future claimants are generally better off having their rights recognized and settled in bankruptcy. Absent a comprehensive settlement, the business would likely fail eventually,⁸² and future claimants with late-maturing claims would have no avenue of recovery when their respective claims matured.⁸³ In this respect, the FCR mechanism benefits the group of future claimants by overcoming a collective action problem among them,⁸⁴ much like the class action mechanism.⁸⁵

However, because future claimants cannot ordinarily initiate appointment of a FCR, they must rely on other parties to do it. And those other parties will have interests opposed to those of future claimants. The impetus to recognizing and settling future claimants' rights is not simply some abstract desire to do justice or treat future tort victims fairly. Instead, it derives from the recognition by other parties in interest that they have something to gain from resolving future claims liability in bankruptcy, and that appointment of a FCR is necessary to that end. In particular, parties decide that a reorganization of the business will maximize returns to them, provided future claims liability can be resolved.⁸⁶ And the parties conclude that only with representation may future claimants' rights be affected in bankruptcy.

Presumably in many cases whereIf the debtor's business were to be liquidated instead, there would typically be no incentive for other parties in interest to include future claims in the bankruptcy distribution, and therefore no incentive to provide for their representation. In these cases, no FCR is appointed, and future claims arewill be ignored in the bankruptcy. But if future claimants are truly creditors with rights cognizable in bankruptcy, then they deserve equal treatment with other unsecured creditors, whether the debtor is liquidating or reorganizing.⁸⁷ Representation may be critical to assuring equal treatment. But future claimants will not always be represented.

In *Locks v. U.S. Trustee*,⁸⁸ Gene Locks, a lawyer for asbestos claimants, attempted to have himself appointed as the FCR, a move opposed by the debtor and creditors' committee. The committee represented prepetition asbestos claimants—those whose disease had already manifested.⁸⁹ The debtor was liquidating, and, since there would be no business left to save from overhanging future claims liability, the court was unwilling to recognize future

claimants as creditors, citing among other reasons the administrative costs of maintaining a facility to pay future claims and the minimal dividend they would receive. Future claims received no distribution.⁹⁰

In the *Piper Aircraft* case, future claimants were lucky. An FCR was appointed at the behest of a prospective acquirer of the debtor's business.⁹¹ The debtor and creditors' committee had agreed that the business should be sold, but it seemed unlikely that a buyer could be found unless future products liabilities of the extant fleet were resolved in the bankruptcy and successor liability risks eliminated. Formal representation of future claimants would be necessary to bind them to any plan.⁹² Later in the case, however, the debtor and committee decided that a buyer *could* be found without addressing future claims liability.⁹³ But by that point, the FCR had already been appointed, and there was no way to get rid of him! Future claimants would have to be accounted for in the bankruptcy distribution.⁹⁴

Even in reorganization, the judge may refuse to appoint an FCR. In *Dow Corning*, for example, the future claimants were women with allegedly defective breast implants manufactured by the debtor. Alan B. Morrison, a noted public interest lawyer, tried to get himself appointed as their FCR. His application was opposed by the official tort claimants' committee, which officially represented all women with defective implants, regardless of whether they had manifested health problems.⁹⁵ The judge rejected the application.⁹⁶ The judge agreed with the tort claimants' committee that all claimants were capable of coming forward and representing their own interests, despite the fact that some potential claimants had not manifested any injury from the implants.⁹⁷

As an institution for the representation and protection of future claimants, the FCR device is underinclusive. Its use suggests not so much a concern for otherwise unrepresented claimants, but instead a need to provide due process cover in order to bind future claimants to a reorganization plan.

2. *Appointment of the FCR and the Commitment to Reorganize*

Once application has been made for appointment of the FCR, then it is up to the judge to decide whether to appoint. Presumably, the judge will favor appointment if she agrees with the assessments of the moving parties concerning the promise of reorganization and, to that end, the necessity of resolving future claims liability.⁹⁸

A consequence of this initial screening process by parties in interest and the court is that they have all become invested in the prospect of a successful reorganization. The decision to appoint an FCR is an important milestone in committing to reorganization.⁹⁹ The court and parties in interest effectively commit to the view that the debtor's business should be saved, and that future claimants are entitled to a share of value in the reorganized entity. And tThese commitments are more or less irrevocable. The FCR's appointment implicitly recognizes future claimants' rights in the case, and once appointed, the FCR cannot be decommissioned. The court and parties in interest commit to including future claims in the bankruptcy distribution, as well to the complex—and expensive—mechanisms necessary for estimation, liquidation and payment of those future claims. All of this overhead, along with the costs of having an FCR at all, might be difficult to justify if no going concern surplus were in the offing—that is, if the debtor's business were ultimately liquidated.¹⁰⁰

This escalating commitment to reorganize affects the entire course and conduct of the bankruptcy case. While a successful reorganization is certainly a desirable outcome, *how* that outcome is achieved also matters. This commitment to reorganize affects the judge, the FCR, and other parties in interest in ways that may be inimical to future claimants' interests. While all parties stand to benefit from a successful reorganization, future claimants' inability to select or monitor their agent disadvantages them in terms of the ultimate division of value in reorganization.

With the power to decide whether and whom to appoint, the judge will wish to select a "safe" FCR, one who subscribes to the common goal of reorganization. The FCR, the judge, and other parties in interest will understand this role for the FCR, and their respective expectations of the FCR's conduct will be affected accordingly. The FCR's latitude to champion future claimants' cause may be circumscribed. She is not negotiating on a clean slate, as she would be if her appointment did not depend on this collective precommitment to reorganization.

The FCR may face pressure to compromise future claimants' interests in subtle ways. Bankruptcy reorganization facilitates collective action among claimants in order to preserve the debtor's going concern surplus, and the legal culture in large corporate reorganization is one that ultimately values consensual resolution. However, the division of the going concern surplus among claimants depends to a great extent on claimants' relative ability to bluster and threaten to defect.¹⁰¹ The FCR may be singularly

handicapped in this poker game. Of all the bargaining agents, the FCR has the widest discretion to settle and the least credible threat to defect. The late House Speaker Sam Rayburn would advise new members of Congress, "To get along, go along." The context of large firm reorganization may give incentive for the FCR to do just that.

In the next section, I discuss future claimants' inability to monitor their representative. I then discuss other influences that may be brought to bear on the FCR in reorganization—namely, the influences of the judge and other parties in interest.

B. Reducing Agency Costs

Getting beyond the screening process for appointment of the FCR, a wholly separate set of issues arise in those cases in which an FCR is ultimately appointed. The agency costs of the FCR arrangement may be quite high.

A principal may ordinarily reduce agency costs by affecting her agent's incentives, rewarding behavior consistent with the principal's interests and penalizing deviations. A principal may monitor performance of her agent, intervening directly to penalize shirking or other undesirable behavior. The principal and agent may also decide in advance that specific benchmarks will be used to assess an agent's performance *ex post*, with rewards or penalties depending on such benchmarks. Player contracts in professional sports, for example, routinely contain bonus contingencies for exceptional performance based on objective measures.¹⁰²

In lawyer-client relationships, unfortunately, clients often lack the expertise to assess the quality of a lawyer's advocacy or work product, or even to question the lawyer's bills.¹⁰³ Monitoring may therefore not be effective, and specifying objective *ex post* benchmarks for evaluation may be infeasible. In the case of future claimants, they have all these disabilities as clients and more. Even if they had the expertise to monitor or evaluate their agent, they do not choose their agent or negotiate the fee arrangement or participate at all.¹⁰⁴ Therefore, they can neither set incentives *ex ante* nor monitor *ex post*.¹⁰⁵ They have no way to assure the faithfulness of their agent.

Moreover, the quality of the FCR's representation of future claimants will realistically *never* be subjected to scrutiny by the ostensible principals. Not only are the principals absent, but they are amorphous and scattered. Many may not even discover their stake in the reorganization until decades after its conclusion. Given the complexity of the mass tort reorganization process and the lapse of time between the closing of the

case and the maturing of many of the future claims, it is unlikely that any particular future claimant would have sufficient incentive to review—let alone challenge—the FCR’s performance.¹⁰⁶

Since future claimants are disabled from influencing the FCR’s agency, in the way that typical principals would, that leaves open the question of what other influences operate on the FCR and how they affect her representation of future claimants. Given the absence of monitoring by the FCR’s ostensible principals during the case and the FCR’s virtual insulation from retrospective scrutiny, these other influences deserve careful consideration.

C. *The Dominant Role of the Judge*

Because future claimants are unavailable to decide whether to retain an agent for themselves, select an agent, or arrange the terms of any agency, those tasks fall to the judge. Once the judge has decided to appoint, it is up to her to select the FCR and decide the terms of the appointment. Typically, the U.S. Trustee recommends an individual, whom the court approves after notice and hearing.¹⁰⁹ While the judge may not necessarily perform the initial screening, she has the final say over the FCR’s appointment as well as the terms of that appointment.¹⁰⁸ She defines the FCR’s powers and duties. In addition, the judge’s control over the purse—that is, the judge’s power over professional fees¹⁰⁹—and over the FCR’s retention of professionals¹¹⁰ may have a significant effect on the FCR’s ability to serve as the zealous advocate.

By contrast, other official appointments in bankruptcy are made by the U.S. Trustee. In particular, the U.S. Trustee appoints the creditors’ committee in Chapter 11¹¹¹, and the committee and debtor choose their own attorneys and other professionals.¹¹² This role for the U.S. Trustee was created expressly for the purpose of removing the judge from the administrative aspects of bankruptcy cases. Prior to the inception of the U.S. Trustee program, judicial involvement with appointments and supervision of appointees led to (i) appointees either feeling or appearing beholden to judges,¹¹³ and (ii) judges developing feelings of personal responsibility for the success or failure of their cases.¹¹⁴ Analogous dangers may exist with judges’ involvement in the FCR appointment process. Unlike members of creditors’ committees or their professionals, the FCR is beholden to the judge for her appointment.¹¹⁵ And the judge may also feel some proprietary interest in "her" FCR and the conduct of the case.

Judicial control of the FCR is not an entirely objectionable practice, given that the FCR, with no principal monitoring her actions, would otherwise

be unconstrained. But this practice of judicial supervision necessarily requires us to consider the judge's incentives.

1. What Does the Judge Maximize?

Where does the judge's self-interest lie? Even posing this question might have seemed heretical in the not-too-distant past.:

"[C]riticizing judges for self-interested behavior . . . is considered by many to be as profane as accusing the Pope of a lecherous eye, a charge well-nigh outside the bounds of civilized discourse."¹¹⁶

Recent scholarship, however, has focused attention on judges as utility maximizers, not necessarily immune to the pursuit of self-interest.¹¹⁷

What does the judge seek to maximize in the mass tort case?¹¹⁸ To answer this query, it is important to understand the relative novelty of a mass tort case on any bankruptcy judge's docket. It will undoubtedly involve a large company. Outside of the Southern District of New York and the District of Delaware, "megabankruptcies" are not common affairs.¹¹⁹ A mass tort filing is likely to be one of the largest—if not *the* largest—and most widely followed bankruptcy case over which the judge has ever presided. Especially given the mass harm involved, the case is likely to attract significant public scrutiny.

Given the public and professional attention focused on the case, the judge will have a reputational stake in the conduct and outcome of the case. A well-managed case with a good outcome will maximize the judge's prestige and reputation. Therefore, the judge will wish to appear competent—intelligent, an efficient case manager. A perception of fairness may also be important. In terms of outcome, the judge's best hope is that the debtor successfully reorganize, and that it do so on a consensual basis—that is, all impaired classes vote in favor of the plan.¹²⁰ A "successful" outcome is one that saves the company. Many employees will keep their jobs. The local community preserves its tax base. Existing customer and supplier relationships with the debtor continue. Going concern value is preserved. And future claimants are promised compensation for their future injuries.

In the mass tort context, saving the going concern may be especially beneficial in terms of reputational enhancement. The cases are complex. The legal and logistical issues are daunting. Moreover, having agreed to appoint the FCR in the first place, the judge—as well as the parties in interest—have already escalated their commitment to reorganization.¹²¹

2. *Expressing the Judge's Preferences*

How does the judge's preference for reorganization affect the FCR mechanism? Certainly, the process of appointing an FCR and defining the terms of the appointment allow the judge an opportunity to express her preferences. A judge—and certainly parties in interest—might be less interested in finding a person to provide zealous representation for future claimants than one who understands the paramount goal of reorganization. The ideal candidate may be one who will provide "adequate" representation, understanding and subscribing to the ultimate aim of reorganizing the debtor.¹²²

In *Robins*, for instance, the court agreed to the appointment of a FCR, but the judge chose a surprisingly junior person for the task, given the size of the case and the caliber and experience of the other lawyers involved.¹²³ Stanley Joynes, the appointee, was a young lawyer who apparently had no significant bankruptcy experience at the time of his appointment.¹²⁴ The court also refused Mr. Joynes' request to retain a bankruptcy expert in the case. Joynes' proposed expert, Professor Vern Countryman of Harvard, was willing to work for a remarkably low hourly rate. The sum total of Professor Countryman's fees in the case would not likely have exceeded \$50,000, a pittance compared to the fees paid to the lawyers and other professionals retained by the debtor and official committees in the case.¹²⁵ The court was apparently concerned with duplication of effort and unnecessary expense!¹²⁶

Appointment of an FCR, then, does not typically constitute a blank check for the agent to fight the good fight on behalf of the principal. In *UNR*, the court initially refused a request to appoint an FCR.¹²⁷ On appeal, the Seventh Circuit dismissed, finding that the judge's order was not a final order and therefore not ripe for appeal.¹²⁸ Judge Posner did suggest, however, that future claims might properly be handled in bankruptcy.¹²⁹ Upon a subsequent motion to reconsider, the bankruptcy court agreed to the appointment, ordering that the FCR's "primary task" would be "to advise putative asbestos disease victims of the pendency of and their interest in these bankruptcy proceedings."¹³⁰ In addition, the FCR "may also be heard" with respect to any plan of reorganization and any motion to convert the case. However, the FCR was required to seek leave of the court to become involved in any other litigation.¹³¹ In subsequent litigation, the court expressed the view that defining the scope of the FCR's powers and duties was a matter of administration, as to which the court had final decision-making authority. "This Court can alter or amend [the

FCR's] powers and responsibilities as circumstances might dictate."¹³²

In addition to sticks, judges have carrots at their disposal with respect to managing the FCR. In *Johns-Manville*, the first of the mass tort bankruptcy cases, the judge ultimately awarded the FCR a 100% premium over and above his fee for his billed hours.¹³³ From future claimants' perspective, however, the representation was hardly ideal. The FCR, rather than a single-minded advocate for future claimants interests, played instead the "honest broker" among represented constituencies. While he successfully brokered a consensual plan of reorganization in an enormously complex case—presumably justifying his 100% bonus in the judge's eyes—future claimants fared quite badly in the resulting deal.¹³⁴

Given this sort of judicial management, the FCR in the course of her representation of future claimants must necessarily consider not only what is best for future claimants, but also what the judge wants. These two sets of interests may not always coincide.

In addition to the judge's control over the selection of the FCR and the terms of her agency, the judge has significant influence over other aspects of the case that directly affect future claimants and the prospects for reorganization. An estimation proceeding, for instance, fixes the aggregate amount of future claims liability. By fixing this number, the judge effectively sets an important negotiating parameter. She decides how much future claimants are "owed," and therefore resolves future claimants' maximum entitlement under the plan. A small number may be better than a big number in terms of facilitating reorganization,¹³⁵ since a high estimate of future claims liability shrinks all other slices of the reorganization pie. Competing claimants' recoveries must necessarily be reduced, the larger the share of value that belongs to future claimants. However, creditors staring at quantifiable out-of-pocket losses may be less willing to take a "haircut"—a recovery discounted from the face amount of their debt—than a FCR, whose clients' losses are not vivid.¹³⁶ Indeed, the losses have not yet occurred. They are prospective and somewhat conjectural. This is not to suggest that a judge *would* consciously skew an estimate in order to preserve value for current claimants. But the mere potential for this may dampen the FCR's enthusiasm for a fight.¹³⁷

The judge's preference for reorganization, then, combined with her control of the terms of the FCR's appointment and the case itself, may curb the FCR's enthusiasm for zealous advocacy for future claimants' interests. No direct order need be given by the judge.

The FCR may simply find it easier to go along. While there may be countervailing considerations that give the FCR incentive to take on the judge or other creditor groups,¹³⁸ the fear of client reprisal is not an issue. The FCR has no client calling.

D. Legal Culture and Group Norms

The judge is not the only influence affecting the FCR. The mass tort case is a species of "megabankruptcy," and megabankruptcy has its own culture. The FCR must operate within this culture, which values consensual reorganization. In particular, lawyers in the large cases understand that consensual reorganization is the responsible approach, and that they may have to forego strict enforcement of their clients' legal entitlements in order to achieve consensus. In this culture, the FCR may be peculiarly vulnerable to group pressure to compromise her clients' interests.

The lawyers and other professionals who regularly appear as the key players in the reorganization of large, publicly held companies form a fairly small community.¹³⁹ Members of this group can expect to be repeat players in the large cases. As such, they have some incentive to cooperate with each other.¹⁴⁰ As with any culture, this group has shared understandings—norms about how cases are conducted and disputes resolved.¹⁴¹

Lynn LoPucki and Bill Whitford have noted the high incidence of consensual plans in the large reorganizations—all impaired classes ultimately approved the plan—and that distribution of value under such plans almost invariably deviates from the absolute priority rule. In their sample of cases, although debtors were clearly insolvent—and therefore equity holders had no legal entitlement to *any* bankruptcy distribution—senior classes nevertheless ultimately gave up value to equity holders.¹⁴²

Lawyers interviewed asserted that consensual plans were the norm because of the expense and delay of litigating nonconsensual "cram down" plans. And the distributions to equity were the "price of peace."¹⁴³ LoPucki and Whitford found, however, that the avoidance of litigation costs could not explain the size of the distributions to equity, which were worth significantly more than potential litigation costs.¹⁴⁴ Cram down was not necessarily undesirable from an economic standpoint. But it was "just not done."

Although these cases were spread throughout the United States, most of the lawyers who played key roles in them were members of the same legal community. They could expect to be involved in future cases with their current adversaries and were to various degrees dependent on those

adversaries for professional respect and advancement. They were not entirely free to ignore the conventional wisdom that consensual plans were the responsible, appropriate means for accomplishing reorganization and that despite the absolute priority rule, everyone at the bargaining table was entitled to a share.¹⁴⁵

Social norms require that everyone at the bargaining table receive a share, legal entitlements notwithstanding. In the large cases, lawyers expect ultimately to settle. Moreover, they willingly compromise their clients' legal entitlements when no clear legal or economic justification exists. If lawyers with "real" clients will compromise in obeisance to group norms, how much worse off will future claimants be with the FCR? From which classes will the value come that is necessary to achieve consensus in the mass tort bankruptcy? The most ready source is the class of future claims, which are the most abstract and conceptual of legal entitlements. The dollar amount of claims is a statistical and scientific construct. Moreover, the clients themselves are somewhat abstract, at least at the time of the bankruptcy.¹⁴⁶

The division of value among claimants occurs over multiple negotiations in the case. The fight over estimation, the design of the claims resolution facility, and valuation of the consideration to be placed in trust for future claimants, for example, all are issues that will affect the ultimate bankruptcy distribution. Sometimes confrontation beats cooperation in terms of serving the client's best interest. Any lawyer unwilling to push, or unable to mount a credible threat that it *will* push, is disadvantaged in the negotiation.

The FCR may be peculiarly disadvantaged in her ability to bluster. Given the group norm toward consensus—the "responsible" approach—the FCR might be more readily ostracized by the group for disruptive hold-up behavior than would other lawyers. All other players have clients to whom they answer. Any recalcitrance on their part might be understandable. No such countervailing consideration is available to the FCR. All bargaining agents in Chapter 11 enjoy some degree of independence from their constituents.¹⁴⁷ None, however, is quite so free as the FCR.

Given the small community of lawyers involved in the large cases, the FCR will have some stake in maintaining good standing with the group. Professional reputation and opportunities for future work in the megacases may turn to some extent on other group members' opinion of the quality of the FCR's representation.

[L]awyers . . . had an incentive to be concerned not only with the welfare of their clients but also with their relationships to each other. Lawyers who act unconventionally in a particular case may find it difficult to negotiate

effectively in future cases with the other lawyers. Moreover, the other lawyers are likely to form and express opinions about the quality of the lawyer's representation, and these opinions may influence whether the lawyer obtains future clients. . . . Social norms typically are enforced by ostracizing violators and these norms are no exception.¹⁴⁸

Obstructionist tactics that violate group norms may lead to accusations that the FCR was a "crazy" or "troublemaker."¹⁴⁹ Lawyers with "real" clients succumb to the pressure of the group norms. For the FCR, subscribing to the group norms is likely costless.

IV. Tentative Conclusions and Further Inquiries

The FCR device ought to be viewed with a degree of skepticism. The result-oriented nature of the FCR mechanism, the influence of the judge, and the legal culture of the megabankruptcy—coupled with the absence of principals to monitor the FCR's behavior—together give cause for concern.

Have future claimants gotten good deals or raw deals in the mass tort bankruptcies to date? Assessment of outcomes is not a straightforward task. First, given the relative handful of cases, broad generalizations would be ill-advised; only tentative assessments are appropriate. Second, there is the problem of ascertaining the appropriate baseline for comparison. The evolution of the traditional bankruptcy approach has occurred in the face of significant legal uncertainty. While courts have upheld the various elements of the traditional approach, some uncertainty still exists concerning (a) future claimants' status as creditors in bankruptcy, (b) bankruptcy courts' power to estimate future claims liability for distribution purposes, (c) bankruptcy's ability to bind future claimants to the terms of a confirmed plan and courts' power to enjoin future lawsuits against the reorganized debtor or its successors.¹⁵⁰ Therefore, future claimants' entitlement in bankruptcy has not always been clear. This is a separate problem from the issues of effective representation raised by the FCR mechanism, but one that has also affected future claimants' treatment in bankruptcy.

The mass tort problem may well-nigh be intractable for courts and lawyers, who have been left to craft prospective solutions—providing compensation systems for harms that have not yet occurred—only because of legislative inaction. One might credibly assert that saving the debtor and providing some compensation to future tort victims at all should be considered a victory.

Moreover, the FCR mechanism may be the best of a whole host of imperfect alternatives.¹⁵¹ Given an appropriate benchmark, empirical research may show that the FCR mechanism has worked well on the whole. Despite the absence of principals, other influences may exist that serve as adequate substitutes for actual monitoring of the agent. Public scrutiny of future claimants' fortunes in these highly visible cases might provide a substitute for active monitoring of the FCR

by real principals. However, given the complexity of the proceedings—both legal and scientific—public assessment of outcomes might be difficult. Assessment of the performance of particular individuals would be even more problematic.¹⁵²

Reputational concerns may exist that cause the interests of the FCR to align with those of future claimants in maximizing recoveries to the latter. Or perhaps norms of professional integrity and responsibility operate to constrain shirking or self-interested behavior by the FCR. The prospect of *repeat* business as a FCR is probably not very promising, given the rarity of mass tort filings. Moreover, given judges' incentives, an overly aggressive FCR from an earlier mass tort case may not be an attractive candidate for a subsequent appointment. On the other hand, competent and faithful representation of future claimants might plausibly facilitate a reputation for professionalism and integrity, qualities that would be useful in landing other representations. Stanley Joynes, for example, the young and inexperienced lawyer picked to represent the *Robins* future claimants, served future claimants "admirably."¹⁵³ He was later retained by the official physicians' committee in the *Dow Corning* case.¹⁵⁴

To the extent external influences exist to align the interests of FCRs with future claimants, these influences need explaining. If they do not currently exist, then perhaps they could be manufactured. Perhaps a compensation arrangement for the FCR could be designed to encourage her attention to future claimants' ultimate recoveries. That is, the FCR could be explicitly reconceptualized as an entrepreneur—as well as an agent—and given some financial stake in maximizing future claimants' recoveries.¹⁵⁵ This approach would require, among other things, a bankruptcy judge willing to turn the FCR loose to advocate for her clients. Or, given that the Chapter 11 culture creates pressure to compromise future claimants' interests, perhaps influences from outside this culture could be imported. A federal agency with a strong consumer protection culture—the Federal Trade Commission, for example—could be enlisted to participate in reorganizations involving mass tort claims.¹⁵⁶

In any event, a "traditional" approach to mass tort bankruptcy has emerged. It is high time that the FCR mechanism, a central feature of this bankruptcy model, receive careful consideration. This Article sketches some of the major issues, with the hope and expectation of further scholarly and professional attention to the subject.

* Professor of Law, University of San Francisco School of Law. A.B. 1983, Cornell University; J.D. 1987, Harvard University. Many thanks to David Epstein for invaluable conversation and critique of an earlier draft of this paper. Thanks also to Judge Sam Bufford for his thoughtful comments during the symposium. I am also indebted to numerous colleagues at the University of San Francisco School of Law, who participated in a faculty workshop and commented on earlier drafts. The usual disclaimer applies.

1. Other parties as well—distributors, insurance companies, successor companies—will also be named as defendants.
2. The other is the settlement class action. See Roger Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions,"* 80 Cornell L. Rev. 811 (1995); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 Colum. L. Rev. 1343 (1995).
3. Future claims are those potential future products liabilities that exist but have not matured by the conclusion of the bankruptcy case. The debtor-manufacturer's liability-creating conduct occurred prebankruptcy, but any harmful consequence has yet to appear.
4. On estimating future claims, see David S. Salsburg & Jack F. Williams, *A Statistical Approach to Claims Estimation in Bankruptcy,* 32 Wake Forest L. Rev. 1119 (1997) (critiquing various approaches used by bankruptcy courts and advocating statistical methods). On the design of claims resolution facilities, see Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts,* 53 Law & Contemp. Probs. No. 4 (1990), which discusses claims resolution facilities designed in class actions as well as in bankruptcy. On discharging future claimants, see Ralph R. Mabey & Jamie Andra Gavrin, *Constitutional Limitations on the Discharge of Future Claims in Bankruptcy,* 44 S.C. L. Rev. 745 (1993) (concluding that discharge is constitutionally permissible); G. Marcus Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-Debtor "Discharge,"* 84 Iowa L. Rev. 753 (1999) (finding that discharge of future claims is impermissible with respect to third party non-debtors).
5. See Mark J. Roe, *Bankruptcy and Mass Tort,* 84 Colum. L. Rev. 846, 855 (1984) (noting society's willingness to spend more on current identifiable victims and less on future statistical victims despite expert consensus that dollars are better spent on latter); Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy,* 104 Yale L.J. 367, 383 (1994) (noting in the mass tort context that "[p]resent claimants have powerful psychological advantages over future claimants in their battle to maximize their share of the debtor's estate. Present claimants in mass tort bankruptcies are identifiable persons with urgent medical and financial needs, while future claimants are only statistical probabilities."). See generally Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* 43-62 (1980) (finding that cognitive processes tend to lead us to overemphasize information which is most concrete and "vivid"); Shelley E. Taylor & Suzanne C. Thompson, *Stalking the Elusive "Vividness" Effect,* 89 Psychol. Rev. 155 (1982) (questioning evidence supporting vividness effect, but proposing salience-vividness effect to explain differential impact of vivid information under conditions of information competition).
6. Moreover, experience to date suggests that the bankruptcy approach is superior to the settlement class action as currently devised. See Coffee, *Class Wars*, *supra* [2](#)note, at 1457 (finding bankruptcy reorganization superior to class action for resolving mass torts while protecting interests of future claimants); Ralph R. Mabey & Peter A. Zisser, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments,* 69 Am. Bankr. L.J. 487, 488 (1995) (asserting that bankruptcy court is the "best forum" for mass tort future claims cases). But see Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?,* 76 Tex. L. Rev. 1695 (1998) (criticizing National Bankruptcy Review Commission proposal, and bankruptcy approach generally, questioning whether bankruptcy approach is truly improvement over class action approach).
7. The Manville Trust, for example, ran out of funds less than two years after its inception and had to be restructured with dramatically diminished expectations for compensating future claimants. See *infra* note [59](#) and accompanying text. Describing the FCR's role in *Manville*, one commentator has noted:

The [FCR] adopted the role of shuttle diplomat, selling his proposed plan to the various parties separately. He apparently saw his role not as the intransigent defender of future claimants, but as the honest broker among constituencies. That the [FCR] adopted the role of broker was not an accident, as the [FCR] was the only claimant representative

whose constituency was entirely unable to monitor his performance. In truth, he was as he behaved, less a representative than a go-between among representatives. . . . Liberated from any concrete constituency, the [FCR] brokered a deal that gave [present] tort claimants 80% of the firm's value, and equity holders the remaining 20%. . . . The ultimate result, whatever the [FCR's] intentions may have been, was a division of the debtor's value between present claimants and equity holders that left future claimants almost entirely unprovided for, as the protections of future claimants in the plan proved completely ineffective.

Smith, *supra* note [5](#), at 390-91 (citations omitted).

With respect to claims resolution in *A.H. Robins*, compare Francis E. McGovern, *Foreword, Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 Law & Contemp. Probs. 1, 7 (1990) (noting some dissatisfaction with Dalkon Shield Trust) with Georgene M Vairo, *Essay: The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617 (1992) (defending Trust).

8. For a complete discussion of the plan negotiation process, see Frederick Tung, *Confirmation and Claims Trading*, 90 Nw. U. L. Rev. 1684, 1689-99 (1996).

9. In smaller cases, there may be few creditors willing to serve on committees.

10. 11 U.S.C. §§ 101-1330 (1994 & Supp. IV 1998). The Bankruptcy Code may be referred to herein as the "Code." Unless otherwise indicated, all subsequent statutory references are to the Bankruptcy Code.

11. *Id.* § 1102(a).

12. *Id.* § 1103(b)(1).

13. *Id.* § 1103(a).

14. *Id.* §§ 328, 330(a).

15. *Id.* § 1102(a)(2).

16. The only strict substantive limitation concerning creditor distributions under a plan is that each creditor must receive as much as it would have received in liquidation. See 11 U.S.C. § 1129(a)(7) (1994).

17. *Id.* § 1129(b)(2)(B). See also Tung, *supra* note [8](#), at 1692-93 (explaining rule of absolute priority).

18. *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 58 (1990).

19. See 11 U.S.C. §§ 1126(c), 1129(a)(8) (1994). Secured creditors have additional leverage as well. They may insist on adequate protection of their security interests or—failing that—seek relief from stay in order to repossess their collateral. *Id.* § 362(d)(1).

20. *Id.* § 1122(a). All creditors in the same class are entitled to identical treatment under the plan. *Id.* § 1123(a)(4).

21. Unimpaired classes are deemed to have accepted the plan. *Id.* §§ 1126(f), 1129(a)(8). A class accepts the plan if, of the claims voting, a majority in number of claims in the class approves, and that majority holds at least two-thirds in dollar amount of claims in the class. *Id.* § 1126(c).

22. *Id.* § 1129(a)(8).

23. *Id.* § 1129(b)(2)(B)(ii). This is the Chapter 11 "cram down." *See generally* Kenneth N. Klee, *All You Ever Wanted to Know About Cramdown Under the New Bankruptcy Code*, 53 Am. Bankr. L.J. 133 (1979). Confirmation could also occur over the objection of an impaired class if that class were paid in full under the plan. *See* 11 U.S.C. § 1129(b)(2)(B)(i) (1994). That option is rarely available in practice.

24. *Id.* § 1121(b) (describing initial 120-day exclusivity period). *See generally* Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 Va. L. Rev. 561 (1977).

25. *See* Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. Pa. L. Rev. 669, 693 (1993) (noting that a large, publicly held debtor almost always enjoys exclusivity for duration of case).

26. *See* Tung, *supra* note 8, at 1694 & n.52.

27. *See* 11 U.S.C. § 1121(c) (1994).

28. *Id.* §§ 1121, 1112.

29. "The premise of a business reorganization is that assets that are used for production in the industry for which they are designed are more valuable than those same assets sold for scrap." H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977) [hereinafter, House Report].

30. Roger Fischer and Bill Ury refer to this consideration as "BATNA," the best alternative to a negotiated agreement. *See* Roger Fisher, William L. Ury, and Bruce Patton, *Getting to Yes* (1992).

31. Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtors and Creditors* 477 (3d ed. 1996).

32. *See* Lynn M. LoPucki & William C. Whitford, *Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 139 U. Pa. L. Rev. 125, 138 (1990).

33. *Id.* at 178. Deviations from strict absolute priority, however, are generally small in percentage terms. *See id.*

34. Johns-Manville, for example, was profitable when it filed for bankruptcy, and its financial picture actually improved during the first few years of bankruptcy. *See* The Journal Record, Aug. 3, 1985.

35. In some cases, the harm-generating potential was known to the manufacturer long before it became apparent to the public. *See* Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985) (claiming that executives of Johns-Manville and other asbestos producers actively suppressed evidence of harmful effects of exposure); Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 1-22 (1991) (chronicling A.H. Robins' history of ignoring safety research showing dangers associated with use of Dalkon Shield); Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 Cornell L. Rev. 773, 823-24 (1997) (describing concealment of adverse safety testing results in marketing of breast implants and tobacco, as well as asbestos and Dalkon Shield).

36. *See* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 Harvard J. on Legis. 383, 387-88 (1993). In addition to toxic torts, products liability may also give rise to long-tail mass tort problems. A product may remain in circulation for quite some time, for example, before causing harm. At the time of the Piper Aircraft bankruptcy, an estimated 95,000 Piper planes were still in existence worldwide, and the average age of a Piper aircraft still flying was 24 years. Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code with Respect to the First Amended Joint Chapter 11 Plan

of Reorganization of the Debtor, the Official Committee of Unsecured Creditors of Piper Aircraft Corporation, Newco Pac, Inc., Teledyne Indus., Inc. and Dimeling, Schreiber and Park, dated May 19, 1995 (*In re Piper Aircraft Corp.*) (No. 91-31884-BKC-RAM) at 12-13 [hereinafter Piper Disclosure Statement]. *See also* *In re RegO Co.*, 623 A.2d 92, 100 (Del. Ch. 1992) (noting actuarial forecasts that future claims involving industrial valve products would arise for 20 to 30 years following dissolution); *Polius v. Clark Equip.*, 802 F.2d 75 (3d Cir. 1986) (involving 1983 accident with machine manufactured in 1969); *Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106 (Pa. 1981) (involving 1972 accident with machine manufactured in 1957); Mark R. Sarlito, Note, *Recognizing Products Liability Claims at Dissolution: The Compatibility of Corporate and Tort Law Principles*, 87 Colum. L. Rev. 1048 (1987):

Insurance industry statistics. . . suggest that only thirty percent of expected general liability claims (which include products liability) are reported three years after the initial policy year and only sixty percent are reported after the eighth year. Not until thirteen years after the initial policy year are seventy-five percent of the losses known to the insurer. The balance of these losses develop over the next two decades.

Id. at 1052 (citing Reinsurance Ass'n of America, Loss Development Study: 1985 Edition 5 (1985)).

37. While a factory explosion that injures many could also reasonably be described as a "mass" tort, that situation does not present the same difficulties involving contingent liabilities as the asbestos cases or other future claims cases. My focus in this Article is on these latter types of cases, and I use the term "mass tort" in that sense.

38. *See* Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846, 856-62 (1984) [hereinafter Roe, *Mass Tort*] (describing slow process of operational collapse for company beset by mass future tort liabilities which inhibit its access to capital markets).

39. In addition, upon the debtor's collapse, the only possible source of future compensation to future claimants disappears. As the *UNR* court described:

The debtors allege what will occur if the court denies their Application [for appointment of a FCR]: The 17,000 claims which already have been brought will be followed by between 30,000 and 120,000 more over the next forty years. No lenders will extend credit to companies burdened by litigation costs exceeding \$1 million per month, with exposure to damages in the incalculable millions of dollars. If the putative claims cannot be dealt with in a reorganization, the debtors will have no choice but to liquidate. Whatever hope the putative claimants have to a future recovery would vanish, because by the time their diseases are discovered, there will be no company left with any assets to satisfy a judgment.

In re UNR Indus., Inc., 29 B.R. 741, 743-44 (N.D. Ill. 1983). Theoretically, even in a liquidation, value could be set aside to compensate future claimants. However, this almost never happens, since no represented party has any interest in paying future claims if the debtor is liquidating. *See infra* Part III.A.1.

40. Several general aviation aircraft manufacturers have also filed for bankruptcy. *See* *Fairchild Aircraft Inc. v. Cambell (In re Fairchild Aircraft Corp.)*, 184 B.R. 910 (Bankr. W.D. Tx. 1995), *vacated*, 220 B.R. 909 (Bankr. W.D. Tx. 1998); *Epstein v. Official Committee of Unsecured Creditors (In re Piper Aircraft Corp.)*, 58 F.3d 1573 (11th Cir. 1995). Whether tort liability was the precipitating cause of their demise is unclear. However, blaming tort liability, these companies succeeded in obtaining passage of the General Aviation Revitalization Act of 1994, 49 U.S.C. § 40,101 (1994), a statute of repose that prohibits certain products liability suits against manufacturers for accidents involving aircraft more than 18 years old. *See* Frederick Tung, *Taking Future Claims Seriously: Future Claims and Successor Liability in Bankruptcy*, 49 Case W. Res. L. Rev. 435, 471 nn.142 & 143 (1999) [hereinafter, Tung, *Future Claims*] (describing statute). However, at least in the bankruptcy of Piper Aircraft, poor management was apparently at least as

significant a cause of the company's demise as its contingent tort liability. *See* Piper Disclosure Statement, *supra* note 36, at 11-12 (describing "devastating consequences" of key business decisions of prepetition management).

41. Courts have struggled over the preliminary question whether future claimants qualify as "creditors" holding "claims" that may be addressed in bankruptcy. *See* Tung, *Future Claims*, *supra* note 40, at 466. Commentators, however, generally agree that future claims may be included as bankruptcy "claims" and dealt with in bankruptcy, *id.* at 457 n.86, and it seems unlikely that a bankruptcy court would refuse to treat future claims in bankruptcy if other parties felt it necessary to saving the business.

42. With products liability, the universe of future victims may be impossible to capture except in general terms. For example, the universe of potential future victims of plane crashes includes not only owners—whose identities will change over time in any event—but also potential passengers and innocents with no relation whatsoever to the owner of the plane. No one can identify in advance the house upon which the plane will ultimately crash or the occupants of the house at the time.

With some toxic torts, it might be easier to identify all potential future victims. Users of Dalkon Shields or breast implants, for example, could be identified through medical records. This would not apply, of course, for a toxic substance like asbestos that does not require medical insertion into the human body.

43. In the context of mass tort settlement class actions, Susan Koniak contrasts "unknown" future claimants—those who would realize they were future claimants if they received notice, but cannot be given notice because they are unidentified—with unknowing future claimants—those for whom receipt of notice would not be useful because they had not manifested any injury and might not realize they had been exposed.

[H]ow does one provide notice and the opportunity to opt out to the unknowing? It cannot be done, if notice means apprising those people that an action is pending that affects them. By definition, unknowing persons have not manifested any injury and may be unsure whether they have been exposed to the product. Therefore, those class members cannot *know* in any meaningful sense that they are members of the class.

See Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1086-87 (1995).

44. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628 (1997). *See also* Sobol, *supra* note 35, at 107-15 (describing debate over whether notice to future claimants concerning claims bar date in bankruptcy could ever be adequate, given that future claimant in perfect health at time of notice would likely fail to appreciate its significance and would not likely file proof of claim).

45. For instance, the Manville Trust, set up to manage assets for payment to asbestos claimants of Johns-Manville, initially received 80% of the equity of the reorganized debtor and \$869 million in cash and receivables. *See* Findley v. Falise (*In re* Joint Eastern & Southern Dist. Asbestos Litig.), 878 F. Supp. 473, 484 (E. & S.D.N.Y. 1995), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996), *on remand*, 929 F. Supp. 1 (E. & S.D.N.Y. 1996). Even that turned out to be insufficient. *Id.*

46. *See In re Dow Corning Corp.*, 211 B.R. 545, 600 (Bankr. E.D. Mich. 1997) (describing "traditional" model and noting its failures).

47. *See* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 944 (1995). "The evolutionist emphasis draws attention to, and treats in a more consistent fashion, three distinct but related features of mass torts litigation: (1) incremental system-building, (2) common-law process, and (3) selection by judges and other policymakers among competing institutional designs." *Id.*

48. *See, e.g., In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (appointing representative for asbestos-exposed future claimants, who are parties in interest); *In re Amatek Corp.*, 755 F.2d 1034 (3d Cir. 1985) (same). Some courts, however, refused to appoint FCRs. *See infra* Part III.A.1.

49. *See, e.g., In re Eagle-Picher Indus., Inc.*, 189 B.R. 681 (Bankr. S.D. Ohio 1995) (estimating both prepetition and future asbestos claims for distribution purposes). *See also* *Dow Corning*, 211 B.R. 545 (discussing merits of competing estimation proposals). In *Dow Corning*, the court refused to adopt an estimation process from among those presented by the parties, suggesting instead that the parties reach a consensual resolution. *Id.*

While the Code specifically contemplates court estimation of contingent or unliquidated claims, estimation is specifically authorized only for purposes of allowance, see 11 U.S.C. § 502(c) (1994), and voting. *See* Fed. R. Bankr. P. 3018(a) (court may temporarily allow claim "in an amount which the court deems proper" for voting purposes). Claim allowance determines which claims may validly participate in the case. Only claims that are "allowed" are entitled to vote on the terms of reorganization, see 11 U.S.C. § 1126, and receive distributions. *Id.* § 726.

Estimation for purposes of distribution is not specifically authorized in the Code or the Bankruptcy Rules. The National Bankruptcy Review Commission has recommended statutory amendments clarifying that courts may estimate claims for purposes of distribution in mass future claims cases. *See* 1 Report of the National Bankruptcy Review Commission 341 (1997) [hereinafter NBRC Report].

50. *See, e.g., In re Joint Eastern & Southern Dist. Asbestos Litig. (In re Johns-Manville)*, 982 F.2d 721 (2d Cir. 1992) (describing plight of Manville Trust), *modified*, 993 F.3d 7 (2d Cir. 1993). *See generally* *Roe, Mass Tort*, *supra* note [38](#), at 864 (describing payment devices to manage uncertainty regarding aggregate claims liability).

51. In *Piper*, the claim resolution process included mandatory pre-trial mediation, as well as a binding arbitration alternative to litigation. *See* *Piper* Disclosure Statement, *supra* note [36](#), at 138-39. In *Robins*, the Claims Resolution Facility offers several different claim processing options, ranging from a "short form," which pays the electing claimant a nominal amount upon a minimal showing of Dalkon Shield use and injury, to a fairly elaborate settlement process involving in-depth review of the claim, including the electing claimant's medical records. Should the process fail to produce a settlement, the claimant may resort to binding arbitration or trial. *See* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, March 28, 1988 (*In re A.H. Robins Co.*) (No. 85-01307-R), at CRF 1-9. *See generally* Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 Law & Contemp. Probs. 113 (1990) (comparing differing features and objectives of several claims resolution facilities).

52. *See, e.g., In re Johns-Manville Corp.*, 68 B.R. 618, 625 (Bankr. S.D.N.Y. 1986) (holding that bankruptcy court has equitable power to issue channeling injunction), *aff'd sub nom.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988) (enjoining suit against successor corporation, among others), *aff'd sub nom.*, *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir. 1989); *Piper* Disclosure Statement, *supra* note [36](#), at 112 (describing channeling injunction). *Piper* involved an asset sale. Manville was internally reorganized, and the channeling injunction was used to insulate the reorganized debtor and others from suit by future claimants. *Johns-Manville*, 68 B.R. at 624. In *Robins*, the debtor was merged into another entity as part of the plan. That surviving entity and others were the beneficiaries of the channeling injunction. *A.H. Robins*, 88 B.R. at 751.

53. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). *See generally* *Mabey & Zisser*, *supra* note [6](#).

54. *See* 11 U.S.C. § 524(g)(4)(B)(i) (1994).

55. *Id.* § 524(g)(2)(B)(i).

56. *Id.* § 524(g)(2)(B)(i)(I).

57. See NBRC Report, *supra* note [49](#), at 315-50. Unlike the Manville Amendments, the NBRC Report does not insist on the use of a trust device to hold assets on behalf of future claimants. It opts instead for more flexibility, noting for example that insurance may provide a superior method of assuring compensation. *Id.* at 346-47.

58. See *In re Dow Corning Corp.*, 211 B.R. 545, 602 (discussing difficulties of accurately estimating mass tort liability). See generally Salsburg & Williams, *supra* note [4](#).

59. See Findley v. Falise (*In re Joint Eastern & Southern Dists. Asbestos Litig.*), 878 F. Supp. 473 (E. & S.D.N.Y. 1995), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996), *on remand*, 929 F. Supp. 1 (E. & S.D.N.Y. 1996).

60. See Findley, 878 F. Supp at 484.

61. *Id.* at 493.

62. See Findley v. Blinken (*In re Joint Eastern & Southern Dists. Asbestos Litig.*), 129 B.R. 710, 755 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified* 993 F.2d 7 (2d Cir. 1993). It was further assumed that the timing of required claim payments would roughly coincide with the timing of the trust's cash inflows. See Findley, 129 B.R. at 755.

63. *Id.*

64. See Menard-Sanford v. Mabey (*In re A. H. Robins, Co.*), 880 F.2d 694, 699 (4th Cir. 1989), *cert. denied.*, 493 U.S. 959 (1989).

65. See 11 U.S.C. § 502(c)(1) (1994).

66. Or at least the estimation will set the baseline from which negotiation over distributions begins. See *supra* note [18](#) and accompanying text.

67. *In re Dow Corning*, 211 B.R. 545 (Bankr. E.D. Mich. 1997).

68. *Id.* at 602 ("It is our fervent hope that the parties achieve a fair distribution through settlement or mutual agreement upon a process for resolving the case.").

69. See generally Sobol, *supra* note [35](#), at 165-97 (describing complex wrangling among multiple parties concerning conduct of estimation process).

70. See generally Peterson, *supra* note [51](#) (comparing differing features and objectives of several claims resolution facilities).

71. See Sobol, *supra* note [35](#), at 155.

72. *Id.*

73. Of course, only in hindsight may that "last day" be determined.

74. *In re A.H. Robins Co., Inc.*, 88 B.R. 742, 752 (E.D. Va. 1988). *See also* Sobol, *supra* note [35](#), at 287 (describing judge's control of Dalkon Shield Claimants' Trust).

75. *See supra* note [45](#) and accompanying text.

76. As to the actual selection of the FCR, the judge typically acts on a nomination by the U.S. Trustee. *See infra* notes [107-08](#) and accompanying text.

77. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305 (1976).

78. Even if the client had the necessary skills to represent herself, she might have difficulty making dispassionate judgments given her self-interest in the matter. She would risk being the proverbial "fool for a client."

79. There may be some situations in which a future claimant's perceived interest in the bankruptcy might be immediate enough that she could reasonably be expected to act in her own behalf—either by retaining her own lawyer or appearing pro se. *See infra* note [97](#) and accompanying text.

80. *See supra* Part II.C.1.

81. Similar issues may arise when a court appoints a guardian to represent an infant or incompetent person. *See* Fed. R. Civ. P. 17(c). However, the FCR device may be unique in terms of the sheer number of principals to be represented who are unable to oversee their agent, and the principals' enormous aggregate stake in the proceeding.

82. If the business could survive without comprehensive settlement of future claims, then perhaps future claimants would be better off being left out. Each future claimant would then be free to sue the reorganized debtor for a full recovery when her claim matured, instead of being relegated to the pro rata recovery that might result from a bankruptcy settlement. *See generally* Tung, *Future Claims*, *supra* note [40](#), at 472.

83. This suggests that serious conflicts may exist among mass tort future claimants inter se. Early maturing claimants may wish to be excluded from any collective settlement, leaving them free to pursue the reorganized debtor.

84. Even if the problem of identifying future claimants can be overcome, *see supra* note [80](#) and accompanying text, the costs of individual participation might discourage future claimants from becoming involved. *See supra* note [80](#) and accompanying text.

85. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 8 (1991) (noting that the class action is "a tool for overcoming the free-rider and other collective action problems that impair any attempt to organize a large number of discrete individuals into any common project").

86. For a detailed analysis of creditors' calculus with respect to asset disposition alternatives, *see* Tung, *supra* note [40](#), at 473.

87. *See* NBRC Report, *supra* note [49](#), at 321 ("[M]ass future claimants of a debtor liquidating in Chapter 7. . . should be entitled to equal priority with present claimants."). True, some future claimants might be better off left out of bankruptcy. But many will be made worse off, in large measure because the decision whether or not they should be included is not randomly made. This decision is made by those with interests in direct conflict with the interests of future claimants. *See generally* Tung, *Future Claims*, *supra* note [49](#), at 458 (describing alternative outcomes for future claimants when their rights are ignored in bankruptcy).

88. 157 B.R. 89 (W.D. Pa. 1993).

89. *Id.* at 90.

90. *Id.* at 99. Locks also happened to be a member of the creditors' committee. *Id.* at 90. For that reason, the court found that Mr. Locks was not the proper party to bring the motion, since he had an inherent conflict. His fiduciary duty to the committee and the class of claimants it represented disqualified Mr. Locks from advocating on behalf of future claimants, whose interests were adverse to those of current claimants. *Id.* at 93.

One court *was* willing to appoint a FCR despite the fact that the debtor was liquidating. *See In re Forty-Eight Insulations, Inc.*, 58 B.R. 476 (Bankr. N.D. Ill. 1986). "[I]t would be highly inequitable to distribute the liquidated assets of the debtor to the currently known plaintiffs to the detriment of the potential claimants merely because the potential claimants have not yet manifested an injury." *Id.* at 477. That liquidation, however, was unusual insofar as it was planned to be a "slow" liquidation over a 10-year period. *See In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1297 (7th Cir. 1997).

91. The prospective purchaser, Pilatus Aircraft Limited, had signed a letter of intent with the debtor. The letter of intent included a requirement that the debtor seek appointment of a future claims representative so that future claims could be paid off and disposed of. *In re Piper Aircraft Corp.*, 162 B.R. 619, 621 (Bankr. S.D. Fla. 1994), *aff'd*, 168 B.R. 434 (S.D. Fla. 1994), *aff'd as modified*, 58 F.3d 1573 (11th Cir. 1995).

92. *See Piper*, 162 B.R. at 622 n.3.

93. That is, an acquirer would be willing to purchase the business and assume the risk of post-bankruptcy successor liability suits as future claims matured.

94. When the FCR, Professor David Epstein, filed a proof of claim attempting to define a broad class of future claimants and setting the aggregate amount of their claims at \$100 million, the debtor and committee objected. The judge agreed with the debtor and the committee that Epstein's proposed class was too broad. *See Piper*, 162 B.R. 619. Ultimately, the issue was settled with a little help from Congress. *See Tung, Future Claims*, *supra* note [40](#), at 471.

95. The committee took the position that all implant recipients had already suffered injury by virtue of having received implants, and therefore that they were all current—and not future—claimants. *Id.*

96. *See, e.g.*, Order Dismissing Motion of Alan B. Morrison for Appointment as the Legal Representative of Future Breast Implant Claimants, *In re Dow Corning Corp.*, No. 95-20512 (Bankr. E.D. Mich. Oct 10, 1995), which is discussed in *In re Dow Corning*, 211 B.R. 545, 598 (Bankr. E.D. Mich. 1997).

97. The court differentiated the breast implant controversy from future asbestos disease victims and future airplane crash victims on the ground that all breast implant recipients could self-identify and file their own individual proofs of claim. *Id.*

98. If the judge agrees to make the appointment, she will typically solicit a nomination from the U.S. Trustee, approve a nomination, and define the terms of the appointment. *See infra* Part III.C.

99. Some have suggested that a judicial bias exists toward reorganization generally. *See* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 220-21 (1986) (discussing bias of bankruptcy judges in favor of reorganization); Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. Ill. L. Rev. 1 (discussing Chapter 11 reorganization bias).

100. One foundational concept in social psychology is the phenomenon of escalating commitment. Once a decision maker commits to an idea or a course of action, she has invested in it and will persist with it, even in the face of information that tends to call into question the wisdom of the prior decision. She will reject such information, while paying more attention to information tending to affirm her decision. *See* Barry M. Staw, *The Escalation of Commitment to a Course of Action*, 6 Acad. Mgmt. Rev. 577 (1981). In the business context, organizational behaviorists have shown that managers will often make investment decisions in a manner that justifies previous choices, irrespective of expected outcomes. Therefore, managers will have a tendency to escalate their commitment to a course of action even if it is not cost-effective. *Id.*

101. *See* LoPucki & Whitford, *supra* note [32](#), at 161 (noting strong correlation between "aggressive representation" and success in garnering legally "undeserved" distributions for equity).

102. *See* Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. Miami Ent. & Sports L. Rev. 165, 189 (1993) (discussing incentive clauses); Martin J. Greenberg, *Drafting of Player Contracts & Clauses*, 4 Marq. Sports L.J. 51, 57 (1993) (same).

103. *See* Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 Iowa L. Rev. 965, 970 (1997) (noting informational asymmetry between lawyer and client concerning quality of lawyering).

104. As with the other lawyers and professionals compensated by the estate, the FCR is generally compensated on an hourly basis.

105. Because at the time of the bankruptcy case, each future claimant's individual stake in the outcome of the case is likely to be quite small, no future claimant has sufficient incentive to monitor the FCR or the proceeding.

106. Susan Koniak and George Cohen propose in the class action context that class counsel be subject to malpractice suit by class members in the same way that clients may sue their lawyers in individualized situations. Koniak and Cohen argue that court approval of class settlements should not insulate class counsel from these suits, which would provide a much-needed deterrent to class counsels' shirking or selling out their clients. *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051 (1996). In the mass tort bankruptcy context, the disciplining effect of potential suits against the FCR is doubtful for the reasons described in the text.

107. *See In re UNR*, 71 B.R. 467, 477 n.24 (Bankr. N.D. Ill. 1987); *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 261 (Bankr. S.D. Ohio 1996).

108. *See* Piper Disclosure Statement, *supra* note [36](#), at 26 (recounting debtor's motion for appointment of a FCR and court's subsequent order appointing David Epstein to the position). In *Forty-Eight Insulations*, the court left selection of the FCR to the agreement of the U.S. Trustee, the debtor and an official committee representing asbestos-related claimants. Absent agreement, the court would select from among their respective nominees. *See In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986).

109. *See* 11 U.S.C. §§ 328, 330, 331 (1994).

110. *See infra* note [126](#) and accompanying text.

111. *See* 11 U.S.C. § 1102(a)(1) (1994). There is some controversy over whether a judge has the authority to reconstitute an official committee after it has been appointed. *See In re Dow Corning Corp*, 212 B.R. 258 (E.D. Mich. 1997) (describing controversy and ultimately holding that bankruptcy judge did not have authority to remove attorneys from official tort claimants' committee sua sponte). *See also* Kenneth N.

Klee & K. John Shaffer, *Creditors' Committees under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. Rev. 995, 1032 (1993) (discussing uncertain rules concerning altering of composition of committees).

The U.S. Trustee also appoints trustees in Chapter 7 liquidations. *See* 11 U.S.C. § 701 (1994). Creditor election is available for selection of Chapter 7 trustees. *Id.* § 702. However, very often the few dollars at stake for unsecured creditors in a liquidation do not justify their active monitoring of or participation in the case. Because creditors show no interest in electing the trustee, the U.S. Trustee's "interim" appointment ordinarily remains the trustee for the entire Chapter 7 case. *Id.* § 701.

112. *Id.* §§ 327(a), 1103(a). The debtor's lawyers and other professionals must be "disinterested" and must not "hold or represent an interest adverse to the estate." *Id.* § 327(a). Likewise, committee professionals must not represent "any other entity having an adverse interest in connection with the case." *Id.* § 1103(b).

113. House Report, *supra* note [29](#), at 89-91.

114. As the administrator of bankruptcy cases, and the individual responsible for the supervision of the trustee or debtor in possession, it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case. Bankruptcy judges frequently view a case as "my case." The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court, and has caused at least one occasional bankruptcy practitioner to suggest that "the bankruptcy court is the only court I appear in in which the judge is an interested party."

Id. at 90.

115. Moreover, the notice and hearing that precedes the FCR's approval by the court allows other parties in interest to voice objections to the FCR nominee. No other official appointee or professional comes under similar scrutiny by parties adverse to the interests of those meant to be represented.

116. Koniak & Cohen, *supra* note [106](#), at 1126 (describing judicial bias in favor of settlement in class action context).

117. *See, e.g.*, Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993); Koniak & Cohen, *supra* note [106](#).

118. It may be a bankruptcy judge or district court judge or both. Bankruptcy jurisdiction is vested originally with the district courts, *see* 28 U.S.C. § 1334(a), (b) (1994), and the bankruptcy courts are adjuncts of the district courts. *Id.* § 157(a). While most bankruptcy cases are automatically referred to the bankruptcy court for the district in which the case is filed, in several mass tort bankruptcies, a district judge has used the power of referral to craft a sort of power sharing arrangement with the bankruptcy judge, pursuant to which both judges preside over the case. *See* Sixth Amended and Restated Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, March 28, 1988 (*In re* A.H. Robins Co.) (No. 85-01307-R), at 18. Besides the prestige and public attention that comes from presiding over a mass tort bankruptcy, there may be a sound legal reason for the district judge to maintain close involvement with the case. Under the bankruptcy jurisdiction statute, it is unclear whether a bankruptcy court may estimate or liquidate contingent personal injury tort claims for purposes of distribution in bankruptcy. *See* 28 U.S.C. § 157(b)(2)(B) (1994).

I refer in the text to the bankruptcy judge. However, the description applies equally well to a district court judge presiding over a mass tort case.

119. *See* Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 Cornell L. Rev. 967 (1999).

120. See LoPucki & Whitford, *supra* note [32](#) (discussing judges' view favoring consensual reorganization).

121. See *supra* note [100](#) and accompanying text.

122. One might suppose that the best sort of lawyer to provide zealous representation for future claimants would be one with experience representing other tort claimants. A tort plaintiff's lawyer understands how to litigate, value and settle tort claims. If nothing else, the tort plaintiff's lawyer may have some natural affinity for the plight of future tort victims that other sorts of lawyers may lack. Corporate lawyers, by contrast, would seem to have the opposite sympathies, if any, as their clients would ordinarily be *defending* suits brought by tort plaintiffs. However, a partial survey of FCRs actually appointed shows no tort plaintiffs' attorneys in the bunch. Attempts by Gene Locks, a tort plaintiffs' attorney, and Alan B. Morrison, a consumer advocate, to get themselves appointed were rebuffed. See *supra* notes [88,96](#), and accompanying text.

123. See Sobol, *supra* note [35](#), at 110.

124. *Id.*

Joynes was a young lawyer from Richmond who had begun practice three years earlier in partnership with four other young attorneys. He had attended law school at the University of Tulsa and had then served as a law clerk for a federal judge in Oklahoma. When he returned to Richmond in 1982, Joynes had worked for Judge Merhige [the presiding judge in *Robins*] for several months on a volunteer basis as an extra law clerk before he opened his law office. Neither Joynes nor his partners had any significant experience in bankruptcy law.

Id. A comparison of the relative billing rates of the lawyers involved in the case may give some flavor of the imbalance in terms of experience and sophistication in corporate reorganization. While the New York and San Francisco lawyers were charging from \$200 to \$300 per hour, and the other Richmond lawyers charged from \$120 to \$150 per hour, Joynes' rate was "between \$85 and \$95 per hour for out-of-court time and a maximum of \$110 per hour when in court." *Hefty Fees Sought in Robins Bankruptcy*, Legal Times, March 24, 1986, at 4.

None of this should be taken to suggest, however, that Mr. Joynes did not acquit himself well in the case. "As it turned out, Joynes admirably represented the interests of future claimants. . . ." Sobol, *supra* note [35](#), at 112. At the time of his appointment, however, this outcome may not have been predictable.

125. See Sobol, *supra* note [35](#)

126. The order denying Joynes' application stated:

It appears to the Court that Joynes and other members of his firm . . . are lawyers, duly qualified and admitted to practice in this Court and have appeared in this case and that sufficient cause has not been demonstrated to justify this Court authorizing additional counsel, and it further appears that said Future Tort Claimants are currently represented by counsel and there may be a substantial likelihood of unnecessary duplication of effort and expense.

Id., quoting Order Denying Employment of Special Bankruptcy Counsel for the Legal Representative of Future Tort Claimants, *In re A.H. Robins Co. Inc.*, No. 85-01307-R (Bankr. E.D. Va. May 12, 1986).

127. See *In re UNR Indus., Inc.*, 29 B.R. 741 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984), *mot. to reconsider granted*, *In re UNR Indus., Inc.*, 46 B.R. 671 (Bankr. N.D. Ill. 1985). Among

other things, the court was not convinced that future claimants had rights in bankruptcy. *See* UNR, 29 B.R. at 745.

128. *See* UNR, 725 F.2d at 1117.

129. *Id.* at 1119.

130. UNR, 46 B.R. at 675-76.

131. *Id.* Subject to those limitations, the FCR was authorized to exercise the powers and assume the responsibilities of an official creditors' committee under section 1103 of the Bankruptcy Code. *Id.* at 676.

132. *In re* UNR Indus., Inc., 71 B.R. 467, 479 (Bankr. N.D. Ill. 1987).

133. *See* Rita Henley Jensen, *Judge Turns Up Heat on Asbestos: Did High Fees Bankrupt the Manville Trust?*, Nat'l L.J., July 23, 1990, at 1.

134. *See supra* note [7](#) and accompanying text.

135. In *Piper*, a similar result occurred as a result of the narrowing of the scope of the future claims that qualified as bankruptcy claims. In that case, the debtor's business was to be sold. Once the debtor and creditors' committee decided that the resolution of future claims liability would not be necessary to selling the business, they opposed the FCR's attempt to define a broad class of future claims, and the judge agreed. *See supra* note [94](#) and accompanying text.

136. *See supra* note [94](#) and accompanying text.

137. Richard Nagareda notes similar agency costs in claim estimation for mass tort class action settlements. While future claimants' promised payments may depend on accurate projection of the number of eventual claimants, class counsel get paid the same regardless of any uncertainty in the numbers. *See* Richard A. Nagareda, *Turning from Tort to Administration*, 94 Mich. L. Rev. 899, 953 (1996).

For other general examples of judges' opportunities to express their preference for consensual reorganization, *see* LoPucki & Whitford, *supra* note [32](#), at 157.

138. This issue is discussed *infra* Part 0.

139. In their study of 43 "megabankruptcies," Professors LoPucki and Whitford found that nearly *half* the plum representations—for the debtor or an official committee—were captured by a mere 15 firms. *See* LoPucki & Whitford, *supra* note [32](#), at 156.

140. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 Colum. L. Rev. 509 (1994). Gilson and Mnookin model litigation as a prisoner's dilemma, noting the possible divergence of interest between lawyer and client when the lawyer is playing a repeat game while the client is a one-shot player.

141. In the context of personal bankruptcy practice, Professors Sullivan, Warren, and Westbrook describe conditions leading to the emergence of a lawyer-dominated legal culture:

First, because bankruptcy law is highly technical relative to many areas of law, much of the practice is done by a small subset of attorneys who specialize in bankruptcy. Second, because bankruptcy lawyers tend to be few in number, they are more likely to know

nearly all of the other practitioners. Third, because bankruptcy courts are often separated from other federal courts and are always separated from state courts, bankruptcy lawyers routinely encounter the same adversaries in disputed cases and settlement negotiations and many rarely encounter practitioners in other areas of law. These are ideal circumstances for members of a bankruptcy bar to communicate any special group norms it develops to each other and to newcomers.

Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J. L. & Pub. Pol'y 801, 848 (1994).

142. "[T]he creditors' agreements to the equity distributions . . . were in no significant part the reflection of either real or supposed legal entitlements." See LoPucki & Whitford, *supra* note [32](#), at 144.

143. *Id.*

144. *Id.*

145. *Id.* at 195 (citations omitted). This settlement norm may of course be tempered by opposing reputational concerns. Lawyers will wish to preserve their reputations as zealous advocates, which might be tarnished if cases were always settled and done so very quickly. On the other hand, presettlement wrangling may also be useful in maximizing lawyers' own economic returns, as they are typically paid on an hourly basis.

146. Future claimants . . . are an imagined group, an abstraction, at the time a "futures" settlement is negotiated. We know that a substantial number of people will in the future assert claims against the defendants, but their identity is unknown to the settling parties, the court, and often to themselves. Future claimants are more likely to be exploited because they are never present at the negotiating table, and their interests are hypothetical, indefinite, and uncertain.

Cramton, *supra* note [2](#), at 828.

147. Layers of agency mean that the individuals actually negotiating a deal are relatively far removed from their ultimate clients and not subject to direct monitoring. See LoPucki & Whitford, *supra* note [32](#), at 154-55.

148. LoPucki & Whitford, *supra* note [32](#), at 156 & n.68.

149. *Id.* (describing disapproval of lawyers' obstructionist tactics that violate group norms). In the class action context, Susan Koniak and George Cohen have commented on the incentives of special masters appointed to review class settlements and guardians appointed to protect absent class members. They note these appointees' "own self-interest in cultivating a reputation for not scuttling deals. Anyone who gained that reputation might never work as a class guardian again. The next pair of settling parties would vigorously protest the appointment of such a person and a court would be unlikely to insist in the face of that protest. . . . [G]uardians we have talked to understand their job is to approve the deal that the settling parties have constructed, after suggesting a few minor changes, not to recommend that the settlement be chucked." Koniak & Cohen, *supra* note [106](#), at 1110-11.

150. See NBRC Report, *supra* note [49](#), at 316-17.

151. For a scathing critique of class counsel in *Amchem*, the recent asbestos class action, see Koniak, *supra* note [43](#).

152. Cf. Koniak & Cohen, *supra* note [106](#), at 1125 (noting dearth of media or academic scrutiny of class settlements).

153. See *supra* note [124](#).

154. See *In re Dow Corning, Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997).

155. This conceptual shift would follow a similar rethinking of the role of the plaintiff's lawyer in the derivative and class action contexts. See John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986) (noting prevalence in U.S. of reliance on private enforcement of regulatory measures, and characterizing private attorneys acting in this capacity as "bounty hunters").

156. This approach is not without precedent. Recall that under former Chapter X of the Bankruptcy Act, the Securities and Exchange Commission played a significant role in protecting public investors, scrutinizing reorganization plans and producing advisory reports for the court. See Bankruptcy Act § 172, 11 U.S.C. § 572 (repealed 1978).

INTERPRETING THE BANKRUPTCY CODE:
An Empirical Study of the Supreme Court’s Bankruptcy Decisions

© Karen M. Gebbia-Pinetti*

“[S]tatutes do not interpret themselves”¹ and yet “there can never be a definitive theory or set of rules of interpretation.”²

<u>I. INTRODUCTION: INTERPRETIVE CONFLICT AND THE BANKRUPTCY CODE</u>	3
<u>II. MECHANICS OF INTERPRETATION</u>	10
A. <u>INTERPRETERS’ OBJECTIVES</u>	11
B. <u>SOURCES</u>	12
1. <u>Internal sources</u>	13
2. <u>Sources that are external but intrinsic to the statute</u>	14
3. <u>Sources that are external and extrinsic to the statute</u>	15
C. <u>INTERPRETIVE CANONS, GUIDES, AND AIDS</u>	16
<u>III. THE BANKRUPTCY CODE IN THE SUPREME COURT</u>	17
A. <u>OVERVIEW</u>	17
B. <u>THE UNANIMOUS DECISIONS</u>	19
1. <u>Overview</u>	19
2. <u>Unanimous decisions in the 1981 through 1985 terms</u>	19

* Associate Professor of Law, University of Hawai‘i School of Law; J.D. 1983, Georgetown University Law Center.

This article benefited from the able and always cheerful research assistance of Daniel Chen, Kaleen Hasegawa, Sat Khalsa, and Philip Miyoshi. Research assistance was funded, in part, by the Gregory P. Conlan Memorial Endowment Fund for bankruptcy research, which was established at the University of Hawai‘i by the generosity of the law firm of Chun, Kerr, Dodd, Beaman & Wong. The author also thanks Chapman Law School and *Chapman Law Review* for their many accommodations.

¹ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 170 (2d ed. 1927, from the author’s notes by Roland Gray, LLB) (“[S]tatutes do not interpret themselves; their meaning is declared by the courts, and *it is with the meaning declared by the courts, and with no other meaning, that they are imposed upon the community as Law.*”) (emphasis in original); *see also* JAMES WILLARD HURST, *DEALING WITH STATUTES* 17, 33 (1982) (agreeing that “statutes do not execute themselves . . . [but rather,] [t]heir practical impact is determined by the ways in which affected private persons or groups, lawyers in private practice and government lawyers, executive or administrative officers, and judges interpret them,” and that “[s]tatutory texts are rarely self-executing, but derive much of their impact from the uses others than legislators make of them,” but suggesting that Professor Gray “exaggerates the role of judges” when he argues that all law is judge made law).

² Anthony D’Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 562 (1989) (using Professor Stanley Fish’s proposition as a starting point); *see also id.* at 561 n.1, 562 n.8 (citing works by Professor Fish).

3.	<u>Unanimous decisions in the 1986 through 1998 terms</u>	22
a.	<u>Overview</u>	22
b.	<u>Unanimous opinions that consider only text</u>	24
c.	<u>Unanimous opinions that consider text, structure, and history</u>	28
d.	<u>Unanimous opinions that consider pre-Code practice</u>	34
4.	<u>Summary of unanimous decisions</u>	42
C.	<u>THE UNANIMOUS WITH CONCURRENCE DECISIONS</u>	45
1.	<u>Overview</u>	45
2.	<u>Concurring decisions in the 1981 through 1985 terms</u>	46
3.	<u>Concurring decisions in the 1986 through 1998 terms</u>	48
a.	<u>Single Justice concurrence decisions</u>	48
b.	<u>Multiple Justice concurrence decisions</u>	53
4.	<u>Summary of the unanimous with concurrence decisions</u>	57
D.	<u>THE MINOR SPLIT DECISIONS</u>	57
1.	<u>Overview</u>	57
2.	<u>Minor split decisions in the 1981 through 1985 terms</u>	58
3.	<u>Minor split decisions in the 1986 through 1998 terms</u>	59
a.	<u>Justice Stevens's dissents</u>	60
b.	<u>Justices Blackmun's and Marshall's dissents</u>	64
c.	<u>Justices Scalia's, Thomas's and Breyer's dissents</u>	69
d.	<u>Justices Scalia's and Thomas's concurrence with Justice Stevens's dissent</u>	76
4.	<u>Summary of the minor split decisions</u>	81
E.	<u>THE MAJOR SPLIT DECISIONS</u>	81
1.	<u>Overview</u>	81
2.	<u>The constitutional and quasi-constitutional questions</u>	83
3.	<u>The Bankruptcy Code interaction with other law cases</u>	84
4.	<u>The interpretive dispute cases</u>	90
5.	<u>Summary of the major split decisions</u>	96
IV.	<u>INTERPRETIVE METHOD AND THE BANKRUPTCY CODE</u>	96
A.	<u>PATTERNS THAT EMERGE FROM THE SUPREME COURT'S BANKRUPTCY CODE DECISIONS</u>	96
1.	<u>Patterns that emerge from the Supreme Court's split and non-split Bankruptcy Code decisions</u>	98
a.	<u>The constitutional and quasi-constitutional question cases</u>	99
b.	<u>The unanimous cases</u>	99
c.	<u>The interpretive dispute cases</u>	101
1.	<u>The Justices care about method</u>	102
2.	<u>The statutory text</u>	103
3.	<u>Structure and policy</u>	107
4.	<u>History, including legislative history and pre-Code practice</u>	109
(a)	<u>Legislative history</u>	109
(b)	<u>Broad history and pre-Code practice</u>	110
(c)	<u>The interaction with other law cases</u>	113
(d)	<u>The application of the law cases</u>	118
2.	<u>Patterns of disputes among the Justices</u>	118
B.	<u>ADVICE FOR COURTS, ADVOCATES, AND INTERPRETERS</u>	122

V. CONCLUSIONS AND RECOMMENDATIONS.....125

I. INTRODUCTION: INTERPRETIVE CONFLICT AND THE BANKRUPTCY CODE @

The Supreme Court has issued forty-eight bankruptcy decisions in the two decades since the Bankruptcy Code³ became law.⁴ In at least thirty of these cases, the Supreme Court granted certiorari to mediate conflicts among the circuit courts of appeal.⁵

³ 11 U.S.C. §§ 101-1330 (1994).

The Bankruptcy Code was enacted in 1978 and became effective on October 1, 1979. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402, 92 Stat. 2549, 2682 (1978). It has been amended numerous times since its enactment. *See* The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598, 92 Stat. 2549), as amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (1986); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (1988); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990); Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992); Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972 (1992); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994); ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), and other minor amendments.

The Bankruptcy Code superseded the former Bankruptcy Act of 1898. *See* Bankruptcy Act of 1898 (act July 1, 1898, ch. 541, 30 Stat. 544), as amended by the Chandler Act of 1938 (ch. 575, 52 stat. 840) (repealed 1979) (hereinafter, the “Bankruptcy Act”).

⁴ *See* Appendix I: The Supreme Court’s Bankruptcy Code Decisions (Listed by Term 1981-1998) [hereinafter, “Appendix I”], *post*.

After the Bankruptcy Code was enacted, the Court issued opinions in three Bankruptcy Act cases. *See* *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982); *Butner v. United States*, 440 U.S. 48 (1979); *United States v. Sotelo*, 436 U.S. 268 (1978). This article does not discuss these cases.

This article omits decisions that arose from Bankruptcy Code cases that did not involve questions of bankruptcy law, *see, e.g.*, *Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998) (clarifying the removal issues raised in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981)), and cases in which the Court simply vacated and remanded or dismissed as moot a Bankruptcy Code decision, *see, e.g.*, *Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997) (vacating judgment and remanding for reconsideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997)); *In re Bonner Mall Partnership*, 513 U.S. 18 (1994) (denying vacatur and dismissing the appeal as moot).

⁵ *See* Appendix II: Bankruptcy Code Circuit Court Splits Resolved by the Supreme Court [hereinafter, “Appendix II”], *post*. A study of the circuit court bankruptcy opinions underlying the Supreme Court bankruptcy decisions would be a useful means of enhancing interpreters’ understanding of bankruptcy interpretation because it would reveal the extent to which splits among the circuits arose from the use of divergent interpretive methods. *Patterson v. Shumate*, 504 U.S. 753 (1992), is a classic example of a case in which divergent methods (plain text versus legislative history) led to splits in the lower courts. It would also be particularly interesting to consider the extent to which the Supreme Court resolved such splits through a unanimous opinion. A study of the circuit court splits is, however, well beyond the scope of this article.

Studies examining the effectiveness of competing interpretive models are also critical. For example, in a recent study, Professor Daniel Bussel concluded that textualist decisions were overruled by

Although the Court resolved the specific questions presented in each, or at least most,⁶ of these cases, critics have long complained that the Court has not consistently applied a coherent interpretive method in Bankruptcy Code cases.⁷ Bankruptcy experts contend that the Court's use of divergent, and/or inappropriate, interpretive methods undermines predictability and stability, increases costs, ignores congressional intent, impairs bankruptcy law by preventing the Court from developing a coherent bankruptcy policy and jurisprudence, leaves the lower courts with inadequate guidance concerning how to interpret the Bankruptcy Code, and contributes to confusion and split decisions among the lower courts.⁸

These problems are particularly troubling in the bankruptcy context because the Bankruptcy Code's commercial and remedial provisions affect society in pervasive and important ways.

As a commercial statute, the Bankruptcy Code serves as the backdrop for planning and negotiation in a wide variety of non-bankruptcy commercial transactions involving both businesses and consumers. These transactions, which include financing, corporate restructuring, consumer credit, acquisitions, mergers, workouts, sales, investments, and many other types of transactions, involve incalculable amounts of money,

legislative action more often than non-textualist decisions. *See* Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. – (forthcoming April 2000).

⁶ In *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, Ltd.*, 526 U.S. 434, 119 S. Ct. 1411 (1999), and *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), for example, the Court held that the debtors' proposed contributions to their plans of reorganization did not constitute "new value." The Court declined, however, to determine whether the judicially-developed "new value" exception to the "absolute priority" rule had survived the enactment of the Bankruptcy Code. *See infra* notes 236-48, 520-53 and accompanying text.

⁷ *See, e.g.*, Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 301-38 (1994); Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1 (1988); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1, 6, 109-11 (1996); Bruce A. Markell, *Conspiracy, Literalism, and Ennui at the Supreme Court: An Examination of Bankruptcy Cases Decided From 1990 to 1993*, 41 FED. BAR NEWS & J. 174, 181-83 (1994); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Code Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 879-85 (1991); Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 570-75 (1988); Adam J. Weinsch, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L.J. 1831, 1854-62 (1991).

⁸ *See generally* Peter H. Carroll, III, *Literalism: The United States Supreme Court's Methodology for Statutory Construction in Bankruptcy Cases*, 25 ST. MARY'S L.J. 143, 212-15 (1993); Carlos J. Cuevas, *Public Values and the Bankruptcy Code*, 12 BANKR. DEV. J. 645 (1996); Kelch, *supra* note 7, at 291, 301-38; Klee & Merola, *supra* note 7; Eric W. Lam, *The Limit and Inconsistency of Application of the Plain Meaning Rule to Selected Provisions of the Bankruptcy Reform Act of 1994*, 20 HAMLINE L. REV. 111 (1996); Lawless, *supra* note 7, at 100-07; Markell, *supra* note 7, at 181-83; Tabb & Lawless, *supra* note 7, at 881-85; Tabb, *supra* note 7, at 570-75.

See also *Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1285 (5th Cir. 1991) (Jones, J., dissenting on rehearing) (quoted *infra* text accompanying note 761).

goods, and services.⁹ Uncertainty increases the risks and costs of commercial transactions for borrowers and lenders, buyers and sellers, creditors and debtors, businesses and consumers.

The Bankruptcy Code is also an important remedial statute.¹⁰ The Bankruptcy Code's broad relief chapters apply to a wide variety of debtors, from impoverished individuals, to multi-million and -billion dollar businesses, to municipalities.¹¹ For example, in each of the past three years, over one million debtors have filed for bankruptcy protection.¹² Each year, bankruptcy filings also affect tens of millions of non-debtors.¹³

⁹ See, e.g., E. WARREN & J. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 7 (1993).

¹⁰ Concerns over the proper scope of the Bankruptcy Code's remedial provisions have spurred recent amendments, see, e.g., the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994), comprehensive congressionally-mandated study of the Bankruptcy Code, see Report of the National Bankruptcy Review Commission (October 20, 1997), and recent, hotly contested bankruptcy reform legislation, see Bankruptcy Reform Act of 1999, S. 625, 106th Cong. (1999); Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998).

For an overview of the debate concerning the continued viability of chapter 11, see Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992) (discussing the debate concerning the continued viability of chapter 11); G. Eric Brunstead, Jr., et al., *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcies: Part One*, 53 BUS. LAW. 1381 (1998); Kenneth Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 AM. BANKR. L.J. 551 (1995); Lynn M. LoPucki, *Chapter 11: An Agenda for Basic Reform*, 69 AM BANKR. L.J. 573 (1995); Elizabeth Warren, *The Untenable Case For Repeal of Chapter 11*, 102 YALE L.J. 437 (1992).

¹¹ Chapter 7 relief (liquidation) is available to individuals and businesses; chapter 9 relief (adjustment of debts of a municipality) is available to certain insolvent municipalities; chapter 11 relief (reorganization) is available to individuals and businesses but is used primarily by businesses; chapter 12 relief (adjustment of debts of a family farmer with regular annual income) is available only to family farmers; and chapter 13 relief (adjustment of debts of an individual with regular income) is available only to individuals who earn a regular income and whose debts fall within specific limits. See 11 U.S.C. § 109 (1994).

For empirical data concerning individuals who have filed for bankruptcy relief, see Karen Gross, *Re-Vision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1505 (1990); TERESA SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989); Teresa A. Sullivan, et al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 LAW & CONTEMP. PROBS. 195 (1987); Teresa Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts, 1981-1991*, 68 AM. BANKR. L.J. 121 (1994); Teresa Sullivan, et al., *The Persistence of Local Legal Culture: Twenty Years of Experience from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801 (1994). For select empirical data concerning business bankruptcy filings, see Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Publicly Held Companies*, 1991 WIS. L. REV. 11 (1991). For a discussion of bankruptcy's impact on the community, see KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* (1997).

¹² See Administrative Office of the United States Courts, *In June, Total Bankruptcies Filed Decline Again, Personal Bankruptcies Fall for First Time in 5 Years* (Aug. 6 1999) <<http://www.uscourts.gov/new.html>>. For example, in the year ended June 30, 1999, 1,352,030 individuals and 39,934 businesses filed bankruptcy cases. The 1,391,964 aggregate filings represent a 2.6 % decrease over the aggregate 1998 filings (1,429,451 filings) and a 62.2 % increase over the aggregate 1995 filings (858,104 filings). Non-business filings rose dramatically between 1995 and 1998 (from 806,816 to 1,379,249), and then declined by 2 % in 1999. The year ended June 30, 1999 reflects a dramatic decrease in business filings in comparison with recent years (50,202 filings in 1998, 53,993 filings in 1997, 52,938 filings in 1996, and 51,288 filings in 1995). *Id.*

These non-debtors include not only individuals, businesses, and governmental entities that hold claims against individual and business debtors, but also the employees, retirees, customers, and stockholders of business debtors.

Bankruptcy also affects society in less direct ways. For example, the failure of a major employer may significantly impair a community's social services and tax base. Similarly, large numbers of financially distressed individuals may severely strain social services. When interpretive disputes lead to litigation in bankruptcy cases, everyone suffers. The cost of litigation may spell the difference between liquidation and reorganization. Every dollar spent litigating is a dollar removed from an asset base that is already inadequate to satisfy claims.¹⁴

Although the costs of uncertainty may be particularly high in bankruptcy cases, interpretive uncertainty is by no means unique to bankruptcy. For the past twenty years, a virulent debate over interpretive method has plagued courts, interpreters, and scholars in virtually every field of law governed by statutes.¹⁵ This debate raises important and extraordinarily intractable questions concerning the proper relationship between courts and legislatures; the motives of legislators, judges, and interpreters; the determinacy of language; that nature of interpretation; the role of intrinsic values (such as predictability, stability over time, and coherence throughout the law); and the very objectives of interpretation (which may include legislative intent, statutory purpose, linguistic meaning, best results, or a shared understanding between the drafter and interpreter).¹⁶

Disputes over these fundamentals have led scholars to advocate a variety of divergent interpretive models.¹⁷ Moreover, scholars cannot even reach accord on the end goal. Even as some struggle to prove the superiority of their preferred interpretive models,¹⁸ others contend that the goal of defining one, consistent, comprehensive, and uniformly applicable interpretive method is unrealistic and unachievable.¹⁹

¹³ If each of the 1.3 million bankruptcy cases filed during the year ended June 30, 1999 affected only 20 creditors (or other non-debtors), these cases together would have affected 26 million non-debtors. Some of these creditors (such as institutional lenders) will, of course, have been affected by multiple bankruptcy filings.

¹⁴ See *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 409 (1993) (O'Connor, J., dissenting) ("An entity in bankruptcy can ill afford to waste resources on litigation; every dollar spent on lawyers is a dollar creditors will never see.").

¹⁵ See generally Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy, and Legal-System Values*, 21 SETON HALL LEG. J. 233, 234 nn.1-2 (1997) (collecting authorities).

¹⁶ See generally Gebbia-Pinetti, *supra* note 15, at 271-76, 280-88, 291-302.

¹⁷ See *infra* Part II.

¹⁸ See, e.g., Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999) (advocating the use of legislative history to enforce the expectation of public justification of legislation); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (advocating dynamic interpretation); David A. Forkner & Kent Kostka, *Unanimously Weaving a Tangled Web: Walters, Robinson, Title VII, and the Need For Holistic Statutory Interpretation*, 36 HARV. J. ON LEGIS. 161 (1999) (advocating holistic interpretation); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988) (advocating a modified form of intentionalism); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988) (advocating collaborative

Perhaps the only certainty is that interpretive theory is in a time of turbulent upheaval and transition. Scholars of interpretive theory will likely not achieve consensus for years, if ever. In the meantime, today's interpreters face a formidable challenge. We must determine how to preserve the greatest possible degree of interpretive certainty despite the fact that eminent scholars and jurists urge us to employ incompatible interpretive methods.

If we hope to identify an effective interpretive model for this time of transition, we must consider and attempt to reconcile the empirical, practical, and theoretical aspects of Bankruptcy Code interpretation.

First, empirical studies are the only way to discern current interpretive practice in bankruptcy cases. A study of the Supreme Court's interpretive practices is critical because the lower courts look to the Court for direction concerning interpretive method, and the Court is the ultimate arbiter of cases in which the lower courts have split. When the circuit courts reach conflicting holdings because they have applied conflicting interpretive methods (such as textual meaning versus congressional intent as discerned in pre-Code practice or legislative history), the Court's resolution of the split is a comment on interpretive method. Predicting the Court's holding in the next bankruptcy case (and, consequently, understanding which lower court decisions are at risk of being overruled) depends more on understanding the Court's patterns of reasoning than on knowing the substantive holdings of each Supreme Court bankruptcy decision. Consequently, interpreters should carefully consider the Court's rationale, which is inextricably interwoven with the Court's interpretive method.

This article studies the Court's interpretive methods. Studies of lower court bankruptcy decisions might also provide valuable information concerning interpretive method, particularly if such studies examine whether conflicting decisions arise from conflicting interpretive methods, whether appellate courts and bankruptcy courts apply divergent interpretive methods, and whether textual or non-textual decisions are more frequently overruled by higher courts or legislative action.

In a time of interpretive consensus, interpreters might have achieved certainty by applying the method that conformed to current practice. In this time of interpretive upheaval, however, an empirical analysis is unlikely to reveal a single, universally accepted and applied interpretive method. Moreover, an empirical analysis cannot per se ensure interpreters that the Court's current methods are practically or theoretically optimal, or even legitimate. Nevertheless, an empirical study is critical, for two reasons. First, it is the only way to determine whether the Court's opinions reveal either a consistent interpretive method or consistent patterns of interpretation, including patterns of agreement and disagreement among the Justices. Only by identifying these patterns can interpreters begin to predict the Court's approach in future cases. Second, an empirical study will establish a foundation of current practice that interpreters can test

interpretation); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. Rev. 1 (1991) (advocating comprehensive rationality); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (advocating textualism).

¹⁹ See, e.g., STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); see also Gebbia-Pinetti, *supra* note 15, at 294-97 & n.174 (collecting authorities).

against practically and theoretically ideal interpretive models. Simply stated, if the Court is issuing “bad” decisions in bankruptcy cases, an empirical study may reveal why.

Second, as a practical matter, interpreters should consider which interpretive method would be most appropriate for a statute that has the unique nature and mix of characteristics of the Bankruptcy Code. Of course, interpreters cannot achieve certainty simply by adopting the practically optimal approach, unless that approach happens to conform to current interpretive practice. Only a practical inquiry, however, will reveal whether the Court’s current interpretive method is well-suited to the Bankruptcy Code. Moreover, only a practical inquiry will reveal whether any of the competing interpretive models that theorists claim are optimal, in the abstract, would work well in the specific context of the Bankruptcy Code.

Third, a theoretical analysis is necessary to determine whether either the Court’s current interpretive methods, or an interpretive model that appears to be well-suited to the characteristics of the Bankruptcy Code, satisfies the fundamental objectives of statutory interpretation and the mandates of interpretive theory. Theory alone will not permit interpreters to predict consequences if the courts do not, in fact, apply the theoretically optimal approach. Nevertheless, theory is the only basis for testing the validity of current interpretive methods and practically desirable interpretive methods.

Interpreters operating during today’s period of interpretive discord must begin by understanding current interpretive practices, identifying practically desirable interpretive methods, and determining whether a single, optimal interpretive model is theoretically possible. They must then determine whether current interpretive practices and desirable interpretive practices can be reconciled. If these divergent practices cannot be reconciled, interpreters must determine whether it is possible to move incrementally toward an interpretive ideal while hewing closely enough to current practice to maintain certainty.

The empirical, practical, and theoretical study necessary to answer these questions cannot be accomplished within the confines of a single law review article. This article embodies the first, fundamental step of the requisite inquiry, which is a comprehensive, empirical analysis of the interpretive methods the Supreme Court has employed in its Bankruptcy Code decisions. A separate work will consider how the results of this empirical study comport with the practical and theoretical components of Bankruptcy Code interpretation.²⁰

Part II of this article briefly identifies the essential components of interpretive method. These components include interpretive objectives, sources, and guides. This section is designed to provide context for an empirical study of the Supreme Court’s interpretive approach.

Part III examines the interpretive methods the Court has employed in each of its Bankruptcy Code decisions. This study differs in three ways from other studies that have undertaken empirical analyses of limited numbers of the Court’s bankruptcy decisions. First, it focuses exclusively on interpretive method. Second, it comprehensively examines all of the Court’s Bankruptcy Code decisions.²¹ Third, it examines the Court’s

²⁰ See Karen M. Gebbia-Pinetti, *Toward a Method and Theory of Interpreting the Bankruptcy Code* (working title, in progress).

²¹ Cf. sources cited *infra* note 683.

majority, concurring, and dissenting opinions in order to determine the import of interpretive disputes among the Justices. It does not simply on the interpretive methods the Court has used in its majority opinions.²²

This article hypothesizes that interpreters can best understand the Court's bankruptcy jurisprudence²³ by examining areas of agreement and disagreement among the Justices in bankruptcy cases.

For example, if substantive bankruptcy policy is the linchpin of the Court's bankruptcy jurisprudence, then one would expect the Court to issue unanimous opinions when the Justices agree on substantive bankruptcy policy and to issue divided opinions when the Justices disagree on substantive bankruptcy policy. One would also expect disputes among the Justices, as revealed in separate concurring and dissenting opinions, to turn on matters of bankruptcy policy.

In contrast, to the extent that interpretive method is the linchpin of the Court's bankruptcy jurisprudence, one would expect that disputes among the Justices concerning the choice and application of interpretive method would lead to separate opinions.

Finally, if other considerations affect the Justices' approach to bankruptcy jurisprudence, if the Court balances interpretive method and substantive results, or if some Justices decide bankruptcy cases based upon substantive bankruptcy policy while others decide bankruptcy cases based upon interpretive method, one would expect the Justices' separate opinions to reflect these considerations. In other words, an examination of the reasons the Justices agree and disagree with each other may reveal more about the Justices' vision for the Bankruptcy Code than an examination of either the substantive results in bankruptcy cases, alone, or the interpretive methods the Court has used in its majority opinions, alone.

To test this hypothesis and determine the extent to which interpretive method drives the Court's bankruptcy jurisprudence, Part III analyzes separately the Court's unanimous, unanimous with concurrence, minor split, and major split bankruptcy decisions. Part IV summarizes the results and elaborates the implications of this empirical study. Among the observations that Part IV discusses are the following:

*In one-half of the Court's Bankruptcy Code decisions, all Justices agreed on the result.

*Nevertheless, in more than two-thirds of the Court's Bankruptcy Code cases, one or more Justices wrote separate opinions.

*The Justices generally decided bankruptcy cases based upon principles of statutory interpretation rather than, for example, based upon substantive bankruptcy policy.

²² Cf. sources cited *supra* notes 7-8, *infra* notes 672-83.

²³ In this context, "jurisprudence" is not limited to judicial development of substantive legal doctrine, but also includes interpretive patterns that help the observer understand the Court's past decisions and predict the Court's future decisions. The latter is sometimes labeled "legisprudence."

*Nevertheless, even the Court’s unanimous cases did not consistently employ one, single interpretive method. The Court’s unanimous opinions do not reveal any obvious criteria for choosing among these divergent methods.

*Disputes among the Justices over interpretive method led to a substantial majority of the Justices’ separate opinions. These separate opinions reveal two significant patterns of discord. First, particular Justices disagreed strongly and consistently with other Justices concerning interpretive method. Second, these disputes centered upon two prominent components of bankruptcy interpretation – the plain meaning canon and the pre-Code practice canon.

*The overwhelming majority of cases in which the Justices disagreed with each other for reasons unrelated to interpretive method involved either constitutional, or quasi-constitutional, questions or tensions between the Bankruptcy Code and other applicable non-bankruptcy law. An inordinately large percentage of the Court’s major splits arose from constitutional questions. A substantial number of the cases involving tensions between the Bankruptcy Code and other law caused disputes among the Justices concerning how to reconcile the Bankruptcy Code’s plain language, pre-Code law, and a “canon” of deference to important federal or state laws or governmental interests.

Part IV elaborates these and other observations and considers how bankruptcy judges, practitioners, and scholars might approach bankruptcy cases in light of these results. Seven Appendices present compilations of this study’s data.²⁴ Finally, Part V summarizes my conclusions and makes recommendations for further study.

II. MECHANICS OF INTERPRETATION

The modern interpretive debate is characterized by a dizzying array of competing interpretive theories and models. Some of the more commonly discussed models include

²⁴ See Appendix I: The Supreme Court’s Bankruptcy Code Decisions (Listed by Term 1981-1998) [hereinafter, “Appendix I”]; Appendix II: Bankruptcy Code Circuit Court Splits Resolved by the Supreme Court [hereinafter, “Appendix II”]; Appendix III: Splits in Supreme Court Bankruptcy Code Cases [hereinafter, “Appendix III”]; Appendix IV: Distribution of Justices’ Opinions in Supreme Court Bankruptcy Code Cases [hereinafter, “Appendix IV”]; Appendix V: Supreme Court Justices’ Dissent and Divergence Rates in Bankruptcy Code Cases [hereinafter, “Appendix V”]; Appendix VI: Distribution of Textual, Non-Textual, and Pre-Code Practice Opinions in the Supreme Court’s Bankruptcy Code Cases [hereinafter, “Appendix VI”]; Appendix VII: Supreme Court Justices’ Rates of Joining Textual and Non-Textual Opinions in Bankruptcy Code Cases [hereinafter, “Appendix VII”], *post*.

textualism, originalism, intentionalism, purposivism, pragmatism, legal process, holistic interpretation, dynamic interpretation, and integrity in interpretation.²⁵

Competing views of interpretative theory, political theory, legal theory, and practical reasoning drive these models.²⁶ The complexity of these underlying philosophical motivations leads to multiple shades, variations, and combinations within each of these general models and frequent overlap among these models. Consequently, a particular interpreter's approach may fit within more than one of these categories.²⁷

Despite the complexities and nuances of interpretive theory, the mechanics of interpretation are relatively simple. Three primary components define every interpretive model. These are the (i) interpreter's goals or objectives, (ii) sources the interpreter consults, and (iii) interpretive guides the interpreter employs to understand the relationships among these sources and to wield these sources in a way that achieves the interpreter's objective. The theoretical or philosophical criteria that drive the different interpretive models direct interpreters to pursue different objectives, consult different sources, and apply different interpretive guides.

Part II briefly identifies the primary mechanical components of interpretation in order to provide the reader with some context for this article's examination of the Court's interpretive methods.

A. Interpreters' Objectives

When an interpreter applies a statute, she typically has in mind a particular objective that defines her task. She may seek to determine and implement the legislature's actual, subjective intent (intentionalist), the statute's objective purpose (purposive), the text's meaning (textualist, formalist), or the best result (consequentialist). Alternatively, she may view interpretation not as a search for a specific objective, but rather, as a dialogue through which the drafter and interpreter achieve a common understanding.²⁸

Within each of these categories of inquiry, the interpreter's approach will depend upon the breadth and temporal focus of her inquiry. First, an interpreter might focus on

²⁵ See generally ESKRIDGE, *supra* note 18 (analyzing divergent interpretive methods); see also sources cited *supra* notes 15, 18, 19; Gebbia-Pinetti, *supra* note 15 (distinguishing textualism, intentionalism, purposivism, originalism, and various forms of dynamic interpretation); KENT GREENAWALT, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 5 (1999) (mentioning textualism, intentionalism, purposivism, legal process, pragmatism, and integrity).

²⁶ See, e.g., Gebbia-Pinetti, *supra* note 15 (extensively analyzing the theoretical foundations of competing interpretive models); GREENAWALT, *supra* note 25, at 10-11.

²⁷ For example, Justice Thomas's interpretive method might be characterized as textualist, originalist, and linguistically holistic. Justice Stevens's approach might be characterized as intentionalist or purposive, dynamic, substantively holistic, and perhaps pragmatic.

²⁸ See generally Gebbia-Pinetti, *supra* note 15 at 271-76, 280-88, 291-302 (for a discussion of different interpretive objectives).

the intent, purpose, or meaning of the statute as a whole (holistic), or of only one particular phrase or section of the statute (narrow or non-holistic).²⁹ Second, the interpreter may seek to implement the original intent, purpose, or meaning (originalist) or she may view the original intent, purpose, or meaning in light of the contexts that surrounded the enactment of the statute and the manner in which those contexts have changed since the statute was enacted (dynamic).³⁰

Although there are exceptions and gradations, intentionalists generally tend to apply originalist interpretation. Consequentialists are dynamic. Textualists typically claim to be originalist, but when they apply a current rather than original meaning, they are dynamic. Purposivists tend to search for the statute's original purpose, but their efforts to discern how that purpose applies in the current day often appear to be dynamic. Interpreters may apply both non-holistic and holistic interpretation in either an originalist or dynamic manner.³¹

In most of the Court's Bankruptcy Code cases, the Court either expressly or impliedly searches for legislative intent.³² In some of these cases, however, the Court's reference to subjective legislative "intent" seems to refer, more objectively, to the purposes of the statute.³³ A full examination of the Court's interpretive objective in bankruptcy cases is beyond the scope of this article.

B. Sources

Interpreters may consult a variety of sources in their efforts to implement the legislature's intent, statute's purpose, text's meaning, best result, or other objective. This section categorizes interpretive sources according to the following criteria. First, sources may have existed before the enactment of the statute (historic), may have been created contemporaneous with the enactment of the statute (contemporaneous), or may have been created after the statute was enacted (subsequent). Second, in each of these three categories, sources may be either internal or external to the statute. Finally, external

²⁹ See generally Forkner & Kostka, *supra* note 18 (discussing holistic and non-holistic interpretation).

³⁰ See generally ESKRIDGE, *supra* note 18 (contrasting originalist and dynamic interpretation).

³¹ See generally sources cited *supra* notes 28-30.

³² See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213, 221-22 (1998); *Fidelity Financial Servs., Inc. v. Fink*, 522 U.S. 211, 215-21 (1998); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6, 523, 526 (1984); *United States v. Noland*, 517 U.S. 535, 539-40 (1996); *Grogan v. Garner*, 498 U.S. 279, 282-83, 287-88 (1991); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 372 (1988); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 350-52 (1985); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, 208, 209 (1983).

³³ See, e.g., *infra* text accompanying notes 147-49.

sources may be closely and integrally related to the statute (intrinsic) or only remotely related to the statute (extrinsic).³⁴

The purpose of this list is simply to identify sources that interpreters might consult and to categorize those sources in a way that may be helpful as readers consider the interpretive methods the Court has applied in bankruptcy cases. This list is not designed as a comprehensive review or as a commentary on the legitimacy of these sources.³⁵

1. Internal sources

Internal to the statute and contemporaneous with the provision being applied:

- (1) Text: language of the particular provision
- (2) Definitions: statutory definitions of terms and phrases
- (3) Formalist holistic (or structural) analysis: use of the term or phrase in other sections of the statute
- (4) Substantive holistic (or structural) analysis: substantive effect of the provision and of related provisions
- (5) Overarching substantive holistic (or structural) analysis: the substantive effect, design, object, or policy of the statute as a whole.³⁶ The Court has recognized two overarching policies that animate the Bankruptcy Code: (a) the rehabilitation of debtors, and (b) the maximization of value and fair and equitable treatment of similarly situated creditors.³⁷

Internal to the statute and historic in relation to the provision being applied:³⁸

³⁴ The distinction between a “source” and an interpretive guide is not definite. For example, a dictionary could be considered a “source” or an interpretive guide that assists the interpreter in applying the text. Similarly, although legislative history is often viewed as a source, it could be deemed an interpretive guide. For simplicity, this article includes all of these materials as sources.

³⁵ For other lists of interpretive sources, see generally SUTHERLAND, STATUTORY CONSTRUCTION, §§ 27.01-27.04 (4th ed. 1991).

³⁶ See, e.g., *Grogan v. Garner*, 498 U.S. 279, 287-88 & n.13 (1991); see also *infra* text and accompanying notes 147-49; *infra* Part IV.A.1.c.3.

³⁷ See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (citing the fresh start policy); *Union Bank v. Wolas*, 502 U.S. 151, 160-62 (1991) (citing the equitable distribution policy, and deter a race to the courthouse policy); *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 58 (1990) (citing the equitable distribution policy); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) (citing the reorganization policy); *Grogan*, 498 U.S. at 287 (citing the fresh start policy); *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 351-54 (1985) (citing the maximization of value policy); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203-04 (1983) (citing the reorganization policy); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (citing the fresh start policy).

³⁸ These sources might be considered external, because they are no longer part of the statute, but are nevertheless intrinsic to the statute. The distinction is not important for purposes of this article.

- (6) Prior law (i.e., the Bankruptcy Act)
- (7) Prior versions of the Bankruptcy Code (i.e., how the provision in question altered an earlier version of the provision)

Internal to the statute and subsequent to the provision being applied:

- (8) Amendments made to the provision after the provision was enacted
- (9) Amendments made to other provisions that affect or are related to the provision

2. Sources that are external but intrinsic to the statute

External, intrinsic, and contemporaneous with the provision being applied:

- (10) Legislative history of the enactment (committee reports, floor statements, speeches, debates)

External, intrinsic, and historic in relation to the provision being applied:

- (11) Legislative history of Bankruptcy Code and Bankruptcy Act predecessors to the provision
- (12) Judicial precedents interpreting and pre-Code judicial doctrines elaborating the Bankruptcy Act predecessor to the Bankruptcy Code provision
- (13) Judicial precedents interpreting and judicial doctrines elaborating prior versions of the Bankruptcy Code provision
- (14) Legislative history of prior, proposed bills that were not enacted

External, intrinsic, and subsequent to the provision being applied:

- (15) Legislative history of subsequently enacted amendments
- (16) Proposed amendments rejected after the provision was enacted
- (17) Legislative history of subsequent, proposed bills that were not enacted
- (18) Judicial precedent interpreting the provision

3. Sources that are external and extrinsic to the statute

External, extrinsic, and contemporaneous with the provision being applied:

- (19) Dictionaries and similar textual aids dated contemporaneous with the statute
- (20) Contemporaneous non-bankruptcy statutes, their text, structure, and policy
- (21) Other contemporaneous non-statutory law (its substance and policy)
- (22) Public debate, popular press, scholarly writings, other commentary contemporaneous with the enactment of the provision

External, extrinsic, and historic in relation to the provision being applied:

- (23) Dictionaries and similar textual aids dated prior to the statute
- (24) Non-bankruptcy statutes (their text, structure, policy) that pre-date the Bankruptcy Code provision
- (25) Other non-statutory law (its substance and policy) that pre-dates the enactment of the Bankruptcy Code provision
- (26) Public debate, popular press, scholarly writings, other commentary that pre-dates the enactment of the provision

External, extrinsic, subsequent to the provision being applied:

- (27) Dictionaries and similar textual aids dated later than the statute
- (28) Non-bankruptcy statutes (their text, structure, policy) that were enacted after the Bankruptcy Code provision
- (29) Other non-statutory law (its substance and policy) that was developed after the enactment of the Bankruptcy Code provision
- (30) Public debate, popular press, scholarly writings, other commentary subsequent to the enactment of the provision
- (31) Changes in social and legal contexts; changes in the legislature
- (32) Consequences in the case and projected consequences in subsequent cases

Three observations concerning these sources are appropriate. First, for purposes of this article, it will rarely be necessary to elaborate the nuances of the competing interpretive models except to differentiate textual from non-textual interpretation.³⁹ This distinction, however, is far from simple. Different commentators hold different views concerning what constitutes textual interpretation.⁴⁰ For purposes of this article, the Court's interpretation will be deemed "textual" only if the Court consults no sources

³⁹ See Appendix VI: Distribution of Textual, Non-Textual, and Pre-Code Practice Opinions in the Supreme Court's Bankruptcy Code Cases [hereinafter, "Appendix VI"], *post*; see also *infra* Parts IV.A.1.c.2, IV.A.2.

⁴⁰ See, e.g., sources cited *infra* notes 50, 672-83.

other than those listed above as sources (1) (text), (2) (textual definitions), (3) (formalist holistic analysis), and (19), (23) and (27) (dictionaries).⁴¹ If the Court considers any other source, for any reason, even simply to confirm textual meaning, the analysis is not purely textual.

Second, although any consideration of post-enactment sources, including subsequent amendments and subsequently enacted, related laws is considered dynamic, the preceding list reveals a rich variety of dynamic sources, many of which courts consult regularly. The more controversial uses of dynamic interpretation involve importing broader changes in the social fabric and self-consciously protecting interests not protected by the legislature.

Third, “history” encompasses a broad array of sources other than “legislative history.” Many of these sources, such as prior law and judicial interpretations of prior law, are intrinsic to the historical development of the doctrines embodied in the current Bankruptcy Code.

C. Interpretive Canons, Guides, and Aids

Interpretive canons, guides, and aids are tools or criteria that interpreters use to determine which sources to consult, how to construe those sources, the import, meaning and relationships among interpretive sources, and how to wield those sources to achieve the interpretive objective.

Courts employ an enormous variety of interpretive canons, guides, and aids.⁴² For simplicity, the article will refer to all of these devices as “canons.” For purposes of this article, the reader should simply be alert to four distinct categories of interpretive canons that appear with some regularity in the Supreme Court’s bankruptcy cases.

First, textual guides include general rules of grammar and linguistic construction.⁴³ Other, more specific, textual canons direct the interpreter when to consider only the text and when to look beyond the text.⁴⁴

Second, structural or holistic canons encourage the interpreter to consider the statute’s words in the context of other components of the statute, including the use of the

⁴¹ See *infra* Parts IV.A.1.c.2, IV.A.2.

⁴² For classic discussions of interpretive canons, see generally SUTHERLAND, *supra* note 35, at § 45.13, 76-78; REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 227-37 (1975); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

⁴³ See, e.g., *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-45 (1989) (applying rules of grammar); *infra* notes 629-57 and accompanying text.

⁴⁴ See, e.g., *Rake v. Wade*, 508 U.S. 464, 471 (1993); *Barnhill v. Johnson*, 503 U.S. 393, 401-02 (1992); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *Ron Pair*, 489 U.S. at 241-43; see also *Dewsnup v. Timm*, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting); *infra* Parts IV.A.1.c.2, IV.A.2.

same or similar words and phrases elsewhere in the statute (linguistic or textual), and the structure, design, object, policy, or purpose of the statute (substantive).⁴⁵

Third, pre-Code canons instruct the interpreter to consider or defer to pre-Code law or pre-Code judicial interpretations, practices, and doctrines, in certain circumstances.⁴⁶

Fourth, the Court occasionally has applied other, bankruptcy-specific canons.⁴⁷ Bankruptcy-specific canons include, for example, suggestions that interpreters defer to important state, federal, or governmental interests,⁴⁸ or that interpreters construe discharge exceptions narrowly in favor of the debtor.⁴⁹

Part III examines the interpretive methods the Supreme Court has employed in its Bankruptcy Code decisions.

III. THE BANKRUPTCY CODE IN THE SUPREME COURT

A. Overview

This article separately analyzes the Court's unanimous (Part B), unanimous with concurrence (Part C), minor split (Part D), and major split (Part E) Bankruptcy Code decisions.

For purposes of this article, a decision is "unanimous" only if the Justices agreed on a single opinion, and no Justice wrote a separate concurring or dissenting opinion. In "unanimous with concurrence" cases, one or more Justices wrote concurring opinions. Together, the unanimous decisions and unanimous with concurrence decisions are referred to as the "non-split decisions."

⁴⁵ See, e.g., *Rake*, 508 U.S. at 474-75; *Grogan v. Garner*, 498 U.S. 279, 288 n.13 (1991); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

⁴⁶ See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998); *United States v. Noland*, 517 U.S. 535, 539 (1996); *Dewsnup*, 502 U.S. at 419-20; *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990); *Ron Pair*, 489 U.S. at 251-54 (O'Connor, J., dissenting); *Timbers*, 484 U.S. at 380; *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986); *Kelly v. Robinson*, 479 U.S. 36, 47 (1986); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 208 (1983); cf. *Dewsnup*, 502 U.S. at 433-34 (Scalia, J., dissenting); *Ron Pair*, 489 U.S. at 240-41.

⁴⁷ The Court also applied constitutional canons in one case that raised constitutional questions in a bankruptcy context. See *United States v. Security Indus. Bank*, 459 U.S. 70, 78-80 (1982); *infra* notes 270-71 and accompanying text.

⁴⁸ See, e.g., *Midlantic*, 474 U.S. at 499-501; *Kelly*, 479 U.S. at 44-49; cf. *Ron Pair*, 489 U.S. at 23-46 (distinguishing the case at bar from cases in which such interests were at stake); see also *infra* Parts IV.A.1.c, IV.A.1.d.

⁴⁹ See, e.g., *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

The cases in which the Justices did not agree on the result (the “split decisions”) are separated into “minor split” and “major split” decisions. Major splits occurred when at least three Justices dissented. Minor splits occurred when one or two Justices dissented.

Where appropriate, the analysis separates cases decided prior to the 1986 Term from cases decided in the 1986 and subsequent Terms. This division is designed to isolate and consider the extent to which the addition of Justice Scalia (whose iconoclastic interpretive methods are legendary)⁵⁰ to the Court in 1986 may have affected the Court’s interpretive splits.

The first of the Court’s forty-eight Bankruptcy Code cases came before the Court during the 1981 Term.⁵¹ Appendix I, *post*, reveals that the number of Supreme Court bankruptcy cases increased dramatically from the 1981 through 1985 period to the 1986 through 1998 period.⁵²

Despite this increase, however, the raw numbers show little distinction between either the non-split decisions and the split decisions or the pre-Justice Scalia period decisions and the Justice Scalia period decisions. Appendix III, *post*, reveals that the Court decided one-half of its forty-eight aggregate bankruptcy cases by split decisions, and one-half by non-split decisions.⁵³ The allocation between split and non-split

⁵⁰ See generally William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court’s Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

⁵¹ See *Central Trust Co. v. Official Creditors’ Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); Appendix I, *post*.

⁵² See Appendix I, *post*. During the 1981 through 1985 Terms, the Court decided eight bankruptcy cases in five years, which is 1.6 cases per year. During the 1986 through 1998 terms, the Court decided 40 bankruptcy cases in 13 years, which is 3.076 cases per year. Any suggested reasons for this increase would be speculative absent an empirical study that goes well beyond the scope of this article. Factors relevant to such a study might include the dramatic increase in bankruptcy filings during this period, frequency of amendments to the Bankruptcy Code, time required for cases to rise from the bankruptcy courts to the Supreme Court, nature of the questions presented, reasons the Court has accepted bankruptcy cases, and whether the Court’s case load has increased correspondingly in other areas of law.

⁵³ See Appendix III: Splits in Supreme Court Bankruptcy Cases [hereinafter, “Appendix III”], *post*. Appendix III does reveal a significant increase in unanimous as compared to concurrence decisions from the pre-Justice Scalia era to the Justice Scalia era, and an increase in the number of minor as compared to major splits from the pre-Justice Scalia era to the Justice Scalia era. Before Justice Scalia joined the Court, one-half (2 cases) of the four non-split decisions were unanimous and one-half (2 cases) included a concurrence. After Justice Scalia joined the Court, 62½% (thirteen cases) of the twenty non-split decisions were unanimous, and 37½% (seven cases) included a concurrence. Similarly, before Justice Scalia joined the Court, 25% (1 case) of the four split decisions were minor splits and 75% (three cases) were major splits. After Justice Scalia joined the Court, however, 70% (fourteen cases) of the twenty non-split decisions were minor splits, and 30% (six cases) were major splits. *Id.* The implications, if any, of this shift are unclear, particularly in light of the small numbers of bankruptcy cases decided in pre-Justice Scalia era.

decisions did not change when Justice Scalia joined the Court. One-half of the eight cases decided during the 1981 through 1985 Terms were split; one-half were not split. One-half of the forty cases decided during the 1986 through 1989 terms were split; one-half were not split.⁵⁴

The simple statistics, however, reveal nothing about the reasons the Justices agreed and disagreed with each other in bankruptcy cases. The following analysis examines the areas of accord and discord among the Justices in order to discern the role and significance of interpretive method in the Court's bankruptcy jurisprudence. Because this analysis focuses on interpretive method rather than substantive law, the facts and holdings are explained only in sufficient detail for the reader to understand the Court's interpretive method.⁵⁵

B. The Unanimous Decisions

1. Overview

During the 1981 through 1998 Terms, the Supreme Court issued fifteen unanimous Bankruptcy Code opinions.⁵⁶ In these cases, each Justice agreed not only with the Court's result, but also (presumably) with the Court's reasoning, including its interpretive method. At the least, no Justice disagreed strongly enough with the Court's reasoning to write a separate concurrence.

This Part concludes that the Court has not applied one, identical interpretive approach in its unanimous bankruptcy cases. These cases do, however, provide interpreters with useful information concerning the components of the Court's interpretative approach.

2. Unanimous decisions in the 1981 through 1985 Terms

⁵⁴ See Appendix III, *post*.

⁵⁵ This analysis focuses on whether Justices wrote separate opinions because of methodological disagreements. Consequently, it elaborates the Court's general interpretive approach in each case, rather than each interpretive nuance. This analysis is not designed to provide a critical analysis of the cases, their results, or the methods the Court has used to interpret the Bankruptcy Code.

For other, and, in some instances, more detailed, analyses of limited groups of these cases, see Lowell P. Botrell, *The Supreme Court and the "Plain Meaning" of the Bankruptcy Code: A Review of Recent And Pending Supreme Court Decisions*, 69 N.D. L. REV. 155 (1993); Carlos Cuevas, *The Rehnquist Court, Strict Statutory Construction, and The Bankruptcy Code*, 42 CLEV. ST. L. REV. 435 (1994); Rasmussen, *supra* note 50; sources cited *supra* notes 7, 8, 50, *infra* notes 672-83.

⁵⁶ See Appendix III, *post*; see also *infra* notes 57, 72-84.

The Court issued two unanimous decisions during the 1981 through 1985 Terms.⁵⁷ In *Commodity Futures Trading Commission v. Weintraub*,⁵⁸ the Court authorized the bankruptcy trustee to waive the corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy case.⁵⁹ In *United States v. Whiting Pools, Inc.*,⁶⁰ the Court held that the Bankruptcy Code required the Internal Revenue Service to turn over to the bankruptcy estate property seized prior to the filing of the debtor's chapter 11 case.⁶¹

In a third case, *NLRB v. Bildisco & Bildisco*,⁶² the Court unanimously held that the Bankruptcy Code authorized a chapter 11 debtor-in-possession to reject a union contract, if certain conditions were satisfied.⁶³ The *Bildisco* Court split five-to-four, however, on whether the debtor-in-possession committed an unfair labor practice when it unilaterally modified the contract after the debtor filed bankruptcy but before it rejected the contract.⁶⁴

Weintraub, *Whiting Pools*, and the unanimous portion of *Bildisco* all sought to implement legislative intent or statutory purpose, as revealed in the statutory text and legislative history.⁶⁵ Each decision also drew upon some aspect of bankruptcy policy. In

⁵⁷ See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985); *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). Both of these cases arose from splits among the circuit courts of appeal. See Appendix II, *post*.

⁵⁸ *Weintraub*, 471 U.S. 343. This was an eight-to-zero opinion because Justice Powell took no part in the decision. *Id.*

⁵⁹ *Id.* at 358.

⁶⁰ *Whiting Pools*, 462 U.S. 198.

⁶¹ *Id.* at 211. Bankruptcy Code section 542(a) obligates any entity (other than a custodian) who is in possession, custody, or control of property that the trustee may use, sell, or lease, or that the debtor may exempt, to turn that property over to the trustee, unless the property is of inconsequential value. See 11 U.S.C. § 542(a) (1994). The Court concluded that the turnover provision contained no exception applicable to either secured creditors, in general, or taxing authorities, in particular. See *Whiting Pools*, 462 U.S. at 207, 209.

⁶² *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). *Bildisco* also arose from a circuit split. See Appendix II, *post*.

⁶³ See *Bildisco*, 465 U.S. at 534. See also 11 U.S.C. § 365 (1994) (governing assumption and rejection of executory contracts, in general). After the *Bildisco* decision (issued on February 22, 1984), Congress promptly amended the Bankruptcy Code to add a specialized provision that now governs the rejection and pre-rejection treatment of collective bargaining agreements. See 11 U.S.C. § 1113 (1994), added by the Bankruptcy Reform Act of 1994, Pub. L. No. 98-353, 98 Stat. 391 (1984) (effective July 10, 1984).

⁶⁴ Five Justices found no unfair practice. See *Bildisco*, 465 U.S. 513. Four Justices would have found an unfair practice. *Id.* at 535 (Brennan, J., concurring in part and dissenting in part). Justices White, Marshall, and Blackmun joined Justice Brennan's concurrence and dissent. *Id.* The split portion of *Bildisco* is discussed *infra* at Part III.E.3.

⁶⁵ See *Weintraub*, 471 U.S. at 349-50 (citing statutory text); *id.* at 350-52 (citing legislative history and congressional intent); *id.* at 358 (citing congressional intent); *Whiting Pools*, 462 U.S. at 202-05 (citing statutory text); *id.* at 205, 208, 209 (citing congressional intent, congressional purpose); *id.* at 204-05, 207-

both *Whiting Pools* and the unanimous portion of *Bildisco*, the Court supported its conclusions by reference to the Bankruptcy Code's general policy of encouraging reorganization.⁶⁶ The *Bildisco* majority also referred to the Bankruptcy Code's equitable policy.⁶⁷ The *Weintraub* Court sought to ensure that any non-bankruptcy rule it applied in the bankruptcy context would be consistent with bankruptcy policy, including the general policy of maximizing value for creditors.⁶⁸

Only *Whiting Pools*, however, applied a pre-Code practice interpretive canon. The Court stated the canon mildly⁶⁹ when it noted that its holding was consistent with judicial precedent under the Bankruptcy Act and that “[n]othing in the legislative history evinces a congressional intent to depart from that practice.”⁷⁰ In essence, the Court presumed that Congress knew the practice under the former law and would have signaled its intent to alter that practice.

Four aspects of the pre-Code canon, as stated and applied in *Whiting Pools*, are significant. First, the Court apparently found nothing in the text that evidenced a congressional intent to alter pre-Code practice. Consequently, it applied the canon solely to consider whether the Bankruptcy Code's legislative history evidenced a congressional intent to change prior practice. Second, the canon refers to judicial practice under the Bankruptcy Act. The Court considered whether Congress intended to alter an existing judicial doctrine that the courts had developed to interpret the former Bankruptcy Act, but which was not codified as part of the Bankruptcy Act. Third, the Court applied the canon in a supporting role, not as the core of its rationale. Fourth, *Whiting Pools* was the first Bankruptcy Code case in which the Court applied such a canon.⁷¹ Although the Court applied a mild form of the canon, the fact that the Court employed this canon during the 1982 Term (the second Term in which the Court considered Bankruptcy Code cases) reflects the canon's established pedigree.

09 (citing legislative history); *Bildisco*, 465 U.S. at 521-22 (citing statutory text); *id.* at 522 n.6, 523, 526 (citing legislative intent); *id.* at 522 n.6 (citing legislative history). *Whiting Pools* also analyzed the structure of the Bankruptcy Code. *See Whiting Pools*, 462 U.S. at 203-04 (viewing the particular provision as one of a group of provisions designed to protect secured creditors).

⁶⁶ *See Whiting Pools*, 462 U.S. at 203-04; *Bildisco*, 465 U.S. at 527.

⁶⁷ *See Bildisco*, 465 U.S. at 525, 527.

⁶⁸ *Weintraub* reasoned that, in a corporate bankruptcy case, the person entitled to waive the privilege would be the person whose duties most closely resembled the duties of the person entitled to waive the privilege outside of bankruptcy, unless permitting that person to waive would interfere with or obstruct the Bankruptcy Code's policies or design. *See Weintraub*, 471 U.S. at 351-54. Applying this caveat, the Court considered which result would be most consistent with the Bankruptcy Code's overarching policy of maximizing value and lesser policy of uncovering fraud. *Id.*

⁶⁹ *Cf.* cases cited *supra* note 46.

⁷⁰ *See Whiting Pools*, 462 U.S. at 208.

⁷¹ None of the earlier Bankruptcy Code cases considered pre-Code practice. *See Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In summary, in these early unanimous decisions, the Court did not rely solely on the statutory text to interpret the Bankruptcy Code. Rather, in each case, the Court professed a search for congressional intent, began with the text, checked legislative history to confirm textual meaning, and verified that its holding was consistent with the statute's purposes or policies. *Whiting Pools* further bolstered its conclusions by considering whether Congress had evinced an intent to alter pre-Code practice.

3. Unanimous decisions in the 1986 through 1998 Terms

a. Overview

During the 1986 through 1998 Terms, the Court issued thirteen unanimous Bankruptcy Code decisions. In chronological order, these are: *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.* (per Justice Scalia, 1988),⁷² *Norwest Bank Worthington v. Ahlers* (per Justice White, 1988),⁷³ *Langenkamp v. Culp* (per curiam, 1990),⁷⁴ *Grogan v. Garner* (per Justice Stevens, 1991),⁷⁵ *Johnson v. Home State Bank* (per Justice Marshall, 1991),⁷⁶ *Board of Governors of the Federal Reserve v. MCorp Financial, Inc.* (per Justice Stevens, 1991),⁷⁷ *Holywell Corp. v. Smith* (per Justice Thomas, 1992),⁷⁸ *Rake v. Wade* (per Justice Thomas, 1993),⁷⁹ *Citizens Bank v. Strumpf* (per Justice Scalia, 1995),⁸⁰ *United States v. Noland* (per Justice Souter, 1996),⁸¹ *Fidelity*

⁷² *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).

⁷³ *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988). This was an eight-to-zero opinion because Justice Kennedy took no part in the decision. *Id.*

⁷⁴ *Langenkamp v. Culp*, 498 U.S. 42 (1990).

⁷⁵ *Grogan v. Garner*, 498 U.S. 279 (1991).

⁷⁶ *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

⁷⁷ *Board of Governors of the Fed. Reserve v. MCorp Fin., Inc.*, 502 U.S. 32 (1991). This was an eight-to-zero opinion because Justice Thomas took no part in the decision. *Id.*

⁷⁸ *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

⁷⁹ *Rake v. Wade*, 508 U.S. 464 (1993).

⁸⁰ *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995).

⁸¹ *United States v. Noland*, 517 U.S. 535 (1996).

Financial Services, Inc. v. Fink (per Justice Souter, 1998),⁸² *Kawaauhau v. Geiger* (per Justice Ginsburg, 1998),⁸³ and *Cohen v. de la Cruz* (per Justice O'Connor, 1998).⁸⁴

Notice that eight different Justices,⁸⁵ including six of the nine currently sitting Justices,⁸⁶ authored the opinions in these cases. Justices Blackmun and Marshall, neither of whom remains on the Court today, authored the unanimous opinions in the pre-1986 bankruptcy cases.⁸⁷ Of the nine sitting Justices, only Chief Justice Rehnquist and Justices Breyer and Kennedy have not authored a unanimous opinion in a Bankruptcy Code case.⁸⁸ Consequently, these cases should, at least in theory, provide a fair cross-section of two-thirds of the Justices' interpretive styles.

In each of these thirteen cases except *Langenkamp v. Culp*,⁸⁹ the Court interpreted a provision of the Bankruptcy Code. *Langenkamp* was a per curiam opinion in which the Court addressed the circumstances in which a preference defendant is entitled to a jury trial.⁹⁰ Because *Langenkamp* focussed on a constitutional question, it adds little to our analysis of the Court's interpretation of the Bankruptcy Code.⁹¹

The twelve remaining unanimous cases employed divergent interpretive methods. The Court decided four of these cases by a primarily textual analysis (*Holywell*, *MCorp*, *Rake*, *Strumpf*). Justices Scalia (*Strumpf*), Stevens (*MCorp*), and Thomas (*Rake*, *Holywell*) wrote these opinions.⁹² The Court decided four cases by text, structure, and history (*Fink*, *Grogan*, *Johnson*, *Kawaauhau*). Justices Ginsburg (*Kawaauhau*), Marshall (*Johnson*), Souter (*Fink*), and Stevens (*Grogan*) wrote these opinions.⁹³ Finally, the

⁸² *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998).

⁸³ *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

⁸⁴ *Cohen v. de la Cruz*, 523 U.S. 213 (1998).

⁸⁵ These are Justices Ginsburg (*Kawaauhau*), Marshall (*Johnson*), O'Connor (*Cohen*), Scalia (*Timbers*, *Strumpf*), Souter (*Noland*, *Fink*), Stevens (*Grogan*, *MCorp*), Thomas (*Holywell*, *Rake*), and White (*Ahlers*).

⁸⁶ These are Justices Ginsburg, O'Connor, Scalia, Souter, Stevens, and Thomas.

⁸⁷ See *supra* notes 58, 60.

⁸⁸ Chief Justice Rehnquist wrote the majority opinion in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). In that case, the Court was unanimous on one issue but split five-to-four on the second issue. See *supra* notes 62-64 and accompanying text; *infra* notes 595-605 and accompanying text. He also wrote the majority opinion in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), but three Justices concurred because they disagreed with Justice Rehnquist's use of interpretive canons. See *infra* notes 274-81 and accompanying text.

⁸⁹ *Langenkamp v. Culp*, 498 U.S. 42 (1990).

⁹⁰ *Id.* (holding that an entity that files a bankruptcy claim waives its right to a jury trial in a preference action filed against it, but that an entity that does not file a claim is entitled to a jury trial).

⁹¹ But see *infra* Part IV.A.1.a (considering the implications of the Court's constitutional Bankruptcy Code cases).

⁹² See *infra* Part III.B.3.b.

⁹³ See *infra* Part III.B.3.c.

Court decided four cases by reference to pre-Code practice (*Ahlers*, *Cohen*, *Noland*, *Timbers*). Justices O'Connor (*Cohen*), Scalia (*Timbers*), Souter (*Noland*), and White (*Ahlers*) wrote these opinions.⁹⁴

Parts (b) through (d) elaborate the Court's interpretive approach in each of these cases. Part (4) considers whether the Court's apparently conflicting interpretive approaches can be reconciled.

b. Unanimous opinions that consider only text

In two of the four cases in which the Court applied a primarily textual analysis, the Court interpreted the Bankruptcy Code (*Rake*, *Strumpf*).⁹⁵ In the other two, the Court based its holding primarily on the interpretation of another federal statute (*Holywell*, *MCorp*).⁹⁶

In *Rake v. Wade*,⁹⁷ the Court held that a debtor must pay an oversecured creditor pre-confirmation and post-confirmation interest on a home mortgage arrearage that the debtor proposes to cure under a chapter 13 plan.⁹⁸ The Court began by applying a text-oriented canon to three Bankruptcy Code sections.⁹⁹ The canon provides that “[w]here the statutory language is clear, our ‘sole function . . . is to enforce it according to its terms.’”¹⁰⁰

Rake's textualist author, Justice Thomas, might indeed believe that the Court should never look beyond the text.¹⁰¹ Notice, however, that the canon he employed is not a purely “textualist” dictate that forbids the Court ever to look beyond the language. Rather, it is a classic statement of the “plain meaning” rule, which directs the Court to

⁹⁴ See *infra* Part III.B.3.d.

⁹⁵ See *infra* notes 97-118 and accompanying text.

⁹⁶ See *infra* notes 119-32 and accompanying text.

⁹⁷ *Rake v. Wade*, 508 U.S. 464 (1993).

⁹⁸ *Id.* at 475 (requiring interest payments regardless of whether state law or the underlying contracts would have required interest on arrearages). Bankruptcy Code section 1322(b)(5) allows a debtor to cure certain defaults under its plan. See 11 U.S.C. § 1322(b)(5) (1994).

⁹⁹ See *Rake*, 508 U.S. at 467-75 (interpreting Bankruptcy Code sections 506(b) (pre-confirmation interest), 1322(b) (cure of defaults), and 1325(a)(5) (post-confirmation interest)).

¹⁰⁰ *Id.* at 471 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)) (citations omitted).

¹⁰¹ Justices Thomas and Scalia each wrote six textual Bankruptcy Code opinions and joined a higher percentage of Bankruptcy Code textual opinions (60%) than any other Justices. See Appendix VI: Distribution of Textual, Non-Textual, and Pre-Code Practice Opinions in the Supreme Court's Bankruptcy Code Cases [hereinafter, “Appendix VI”], *post*; Appendix VII: Supreme Court Justices' Rates of Joining Textual and Non-Textual Opinions in Bankruptcy Code Cases [hereinafter, “Appendix VII”], *post*.

apply the language if the language is plain and unambiguous.¹⁰² This canon, which is a common feature of most interpretative models, implies that the Court may, and indeed perhaps must, look beyond the language, typically in a search for intent or purpose, if the language is ambiguous.¹⁰³

Consequently, *Rake*'s textualist approach may mean simply that all of the Justices believed that the language was, in fact, plain, and not that all of the Justices embraced textualism. Indeed, note that *Rake* quoted the plain language canon from the Court's five-to-four split decision in *United States v. Ron Pair Enterprises, Inc.*,¹⁰⁴ in which the dissenters vehemently disagreed with the majority's textual analysis.¹⁰⁵ This observation demonstrates that the Justices do not always agree on what constitutes ambiguity or on when the Court should look beyond the language.

In *Rake*, Justice Thomas supported his plain meaning analysis with a classic textual aid: the dictionary. He consulted a standard dictionary to discern the "natural reading" of the phrase "provide for."¹⁰⁶

The Court also applied a structural or "holistic" interpretation canon borrowed from the Court's unanimous opinion in *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*¹⁰⁷ That canon urges interpreters to examine the entire statute because "statutory terms are often 'clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes [their] meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'"¹⁰⁸ Notice that this canon contains both a linguistic component (the same terminology used elsewhere) and a substantive component (the substantive effect). In *Timbers*, the Court applied this canon to compare the substantive effect of related provisions of the Bankruptcy Code.¹⁰⁹ In *Rake*, in contrast, Justice Thomas applied this canon in a narrow, textual manner to reconcile the

¹⁰² See generally DICKERSON, *supra* note 42, at 229; Radin, *supra* note 42, at 867; GREENAWALT, *supra* note 25, at 43-57.

¹⁰³ For example, even in the Court's highly textual (and highly criticized) opinion in *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242-43 (1989), the Court acknowledged that, in the rare case in which the language produces a result that is demonstrably at odds with the intentions of the drafters, the intentions of the drafters control.

¹⁰⁴ *Ron Pair*, 489 U.S. 235; see *infra* notes 629-57 and accompanying text.

¹⁰⁵ See *Ron Pair*, 489 U.S. at 249 (O'Connor, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

¹⁰⁶ *Rake*, 508 U.S. at 473 (citing AMERICAN HERITAGE DICTIONARY 1053 (10th ed. 1981)).

¹⁰⁷ *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988); see *Rake*, 508 U.S. at 474-75 (citing *Timbers*); see also *infra* notes 209-28 and accompanying text (discussing *Timbers*).

¹⁰⁸ *Rake*, 508 U.S. at 474-75 (quoting *Timbers*, 484 U.S. at 371).

¹⁰⁹ See *Timbers*, 484 U.S. at 371-76; see *infra* notes 209-28 and accompanying text.

meanings of several uses of the phrase “provide for” and similar phrases throughout the Bankruptcy Code.¹¹⁰

The Court relied upon its conclusion that the language was plain to dismiss summarily the petitioner’s legislative history argument.¹¹¹ It did not consider congressional intent, statutory purpose, legislative history, or pre-Code practice.¹¹²

The Court’s other leading textualist,¹¹³ Justice Scalia, wrote the strongly textual, unanimous opinion in *Citizens Bank v. Strumpf*.¹¹⁴ In *Strumpf*, the Court held that the automatic stay did not prohibit a bank from imposing an administrative hold on the debtor’s account and refusing to turn the account over to the debtor.¹¹⁵

The Court concluded that this interpretation was the “most naturally read[ing]” of the Bankruptcy Code and that nothing in the Bankruptcy Code’s language expressly prohibited the administrative hold.¹¹⁶ The Court referred to state law where relevant,¹¹⁷ but did not refer to congressional intent, statutory purpose, legislative history, or pre-Code practice.¹¹⁸ As in *Rake*, all of the Justices agreed that the language was, in fact, plain.

In each of the other two unanimous, textual decisions, *Board of Governors of the Federal Reserve v. MCorp Financial, Inc.*,¹¹⁹ and *Holywell Corp. v. Smith*,¹²⁰ the Court based its holding primarily on the interpretation of another federal law that interacted with the Bankruptcy Code.

¹¹⁰ See *Rake*, 508 U.S. at 474-75. The Court also applied a canon under which the Court seeks to give effect to every word of the statute. *Id.* at 471.

¹¹¹ *Id.* at 472-74.

¹¹² The Court did, however, refer to the Court’s prior interpretation of the relevant Bankruptcy Code sections. *Id.* at 464.

¹¹³ See Appendix VII, *post*.

¹¹⁴ *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995).

¹¹⁵ *Id.* at 20-21.

¹¹⁶ *Id.* at 18-21 (interpreting Bankruptcy Code sections 362 (automatic stay), 553 (setoff), and 542 (turnover)).

¹¹⁷ *Id.* at 18-19 (referring to state law to determine what constitutes a setoff, and when a right of setoff exists).

¹¹⁸ If the Court had considered the substantive effect of the Bankruptcy Code sections that affect entities holding property subject to a right of setoff, the Court might have noted that the debtor could not compel the bank to turn over funds in the account unless the debtor provided the bank with adequate protection of its interest in the funds. See 11 U.S.C. §§ 361, 363(c)(2), 363(d), 363(e), 553(a) (1994).

¹¹⁹ *Board of Governors of the Fed. Reserve v. MCorp Fin., Inc.*, 502 U.S. 32 (1991).

¹²⁰ *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

In *MCorp*,¹²¹ the Court held that the automatic stay did not authorize the bankruptcy court to enjoin the Federal Reserve from prosecuting an administrative enforcement proceeding against the debtor, which was a bank holding company.¹²² The Court based its holding on the language of the Financial Institutions Supervisory Act,¹²³ the language of the Bankruptcy Code's automatic stay,¹²⁴ and an explanation of an earlier Supreme Court case upon which the circuit court had erroneously relied.¹²⁵ Justice Stevens, who is not known as a textualist and who generally consults legislative history to confirm textual meaning,¹²⁶ wrote *MCorp*.

In *Holywell Corp. v. Smith*,¹²⁷ the debtors' confirmed chapter 11 plan had assigned property to a trust. The Court required the trustee to file tax returns and pay taxes that the debtors would have been required to file and pay if the property had not been assigned to the trust.¹²⁸ Although the Court based its decision primarily on the Internal Revenue Code,¹²⁹ it also considered the Bankruptcy Code section that elaborates the effects of confirmation.¹³⁰ In its brief discussion of that provision, the Court relied solely on the statute's language.¹³¹ Justice Thomas, a textualist, wrote *Holywell*.

Because *MCorp* and *Holywell* focussed primarily on non-bankruptcy law, they add little to our understanding of the Court's interpretation of the Bankruptcy Code. Notice, however, that in each of these cases, the Court undertook a non-bankruptcy-centric analysis. In other words, it first considered how other federal law applied, then considered whether the Bankruptcy Code altered the application of that other federal law. In each case, the Court held, essentially, that nothing in the Bankruptcy Code barred the federal government from enforcing its rights under another federal law. Although the Court did not suggest that the Bankruptcy Code is subordinate to other federal law, these

¹²¹ *MCorp*, 502 U.S. 32 (1991).

¹²² *Id.* at 41. See 11 U.S.C. § 362(a) (1994) (embodying the automatic stay).

¹²³ Financial Institutions Supervisory Act of 1966, 80 Stat. 1046, as amended, 12 U.S.C. § 1818 (Supp. II 1997); see *MCorp*, 502 U.S. at 36-39.

¹²⁴ 11 U.S.C. § 362 (1994); see *MCorp*, 502 U.S. at 39-42 (considering the interaction among different subsections of section 362).

¹²⁵ See *Leedom v. Kyne*, 358 U.S. 184 (1958); *MCorp*, 502 U.S. at 42-44.

¹²⁶ See, e.g., *Nobelman v. American Sav. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J., concurring); see also *infra* notes 327-28; Appendix VII, *post* (reflecting that Justice Stevens joined textual opinions in only 15% of the cases in which he participated).

¹²⁷ *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

¹²⁸ *Id.* at 58.

¹²⁹ I.R.C. § 6012 (b)(3) (1988). The Court considered language, a dictionary definition, and federal regulations when it interpreted the IRC. See *Holywell*, 503 U.S. at 52-58.

¹³⁰ See *Holywell*, 503 U.S. at 58-59; see also 11 U.S.C. § 1141 (1994).

¹³¹ See *Holywell*, 503 U.S. at 58-59.

cases are consistent with a pattern of cases in which the Court has deferred to “important governmental interests” in the bankruptcy context.¹³²

Despite these four text-based opinions, two-thirds of the Court’s unanimous bankruptcy decisions issued during and after the 1986 Term looked beyond the statutory language. Subparts (c) and (d) examine these non-textual opinions.

c. Unanimous opinions that consider text, structure, and history

In four post-1986 unanimous decisions, the Court considered the Bankruptcy Code’s text, structure, and history. The Court decided *Grogan v. Garner* (per Justice Stevens)¹³³ and *Johnson v. Home State Bank* (per Justice Marshall)¹³⁴ in 1991, after Justice Scalia joined the Court but before Justice Thomas joined the Court. The Court decided *Fidelity Financial Services, Inc. v. Fink* (per Justice Souter)¹³⁵ and *Kawaauhau v. Geiger* (per Justice Ginsburg)¹³⁶ in 1998, during the Court’s most recent Term.

None of the authors of these opinions is generally regarded as a textualist.¹³⁷ Despite Justices Scalia’s and Thomas’s reputations as textualists, Justice Scalia joined all four of these opinions and Justice Thomas joined the two opinions that were issued after he joined the Court. Presumably, even these textualist Justices agreed that the language was sufficiently ambiguous to merit consideration of other, non-textual sources.

In *Grogan v. Garner*,¹³⁸ the Court was required to determine what standard of proof (“clear and convincing” or “preponderance”) applied to a creditor’s non-dischargeability complaint.¹³⁹

Justice Stevens examined the text and the legislative history, but determined that neither expressly provided a standard of proof for dischargeability actions.¹⁴⁰ Faced with

¹³² See, e.g., *Kelly v. Robinson*, 479 U.S. 36, 44-49 (1986); *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494, 499-501 (1986); cf. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 243-49 (1989) (distinguishing the case at bar from cases in which important state or federal interests were at stake); see also *infra* Part IV.A.1.d.

¹³³ *Grogan v. Garner*, 498 U.S. 279 (1991).

¹³⁴ *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

¹³⁵ *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998).

¹³⁶ *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

¹³⁷ See generally Appendix VI, *post*; Appendix VII, *post* note. Justice Souter, however, joined textualist opinions in 50% of the cases in which he participated, which is a higher percentage than any Justice other than Justices Thomas and Scalia. See Appendix VII, *post*.

¹³⁸ *Grogan*, 498 U.S. 279.

¹³⁹ *Id.* at 285; see 11 U.S.C. § 523(a) (1994) (setting forth bases upon which particular claims are non-dischargeable in individual debtors’ bankruptcy cases).

¹⁴⁰ *Grogan*, 498 U.S. at 286.

a gap, both the lower court and the Supreme Court reasoned from silence, bankruptcy policy, and negative inferences. The Supreme Court, however, relied more heavily on a substantive, structural analysis of the Bankruptcy Code than had the lower court.

First, the circuit court had reasoned that prior law had required a higher standard, at least in fraud cases, and that Congress's silence suggested that Congress was not likely to have intended to change existing law.¹⁴¹ In contrast, the Supreme Court rejected pre-Code practice because, when Congress added fraud as a basis for nondischargeability, the courts were split over which common law evidentiary standard applied.¹⁴² The Court then inferred¹⁴³ from Congress's silence that Congress probably had not "intended to require a special, heightened standard of proof."¹⁴⁴

At first glance, this aspect of *Grogan* may seem to be inconsistent with the cases in which the Court deferred to pre-Code judicial practice.¹⁴⁵ *Grogan*, however, may simply suggest that the Court will rely upon pre-Code judicial practices only if those practices were well-established before the Bankruptcy Code was enacted. Absent a well-established practice, the Court may have deemed it inappropriate to presume that Congress knew of the practice and intended to incorporate the practice into the Bankruptcy Code.¹⁴⁶

Second, the Court concluded that the Bankruptcy Code's structure supported the Court's inference. Two holistic interpretation canons guided the Court's structural analysis. First, "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."¹⁴⁷ Second, "[i]n determining the meaning of the statute, we look not only to the particular statutory language but to the design of the statute as a whole and to its object and policy."¹⁴⁸ Three important observations flow from these canons.

¹⁴¹ See *In re Garner*, 881 F.2d 579, 582 (1989); see also *Grogan*, 498 U.S. at 282-83.

¹⁴² See *Grogan*, 498 U.S. at 288-90.

¹⁴³ *Id.* at 287-88 (reasoning that (1) the absence of any suggestion that different standards apply to different discharge exceptions "implies" that Congress intended the same standard for all of the exceptions, and (2) because it is clear that preponderance is sufficient to establish some exceptions, "it is fair to infer that Congress intended the ordinary preponderance standard to govern the applicability of all the discharge exceptions" (emphasis added)).

¹⁴⁴ *Id.* at 286.

¹⁴⁵ See *supra* note 46; *infra* Parts IV.A.1.c.4, IV.A.1.d.

¹⁴⁶ Cf., e.g., *United States v. Noland*, 517 U.S. 535 (1996) (discussed *infra* at text accompanying notes 231-34). See also *supra* note 145.

The *Grogan* Court also may have found that its structural analysis obviated the need to consult pre-Code practice. See *infra* notes 147-49 and accompanying text.

¹⁴⁷ See *Grogan*, 498 U.S. at 287 n.13 (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

¹⁴⁸ *Id.* (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

First, these canons view “policy” as an essential embodiment of the statute’s object and design, which is discerned through a substantive, holistic analysis of the statute. Policy is not an external source that stands in contraposition to the text.¹⁴⁹ This approach is consistent with a purposive, legal process analysis.

Second, although the *Grogan* Court was required to fill a statutory gap, these canons do not expressly require the Court to find a gap or even an ambiguity before the Court undertakes a holistic analysis of the statute’s design, object, and policy.

Third, the holistic analysis these canons recommend is broader and less linguistic than the holistic analysis suggested by the canon the Court applied in *Rake v. Wade*.¹⁵⁰

The Court first applied these canons to analyze the Bankruptcy Code’s structure. The Court reasoned that, because the exceptions to discharge are all in the same Bankruptcy Code section and nothing in that section indicates that any one exception is subject to a special standard, each exception must carry the same standard.¹⁵¹

The Court then applied these canons to analyze the Bankruptcy Code’s purposes. The circuit court had reasoned that the Bankruptcy Code’s policy of giving debtors a “fresh start” justified a higher evidentiary standard in dischargeability matters.¹⁵² The Supreme Court countered that an unencumbered fresh start is available only to the “honest but unfortunate debtor.”¹⁵³ By implication, the fresh start is not available to a dishonest debtor who has committed fraud. The Court discerned in the Bankruptcy Code’s general history, rather than in specific legislative history, a “policy” of preventing discharge of all fraud judgments. The Court reasoned that it should follow this policy absent a clear congressional expression of a change in policy.¹⁵⁴ It concluded that a lower burden of proof would be consistent with this policy.¹⁵⁵ Notice how this reasoning parallels the canon of deference to pre-Code laws or practices.

As in *Grogan*, the Court in *Kawaauhau v. Geiger*¹⁵⁶ relied upon the Bankruptcy Code’s text, structure, and history to resolve a dischargeability question. While the *Grogan* Court considered a gap in the statute, however, the *Kawaauhau* Court considered the meaning of an undefined term (“willful”).

¹⁴⁹ See *supra* Parts II.B, II.C; *infra* Part IV.A.1.c.3.

¹⁵⁰ *Rake v. Wade*, 508 U.S. 464 (1993); *supra* notes 107-10 and accompanying text.

¹⁵¹ See *Grogan*, 498 U.S. at 287-88; see also *supra* note 143.

¹⁵² See *In re Garner*, 881 F.2d 579, 582 (1989) (reasoning that the Bankruptcy Code’s “fresh start” policy warranted a standard that favored the debtor); see also *Grogan*, 498 U.S. at 282-83.

¹⁵³ *Grogan*, 498 U.S. at 287 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

¹⁵⁴ *Id.* at 290.

¹⁵⁵ *Id.*

¹⁵⁶ *Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

In *Kawaauhau*, the Court held that a personal injury, medical malpractice claim arising from the debtor's reckless or negligent conduct was not a claim arising from "willful and malicious injury by the debtor."¹⁵⁷

The Court referred to both a dictionary¹⁵⁸ and legislative history¹⁵⁹ to determine the meaning of the term "willful." The Court compared these definitions to the statutory language, and concluded that Congress might have worded the statute differently if it had meant to include reckless or negligent injuries.¹⁶⁰ The Court added that interpreting the willful and malicious injury exception broadly to include negligent injuries would render other discharge exceptions superfluous.¹⁶¹ The Court reasoned that a broad interpretation "would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'"¹⁶² Here, the Court employed as an "interpretive guide" the well-recognized "policy" that discharge exceptions should be narrowly construed in favor of the debtor.¹⁶³ This policy, which derives from and implements the fresh start policy, is not expressly stated in the Bankruptcy Code.

Finally, the *Kawaauhau* Court declined to adopt a substantive policy that was not expressed in the Bankruptcy Code. The creditor argued that the Court should not allow a reckless or uninsured debtor to discharge a malpractice judgment,¹⁶⁴ but the Court deferred this policy question to Congress.¹⁶⁵

Similarly, in *Johnson v. Home State Bank*,¹⁶⁶ the Court relied upon the Bankruptcy Code's text, history, and structure, and rejected an invitation to create bankruptcy policy. Johnson had filed a chapter 7 case, in which he had discharged his personal liability on his farm mortgage debt. He then filed a chapter 13 case, in which he sought to pay the in rem mortgage under a five-year plan. The creditor argued that,

¹⁵⁷ *Id.* at 59; see 11 U.S.C. § 523(a)(6) (1994) (setting forth the willful and malicious injury discharge exception).

¹⁵⁸ *Kawaauhau*, 523 U.S. at 61 n.3 (citing BLACK'S LAW DICTIONARY 1434 (5th ed. 1979)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The Court also confined the holding of an earlier Supreme Court case that seemed to support the creditor's argument. *Id.* at 61-64.

¹⁶² *Id.* at 62. (citation omitted).

¹⁶³ See generally 3 COLLIER ON BANKRUPTCY ¶ 523.05c, 523-20 (15th ed. rev. 1996); 1 GINSBURG & MARTIN ON BANKRUPTCY, PART XI, § 11.06[6], 11-57 (1996 & 1998 Supp.).

In *Grogan v. Garner*, 498 U.S. 279 (1991), in contrast, the Court did not consider whether this policy might have warranted a higher evidentiary standard in nondischargeability actions. See *supra* notes 152-55 and accompanying text; see also *infra* note 138 and accompanying text (offering a suggestion why the Court applied this policy in *Kawaauhau* but not in *Grogan*).

¹⁶⁴ *Kawaauhau*, 523 U.S. at 64.

¹⁶⁵ *Id.*

¹⁶⁶ *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

because the debtor's personal liability had been discharged, the mortgage was not a "claim" subject to treatment under chapter 13.¹⁶⁷ The Court disagreed.

The Court viewed the question as "a straightforward issue of statutory construction to be resolved by reference to 'the text, history, and purpose' of the Bankruptcy Code."¹⁶⁸ The Court relied upon (i) the broad definition of "claim" in the text of the Bankruptcy Code,¹⁶⁹ (ii) the broad definition of "claim" in the text, legislative history, and construction of the former Bankruptcy Act, (iii) Bankruptcy Code legislative history that suggested that Congress had intended to expand the Bankruptcy Act's already broad definition of "claim," and (iv) other legislative history that confirmed the broad meaning of "claim."¹⁷⁰

Although the Court did not cite a pre-Code canon, note the similarity between the Court's broad use of history and the use of a pre-Code canon. In *Johnson*, the Court consulted the Bankruptcy Act and judicial precedent interpreting the Bankruptcy Act to shed light upon the Bankruptcy Code. Under a pre-Code canon, the Court consults judicial practice under the Bankruptcy Act. In each case, the Court is seeking to determine whether Congress, in enacting the Bankruptcy Code, intended to depart from prior practice. Part of this analysis requires the Court to determine whether Congress was aware of the existing practice. In referring to history, the Court assumes that Congress was aware of prior statutory provisions. In referring to pre-Code practice, the Court assumes that Congress also was aware of established judicial interpretations of these provisions and of established judicial doctrines that developed in the absence of express statutory provisions.

Finally, although *Johnson* seemed to present a narrow question concerning the meaning of the term "claim," it also presented a broader question concerning the propriety of a so-called chapter 20 case.¹⁷¹ The creditor argued that the debtor was using an improper serial filing to evade the limits of chapter 7 and chapter 13.¹⁷² The Court applied a structural analysis to reject this appeal to the presumed purposes of the Bankruptcy Code. It reasoned that Congress had specifically prohibited other types of serial filings, but had not categorically prohibited the filing of a chapter 7 case followed by a chapter 13 case.¹⁷³

¹⁶⁷ *Id.* at 83-88.

¹⁶⁸ *Id.* at 83 (citation omitted).

¹⁶⁹ *Id.* at 83-85; see 11 U.S.C. § 101(5) (1994) (defining "claim").

¹⁷⁰ *Johnson*, 501 U.S. at 85-87.

¹⁷¹ Bankruptcy practitioners have coined the term "chapter 20 case" to refer to a serial filing in which the debtor first files a chapter 7 case to discharge the majority of his debts, and then files a chapter 13 case to restructure payments on nondischargeable debts or to discharge additional debts that were not dischargeable in chapter 7.

¹⁷² See *Johnson*, 501 U.S. at 79.

¹⁷³ *Id.* at 87-88. The Court left open the possibility that such a plan might violate chapter 13's good faith or feasibility requirements. *Id.* at 88.

Finally, in *Fidelity Financial Services, Inc. v. Fink*¹⁷⁴ the debtor filed a preference action to avoid a late-perfected security interest. The Court held that, in order to escape avoidance, a security interest must be perfected within the Bankruptcy Code's twenty-day grace period, not the longer state law grace period.¹⁷⁵

The Court based its holding upon congressional intent,¹⁷⁶ which it discerned in the "text, structure, and history of the preference provisions."¹⁷⁷ First, the text expressly provided a specific grace period.¹⁷⁸ Second, the structure of the Bankruptcy Code suggested, by negative implication, that Congress did not intend to allow state law relation-back provisions to govern this preference defense.¹⁷⁹ Third, the creditor's reliance upon "an isolated piece of legislative history" was misplaced because the creditor had misinterpreted the legislative history and the legislative history was inconsistent with the text and the broader history.¹⁸⁰ Fourth, the Court relied upon "broader statutory history," including the preference rules and defenses under the former Bankruptcy Act, the subsequent development of those rules and defenses, and the circumstances surrounding the 1994 Bankruptcy Code amendments.¹⁸¹ Again, the Court's consideration of broad statutory history, including prior practice under the Bankruptcy Act and Bankruptcy Code predecessor provisions, is similar to reliance upon a pre-Code practice canon.

In all four of these cases, the Court consulted the text, structure, and history of the statute. None of these cases, however, contained an extensive analysis of legislative history.¹⁸² Instead, the Court consulted the Bankruptcy Code's broad "history," including prior Bankruptcy Act provisions, case precedent interpreting the Bankruptcy Act provisions, changes the Bankruptcy Code had made to the Bankruptcy Act rules, and changes that amendments to the Bankruptcy Code made to earlier versions of the

¹⁷⁴ *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998).

¹⁷⁵ *Id.* at 221; see 11 U.S.C. § 547(c)(3) (1994) (prohibiting the trustee from avoiding a purchase money security interest that was perfected within 20 days after the debtor received possession of the collateral). The state law applicable in *Fink* contained a "relation back" provision that deemed a purchase money security interest to have been perfected on the date of its creation if the creditor acted to perfect its interest before or within 30 days after the interest was created. The creditor had acted to perfect its interest more than 20 days after the debtor acquired possession of the goods but less than 30 days after the interest had been created. See *Fink*, 522 U.S. at 212.

¹⁷⁶ See *Fink*, 522 U.S. at 215-21 (referring to what Congress intended or understood).

¹⁷⁷ *Id.* at 221.

¹⁷⁸ *Id.* at 214.

¹⁷⁹ *Id.* at 216.

¹⁸⁰ *Id.* at 218-21.

¹⁸¹ *Id.* at 217-21. The 1994 amendments extended the grace period from 10 days to 20 days. See the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (enacted on Oct. 22, 1994).

¹⁸² In *Kawaauhau v. Geiger*, 523 U.S. 57, 61 n.3 (1998), the Court consulted the legislative history to define the term "willful." See *supra* note 159 and accompanying text.

Bankruptcy Code. Although none of these cases applied a pre-Code canon, three of the cases (*Grogan*, *Johnson*, and *Fink*) applied analogous reasoning when they considered whether Congress had intended to change prior practices.¹⁸³

d. Unanimous opinions that consider pre-Code practice

In the four remaining unanimous decisions, the Court expressly relied upon pre-Code practice. The Court decided two of these cases based upon text, structure, history, and pre-Code practice (*Cohen v. de la Cruz*,¹⁸⁴ *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*¹⁸⁵), and two based primarily upon an analysis of pre-Code practice (*Norwest Bank Worthington v. Ahlers*,¹⁸⁶ *United States v. Noland*¹⁸⁷).

As in *Kawaauhau v. Geiger*¹⁸⁸ and *Grogan v. Garner*,¹⁸⁹ the Court in *Cohen v. de la Cruz*¹⁹⁰ interpreted the Bankruptcy Code's non-dischargeability provisions. The Court held that the fraud exception prevented discharge of all damages assessed on account of the debtor's fraud, including treble damages, attorneys' fees, and costs.¹⁹¹

The Court relied upon the "text of § 523(a)(2)(A), the meaning of parallel provisions in the statute, the historical pedigree of the fraud exception, and the general policy underlying the exceptions to discharge"¹⁹² to discern congressional intent.¹⁹³ Pre-Code practice came into consideration as part of the fraud exception's history.

Justice O'Connor established the context by identifying the overarching purposes and policies of the Bankruptcy Code. The non-dischargeability provisions, she noted,

¹⁸³ In *Grogan v. Garner*, 498 U.S. 279 (1991), the Court concluded that the pre-Code practice was not well-established, *see supra* notes 145-46 and accompanying text; in *Johnson v. Home State Bank*, 501 U.S. 78 (1991), the Court noted that Congress had expanded the Bankruptcy Act's already broad definition of "claim," *see supra* note 170 and accompanying text; in *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998), the Court compared the current preference provisions to the provisions under the former Bankruptcy Act, *see supra* notes 180-81 and accompanying text.

¹⁸⁴ *Cohen v. de la Cruz*, 523 U.S. 213 (1998).

¹⁸⁵ *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).

¹⁸⁶ *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988).

¹⁸⁷ *United States v. Noland*, 517 U.S. 535 (1996).

¹⁸⁸ *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *see supra* notes 156-65 and accompanying text.

¹⁸⁹ *Grogan v. Garner*, 498 U.S. 279 (1991); *see supra* notes 138-55 and accompanying text.

¹⁹⁰ *Cohen v. de la Cruz*, 523 U.S. 213 (1998).

¹⁹¹ *Id.* at 223.

¹⁹² *Id.*

¹⁹³ *Id.* at 221-22.

were a component of the “basic policy animating the Code of affording relief only to an ‘honest but unfortunate debtor.’”¹⁹⁴

Turning to the text, the Court reasoned that the “most straightforward reading”¹⁹⁵ of the statutory language required that all damages be included.¹⁹⁶ The Court referred to a standard dictionary and a law dictionary (textual aids) to confirm its definitions.¹⁹⁷

The Court supported this textual interpretation with a holistic, textual analysis that compared the use of the phrase “debt . . . for” in the fraud exception to the use of that same phrase in the other dischargeability exceptions.¹⁹⁸ The Court reasoned that, because the phrase served the same function in each subsection, the “presumption that equivalent words have equivalent meaning when repeated in the same statute . . . has particular resonance here.”¹⁹⁹

Up to this point, the Court’s consideration of text and structure had a strongly textual emphasis. As in *Johnson v. Home State Bank* and *Grogan v. Garner*, however, the Court reinforced its textual analysis with an analysis of the statute’s broad history.²⁰⁰ Unlike *Johnson* and *Grogan*, however, the Court in *Cohen* expressly applied a pre-Code canon. Under this canon, the Court “will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”²⁰¹ The Court considered, as part of the fraud exception’s broad history, the pre-Code judicial construction of the fraud exception and the similarity between the Bankruptcy Code exception and the Bankruptcy Act exception.²⁰² As in *Fidelity Financial Services*,

¹⁹⁴ *Id.* at 217. *Cf. supra* text accompanying notes 152-55 (discussing *Grogan*’s reference to dischargeability policy); text accompanying notes 162-63 (discussing *Kawaauhau*’s reference to dischargeability policy).

¹⁹⁵ *Cohen*, 523 U.S. at 218.

¹⁹⁶ *Id.* The Bankruptcy Code excludes from discharge any “debt -- for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . actual fraud.” 11 U.S.C. § 523(a)(2)(A) (1994). Such debts will be discharged, however, unless the creditor files a timely complaint to determine dischargeability. *Id.* at § 523(c)(1).

¹⁹⁷ *Cohen*, 523 U.S. at 220.

¹⁹⁸ *Id.* at 217-20.

¹⁹⁹ *Id.* at 220 (citations omitted).

²⁰⁰ *Id.* at 219-21; *cf. Johnson v. Home State Bank*, 501 U.S. 78, 85-87 (1991); *Grogan v. Garner*, 498 U.S. 279, 286-90 (1991); *see supra* notes 141-46, 154-55, 170 and accompanying text (discussing this aspect of *Johnson* and *Grogan*).

²⁰¹ *Cohen*, 523 U.S. at 221 (quoting *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (internal quotations omitted)).

Although a 1984 amendment had modified the fraud exception, this amendment did not deter the Court from relying upon pre-Code practice because the legislative history noted that the amendment had effected only a stylistic change. *Id.*

²⁰² *Id.*

Inc. v. Fink, the Court rejected the debtor’s appeal to statements in the narrow legislative history of the section.²⁰³

Finally, the Court returned to the policy considerations with which it had begun its discussion. The Court concluded that the debtor’s construction of the fraud exception was contrary to the congressional policy of compensating a creditor fully for its loss or injury, and of protecting the victim rather than giving the debtor a fresh start.²⁰⁴ Recall the Court’s similar, creditor-oriented reasoning in *Grogan v. Garner*.²⁰⁵ In contrast, the *Kawaauhau v. Geiger* Court applied a debtor-oriented “policy” of construing discharge exceptions narrowly in favor of the debtor.²⁰⁶ Neither *Grogan* nor *Cohen v. de la Cruz*²⁰⁷ mentioned this policy, perhaps because both *Grogan* and *Cohen* involved the debtor’s fraud. Both cases noted that the discharge was designed for the “honest but unfortunate” debtor, not for the dishonest (fraudulent) debtor.²⁰⁸ *Kawaauhau*, in contrast, involved no question of fraud or dishonesty.

The Court applied a similar text, structure, history, and pre-Code canon analysis in *United Savings Association v. Timbers of Inwood Forest Associates, Ltd.*²⁰⁹ The Court held that an under-secured creditor was not entitled to “lost opportunity costs” as adequate protection for the delay in foreclosure caused by the automatic stay.²¹⁰ The case turned on whether such costs were included in the creditor’s “interest in property,” as that phrase was used in the Bankruptcy Code.²¹¹

Justice Scalia began by examining the text. He noted that the phrase in question, “viewed in the isolated context of § 362(d)(1)” might include the right to foreclose.²¹² Nevertheless, in an often-quoted passage, he noted that:

[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a

²⁰³ *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 218-21 (1998); *supra* note 180; *Cohen*, 523 U.S. at 221-22.

²⁰⁴ *Cohen*, 523 U.S. at 221-23.

²⁰⁵ *See Grogan*, 498 U.S. at 287; *supra* note 153 and accompanying text.

²⁰⁶ *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998); *supra* note 162 and accompanying text.

²⁰⁷ *Cohen*, 523 U.S. 213.

²⁰⁸ *See supra* notes 153, 194.

²⁰⁹ *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).

²¹⁰ *Id.* *See* 11 U.S.C. § 361 (1994) (elaborating examples of adequate protection); *id.* § 362(d)(1) (relief from the automatic stay).

²¹¹ 11 U.S.C. § 362(d)(1) (entitling a creditor to relief from the stay if the creditor’s interest in property is not adequately protected); *see Timbers*, 484 U.S. at 370-71.

²¹² *Timbers*, 484 U.S. at 371.

context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. . . .²¹³

As previously noted, this holistic/structural interpretive canon contains both a linguistic component (the same terminology used elsewhere) and a substantive component (the substantive effect of the language).²¹⁴ In contrast to the Court's linguistic, holistic interpretation in *Rake v. Wade*,²¹⁵ and despite Justice Scalia's textualist reputation, the *Timbers* Court engaged in an admirable exercise of substantive, holistic interpretation. First, the Court recognized that:

[s]ection 362(d)(1) is only one of a series of provisions in the Bankruptcy Code dealing with the rights of secured creditors. The language in those other provisions, and the substantive dispositions that they effect, persuade us that the "interest in property" protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure.²¹⁶

The Court based this conclusion on its analysis of the substantive effect of several other Bankruptcy Code provisions that govern secured creditors' rights, principally including section 506.²¹⁷ For example, the Court dismissed one possible interpretation of section 506 as unsupported by legislative intent²¹⁸ and inconsistent with legislative history.²¹⁹ The Court then stated that:

[e]ven more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims – just as it denies oversecured creditors

²¹³ *Id.* (citations omitted).

²¹⁴ See *supra* notes 107-10 and accompanying text (discussing *Rake v. Wade*, 508 U.S. 464 (1993)). Compare the more substantive textual holistic canons the Court employed in *Grogan v. Garner*, 498 U.S. 279, 288 n.13 (1991). See *supra* notes 147-48 and accompanying text.

²¹⁵ *Rake*, 508 U.S. 464. See *supra* notes 107-10 and accompanying text.

²¹⁶ *Timbers*, 484 U.S. at 371 (emphasis added).

²¹⁷ *Id.* at 371-76 (interpreting Bankruptcy Code sections 506 (determination of secured claims and allowance of certain interest on oversecured claims), 552 (post-petition effect of pre-petition security interest), and 362 (automatic stay and grounds for relief from the stay)). See 11 U.S.C. §§ 362, 506, 553 (1994).

²¹⁸ *Timbers*, 484 U.S. at 372 ("No one suggests this was intended.").

²¹⁹ *Id.* Justice Scalia consulted the legislative history of section 506 to confirm his interpretation despite his reputation for spurning references to legislative history and despite his criticism of legislative history later in this same opinion. See *infra* note 225.

postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral.²²⁰

The Court then moved beyond the text and structure and applied a pre-Code interpretive canon. The Court noted that section 506(b)'s denial of post-petition interest to undersecured creditors merely codified pre-Code law.²²¹ The Court reasoned that “a major change in the existing rules would not likely have been made without specific provision in the text of the statute, . . . [and] it is most improbable that it would have been made without even any mention in the legislative history.”²²² The creditor's alternate interpretation, therefore, was “implausible even in the abstract, but even more so in light of the historical principles of bankruptcy law.”²²³

In this iteration of the pre-Code canon, Justice Scalia implied that Congress should signal its intent to alter existing practice in the text of the Bankruptcy Code, but that Congress might evidence its intent in the legislative history.²²⁴ According to Justice Scalia, however, generalizations in legislative history, “are inadequate to overcome the plain textual indication”²²⁵ Because the text seemed to be clear, and was consistent with the pre-Code rule, the Court followed the pre-Code rule.

Timbers, which was the first bankruptcy opinion that Justice Scalia wrote, does not comport with the commonly held view of Justice Scalia as a formalistic wordsmith. Despite the Justices' lack of bankruptcy expertise and despite their apparent discomfort

²²⁰ *Timbers*, 484 U.S. at 372 (emphasis added). The Court interpreted section 506 to mean that the undersecured creditor was not entitled to post-petition interest at the end of the case or during the pendency of the case. *Id.* at 373.

The Court applied a similar substantive inquiry when it concluded that the creditor's reading was “structurally inconsistent with” Bankruptcy Code section 552, which governs the post-petition effect of a pre-petition security interest. *Id.* at 374. Section 552 states the general rule that a pre-petition security interest does not reach property the debtor acquires post-petition, unless that property is the proceeds of the creditor's pre-petition collateral. See 11 U.S.C. § 552 (1994).

The Court also applied a structural analysis when it concluded that allowing interest would “make nonsense of 362(d)(2).” See *Timbers*, 484 U.S. at 374.

The Court applied structural and pragmatic reasoning when it commented that it would be “incomprehensible why Congress would want to favor undersecured creditors with interest if they move for it under 362(d)(1) at the inception of the reorganization process – thereby probably pushing the estate into liquidation – but not if they forebear and seek it only at the completion of the reorganization.” *Id.* at 374. Similarly, “petitioner offers no reason why Congress would want to provide relief for such an obstreperous and thoroughly unharmed creditor.” *Id.* at 375.

²²¹ *Timbers*, 484 U.S. at 373; see also *id.* at 379 (noting that the Bankruptcy Code generally continues pre-Code law); *id.* at 380-81 (comparing the Bankruptcy Code's automatic stay provisions to similar provisions of the former Bankruptcy Act); cf. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989) (reasoning that the Bankruptcy Code significantly changed bankruptcy law).

²²² *Timbers*, 484 U.S. at 380.

²²³ *Id.* at 373.

²²⁴ Cf. *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) (reviewing legislative history for evidence of a congressional intent to change pre-Code practice) (quoted *infra* at text accompanying note 488).

²²⁵ *Id.* at 380 (dismissing legislative history “[i]f it is at all relevant”).

with the Bankruptcy Code, the *Timbers* opinion embodies a thoughtful understanding of the substantive effect of related provisions of the Bankruptcy Code. The *Timbers* Court clearly benefited from a superb Fifth Circuit opinion and briefs written by some of the country's leading bankruptcy scholars and practitioners.²²⁶ In contrast, in more recent cases, Justice Scalia has castigated the Court for relying on pre-Code practice.²²⁷ It is not clear whether Justice Scalia saw some distinction between *Timbers* and these later cases, whether he has changed his method over time, or whether he simply has applied inconsistent interpretive methods.²²⁸

In the two remaining unanimous opinions, the Court relied even more heavily on pre-Code practice than it had in *Cohen* and *Timbers*. Both of these cases involved judicial doctrines that had been developed under the Bankruptcy Act.

In *United States v. Noland*,²²⁹ the Court held that the Bankruptcy Code did not allow the courts categorically to subordinate tax penalty priority claims. Justice Souter began not by analyzing the statutory text but by considering the pre-Code judicial development of the doctrine of equitable subordination.²³⁰ He applied a pre-Code canon under which “[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.”²³¹ In the absence of any indication that Congress intended to change pre-Code practice, the Court concluded that the Bankruptcy Code’s undefined reference to “principles of equitable subordination”²³² must have been designed to embody the pre-Code doctrine.²³³

Legislative history stating that Congress intended to embrace the existing doctrine and leave its continued development to case law bolstered the Court’s deference to pre-Code practice.²³⁴ A conflicting legislative statement was not authoritative, however, because it was not an accurate statement of pre-Code law.²³⁵

²²⁶ See *infra* note 822.

²²⁷ See, e.g., *Bank of America Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. Partnership*, ___ U.S. ___, 119 S. Ct. 1411, 1426 (1999) (Thomas, J., concurring, joined by Scalia, J.); *Dewsnup*, 502 U.S. at 433-434 (Scalia, J., dissenting) (quoted *infra* at text accompanying note 504).

²²⁸ See generally *infra* Part IV.A.1.c.2.

²²⁹ *United States v. Noland*, 517 U.S. 535 (1996).

²³⁰ *Id.* at 538-39.

²³¹ *Id.* at 539 (quoting *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl Protection*, 474 U.S. 494, 501 (1986)). The Court consulted pre-Code practice in a search for congressional intent. *Id.* at 539, 540.

²³² 11 U.S.C. § 510(c)(1) (1994).

²³³ See *Noland*, 517 U.S. at 539.

²³⁴ *Id.* The Court reasoned that Congress’s grant of a general power of equitable subordination allows the courts to apply equitable principles to subordinate particular claims, but that Congress’s specific policy decision to grant priority status to certain tax penalties precludes the courts from subordinating those claims based solely on the fact that they are in the category of priority tax penalty claims. *Id.* at 540-41. “More

In the final unanimous case, *Norwest Bank Worthington v. Ahlers*,²³⁶ the Court considered whether the pre-Code, judicially developed “new value” exception to the judicially developed “absolute priority” doctrine retained its viability after the Bankruptcy Code codified a modified absolute priority rule that did not contain an express new value exception.²³⁷

After stating the Bankruptcy Code rule,²³⁸ the *Ahlers* Court reviewed the history of the judicially developed absolute priority rule under the former Bankruptcy Act.²³⁹

fundamentally, statements in legislative history cannot be read to convert statutory leeway for judicial development of a rule on particularized exceptions into delegated authority to revise statutory categorization, untethered to any obligation to preserve the coherence of substantive congressional judgments.” *Id.* at 542. *See also id.* at 543 (noting that Congress could have made but chose not to make that categorical determination).

²³⁵ *Id.* at 542; *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (declining to rely on a pre-Code practice that was not well-established under pre-Code law); *see supra* notes 142-46 and accompanying text.

²³⁶ *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988).

²³⁷ The most often-cited articulation of the elements of the new value exception is contained in dicta in the well-known Bankruptcy Act case, *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939). The exception requires that the old equity contribute “new capital in money or money’s worth, reasonably equivalent to the property’s value, and necessary for successful reorganization.” *Los Angeles Lumber*, 308 U.S. at 118; *accord Ahlers*, 485 U.S. at 201; *Bank of America Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1416 (1999).

In recent years, bankruptcy scholars and commentators have argued that “new value” should be viewed as a “corollary” rather than an “exception” to the absolute priority rule. This view is based largely on the argument that a debtor who contributes money or money’s worth that is at least equivalent in value to the property or interest that the debtor receives, receives property “on account of” his new contribution, not “on account of” his old equity interest. One difficulty with this analysis is that old equity holders are often given the exclusive right to make such a contribution. A divided Court recently held that such an exclusive right, in and of itself, constituted value to the equity holders. *See LaSalle*, 119 S. Ct. 1411 (discussed *infra* at notes 520-53 and accompanying text).

For a discussion of the absolute priority rule and its new value exception/corollary, see generally Edward S. Adams, *Toward a New Conceptualization of the Absolute Priority Rule and Its New Value Exception*, 1993 DET. C.L. REV. 1445 (1993); John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963 (1989); G. Eric Brunstead, Jr. & Mike Sigal, *Competitive Choice Theory and the Broader Implications of the Supreme Court’s Analysis in Bank of America v. 203 North LaSalle Street Partnership*, 54 BUS. LAW. 1475 (1999); 7 COLLIER, *supra* note 163, ¶ 1129.04[4][a], 1129-82 to 1129-126.3; ¶ 1129.LH[4][a] 1129-187 to 1129-201 (15th ed. rev. 1996); Richard E. Coulson, “New Value” and the Absolute Priority Rule in Chapter 11 Cramdowns, 48 CONSUMER FIN. L. Q. REP. 220 (1994); Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L.J. 229 (1990); Bruce Markell, *Owners, Auctions and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69 (1991); Raymond T. Nimmer, *Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions*, 36 EMORY L.J. 1009 (1987); Linda J. Rusch, *The New Value Exception to the Absolute Priority Rule in Chapter 11 Reorganizations: What Should the Rule Be?*, 19 PEPP. L. REV. 1311 (1992); Ronald Trost et al., *Survey of the New Value Exception to the Absolute Priority Rule and the Preliminary Problem of Classification*, SD24 ALI-ABA 401 (1998); Elizabeth Warren, *A Theory of Absolute Priority*, 1991 ANN. SURV. AM. L. 9 (1992); James J. White, *Absolute Priority and New Value*, 8 COOLEY L. REV. 1 (1991).

²³⁸ *See Ahlers*, 485 U.S. at 201 n.1; 11 U.S.C. § 1129(b)(2) (1994) (stating the conditions under which a plan is “fair and equitable” to a dissenting class).

²³⁹ *Ahlers*, 485 U.S. at 202.

That rule essentially required that creditors be paid in full before equity holders would be entitled to receive any distribution.²⁴⁰ The Court then discussed Bankruptcy Act case law precedent that allowed equity holders to retain interests in a reorganized debtor in exchange for “new value.”²⁴¹

The Court expressly declined to determine whether the new value exception (or corollary) had survived the codification of a modified absolute priority rule in the Bankruptcy Code.²⁴² It held, however, that even if the new value exception had survived, the debtors’ promise to contribute future “labor, experience, and expertise”²⁴³ to the reorganization effort would be inadequate because the Court had found a virtually identical contribution to be inadequate in a case interpreting the Bankruptcy Act rule.²⁴⁴

In essence, the Ahlers Court engaged in a common-law-type analysis in which it compared the facts of the case at bar to the facts of the leading pre-Code case.²⁴⁵ To justify using pre-Code case law to interpret the Bankruptcy Code, the Court reviewed the Bankruptcy Code’s history and confirmed that the Bankruptcy Code had not liberalized the pre-Code doctrine.²⁴⁶

The Court rejected the debtor’s argument that the bankruptcy court’s equitable powers permitted the Court to effectuate a result that was in the best interests of all

²⁴⁰ See generally sources cited *supra* note 237.

²⁴¹ *Ahlers*, 485 U.S. at 203.

²⁴² *Id.* at 203 n.3.

The Bankruptcy Code rule is a modified absolute priority rule because it does not absolutely prohibit equity from retaining an interest. The rule prohibits pre-petition equity holders from receiving or retaining property under a chapter 11 plan “on account of” their prior interests if (i) a senior class of claims rejects the plan, and (ii) the members of that senior class receive less than full payment on their claims. See 11 U.S.C. §§ 1129(b)(1), 1129(2)(B)(i), (ii), 1129(a)(8) (1994). Equity can retain an interest even if a senior class is not paid in full if the senior class accepts the plan and the plan satisfies the other requirements for confirmation. See 11 U.S.C. §§ 1129(a), (a)(8) (1994). The rule does not mention the rights of equity holders who contribute new value contributions.

²⁴³ Bankruptcy practitioners refer to this type of contribution as “sweat equity.”

²⁴⁴ *Ahlers*, 485 U.S. at 206-07; see *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939).

²⁴⁵ *Ahlers*, 485 U.S. at 204-05.

²⁴⁶ *Id.* at 205-06 (noting that, when Congress enacted the Bankruptcy Code, it rejected a proposed “liberalization” of the absolute priority rule that would have allowed equity holders to retain an interest in exchange for a contribution similar to the contribution found to be inadequate in *Los Angeles Lumber*); see also *id.* at 206 (noting that the legislative history stated that section 1129 codified the absolute priority rule).

The Court also turned to legislative history to determine whether the equity holder’s retention of ownership would deprive creditors of “property.” *Id.* at 207-08. Although the Bankruptcy Code does not define the term “property,” the legislative history suggests that “property” has a broad meaning. *Id.* at 208-09 (also reasoning that the company’s equity must have some value, otherwise the old equity holders would not be litigating to retain ownership).

creditors and the debtors.²⁴⁷ The Court also declined to implement a result that would foster Congress's broad policy of assisting family farmers in financial distress.²⁴⁸

4. Summary of unanimous decisions

The Court's unanimous Bankruptcy Code opinions seem to apply three distinct interpretive methods: text only; text, structure, and history; and pre-Code practice, with or without reference to text, structure, and history.

It is not surprising that the Court's most prominent textualists, Justices Scalia and Thomas, wrote three of the Court's four unanimous textual opinions.²⁴⁹ Nevertheless, non-textualist Justices joined these opinions, apparently because they agreed that the language was so plain that there was no need to consult sources other than the text.

The Court's unanimous opinions do not, however, provide any definitive guidance concerning when the Court will consider the statutory language to be plain. For example, in cases where the Bankruptcy Code clearly contains a gap, undefined term, or ambiguity, such as *Weintraub*, *Grogan*, *Kawaauhau*, and *Noland*, the Court's reliance on sources other than the language is understandable. It is not immediately clear, however, why the Court considered structure, history and/or pre-Code practice to confirm an apparently clear meaning in *Johnson*, *Fink*, and *Whiting Pools*, but declined to consult these sources to confirm an apparently clear textual meaning in *Rake* and *Strumpf*.

Similarly, no obvious reason explains why the Court consulted only text, structure, and history in some cases, but added pre-Code practice in other cases. The Court's review of the Bankruptcy Code's "broad history," including provisions of the former Bankruptcy Act and judicial interpretations of the Bankruptcy Act, is similar to the Court's review of "pre-Code" law and judicial practices. Although some of the cases in which the Court applied the pre-Code canon involved judicially developed doctrines rather than prior statutory provisions (*Timbers*, *Noland*), this postulate is not true of all of the Court's pre-Code canon cases (*Cohen*, *Ahlers*). It is unclear, therefore, whether broad history and pre-Code practice are distinct concepts or merely gradations of the same continuum.

Several possible explanations exist for the Court's use of different interpretive methods:

²⁴⁷ *Id.* at 206 ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

²⁴⁸ *Id.* at 209-11. Making it easier for family farmers to retain their farms in chapter 11 cases, the Court reasoned, would be contrary to Congress's expectations in enacting chapter 12. *See* Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, § 255, 100 Stat. 3105-3114 (creating chapter 12); *Ahlers*, 485 U.S. at 210. The legislative history of chapter 12 noted that chapter 12 was designed to make it easier for family farmers to retain their farms, because it was difficult for family farmers to retain their farms in chapter 11 cases. *See Ahlers*, 485 U.S. at 210-11. The Court declined, therefore, to misconstrue chapter 11 in order to help family farmers. *Id.* at 209. Note that this reasoning considers the views of a current Congress – which is an interpretive strategy of dynamic interpreters. Originalist interpreters consider only what the original enacting legislature intended, not what the current legislature might desire.

²⁴⁹ *See infra* Parts IV.A.1.c.2, IV.A.2; Appendix VI, *post*; Appendix VII, *post*.

1) Perhaps the Court does not care about interpretive method, but uses whatever method allows it to achieve a desirable substantive result.²⁵⁰

2) Perhaps the author of each opinion chooses his or her preferred interpretive method, and other Justices join the opinion if they agree with the substantive results, without regard to the interpretive method.

3) Perhaps the Court, as a body, applies some not immediately apparent criteria, rules, or guidelines to determine when to consider only the statutory text, when to consult the text, structure, and history, and when to consult pre-Code practice.

4) Perhaps different Justices employ different criteria to determine when to apply these apparently diverse interpretive methods.

If either of the first two explanations are accurate, then critics are correct to lament a lack of clear direction concerning how the Court will interpret the Bankruptcy Code. In the first case, interpreters cannot predict results unless they understand the criteria the Court applies to determine what is a desirable substantive result (and, perhaps, understand the Justices' personal agendas). In the second case, interpreters cannot predict results unless each Justice applies a consistent interpretive approach, interpreters know in advance which Justice will author each opinion, and interpreters know what interpretive approach that each Justice generally employs. Moreover, in either case, interpreters will be unable to predict how lower courts will interpret the Bankruptcy Code because the Supreme Court's random choice of interpretive method leaves the lower courts with inadequate guidance.

If either of the first two explanations are correct, however, we would not expect to find Justices writing separate concurring opinions based upon methodological disputes. Consequently, if we do find methodological disputes raised in separate concurring opinions, we must conclude that at least some of the Justices care about the interpretative method the Court has employed in those cases as much as or more than they care about the results in those cases.

If the fourth explanation is correct, then we should expect to see the Justices writing separate opinions to voice their methodological disputes. If the third explanation is correct, we might hope that the Court would elaborate on its methods in cases we have not yet examined.

Legal scholars (or at least those versed in hermeneutics) understand that interpretation is a fluid process in which meaning is not fully developed until a statute is applied, in context, by an interpreter. We also suspect that there may never be one definitive set of interpretive rules. We nevertheless refuse to believe that results are random and completely unpredictable. We cling to the belief that courts, or at least individual Justices, apply coherent criteria when they interpret statutes.

²⁵⁰ Cynics might suggest that the Justices, or the Court, might employ whatever method enables them to achieve a result that is consistent with their own personal biases or political aims.

Assume for a moment, therefore, that either the third or fourth explanation is accurate; that is, there are some criteria that distinguish the Court's three apparently divergent interpretive methods, even though the Justices may not be in accord concerning those criteria. Can we define a set of guidelines that would explain the divergent methods in the Court's unanimous opinions? Suppose we make the following somewhat imprecise observations concerning the Court's unanimous opinions:

Tentative general observation: The Bankruptcy Code's text, structure, and history assist the Court in interpreting the Bankruptcy Code.²⁵¹

Corollary 1 concerning the text: The court need not, or perhaps should not, or perhaps may not, consider the statute's structure and history if the text is "clear," or perhaps "plain," or perhaps "unambiguous," or perhaps not the product of an obvious "scrivener's error." This corollary reveals three criteria that are unclear from an examination of only the Court's unanimous cases. First, is the rule permissive (need not or should not look beyond the text) or prohibitive (may not look beyond the text)? Second, what level of textual indeterminacy is required to trigger an examination of the sources other than the text? Third, what does it mean for text to be plain, clear, or unambiguous?

Corollary 2 concerning statutory structure: When the Court considers the structure of the Bankruptcy Code, it may, or perhaps should, or perhaps must, undertake a linguistic holistic analysis and a substantive holistic analysis. In a linguistic holistic analysis, the Court considers the meaning of the same term or phrase used throughout the Bankruptcy Code. In a substantive holistic analysis, the Court considers the substantive effect or function of the applicable provision and related provisions. In a substantive holistic analysis, the Court might also consider the broad statutory design, object, purpose or policy. This corollary leaves open questions concerning (i) whether a structural analysis is required, permitted, or encouraged, and (ii) what criteria, if any, guide the Court's decision to employ a linguistic versus a substantive holistic analysis.

Corollary 3 concerning statutory history: History includes both legislative history and broader statutory history. This broader history includes prior practice, including prior codifications and well-established judicial practices and interpretations.²⁵² When the Court considers the statutory history, it may, or perhaps must, or perhaps should, consider the statute's

²⁵¹ This observation obviates questions concerning whether the Court's interpretive objective is textual meaning, congressional intent, statutory purpose, or something else.

²⁵² This approach is analogous to common law analysis, in which the courts trace the development of a doctrine over time through case law.

broader history. The line between broad history and pre-Code practice is indefinite. Although the Court spurns isolated and general statements in the legislative history, none of these cases presents an in-depth analysis of legislative history. Therefore, the weight and import of legislative history is unclear.

These observations explain the Court's unanimous decisions, but leave important questions open concerning the Court's choice of interpretive method. By examining the cases in which the Justices wrote separate opinions, we can determine whether (i) those opinions confirm these basic observations, (ii) disputes among the Justices arise from the use of different interpretive methods, and (iii) disputes among the Justices center upon the questions left open in the foregoing general observations about the Court's interpretive method.²⁵³

Section C reviews the Court's unanimous with concurrence decisions.

C. The Unanimous with Concurrence Decisions

1. Overview

In nine Bankruptcy Code cases decided during the 1981 through 1998 Terms, all of the Justices agreed on the result, but one or more Justices wrote a separate concurring opinion.²⁵⁴ In chronological order these are: *United States v. Security Industrial Bank*,²⁵⁵ *Ohio v. Kovacs*,²⁵⁶ *Begier v. Internal Revenue Service*,²⁵⁷ *Farrey v. Sanderfoot*,²⁵⁸ *Union*

²⁵³ This article does not consider whether the justices or other interpreters could actually apply these rules in each case and achieve undeniably predictable results. There are many reasons to doubt interpreters' ability to achieve unbiased, neutral and certain interpretation. Rather, the inquiry focuses on whether the Justices appear to follow certain criteria and, if so, whether we can identify those criteria and apply them to predict the results in future cases.

²⁵⁴ See Appendix III, *post*.

²⁵⁵ *United States v. Security Indus. Bank*, 459 U.S. 70 (1982).

²⁵⁶ *Ohio v. Kovacs*, 469 U.S. 274 (1985).

²⁵⁷ *Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990).

²⁵⁸ *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

Bank v. Wolas,²⁵⁹ *Connecticut National Bank v. Germain*,²⁶⁰ *Patterson v. Shumate*,²⁶¹ *Nobleman v. American Savings Bank*,²⁶² and *Things Remembered, Inc. v. Petrarca*.²⁶³

The Court decided two of these cases before Justice Scalia joined the Court.²⁶⁴ In these two cases, the Justices who wrote or joined a concurrence did so for reasons other than disagreement with the majority's statutory interpretation methods.²⁶⁵ In contrast, in all but one of the seven cases decided after Justice Scalia joined the Court, disputes concerning interpretive method were at the heart of the disagreements among the majority Justices and the concurring Justices.²⁶⁶

2. Concurring decisions in the 1981 through 1985 Terms

During the 1981 through 1985 Terms, the Court issued only two Bankruptcy Code decisions in which the result was unanimous but one or more Justices wrote or joined a separate concurring opinion.²⁶⁷

First, in *Ohio v. Kovacs*,²⁶⁸ the Court held that a debtor's obligation under an injunction that required the debtor to clean up a hazardous waste site was a "debt" that was dischargeable in the debtor's bankruptcy case.²⁶⁹ In an opinion written by Justice White, the majority implemented congressional intent, which it discerned from the Bankruptcy Code's text, structure, and legislative history.²⁷⁰ In this pre-Justice Scalia and pre-Justice Thomas opinion, none of the Justices objected to the Court's reference to legislative history.

²⁵⁹ *Union Bank v. Wolas*, 502 U.S. 151 (1991).

²⁶⁰ *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992).

²⁶¹ *Patterson v. Shumate*, 504 U.S. 753 (1992).

²⁶² *Nobleman v. American Sav. Bank*, 508 U.S. 324 (1993).

²⁶³ *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

²⁶⁴ See *Ohio v. Kovacs*, 469 U.S. 274 (1985); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982); see also Part III.C.2; Appendix VI, *post*; Appendix VII, *post*.

²⁶⁵ See *infra* notes 71-273, 280-81 and accompanying text.

²⁶⁶ See *infra* Part III.C.3.

²⁶⁷ See *Kovacs*, 469 U.S. 274; *Security Indus. Bank*, 459 U.S. 70.

²⁶⁸ *Kovacs*, 469 U.S. 274.

²⁶⁹ *Id.* at 282-83; see 11 U.S.C. § 101(12) (1994) (defining "debt").

²⁷⁰ *Kovacs*, 469 U.S. at 279 (citing congressional intent); *id.* at 278 (citing language of the applicable provision); *id.* at 279 (citing language of other Bankruptcy Code provisions); *id.* at 279 n.3, 280 & nn.6-8 (citing legislative history).

Justice O'Connor joined the majority, but wrote a separate concurrence²⁷¹ "to address the petitioner's concern that the Court's action will impede States in enforcing their environmental laws" and explain why the majority's holding was not hostile to state enforcement of environmental laws.²⁷² She did not challenge the majority's interpretive method. Query whether Justice O'Connor and the other Justices might have reached a different result if they had believed that the application of the Bankruptcy Code was detrimental to environmental law policy.²⁷³

Second, in *United States v. Security Industrial Bank*,²⁷⁴ Chief Justice Rehnquist, writing for six Justices, held that the Bankruptcy Code did not permit the trustee to avoid liens that were perfected before the Bankruptcy Code was enacted.²⁷⁵ The Court reasoned that retroactive application might violate the Fifth Amendment.²⁷⁶ In order to avoid the constitutional question, the Court relied upon two "canons" of construction. The first urges the Court to read a statute to avoid a constitutional question, if such a reading is "fairly possible."²⁷⁷ The second favors prospective application of a statute absent a clear indication that the legislature intended that the statute be applied retroactively.²⁷⁸ In applying these two canons, the Court found no clear expression that Congress intended the applicable Bankruptcy Code section to apply retroactively.²⁷⁹

In an opinion written by Justice Blackmun, three concurring Justices agreed that Supreme Court precedent mandated the result.²⁸⁰ Absent that precedent, however, they would have concluded that the section did apply retroactively and that retroactive application did not violate the Fifth Amendment.²⁸¹

²⁷¹ See *Kovacs*, 469 U.S. at 285 (O'Connor, J., concurring).

²⁷² *Id.*

²⁷³ See *infra* Part IV.A.1.c.3; Part IV.A.1.d.

²⁷⁴ *United States v. Security Indus. Bank*, 459 U.S. 70 (1982).

²⁷⁵ *Id.* at 81-82; see 11 U.S.C. § 522(f) (1994) (permitting the debtor to avoid certain pre-petition liens).

²⁷⁶ *Security Indus. Bank*, 459 U.S. at 81-82; see U.S. CONST. amend. V.

²⁷⁷ *Security Indus. Bank*, 459 U.S. at 78 (stating the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided" (citations and internal quotations omitted)).

²⁷⁸ *Id.* at 79-80 (stating that the "first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . [and that] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'" (citations omitted)).

²⁷⁹ *Id.* at 81-82.

²⁸⁰ *Id.* at 82 (Blackmun, J., concurring). Justices Brennan and Marshall joined Justice Blackmun's concurrence. *Id.*

²⁸¹ *Id.* at 83-85. Although the concurring justices disagreed with the majority's use of canons, these were constitutional canons, not bankruptcy law statutory interpretation canons. Cf. *id.* at 81 (drawing from earlier Supreme Court cases the "principle of statutory construction" that "[n]o bankruptcy law shall be

The separate opinions in *Kovacs* and *Security Industrial* do not embody disputes concerning the method the majority used to interpret the Bankruptcy Code. *Kovacs* is consistent with the observation that the Court considers the Bankruptcy Code's text, structure, and history. *Security Industrial* is a constitutional case, which adds little to our understanding of how the Court will interpret the Bankruptcy Code.

3. Concurring decisions in the 1986 through 1998 Terms

During the 1986 through 1998 terms, the Court issued seven bankruptcy opinions in which all of the Justices agreed with the result, but one or more Justices wrote or joined a separate concurrence.²⁸²

a. Single Justice concurrence decisions

In four of these cases, a single Justice concurred: *Begier v. Internal Revenue Service*,²⁸³ *Union Bank v. Wolas*,²⁸⁴ *Patterson v. Shumate*,²⁸⁵ and *Nobleman v. American Savings Bank*.²⁸⁶ In three of these cases, Justice Scalia was the lone concurring Justice (*Begier*, *Wolas*, and *Patterson*). In the fourth, Justice Stevens was the lone concurring Justice (*Nobleman*).

In all four of these cases, the concurring Justice wrote separately solely to criticize the majority's interpretive method. In both *Begier* and *Wolas*, Justice Scalia wrote separately to castigate the Court for considering legislative history.²⁸⁷ In *Nobleman*, in contrast, Justice Stevens wrote separately to complain of the Court's failure to consult legislative history to confirm the textual meaning.²⁸⁸ In *Patterson*, Justice Scalia wrote separately to praise the Court for using a "holistic," textual interpretation and to criticize the Court for having failed to do so in another case decided earlier in the same Term.²⁸⁹

construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress").

²⁸² See *infra* notes 283-86, 329-31; Appendix III, *post*.

²⁸³ *Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990).

²⁸⁴ *Union Bank v. Wolas*, 502 U.S. 151 (1991).

²⁸⁵ *Patterson v. Shumate*, 504 U.S. 753 (1992).

²⁸⁶ *Nobleman v. American Sav. Bank*, 508 U.S. 324 (1993).

²⁸⁷ See *infra* notes 297-99, 304-05 and accompanying text.

²⁸⁸ See *infra* notes 327-28 and accompanying text.

²⁸⁹ See *infra* notes 318-22 and accompanying text.

In *Begier v. Internal Revenue Service*,²⁹⁰ the Court held that the trustee could not recover as preferential transfers certain of the debtor's pre-petition tax payments because the payments had been made from funds held in trust for the Internal Revenue Service.²⁹¹ The Court relied upon the language of the Bankruptcy Code,²⁹² the language of relevant provisions of the Internal Revenue Code,²⁹³ the history of the Bankruptcy Code, including the legislative history and the broader history of how the Bankruptcy Code had modified pre-Code law,²⁹⁴ and the legislative history of the Internal Revenue Code.²⁹⁵ The Court interpreted these sources in the context of the preference provisions' role in furthering the overarching bankruptcy policy of equitable distribution among creditors.²⁹⁶ The Court's approach is consistent with the observation that the Court will consider the statute's text, structure, and history.

Justice Scalia, concurring,²⁹⁷ excoriated the Court for relying upon legislative history.²⁹⁸ He argued that "[i]f the Court had applied to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point . . . , it would have reached the same result it does today"²⁹⁹ Justice Scalia did not, however, clearly state a "test" for when, if ever, the Court might consider legislative history. He also did not expressly object to the Court's references to the Bankruptcy Code's purposes and overarching policies.

In *Union Bank v. Wolas*,³⁰⁰ Justice Stevens, writing for eight Justices, held that the "ordinary course" of business preference defense applied to payments on long-term debts as well as short-term debts. Although the Court reasoned that the text of the

²⁹⁰ *Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990).

²⁹¹ *Id.* at 60-67.

²⁹² *Id.* at 56 n.1, 59. *See* 11 U.S.C. § 541 (1994) (defining property of the bankruptcy estate); *id.* § 547 (authorizing the trustee to recover preferential transfers).

²⁹³ *Begier*, 496 U.S. at 60-61.

²⁹⁴ *Id.* at 57, 59 n.3, 63-67.

²⁹⁵ *Id.* at 61.

²⁹⁶ *Id.* at 58. For example, the Court defined "property of the debtor" by reference to the purposes underlying the preference provisions and by analogy to the Bankruptcy Code's definition of "property of the estate." *Id.*

²⁹⁷ *See Begier*, 496 U.S. at 67 (Scalia, J., concurring).

²⁹⁸ *Id.* at 67-70.

²⁹⁹ *Id.* at 70.

³⁰⁰ *See Union Bank v. Wolas*, 502 U.S. 151 (1991). *See* 11 U.S.C. § 547(b) (1994) (setting forth the elements of a preferential transfer); *id.* § 547(c) (creating exceptions); *id.* § 547(c)(4) (embodying the ordinary course exception).

Bankruptcy Code led clearly to this result,³⁰¹ the Court did not stop with the text. It also considered the legislative history and bankruptcy policy.

As for legislative history, however, the Court noted that “[g]iven the clarity of the statutory text, respondent’s burden of persuading us that Congress intended to create or to preserve a special rule for long-term debt is exceptionally heavy.”³⁰² The respondent failed to meet this burden.

As for policy, the Court considered how the rule it announced would foster the fundamental bankruptcy policies served by the preference rules, which include providing equitable distribution among similarly situated creditors, and deterring a race to the courthouse.³⁰³

Justice Scalia concurred, including in the portions of the opinion that “respond[ed] persuasively to legislative-history and policy arguments made by respondent.”³⁰⁴ He argued, however, that “[s]ince there was here no contention of a ‘scrivener’s error’ producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable.”³⁰⁵

Wolas reveals a clash between the majority’s test for looking beyond the plain text (may look beyond the text but with an exceptionally heavy burden to overcome plain meaning), and Justice Scalia’s test (do not look beyond the text absent a scrivener’s error that produces an absurd result). It also reflects a dispute between Justice Scalia and the other Justices concerning what it means for the text to be plain.

*Patterson v. Shumate*³⁰⁶ applied the *Wolas* test³⁰⁷ to determine what weight the Court should accord to legislative history when the text appears to be plain.

In *Patterson*, the Court was asked to determine whether the bankruptcy estate included the debtor’s interest in an Employee Retirement Income Security Act (“ERISA”) qualified pension plan.³⁰⁸ The issue arose because the Bankruptcy Code excludes from the debtor’s estate the debtor’s interest in a trust that contains a transfer restriction enforceable under “applicable non-bankruptcy law.”³⁰⁹ The Court held that

³⁰¹ See *Wolas*, 502 U.S. at 152, 154-56.

³⁰² *Id.* at 155-56; see also *id.* at 156-60 (analyzing legislative history).

³⁰³ *Id.* at 160-62.

³⁰⁴ *Id.* at 163 (Scalia, J., concurring).

³⁰⁵ *Id.*

³⁰⁶ *Patterson v. Shumate*, 504 U.S. 753 (1992).

³⁰⁷ See *Wolas*, 502 U.S. at 155-56; *supra* text accompanying note 302 (quoting *Wolas*); *Patterson*, 504 U.S. at 760.

³⁰⁸ *Patterson*, 504 U.S. 753.

³⁰⁹ See 11 U.S.C. § 541(c)(2) (1994). For a general discussion of the treatment of pension plans in bankruptcy, see 4 COLLIER, *supra* note 163, ¶ 541.11[7], 541-54.9 to 541-54.11; Patricia E. Dilley, *Hidden in Plain View: The Pension Shield Against Creditors*, 74 IND. L.J. 355 (1999); 1 GINSBURG & MARTIN ON BANKRUPTCY, § 5.02[G] at 5-17 to 5-18 (4th ed. 1996 & 1997 Supp.); Mary Ann Jackson, *Patterson v. Shumate: What Happens to Pension Benefits in Bankruptcy?*, 47 ARK. L. REV. 449 (1994); Michael Sabino

the phrase “applicable non-bankruptcy law” included both state spendthrift trust law, which the legislative history expressly mentioned,³¹⁰ and federal law, such as ERISA, which the legislative history did not expressly mention.³¹¹

Justice Blackmun, writing for eight Justices, began by stating that “the plain language of the Bankruptcy Code and ERISA is our determinant.”³¹² In an exemplary use of holistic, textual interpretation, he considered not only the language of the applicable Bankruptcy Code section, but also the uses of the phrases “state law” and “applicable non-bankruptcy law” throughout the Bankruptcy Code.³¹³

With respect to the legislative history’s reference to state spendthrift trust law, Justice Blackmun quoted *Wolas*³¹⁴ for the proposition that, because the text was clear, the petitioner carried an “exceptionally heavy” burden to convince the Court the Congress intended a result other than the result that followed from the plain language.³¹⁵

Finally, the Court explained why its holding was consistent with both the Bankruptcy Code’s policy of broadly including assets in the estate, and ERISA’s policies of fully protecting pension benefits and providing uniform national treatment of pension benefits.³¹⁶ Once again, the Court supported an apparently clear textual statement with references to broad statutory design.³¹⁷ Once again, the broad design and policy overcame a more particular statement in the legislative history.

Justice Scalia joined the majority opinion, but used a concurring opinion to comment on the Court’s interpretive method.³¹⁸ Interestingly, Justice Scalia did not criticize the Court for applying in *Patterson* the same interpretive canon to which Justice Scalia had objected in *Wolas*.³¹⁹ Instead, Justice Scalia praised the majority for using a

& John P. Clarke, *The Last Line of Defense: The New Test for Protecting Retirement Plans From Creditors in Bankruptcy Cases*, 48 ALA. L. REV. 613 (1997). See also *Patterson*, 504 U.S. at 757 n.1 (listing the circuit courts that were split over this issue).

³¹⁰ See *Patterson*, 504 U.S. at 761-62 & n.4; see also H.R. REP. NO. 95-595, at 176, 369 (1977), reprinted in U.S.C.C.A.N. 5787, 5869, 6136, 6325.

³¹¹ See *Patterson*, 504 U.S. at 757-59.

³¹² *Id.* at 757.

³¹³ *Id.* at 759; see also *id.* at 762-63 (rejecting the petitioner’s argument that the Court’s holding would render another section of the Bankruptcy Code superfluous).

³¹⁴ *Union Bank v. Wolas*, 502 U.S. 151, 155-56 (1991); see *supra* text accompanying note 302 (quoting *Wolas*).

³¹⁵ *Patterson*, 504 U.S. at 760.

³¹⁶ *Id.* at 763-65.

³¹⁷ Because the Court considered sources other than the text, *Patterson* is not classified as a “textual” opinion for purposes of Appendices VI and VII.

³¹⁸ See *Patterson*, 504 U.S. at 766 (Scalia, J., concurring).

³¹⁹ See *supra* notes 314-15.

“holistic” textual interpretation, in which a particular phrase means the same thing throughout the Bankruptcy Code.³²⁰ Justice Scalia used his concurrence primarily to castigate the Court for failing to follow this same approach in another case earlier in the same Term (*Dewsnup v. Timm*).³²¹ In one of his more biting criticisms of the Court’s interpretive methodology, he wrote: “I trust that in our search for a neutral and rational interpretive methodology we have now come to rest, so that the symbol of our profession may remain the scales, not the seesaw.”³²²

Justice Scalia did not expressly object to the Court’s consideration of the broad statutory design (i.e., “policy” inherent in the Bankruptcy Code’s structure). This suggests that Justice Scalia’s criticism in *Wolas* may have been addressed more to the Court’s discussion of legislative history than to the Court’s discussion of policies and purposes.³²³

Finally, in *Nobleman v. American Savings Bank*,³²⁴ the Court held that the Bankruptcy Code prohibited a chapter 13 debtor from “lien-stripping” a claim secured solely by the debtor’s principal residence.³²⁵ In a heavily textual opinion written by Justice Thomas, the Court relied exclusively on the interplay between the language of two relevant sections of the Bankruptcy Code.³²⁶ The opinion made no reference to legislative history or bankruptcy policy.

In his *Nobleman* concurrence,³²⁷ Justice Stevens appeared as the other side of Justice Scalia’s legislative history mirror. Justice Scalia avoids considering legislative history whenever possible, whereas Justice Stevens prefers to consider legislative history whenever it might be helpful, particularly if the apparently plain meaning produces an odd result. In his concurrence, Justice Stevens explained that the majority’s interpretation created an apparent anomaly under which the Bankruptcy Code granted debtors less protection for their principal residences than for their other assets. The legislative history resolved this anomaly because it revealed that Congress had, indeed, intended to grant mortgage lenders favorable treatment in order to encourage them to make home loans.³²⁸

³²⁰ *Patterson*, 504 U.S. at 766-67 (Scalia, J., concurring).

³²¹ *Dewsnup v. Timm*, 502 U.S. 410 (1992); *see infra* notes 479-507 and accompanying text; *Patterson*, 504 U.S. at 766 (Scalia, J., concurring).

³²² *Patterson*, 504 U.S. at 766-67 (Scalia, J., concurring).

³²³ *See supra* note 304-05 and accompanying text.

³²⁴ *Nobleman v. American Sav. Bank*, 508 U.S. 324 (1993).

³²⁵ *Id.* at 327-32.

³²⁶ *Id.* at 325-32. *See* 11 U.S.C. § 506(a) (1994) (providing generally for the strip down of undersecured claims); *id.* § 1322(b)(2) (prohibiting the debtor from altering the “rights” of holders of claims secured solely by the debtor’s principal residence).

³²⁷ *See Nobleman*, 508 U.S. at 332 (Stevens, J., concurring).

³²⁸ *Id.*

In summary, each of the single-Justice concurring opinions decided after Justice Scalia joined the Court involves a dispute over interpretive method. In three of the majority opinions (*Begier*, *Wolas*, *Patterson*), the Court considered text, structure (including policy and purpose), and history (in *Begier*, including a reference to pre-Code practice). Justice Scalia objected to the Court's reference to legislative history in two of these cases (*Begier*, *Wolas*), and commented on the Court's use of a holistic analysis in the third (*Patterson*). In the fourth case (*Nobleman*), the Court considered only the text and textual structure. Justice Stevens concurred to confirm the textual meaning by reference to legislative history. These cases suggest that Justices Scalia and Stevens, at least, care enough, or disagree enough, about interpretive method to write separate opinions, even if they agree with the Court's results.

b. Multiple Justice concurrence decisions

In the three remaining unanimous with concurrence decisions (*Farrey v. Sanderfoot*,³²⁹ *Connecticut National Bank v. Germain*,³³⁰ and *Things Remembered, Inc. v. Petrarca*³³¹), three or four Justices diverged from the majority opinion.

Two of these cases (*Germain* and *Things Remembered*) involved the interaction between general jurisdiction statutes and bankruptcy jurisdiction statutes. Because neither case interpreted a provision of the Bankruptcy Code, neither adds to our understanding of how the Court will interpret the Bankruptcy Code, itself. Nevertheless, these cases are consistent with the pattern of cases in which disagreements over interpretive method have led to concurrences. In each case, Justice Thomas wrote a textual majority opinion. In each case, other Justices wrote non-textual concurrences. In each case, the Justices disagreed over aspects of the plain meaning rule, including what it means for language to be plain, and when the Court may or should look beyond the language.

In *Connecticut National Bank v. Germain*,³³² the Court considered whether the federal circuit courts of appeals have power to review interlocutory orders issued by district courts in appeals from bankruptcy courts. The question arose because the bankruptcy appeals jurisdiction statute expressly grants the circuit courts power to hear only final orders issued by bankruptcy appellate panels and by district courts sitting as appellate courts in bankruptcy cases.³³³ The general jurisdiction statute grants the courts of appeal power to hear interlocutory orders issued by the district courts, in certain

³²⁹ *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

³³⁰ *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992).

³³¹ *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

³³² *Germain*, 503 U.S. 249.

³³³ See 28 U.S.C. § 158(d) (1994).

circumstances, but does not expressly refer to orders issued by district courts sitting as appellate courts in bankruptcy cases, rather than as trial courts.³³⁴

Writing for the five-Justice majority,³³⁵ Justice Thomas held that the bankruptcy jurisdiction statute did not limit the courts of appeals' power under the general jurisdiction statute.³³⁶ The Court reasoned that the language of the general jurisdiction statute was plain and unambiguous.³³⁷ Although the respondent argued that the legislative history of the bankruptcy jurisdiction statute suggested a different result, the Court refused to consider the legislative history: "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'. . . . [J]udicial inquiry into the applicability of § 1292 begins and ends with what § 1292 does say and with what § 158(d) does not."³³⁸

The five Justices who joined this opinion embraced a prohibitive rule (the Court "may not" look beyond the text), and determined that this rule applied when the words were "unambiguous."

In two separate concurrences, four Justices disagreed with the majority's staunch refusal to look beyond the "plain" language. First, Justice Stevens's concurrence³³⁹ began with a concise, classic statement of his interpretive philosophy: "Whenever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."³⁴⁰ Justice Stevens argued that, if Congress had intended to alter appellate jurisdiction in the drastic way urged by the respondent, Congress is likely to have indicated that purpose in the legislative history.³⁴¹ Consequently, the legislative history's silence on the issue supported the Court's holding.³⁴² In these short statements, Justice Stevens disagreed with the majority on all three elements of the plain meaning rule. First, he rejected the prohibitive rule (may not look beyond the language), in favor of a persuasive rule (should look beyond the language if there is some uncertainty). Second, by rejecting the "unambiguous" test in favor of a "some uncertainty" test, he seemed to require a lesser degree of textual inexactitude. In contrast, the test Justice Scalia

³³⁴ See 28 U.S.C. § 1292 (1994); *Germain*, 503 U.S. at 253.

³³⁵ Justice Thomas wrote the majority opinion, which Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter joined. See *Germain*, 503 U.S. 249.

³³⁶ *Id.* at 250-55.

³³⁷ *Id.* at 251-52; 28 U.S.C. § 1292 (1994).

Another general jurisdiction statute grants the courts of appeals power to hear appeals of final orders of the district courts. See 28 U.S.C. § 1291 (1994). The Court concluded that this statute did not render the bankruptcy jurisdiction statute superfluous. See *Germain*, 503 U.S. at 252-53.

³³⁸ *Germain*, 503 U.S. at 254.

³³⁹ See *Germain*, 503 U.S. at 255 (Stevens, J., concurring).

³⁴⁰ *Id.* (emphasis added).

³⁴¹ *Id.* at 255-56.

³⁴² *Id.*

articulated in his *Union Bank v. Wolas* concurrence (do not look beyond the language absent a scrivener's error that produces an absurd result)³⁴³ seems to be stricter than either Justice Stevens's "some uncertainty" test or the *Germain* majority's "unambiguous" test.³⁴⁴ Justice Stevens encouraged the Court to examine sources other than the text if the text contained "some uncertainty," but cautioned that the parties would have a heavy burden of demonstrating that Congress's intent was contrary to the plain text. Third, Justice Stevens disagreed with the majority's conclusion that the language was plain. Finally, in reasoning that paralleled the pre-Code canon, Justice Stevens urged the Court to consider not only the legislative history, but also prior practice.

Second, Justice O'Connor wrote a separate concurrence that Justices White and Blackmun joined.³⁴⁵ These three Justices argued that the language was not plain. Rather, they reasoned that the language of the general jurisdiction statute rendered the bankruptcy jurisdiction statute largely superfluous. Nevertheless, because they did not believe that Congress "intended" this result, they agreed with the majority's result.³⁴⁶ In this concurrence, congressional intent trumped the apparent textual meaning. Justices O'Connor, White and Blackmun agreed with Justice Stevens that the language was not plain.

Germain suggests that Justice Thomas required less clarity to deem the language unambiguous than did the four concurring Justices.

*Things Remembered, Inc. v. Petrarca*³⁴⁷ presented a similar dispute over the meaning of "plain" and the parameters of the plain meaning rule. Justice Thomas, writing for six Justices,³⁴⁸ held that the general federal remand statute prohibited review of a remand order, regardless of whether the proceeding had been removed under the general removal statute or the bankruptcy removal statute.³⁴⁹

In a characteristically textual opinion, Justice Thomas relied solely on the text of the bankruptcy removal statute and the general remand statute. He found that these statutes comfortably co-existed in the bankruptcy context.³⁵⁰ He declined to rely on the (arguably ambiguous) bankruptcy remand statute.

Justice Ginsburg, in a concurrence that Justice Stevens joined, agreed with the result but argued that the Court should have considered the bankruptcy remand statute.

³⁴³ *Union Bank v. Wolas*, 502 U.S. 151 (1991); *see supra* text accompanying note 305.

³⁴⁴ *See Germain*, 503 U.S. at 254; *see supra* text accompanying note 338.

³⁴⁵ *See Germain*, 503 U.S. at 256 (O'Connor, J., concurring).

³⁴⁶ *Id.*

³⁴⁷ *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995)

³⁴⁸ Chief Justice Rehnquist and Justices Breyer, O'Connor, Scalia, and Souter joined Justice Thomas's majority opinion. *Id.* Cf. *Germain*, 503 U.S. 249 (per Thomas, J., joined by Rehnquist, C.J., and Kennedy, Scalia, Souter, JJ.); *see supra* note 335.

³⁴⁹ *Things Remembered*, 516 U.S. 124.

³⁵⁰ *Id.* at 129.

She reconciled the two remand statutes using dictionaries³⁵¹ and substantive holistic interpretive canons.³⁵² She did not agree that the statutes, considered together, were “plain.”

Justice Kennedy wrote a separate concurrence, which Justice Ginsburg joined, to clarify the effect of the holding on an earlier Supreme Court removal decision.³⁵³

In *Things Remembered* and *Germain*, Justice Thomas applied a narrow, textual interpretation to avoid considering sources that might have raised ambiguity.

Finally, in *Farrey v. Sanderfoot*,³⁵⁴ three Justices concurred for reasons unrelated to interpretive method. The Court held that a Bankruptcy Code lien avoidance provision did not apply if the property was subject to the lien when the debtor acquired the property. The Court discerned this rule in the language of the Bankruptcy Code,³⁵⁵ supported by the purposes and legislative history of the provision in issue.³⁵⁶ The decision turned on the Court’s factual finding that the lien had attached, under state law, at the same time the debtor acquired the property.³⁵⁷ This factual conclusion, and its broader implications for subsequent cases, raised concern among the concurring Justices.³⁵⁸

³⁵¹ *Id.* at 133 (Ginsburg, J., concurring).

³⁵² *Id.* at 133 (consulting dictionaries); *id.* at 135-36 (citing canons that interpret the text in context; look to the whole law, its object, and policy; reconcile statutes to fit harmoniously within a set of provisions; clarify the meaning of a term by considering the statutory scheme; and consider the statute’s substantive effect).

³⁵³ *Id.* at 129-30 (Kennedy, J., concurring). Justice Kennedy noted that *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), on which the majority had relied, had been limited by *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988). See *Things Remembered*, 516 U.S. at 129-130.

³⁵⁴ *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

³⁵⁵ *Id.* at 295-96; see 11 U.S.C. § 522(f) (1994).

³⁵⁶ See *Farrey*, 500 U.S. at 297-99.

³⁵⁷ *Id.* at 299-301. A divorce decree had granted the ex-husband the marital home, subject to a lien that secured the ex-husband’s obligation to pay certain monies to his ex-wife. The Court concluded that the divorce decree had extinguished the ex-husband’s property rights and created new property rights. *Id.*

³⁵⁸ Justice Kennedy wrote a separate concurrence, which Justice Souter joined. See *Farrey*, 500 U.S. at 301-04 (Kennedy, J., concurring). They argued that, if the debtor had not conceded that his interest in the property arose at the same time the lien attached, the Court might have concluded that the debtor had held an interest in the property before the lien attached. Under the majority’s holding, if the debtor had a property interest under state law before the lien attached, the Bankruptcy Code would have allowed the debtor to avoid the lien. The concurring justices lamented that this result would be contrary to fairness, common sense, and the policies recognized by the Court in the majority opinion. They suggested that congressional action might be necessary to avoid this result. *Id.*

Similarly, although Justice Scalia did not write a separate opinion, he declined to join in the one paragraph in which the Court presented a hypothetical case under which the debtor might have held an interest in the property, under state law, before the lien attached. *Id.* at 300 n.4.

In summary, in two of the three multiple Justice concurrence cases, interpretive disputes led to separate opinions. In these concurrences, five separate Justices (Justices Blackmun, Ginsburg, O'Connor, Stevens, and White) objected to Justice Thomas's narrow, textual interpretation.

4. Summary of the unanimous with concurrence decisions

In all but three of the Court's nine unanimous with concurrence decisions, Justices wrote separately because they disagreed with the majority's interpretive method.

Two of these three cases were decided before Justice Scalia joined the Court. One, *Security Industrial*, involved a constitutional question; the other, *Kovacs*, involved a tension between bankruptcy law and environmental law. The third case, *Farrey*, decided after Justice Scalia joined the Court, involved the application of state law. These cases do not yet reveal any pattern.

The six cases in which Justices disagreed over interpretive method were all decided after Justice Scalia joined the Court (*Begier*, *Wolas*, *Patterson*, *Nobleman*, *Germain*, *Things Remembered*). All but one, *Begier*, were decided after Justice Thomas joined the Court. Three were textual opinions written by Justice Thomas, which spurred non-textual concurrences (*Nobleman*, *Germain*, *Things Remembered*). Two were non-textual opinions to which Justice Scalia wrote textual concurrences (*Begier*, *Wolas*). The sixth was a quasi-textual opinion to which Justice Scalia wrote a concurrence praising the Court's holistic textualism (*Patterson*). It seems clear from these cases that Justices Scalia's and Thomas's interpretive methods have adversely affected the Court's ability to reach consensus in bankruptcy cases.

One might argue that the disputes among the Justices in these cases have not undermined certainty because these disputes merely led to concurring opinions, rather than to disagreements over the results in these cases. These disputes, however, give the lower courts inconsistent signals concerning how to interpret the Bankruptcy Code. Moreover, Parts C (minor splits) and D (major splits) demonstrate that the Justices frequently have written dissents in Bankruptcy Code cases because disputes over interpretive method caused the Justices to reach different results.

D. The Minor Split Decisions

1. Overview

This article separates the minor splits and major splits simply to determine whether any pattern emerges that distinguishes those cases in which three or four Justices disagreed with the result from those cases in which only one of two Justices disagreed with the result.

The minor splits show a continuing pattern of divergent opinions arising from interpretive disputes, particularly between Justice Stevens, on the one hand, and Justices Scalia and Thomas, on the other. Other patterns also begin to emerge, including disputes arising in cases in which the Bankruptcy Code is in tension with other law.

2. Minor split decisions in the 1981 through 1985 Terms

*Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*³⁵⁹ is the only Bankruptcy Code decision of the pre-Justice Scalia era that the Court decided by a minor split.

In a per curiam opinion expressing the views of seven Justices,³⁶⁰ the Court held that a debtor could not dismiss a case filed under the former Bankruptcy Act in order to file a case under the new Bankruptcy Code. The Court based its holding on the plain language of the Bankruptcy Code.³⁶¹

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.³⁶²

Although the Court wrote a primarily textual opinion, and applied a textual canon, the Court, nevertheless, consulted legislative history. It noted that the legislative history supported the Court's interpretation of the plain meaning. The Court did not, however, engage in a detailed analysis of the legislative history.³⁶³

Justice Stevens dissented, in an opinion that Justice Marshall joined.³⁶⁴ The dissenters spurned the majority's search for "meaning" in favor of a search for congressional intent.³⁶⁵ Justice Stevens discerned Congress's intent in the purpose and

³⁵⁹ *Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982).

³⁶⁰ Chief Justice Burger and Justices Blackmun, Brennan, O'Connor, Powell, Rehnquist, and White joined the majority opinion. *See Geiger*, 454 U.S. at 355-60.

³⁶¹ *See Geiger*, 454 U.S. at 357 & n.1, 359-60; *see also* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(a), 92 Stat. 2549, 2683 (1978); 11 U.S.C. § 101 (1994). Because *Geiger* consulted legislative history only in passing, it is included as a "textual" opinion in Appendices VI and VII.

³⁶² *Geiger*, 454 U.S. at 359-60 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

³⁶³ *Id.* at 355-56.

³⁶⁴ *Id.* at 360 (Stevens, J., dissenting).

³⁶⁵ *Id.* at 360, 363.

spirit of the Bankruptcy Code and Bankruptcy Act.³⁶⁶ He supported his understanding of Congress's intent through a plausible reading of the statute's language.³⁶⁷ Finally, the dissent criticized the Court for accepting the case on an interlocutory appeal when the Court could have mooted the issue by denying certiorari.³⁶⁸

Geiger is a good example of a case in which the Justices split (even before Justice Scalia joined the Court) in an interpretive dispute over the statute's letter versus its presumed purpose and spirit. The dissenters discerned congressional intent by reconciling all of the sources that shed light on the statute's meaning rather than by relying primarily, or exclusively, on the text.

3. Minor split decisions in the 1986 through 1998 terms

In fifteen Bankruptcy Code cases decided after Justice Scalia joined the Court, one or two Justices dissented. In chronological order, these cases are *Kelly v. Robinson*³⁶⁹ (seven-to-two, Justices Marshall and Stevens dissenting), *Pennsylvania Department of Public Welfare v. Davenport*³⁷⁰ (seven-to-two, Justices Blackmun and O'Connor dissenting), *United States v. Energy Resources Co.*³⁷¹ (eight-to-one, Justice Blackmun dissenting), *Owen v. Owen*³⁷² (eight-to-one, Justice Stevens dissenting), *Toibb v. Radloff*³⁷³ (eight-to-one, Justice Stevens dissenting), *Dewsnup v. Timm*³⁷⁴ (six-to-two, Justices Scalia and Souter dissenting), *United States v. Nordic Village, Inc.*³⁷⁵ (seven-to-two, Justices Stevens and Blackmun dissenting), *Barnhill v. Johnson*³⁷⁶ (seven-to-two, Justices Stevens and Blackmun dissenting), *Taylor v. Freeland & Kronz*³⁷⁷ (eight-to-one, Justice Stevens dissenting), *Celotex Corp. v. Edwards*³⁷⁸ (seven-to-two, Justices Stevens

³⁶⁶ *Id.* at 360-61.

³⁶⁷ *Id.* at 361-63.

³⁶⁸ *Id.* at 363.

³⁶⁹ *Kelly v. Robinson*, 479 U.S. 36 (1986).

³⁷⁰ *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

³⁷¹ *United States v. Energy Resources Co.*, 495 U.S. 545 (1990).

³⁷² *Owen v. Owen*, 500 U.S. 305 (1991).

³⁷³ *Toibb v. Radloff*, 501 U.S. 157 (1991).

³⁷⁴ *Dewsnup v. Timm*, 502 U.S. 410 (1992).

³⁷⁵ *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

³⁷⁶ *Barnhill v. Johnson*, 503 U.S. 393 (1992).

³⁷⁷ *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992).

³⁷⁸ *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).

and Ginsburg dissenting), *Field v. Mans*³⁷⁹ (seven-to-two, Justices Breyer and Scalia dissenting, and Justice Ginsburg joining the majority but also writing a separate concurrence), *United States v. Reorganized CF&I Fabricators of Utah, Inc.*³⁸⁰ (eight-to-one, Justice Thomas concurring in part and dissenting in part), *Associates Commercial Corp. v. Rash*³⁸¹ (eight-to-one, Justice Stevens dissenting and Justice Scalia joining the majority but declining to join in one footnote), and *Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*³⁸² (six-to-one-to-two, Justice Stevens dissenting, and Justices Thomas and Scalia concurring).

To determine whether these dissents embody any patterns of disputes among the Justices, including patterns of disputes concerning interpretive method, this section separates the dissents according to their authors. Part (a) discusses Justice Stevens's dissents, Part (b) discusses Justices Marshall's and Blackmun's dissents, Part (c) discusses Justices Thomas's, Scalia's, and Breyer's dissents, and Part (d) discusses a case in which Justice Stevens dissented and Justices Thomas and Scalia concurred.

Notice that only six Justices wrote dissents in these fifteen minor split cases.³⁸³ Of these, only four, Justices Breyer, Scalia, Stevens, and Thomas, remain on the Court today. The analysis below reveals that most of Justices Scalia's, Stevens's, and Thomas's dissents arose from disagreements among these three Justices over interpretive method.³⁸⁴ Not surprisingly, Justices Scalia and Thomas prefer textual interpretive methods whereas Justice Stevens prefers more flexible interpretive methods.³⁸⁵

a. Justice Stevens's dissents

Justice Stevens dissented in nine of the fifteen minor splits during the 1986 through 1998 Terms. He wrote the dissents in the following eight cases: *Owen v. Owen*,³⁸⁶ *Toibb v. Radloff*,³⁸⁷ *United States v. Nordic Village, Inc.*,³⁸⁸ (joined by Justice

³⁷⁹ *Field v. Mans*, 516 U.S. 59 (1995).

³⁸⁰ *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

³⁸¹ *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

³⁸² *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411 (1999).

³⁸³ These are Justices Blackmun, Breyer, Marshall, Scalia, Stevens, and Thomas.

³⁸⁴ See *infra* notes Part III.D.3.a, c, d.

³⁸⁵ *Id.*; see also *infra* Part IV.A.2.

³⁸⁶ *Owen v. Owen*, 500 U.S. 305 (1991).

³⁸⁷ *Toibb v. Radloff*, 501 U.S. 157 (1991).

³⁸⁸ *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

Blackmun), *Barnhill v. Johnson*,³⁸⁹ (joined by Justice Blackmun), *Taylor v. Freeland & Kronz*,³⁹⁰ *Celotex Corp. v. Edwards*,³⁹¹ (joined by Justice Ginsburg), *Associates Commercial Corp. v. Rash*,³⁹² and *Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*.³⁹³ In the ninth case, *Kelly v. Robinson*,³⁹⁴ Justice Stevens joined a dissent that Justice Marshall wrote. *Kelly* is discussed in Part (b) together with Justices Marshall's and Blackmun's other dissents.

In six of the eight dissents that he wrote, Justice Stevens disagreed with the majority over interpretive method.³⁹⁵ The two remaining cases each involved some disagreement over interpretive method; however, these cases are better understood as disputes concerning constitutional or quasi-constitutional issues that simply happened to arise in the bankruptcy context.³⁹⁶

In five of the six cases involving Bankruptcy Code interpretation disputes, the majority relied primarily on the text of the Bankruptcy Code. These are *Owen v. Owen*,³⁹⁷ *Barnhill v. Johnson*,³⁹⁸ *Taylor v. Freeland & Kronz*,³⁹⁹ *Toibb v. Radloff*,⁴⁰⁰ and

³⁸⁹ *Barnhill v. Johnson*, 503 U.S. 393 (1992).

³⁹⁰ *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992).

³⁹¹ *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).

³⁹² *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

³⁹³ *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411 (1999).

³⁹⁴ *Kelly v. Robinson*, 479 U.S. 36 (1986).

³⁹⁵ See *infra* notes 397-408, 520-53 and accompanying text.

³⁹⁶ See *infra* notes 409-18 and accompanying text.

³⁹⁷ *Owen v. Owen*, 500 U.S. 305 (1991) (holding that Bankruptcy Code section 522(f) allows the debtor to avoid a judicial lien that impairs the debtor's state law exemptions, even though the state law defines exemptions to exclude property subject to such a lien); *id.* at 311 ("this meaning is more consonant with the text . . ."). See 11 U.S.C. § 522(f) (1994) (permitting the debtor to avoid certain liens that impair the debtor's exemptions); *id.* § 522(b) (authorizing individual debtors to exempt certain property from their bankruptcy estates).

The majority rejected an appeal to policy. It stated that the opt-out policy did not impel the Court to "create a distinction [between federal and state exemptions] that the words of the statute do not contain." *Owen*, 500 U.S. at 313; see 11 U.S.C. § 522(b) (1994) (providing debtors with a choice between state and federal exemptions unless the debtor's state has "opted out" of the federal exemption scheme and limited its residents to the state law exemptions). The Court also suggested that the opt-out policy was limited by the Bankruptcy Code's policies. See *Owen*, 500 U.S. at 313.

³⁹⁸ *Barnhill v. Johnson*, 503 U.S. 393 (1992) (holding that, for purposes of the Bankruptcy Code's preferential transfer recovery provisions, a transfer by check is made when the debtor's bank honors the check rather than when the debtor delivers the check to the payee); *id.* at 397-98 (reasoning that the Bankruptcy Code's definition of "transfer" turns on the meaning of "property" which is determined by state law); see 11 U.S.C. § 547 (1994) (establishing rules for the avoidance of preferential transfers).

³⁹⁹ *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (holding that a chapter 7 trustee may not challenge a debtor's exemptions after the period for objecting has expired if the trustee never sought an extension of time to file an objection, even if the debtor had no colorable basis for claiming the exemption); *id.* at 643-

Associates Commercial Corp. v. Rash.⁴⁰¹ In each of these cases, Justice Stevens would have reached a different result by applying an interpretive method that relied less exclusively on the text and more flexibly on other sources. Specifically, Justice Stevens would have relied on (i) the text viewed in the context of the function of the Bankruptcy Code sections in issue (*Owens*);⁴⁰² (ii) the text, holistic interpretive canons, consistency with commercial practice, and legislative history (*Barnhill*);⁴⁰³ (iii) policy, equity, and the common law, supported by the text (*Taylor*);⁴⁰⁴ (iv) a holistic reading of the Bankruptcy Code, supported by the legislative history (*Toibb*);⁴⁰⁵ and (v) the text, supported by the

45 (applying a textual analysis); *see* 11 U.S.C. § 522(b) (1994) (establishing exemptions rules); FED. R. BANKR. P. 4003(b) (West 1999) (fixing time for filing objections to exemptions).

⁴⁰⁰ *Toibb v. Radloff*, 501 U.S. 157 (1991) (holding that an individual not engaged in business may file for relief under chapter 11); *id.* at 160 (reasoning that “the plain language of the Bankruptcy Code disposes of the question before us”); *id.* at 166 (reasoning that “[t]he plain language of the Bankruptcy Code permits individual debtors not engaged in business to file for relief under Chapter 11. Although the structure and legislative history of Chapter 11 indicate that this Chapter was intended primarily for the use of business debtors, the Code contains no ‘ongoing business’ requirement for Chapter 11 reorganization, and we find no basis for imposing one.”). *See* 11 U.S.C. § 109(d) (1994) (establishing eligibility requirements for chapter 11).

The Court also rejected an appeal to policy considerations and warnings of dire consequences that would follow from allowing individuals to file chapter 11. *Toibb*, 501 U.S. at 163-65.

⁴⁰¹ *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 959-63 (1997) (holding that, when a chapter 13 debtor proposes to retain property under the cramdown provision, the value of the collateral is the price a willing buyer would pay to obtain similar property from the seller). *See* 11 U.S.C. § 1325(a)(5) (1994) (providing for cramdown against secured claims).

⁴⁰² *See Owen*, 500 U.S. at 314-21 (Stevens, J., dissenting).

⁴⁰³ *See Barnhill*, 503 U.S. at 403 (Stevens, J., dissenting, joined by Blackmun, J.) (arguing that a transfer by check occurs on the date of delivery, provided that the check is honored within 10 days thereafter); *id.* at 403-04 (reasoning from consistency with commercial practice); *id.* at 404-06 (reasoning from the text); *id.* at 406 (reasoning that the result is consistent with legislative history and with the canon of construction under which the same term is presumed to have the same meaning in different sections of the statute).

⁴⁰⁴ *See Taylor*, 503 U.S. at 646 (Stevens, J., dissenting) (arguing that the limitation period for objecting to the debtor’s exemptions should be tolled if the debtor has no colorable basis for claiming an exemption); *id.* at 646-50 (reasoning from equitable tolling, equitable considerations, common law); *id.* at 650-51 (reasoning from the text); *id.* at 651-52 (appealing to the Court’s “power to reach a just result despite the ‘plain meaning’,” arguing that the Court should “be guided by common law principles,” and concluding that “it is a mistake to adopt a ‘strict letter’ approach . . . when justice requires a more searching inquiry” (citations omitted)).

⁴⁰⁵ *See Toibb*, 501 U.S. at 166 (Stevens, J., dissenting) (arguing that the history and structure of the Bankruptcy Code suggest that individual debtors not engaged in business should not be allowed to file for relief under chapter 11); *id.* at 166-67 (arguing that, while “[t]he Court’s reading of the statute is plausible. . . [w]hen the statute is read as a whole, . . . it seems quite clear that Congress did not intend to authorize a ‘reorganization’ of the affairs of an individual consumer debtor”); *id.* at 167 (arguing that “the word ‘only’ [in Bankruptcy Code section 109(d)] introduces sufficient ambiguity to justify a careful examination of other provisions of the Act, as well as the legislative history”); *id.* at 167-69 (considering repeated references to the debtor’s business in other sections of chapter 11 and its legislative history); *id.* at 168-69 (comparing chapter 11 and chapter 13); *id.* at 170 (reasoning based upon “read[ing] the statute as a whole”).

context of the entire Bankruptcy Code, and a comparison of similar substantive bankruptcy concepts in different Bankruptcy Code chapters (*Rash*).⁴⁰⁶

These cases demonstrate Justice Stevens's standard approach of reviewing all relevant sources of meaning and determining congressional intent through the best justification of these sources, rather than giving primacy to one source, such as the text. In the majority opinions, the Court generally deferred to the text because the text was clear. Two of the majority opinions employed a textual canon that prohibited the Court from consulting legislative history because the text was unambiguous.⁴⁰⁷

The sixth Justice Stevens dissent, in *Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*,⁴⁰⁸ will be discussed in Part (d). This discussion will allow the reader to review Justices' Thomas's and Scalia's dissents in Part (c) and then compare Justice Stevens's dissent in *LaSalle* to Justice Thomas's and Justice Scalia's concurrence in *LaSalle*.

The two remaining minor split cases in which Justice Stevens wrote a dissent involve interpretive disputes; however, they are best understood not as Bankruptcy Code interpretive disputes but as constitutional or quasi-constitutional questions that simply happened to arise in the bankruptcy context.

The seventh case, *United States v. Nordic Village, Inc.*⁴⁰⁹ presented a quasi-constitutional question that is clearly explained as a part of the Court's sovereign immunity jurisprudence.⁴¹⁰ The majority's reading of the text in *Nordic Village* was heavily influenced by a judicially created rule applied exclusively to sovereign immunity cases. This rule requires that Congress make an "unequivocal statement" in order to waive the federal government's immunity from suit.⁴¹¹ The Court held that the statement in the Bankruptcy Code was not sufficiently unequivocal.⁴¹²

⁴⁰⁶ See *Rash*, 520 U.S. at 966 (Stevens, J., dissenting) (arguing that "[a]lthough the meaning of 11 U.S.C. § 506(a) is not entirely clear, I think its text points to foreclosure as the proper method of valuation in this case"); *id.* at 967 (reasoning from text, context, purpose, coherent use of section 506(a) throughout the Bankruptcy Code, economic reality, consequences, and "consist[ency] with the larger statutory scheme").

⁴⁰⁷ See *Barnhill*, 503 U.S. at 401-02 (reasoning that "appeals to statutory history are well taken only to resolve 'statutory ambiguity,'" and that the legislative history did not support the petitioner's argument in any event); *Toibb*, 501 U.S. at 162 (rejecting an appeal to legislative history because "[w]here, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear. . . . although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here." (internal quotations and citation omitted)). Cf. *Rash*, 520 U.S. at 963 n.4 (giving no weight to legislative history because the history was "unedifying, offering snippets that might support either standard of valuation").

⁴⁰⁸ *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411 (1999).

⁴⁰⁹ *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (per Scalia, J.).

⁴¹⁰ See also *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) (concerning abrogation of state sovereign immunity); see *infra* notes 570-78 and accompanying text. See also sources cited *infra* at note 574. *Nordic* and *Hoffman* are quasi-constitutional because they apply to the Bankruptcy Code a strict interpretive test reserved for statutes purporting to waive or abrogate sovereign immunity.

⁴¹¹ See *Nordic Village*, 503 U.S. at 33-37.

Justice Stevens, joined by Justice Blackmun, disagreed.⁴¹³ He argued that the Court's result was not only unjust, but also unnecessary because the text plainly provided a waiver and the legislative history suggested that Congress had intended to effect a waiver.⁴¹⁴ The dissent also castigated the majority for insisting that Congress make a "clear statement" in order to waive sovereign immunity.⁴¹⁵

The eighth, and final, Justice Stevens dissent occurred in *Celotex Corp. v. Edwards*.⁴¹⁶ In *Celotex*, the Court held that creditors could not collaterally attack a bankruptcy court injunction that prohibited the creditors from executing upon a bond issued by the debtor's surety.⁴¹⁷ The dissent argued that the non-Article III bankruptcy court had no jurisdiction to enjoin an Article III court. Even if bankruptcy courts did have such jurisdiction, the dissent argued, the injunction should have been voided because it had only a frivolous pretense to validity.⁴¹⁸ *Celotex* raised a constitutional question - not a question of statutory interpretation.

b. Justices Blackmun's and Marshall's dissents

Justices Stevens's, Blackmun's, and Marshall's dissents overlap. Justice Blackmun joined Justice Stevens' dissent in *Barnhill v. Johnson*.⁴¹⁹ Justice Blackmun wrote the dissent in two other minor split decisions, namely *Pennsylvania Department of Public Welfare v. Davenport*⁴²⁰ and *United States v. Energy Resources Co.*⁴²¹ In another

⁴¹² *Id.* at 39; see 11 U.S.C. § 106 (1994) (entitled "waiver of sovereign immunity").

⁴¹³ See *Nordic Village*, 503 U.S. at 39 (Stevens, J., dissenting).

⁴¹⁴ *Id.* at 39-41.

⁴¹⁵ *Id.* at 45.

⁴¹⁶ *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).

⁴¹⁷ *Id.* at 313.

⁴¹⁸ See *Celotex*, 514 U.S. at 313 (Stevens, J., dissenting, joined by Ginsburg, J.); *id.* at 313-30. See also U.S. CONST. art. III.

⁴¹⁹ See *Barnhill v. Johnson*, 503 U.S. 393, 403 (1992) (Stevens, J., dissenting, joined by Blackmun, J.). Justice Blackmun also joined Justices Stevens's dissent in *Nordic Village*, 503 U.S. at 39 (Stevens, J., dissenting, joined by Blackmun, J.). Justice Ginsburg joined Justice Stevens' dissent in *Celotex*, 514 U.S. at 313 (Stevens, J., dissenting, joined by Ginsburg, J.). Those cases did not involve statutory interpretation disputes, however.

⁴²⁰ *Davenport*, 495 U.S. at 564 (Blackmun, J., dissenting, joined by O'Connor, J.). Justices Marshall, Blackmun, and Stevens are not always in accord. In *Davenport*, for example, Justice Blackmun dissented from Justice Marshall's majority opinion. In *Toibb v. Radloff*, 501 U.S. 157 (1998), Justice Stevens dissented from Justice Blackmun's majority opinion.

minor split decision, *Kelly v. Robinson*,⁴²² Justice Marshall wrote the dissent, which Justice Stevens joined.⁴²³ Part (b) discusses Justices Marshall's and Blackmun's dissents in *Kelly*, *Davenport*, and *Energy Resources*.

*Kelly*⁴²⁴ and *Davenport*⁴²⁵ considered the Bankruptcy Code's treatment of criminal restitution obligations.⁴²⁶

In *Kelly*, the Court held that a state criminal restitution obligation imposed as a condition of probation was not dischargeable in an individual's chapter 7 case.⁴²⁷ The Court concluded that such an obligation fits within the exception to discharge for fines and penalties that are payable to or for the benefit of the government and that are not "compensation for actual pecuniary loss."⁴²⁸ In dictum, the Court also suggested that, even if this exception to discharge did not apply, a restitution penalty might be enforceable notwithstanding the bankruptcy case because the Court had "serious doubts whether Congress intended to make criminal penalties 'debts'"⁴²⁹ under the Bankruptcy Code.⁴³⁰

The Court based its holding on the "language . . . in light of the history of bankruptcy court deference to criminal judgments and in light of the interests of the States in unfettered administration of their criminal justice systems."⁴³¹ Faced with a

⁴²¹ *United States v. Energy Resources Co.*, 495 U.S. 545, 551 (1990) (Blackmun, J., dissenting) (without opinion).

⁴²² *Kelly v. Robinson*, 479 U.S. 36 (1986).

⁴²³ *Id.* at 53 (Marshall, J., dissenting, joined by Stevens, J.).

⁴²⁴ *Id.* Justice Powell wrote the majority opinion, which Justices Blackmun, Brennan, O'Connor, Rehnquist, Scalia, and White joined. *Id.* Justice Marshall wrote the dissent, which Justice Stevens joined. *Id.* at 53 (Marshall, J., dissenting).

⁴²⁵ *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990). Justice Marshall (who had written the dissent in *Kelly*) wrote the majority opinion, which Chief Justice Rehnquist and Justices Brennan, Scalia, Stevens, Kennedy, and White joined. *Id.* Justice Blackmun wrote the dissent, which Justice O'Connor joined. *Davenport*, 495 U.S. at 564 (Blackmun, J., dissenting).

⁴²⁶ See generally 8 COLLIER, *supra* note 163, ¶¶ 1328.02[2], at 1328-6 to 1328-8, 1328.02[3][f], 1328-15 to 1328-17 (15th ed. rev. 1999) (discussing criminal restitution debts in bankruptcy); John P. Hennigan, Jr., *Criminal Restitution and Bankruptcy Law in the Federal System*, 19 CONN. L. REV. 89 (1986).

⁴²⁷ See *Kelly*, 479 U.S. at 43-53.

⁴²⁸ *Id.* at 50-53; see 11 U.S.C. § 523(a)(7) (1994) (excluding from discharge certain penalties payable to a governmental unit).

⁴²⁹ *Id.* at 50.

⁴³⁰ *Id.* at 43-50 (dictum).

⁴³¹ *Id.* at 43-44. See also *id.* at 43 (arguing that "the text is only the starting point . . . ' . . . we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy'" (citations omitted)); *id.* at 49 (noting that "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. [citation omitted] . . . [and that] [t]his

perceived tension between bankruptcy law and states' interests, the Court heavily favored the states' interests. The Court reasoned that the bankruptcy courts had always deferred to state criminal proceedings and judgments, both under the Bankruptcy Code and prior law, even where that deference seemed inconsistent with the bankruptcy law's plain language.⁴³²

The Court applied a pre-Code canon to justify its reliance on prior practice. This canon states that “‘if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.’”⁴³³

Kelly embodies the Court's broadest application of the pre-Code canon. In *Kelly*, the Court applied the canon not simply to embrace a judicial interpretation of the Bankruptcy Act,⁴³⁴ nor simply to trace the historical development of a Bankruptcy Code concept.⁴³⁵ Instead, the Court applied the canon broadly to comment on the historical relationship between the Bankruptcy Code and state criminal law, and to incorporate into the federal Bankruptcy Code an implied principle of deference to an important state interest, despite the Supremacy Clause.⁴³⁶

The dissenters (Justices Marshall and Stevens) argued that, according to the language and history of the Bankruptcy Code, restitution claims were indeed “debts” under the Bankruptcy Code.⁴³⁷ They also argued that, on its face, the discharge exception, upon which the Court relied, did not apply to restitution obligations.⁴³⁸ The dissenters expressed sympathy for the policy interests that drove the Court's reasoning, but argued that separation of powers prohibited the Court from pre-empting congressional action in favor of the Court's own view of good policy.⁴³⁹

Finally, the *Kelly* dissenters warned that the restitution issue was likely to arise again because the discharge exception upon which the Court had relied in *Kelly* applies

reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.”); *id.* at 53 (reasoning that, “[i]n light of the strong interests of the States, the uniform construction of the old Act over three-quarters of a century, and the absence of any significant evidence that Congress intended to change the law in this area, we believe this result best effectuates the will of Congress.”).

⁴³² *Id.* at 44-49.

⁴³³ *Id.* at 47 (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986)); *see also supra* note 431.

⁴³⁴ *Cf.* *United States v. Noland*, 517 U.S. 535, 538-43 (1996) (applying a pre-Code canon to determine the scope of the equitable subordination power); *Midlantic Nat'l Bank*, 474 U.S. at 499-505 (applying a pre-Code canon to determine the scope of the abandonment power).

⁴³⁵ *Cf.* *Cohen v. de la Cruz*, 523 U.S. 213 (1998); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 373-80 (1988).

⁴³⁶ U.S. CONST. art. VI; *see infra* Parts IV.A.1.c.4; IV.A.1.d.

⁴³⁷ *Kelly v. Robinson*, 479 U.S. 36, 53, 56-58 (1986) (Marshall, J., dissenting, joined by Stevens, J.).

⁴³⁸ *Id.* at 54-56 (reasoning that such obligations are, in fact, compensation for actual pecuniary loss).

⁴³⁹ *Id.* at 58-59.

only in chapter 7 cases. A chapter 13 case would force the Court to revisit the dicta in which the Court had suggested that restitution obligations might not be “debts.”⁴⁴⁰

Four years after *Kelly*, the Court was required to revisit the restitution question in a chapter 13 case, *Pennsylvania Department of Public Welfare v. Davenport*.⁴⁴¹ In *Davenport*, the Court abandoned the *Kelly* dicta.⁴⁴² Instead, the Court relied upon the language and structure of the Bankruptcy Code to hold that criminal restitution obligations do, indeed, constitute “debts” for purposes of the Bankruptcy Code.⁴⁴³ Because the discharge exception upon which the Court had relied in *Kelly* does not apply in chapter 13 cases, the Court held that restitution debts are dischargeable in chapter 13 cases.⁴⁴⁴

The Court embraced the same pre-Code practice canon that it had applied in *Kelly*: “We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”⁴⁴⁵ Nevertheless, the Court concluded that the plain language of the Bankruptcy Code did, indeed, clearly evince Congress’s intent to change prior practice. The Court reasoned that concerns for the administration of states’ criminal justice systems could not justify rewriting the plain language of the Bankruptcy Code in order to defer to state criminal law.⁴⁴⁶

Justice Blackmun’s dissent, which Justice O’Connor joined, heartily embraced *Kelly*’s states’ rights dicta and concluded that the Bankruptcy Code does not permit the discharge of criminal restitution obligations in chapter 13 cases.⁴⁴⁷ Both Justices had joined the majority opinion in *Kelly*.

The dissent’s attempt to justify its deference to state law despite the Bankruptcy Code’s plain language provides a fascinating reconciliation of the Court’s prior decisions and a revealing insight into the interpretive method that at least two Justices consider proper for the Bankruptcy Code. The dissent lamented the majority’s approach, stating:

⁴⁴⁰ *Id.* at 59 n.6. See 11 U.S.C. § 1328(a) (1994) (discharging individual chapter 13 debtors from certain debts that are not dischargeable in chapter 7 cases).

⁴⁴¹ *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

⁴⁴² *Id.* at 557 (referring to *Kelly*’s discussion of whether restitution obligations are debts as dicta).

⁴⁴³ *Id.* at 555, 557-60 (analyzing the relevant provision’s language and history to determine the meaning of “debt”); *id.* at 560-63 (analyzing the structure of the Bankruptcy Code, including other Bankruptcy Code sections and their history); see 11 U.S.C. § 101(12) (1994) (defining “debt”).

⁴⁴⁴ See *Davenport*, 495 U.S. at 562-63.

⁴⁴⁵ *Id.* at 563.

⁴⁴⁶ *Id.* at 563-64.

⁴⁴⁷ *Id.* at 564, 574 (Blackmun, J., dissenting, joined by O’Connor, J.). Justice Marshall, who wrote the dissent in *Kelly v. Robinson*, 479 U.S. 36 (1986), and objected to the Court’s dicta in that case, wrote the majority opinion in *Davenport*. Justice Stevens, who joined Justice Marshall’s dissent in *Kelly*, also joined Justice Marshall’s majority opinion in *Davenport*. Five justices, however, namely Chief Justice Rehnquist and Justices Brennan, Scalia, and White, joined the majority opinions in both *Kelly* and *Davenport*.

This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. . . . When analyzing a bankruptcy statute, the Court, of course, looks to its plain language. But the Court has warned against an overly literal interpretation of the Bankruptcy Code. “[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” The strict language of the Bankruptcy Code does not control, even if the statutory language has a “plain” meaning, if the application of that language ‘will produce a result demonstrably at odds with the intention of its drafters’. . . . To determine the drafters’ intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978. . . . For me, the statutory language, the consistent authority treating criminal sanctions as nondischargeable under the Bankruptcy Act of 1898, the absence of any legislative history suggesting that the Code was intended to change that established principle, and the strong policy of deference to state criminal judgments all compel the conclusion that a restitution order is not a dischargeable debt.⁴⁴⁸

This statement raises three critical issues concerning the plain meaning canon and the relationship between that canon and the pre-Code practice canon. First, in the unique context of the Bankruptcy Code, Justices Blackmun and O’Connor would have required very little evidence of “ambiguity” before looking beyond the text. Indeed, they suggested that the Court should be chary of accepting a textual interpretation that fails to reconcile the statute’s language with the statute’s structure, object, policy, and history. Second, in this iteration of the pre-Code canon, Justices Blackmun and O’Connor seemed to suggest that, if Congress intends to alter pre-Code practice, it will do more than indicate its intent in the text. It will also confirm, through statements in the legislative history, that it knew it was making a change and that it intended to make that change. In contrast, for the majority, a clear statement in the text was adequate evidence of Congress’s intent to change pre-Code practice. Third, like the *Kelly* majority, the Davenport dissent linked the pre-Code canon with deference to state criminal processes. The *Kelly* majority and the Davenport dissent did not go so far as to suggest, in contravention of the Supremacy Clause, that federal bankruptcy law is subordinate to state criminal law. Rather, they suggested that the history and practice of federal bankruptcy law, itself, embodied a principle of deference.⁴⁴⁹

A similar question of deference to important governmental interests arose, although more subtly, in *United States v. Energy Resources Co.*⁴⁵⁰ The Court held that the bankruptcy court has authority to order the Internal Revenue Service to treat tax

⁴⁴⁸ *Davenport*, 495 U.S. at 565 (citations omitted); *see also id.* at 555-74 (applying this interpretive method).

⁴⁴⁹ *See infra* Part IV.A.1.d.

⁴⁵⁰ *United States v. Energy Resources Co.*, 495 U.S. 545 (1990).

payments made by a chapter 11 debtor as trust fund payments.⁴⁵¹ The Court found that this power was consistent with the bankruptcy courts' broad equitable powers to adjust debtor-creditor relationships, and that this power did not conflict with other laws protecting important governmental interests.⁴⁵² The latter part of this reasoning implies that the Court might have balked if the exercise of this power had conflicted with important governmental interests.⁴⁵³ The Court also noted that the bankruptcy court had the power to designate trust fund taxes if the court concluded that such an order was necessary for the success of the reorganization.⁴⁵⁴

Justice Blackmun dissented.⁴⁵⁵ Because Justice Blackmun did not write an opinion, it is difficult to classify the nature of his disagreement with the majority. The dissent appears, however, to be consistent with Justice Blackmun's view that bankruptcy law should defer to important governmental interests. This speculation follows from the fact that Justice Blackmun joined the states' rights oriented *Kelly* majority and wrote the states' rights-oriented *Davenport* dissent. Each of these opinions required that the Court read the Bankruptcy Code to defer to state governmental interests. By dissenting in *Energy Resources*, Justice Blackmun recorded his opposition to the Court's refusal to defer to the federal government's interest in designating the treatment of tax payments. Because the Court issued *Energy Resources* and *Davenport* on the same day,⁴⁵⁶ Justice Blackmun may have had inadequate time to write a separate opinion in *Energy Resources*, and may have believed that his opinion in *Davenport* adequately conveyed his views concerning the Bankruptcy Code's deference to important governmental interests.

Kelly, *Davenport*, and *Energy Resources* introduce questions concerning the manner in which the Court will interpret the Bankruptcy Code when the Bankruptcy Code interacts with important state and federal governmental interests. We shall see this pattern arise again in the major splits.⁴⁵⁷

c. Justices Scalia's, Thomas's and Breyer's dissents

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 549-51; *see generally* 11 U.S.C. § 105 (1994) (granting bankruptcy courts broad equitable powers).

⁴⁵³ *See infra* Part IV.A.1.d.

⁴⁵⁴ *Energy Resources*, 495 U.S. at 551.

⁴⁵⁵ *Id.* (Blackmun, J., dissenting).

⁴⁵⁶ Both cases were decided on May 29, 1990. *See Energy Resources*, 495 U.S. 545; *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

⁴⁵⁷ *See infra* Part III.E.3.

Justices Scalia, Thomas, and Breyer dissented in three minor split cases. In *United States v. Reorganized CF&I Fabricators of Utah, Inc.*,⁴⁵⁸ Justice Scalia declined to join a portion of the majority opinion,⁴⁵⁹ and Justice Thomas concurred, in part, and dissented, in part.⁴⁶⁰ In *Dewsnup v. Timm*,⁴⁶¹ Justice Scalia dissented.⁴⁶² In *Field v. Mans*,⁴⁶³ Justice Breyer wrote a dissent, which Justice Scalia joined.⁴⁶⁴ In *Field*, Justice Ginsburg joined the majority but also wrote a concurrence.⁴⁶⁵

In *CF&I Fabricators*,⁴⁶⁶ the Court held that (i) for purposes of the Bankruptcy Code's priority scheme, certain payments required under the Internal Revenue Code ("IRC") in connection with pension plan funding deficiencies were penalties rather than priority excise taxes, and (ii) the Bankruptcy Code did not allow the courts categorically to subordinate all such penalty obligations.⁴⁶⁷

In the absence of any clear textual guidance,⁴⁶⁸ Justice Souter based his analysis primarily on Supreme Court Bankruptcy Act precedents, which required the courts to apply a "functional analysis" to determine whether an exaction was a "tax" for Bankruptcy Code priority purposes.⁴⁶⁹ In an unusual twist on the pre-Code canon, he noted that "Congress could, of course, have intended a different interpretive method for reading terms used in the Bankruptcy Code it created in 1978. But if it had so intended we would expect some statutory indication"⁴⁷⁰ The Court relied upon its

⁴⁵⁸ *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

⁴⁵⁹ *Id.* at 215 n.†; *infra* note 473 and accompanying text.

⁴⁶⁰ *See CF&I Fabricators, Inc.*, 518 U.S. at 229 (Thomas, J., concurring in part and dissenting in part); *infra* notes 474-75 and accompanying text.

⁴⁶¹ *Dewsnup v. Timm*, 502 U.S. 410 (1992).

⁴⁶² *See Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting); *infra* notes 490-507 and accompanying text.

⁴⁶³ *Field v. Mans*, 516 U.S. 59 (1995).

⁴⁶⁴ *See Field*, 516 U.S. at 79 (Breyer, J., dissenting, joined by Scalia, J.); *infra* notes 517-19 and accompanying text.

⁴⁶⁵ *See Field*, 516 U.S. at 78 (Ginsburg, J., concurring); *infra* note 516 and accompanying text.

⁴⁶⁶ *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 219-20 (noting the absence of any express reference to the IRC provisions in the Bankruptcy Code priority section).

⁴⁶⁹ *Id.* at 220-22, 222 n.6; *see also id.* at 224-25 (applying the functional analysis to conclude that the exaction was a penalty rather than a tax); *id.* at 225-26 (analyzing the legislative history of the IRC to bolster this conclusion).

⁴⁷⁰ *Id.* at 221; *see also id.* at 222-24 (concluding that neither the language nor the legislative history of the Bankruptcy Code or IRC reflected such an intent).

Bankruptcy Code precedent, *United States v. Noland*,⁴⁷¹ to conclude that the bankruptcy court could not categorically subordinate tax penalties.⁴⁷²

Justice Scalia, true to his textualist leanings, declined to join the portion of the majority opinion that discussed the IRC's legislative history.⁴⁷³ He did not, however, object to the Court's examination of other sources beyond the text. Presumably, he concurred in this examination because he agreed that the text was ambiguous.

Justice Thomas concurred in part and dissented in part.⁴⁷⁴ He argued that, if Congress imposes a "tax" that is generally considered to be an excise tax, then it is an excise tax for Bankruptcy Code priority purposes. Although the bankruptcy court can apply a functional analysis to determine whether a statutory obligation that a state calls a "tax" is a "tax" for federal Bankruptcy Code priority purposes, the bankruptcy court must view any "tax" that Congress imposes in a federal statute as a "tax" for bankruptcy purposes.⁴⁷⁵

Second, in *Dewsnup v. Timm*,⁴⁷⁶ as in *Kelly v. Robinson*⁴⁷⁷ and *Pennsylvania Department of Public Welfare v. Davenport*,⁴⁷⁸ the Justices split again over the scope, application, and interaction between the plain-meaning rule and the pre-Code practice canon.

In *Dewsnup*, the Court considered the interplay between Bankruptcy Code subsections 506(a) and (d).⁴⁷⁹ Under section 506(a), a secured creditor's "allowed secured claim" is equal to the lesser of the amount of the claim or the value of the collateral.⁴⁸⁰ Consequently, if an "undersecured" creditor holds a claim for one million dollars, but the collateral is worth only seven hundred thousand dollars, the creditor will have an allowed secured claim of seven hundred thousand dollars and an unsecured claim

⁴⁷¹ *United States v. Noland*, 517 U.S. 535 (1996); *see supra* notes 229-235 and accompanying text.

⁴⁷² *See CF&I Fabricators*, 518 U.S. at 228-29; *see generally* 11 U.S.C. § 510(c) (1994) (providing for equitable subordination).

⁴⁷³ *See CF&I Fabricators*, 518 U.S. at 215 n.†, 225-26.

⁴⁷⁴ *Id.* at 229 (Thomas, J., concurring in part, dissenting in part).

⁴⁷⁵ *Id.* at 229-30.

⁴⁷⁶ *Dewsnup v. Timm*, 502 U.S. 410 (1992). This was a six-to-two decision because Justice Thomas took no part in the consideration of the case. *Id.*

⁴⁷⁷ *Kelly v. Robinson*, 479 U.S. 36 (1986); *see supra* notes 427-40 and accompanying text.

⁴⁷⁸ *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *see supra* notes 441-49 and accompanying text.

⁴⁷⁹ *See* 11 U.S.C. § 506(a), (d) (1994); *Dewsnup*, 502 U.S. at 416-17.

⁴⁸⁰ *See* 11 U.S.C. § 506(a) (1994). This shorthand statement of the effect of section 506(a) applies if the debtor is the sole owner of the collateral and the claim is a recourse claim. Section 1111(b)(1)(A) creates essentially the same result for non-recourse claims. *Id.* § 1111(b)(1)(A).

of three hundred thousand dollars. The creditor in *Dewsnup* held such an undersecured claim.⁴⁸¹

Section 506(d) allows a debtor to avoid a lien to the extent that the lien secures a claim that is not an “allowed secured claim.”⁴⁸² This section allows the debtor to avoid a lien when the underlying claim has been found to be invalid. The debtor argued that section 506(d) also allowed the Court to “strip down” an undersecured creditor’s lien to the judicially determined value of the property.⁴⁸³ Avoiding the lien would make it easier for the debtor to confirm a plan of reorganization over the creditor’s objection.

The Court denied the strip down, even though only the “secured” portion of the claim was an “allowed secured claim” under section 506(a).⁴⁸⁴ The Court reached this result by declining to apply section 506(a)’s definition of “allowed secured claim” to section 506(d). Instead, the Court concluded that the debtor could not avoid the lien if the creditor’s claim was both “allowed” (i.e., was a valid claim not subject to disallowance or avoidance) and “secured” (i.e., any portion of the allowed claim was secured by any of the debtor’s property).⁴⁸⁵

The Court reasoned that the divergent views espoused by the parties and amici demonstrated that the language was ambiguous.⁴⁸⁶ The Court then rejected the “words have the same meaning throughout the statute” canon in favor of a pre-Code practice canon.

Were we writing on a clean slate, we might be inclined to agree with petitioner that the words allowed secured claim must take the same meaning in § 506(d) as in § 506(a). But, given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.⁴⁸⁷

In perhaps the strongest statement yet of the Court’s pre-Code practice canon, the Court explained that:

[w]hen Congress amends the bankruptcy laws, it does not write “on a clean slate.” [citations omitted] Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in

⁴⁸¹ See *Dewsnup*, 502 U.S. at 413.

⁴⁸² See 11 U.S.C. § 506(d) (1994).

⁴⁸³ See *Dewsnup*, 502 U.S. at 415.

⁴⁸⁴ *Id.* at 417; see 11 U.S.C. § 506(a) (1994).

⁴⁸⁵ See *Dewsnup*, 502 U.S. at 418.

⁴⁸⁶ *Id.* at 416.

⁴⁸⁷ *Id.* at 417.

the legislative history. [citations omitted] Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But, given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy . . . without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.⁴⁸⁸

Notice the similarity between this iteration of the manner in which the Court will reconcile the text and pre-Code practice and the interpretive philosophy stated in the *Davenport* dissent.⁴⁸⁹ Not surprisingly, the same Justice, Justice Blackmun, wrote both. Because Justice Blackmun is no longer on the Court, the continued viability of his flexible test is unclear. Only four of the Justices who joined Justice Blackmun's majority opinion in *Dewsnup* remain on the Court today. These are Chief Justice Rehnquist, and Justices Kennedy, O'Connor, and Stevens. Justices Blackmun and White, who also joined the *Dewsnup* majority, have been replaced by Justices Thomas, Ginsburg, and Breyer.

Justice Scalia answered with a stinging dissent, which Justice Souter joined.⁴⁹⁰ The dissenters castigated the majority for "replac[ing] what Congress said with what it thinks Congress ought to have said – and in the process disregard[ing], and hence impair[ing] for future use, well-established principles of statutory construction."⁴⁹¹ Similarly, the dissent complained that:

[t]he principal harm caused by today's decision is not the misinterpretation of § 506(d) of the Bankruptcy Code. . . . The greater and more enduring damage of today's opinion consists in its destruction of predictability, in the Bankruptcy Code and elsewhere. By disregarding well-established and oft-repeated principles of statutory construction, it renders those principles less secure and the certainty they are designed to achieve less attainable. When a seemingly clear provision can be pronounced ambiguous sans textual and structural analysis, and when the assumption of uniform meaning is replaced by 'one-subsection-at-a-time' interpretation, innumerable statutory texts become worth litigating.⁴⁹²

In this concise statement of his interpretive philosophy, Justice Scalia objected to three aspects of the Court's interpretive method. He argued that the Court manufactured

⁴⁸⁸ *Id.* at 419-20.

⁴⁸⁹ *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 565 (1990) (Blackmun, J., dissenting); see *supra* text accompanying note 448.

⁴⁹⁰ See *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting).

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 435.

an ambiguity, failed to apply holistic textualism, and improperly considered pre-Code practice and legislative history.

First, the dissent undertook a natural or plain meaning reading. According to the dissent, section 506(d) “[r]ead naturally and in accordance with other provisions of the statute” “unambiguously provides” that the lien is avoidable.⁴⁹³ Disagreement among self-interested litigants cannot create an ambiguity⁴⁹⁴ because “[t]his mode of analysis makes every litigated statute ambiguous.”⁴⁹⁵

Second, the dissent applied a holistic textual analysis. The dissent argued that the phrase “allowed secured claim,” used in section 506(d) “obviously bears” the meaning set forth in section 506(a) and “inevitably means” the same thing when that phrase is used throughout the Bankruptcy Code.⁴⁹⁶ In a “clear and unmistakable pattern of usage,” the Bankruptcy Code is similarly consistent in its use of the phrases “allowed unsecured claim” and “allowed claim.”⁴⁹⁷ The dissent argued that “the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning . . . must surely apply, a fortiori, to use of identical words in the same section of the same enactment.”⁴⁹⁸ According to the dissent, the majority replaced this “normal and sensible” rule with a “one-section-at-a time” approach.⁴⁹⁹

Third, the dissent challenged the majority’s application of the pre-Code canon.⁵⁰⁰ The dissent did not absolutely prohibit all uses of the pre-Code canon, but it articulated a narrower canon under which the Court may consult pre-Code practice only if the statute contains a gap or true ambiguity. The dissent acknowledged that:

[w]e have, of course, often consulted pre-Code behavior in the course of interpreting gaps in the express coverage of the Code, or genuinely ambiguous provisions. And we have often said in such cases that, absent a textual footing, we will not presume a departure from longstanding pre-Code practice [citing *Midlantic National Bank v. New Jersey Department*

⁴⁹³ *Id.* at 420; *see also id.* at 425-27 (arguing that the majority’s reading created redundancy in § 506(d) was not consistent with a “natural reading,” “natural meaning,” or “straightforward reading,” and created a practical absurdity).

⁴⁹⁴ *Id.* at 422-23.

⁴⁹⁵ *Id.* at 432.

⁴⁹⁶ *Id.* at 421.

⁴⁹⁷ *Id.* at 422.

⁴⁹⁸ *Id.* (emphasis in original; internal quotation marks omitted; citations omitted); *cf.* *Patterson v. Shumate*, 504 U.S. 753, 766-67 (1992) (Scalia, J., concurring) (criticizing the majority’s approach in *Dewsnup*).

⁴⁹⁹ *Dewsnup*, 502 U.S. at 423.

⁵⁰⁰ *Id.* at 432-35.

of *Environmental Protection*,⁵⁰¹ and *Kelly v. Robinson*⁵⁰²]. But we have never held pre-Code practice to be determinative in the face of what we have here: contradictory statutory text. To the contrary, where “the statutory language plainly reveals Congress’ intent” to alter pre-Code regimes [citing *Pennsylvania Department of Public Welfare v. Davenport*⁵⁰³], we have simply enforced the new Code according to its terms, without insisting upon “at least some discussion [of the change from prior law] in the legislative history,” . . . Congress’ careful reexamination and entire rewriting of those provisions supports the conclusion that, regardless of whether pre-Code practice is retained or abandoned, the text means precisely what it says.⁵⁰⁴

Finally, in an innocuous but intriguing comment, the dissent quoted from *United States v. Ron Pair Enterprises, Inc.*⁵⁰⁵ The dissent noted that, in *Ron Pair*, “[h]aving found a ‘natural interpretation of the statutory language [that] does not conflict with any significant state or federal interest, nor with any other aspect of the Code,’ . . . we deemed the pre-Code practice to be irrelevant.”⁵⁰⁶ This passage suggests that Justice Scalia might allow language, textual canons, and structure to be overridden when the Bankruptcy Code clashes with some important state or federal interest.⁵⁰⁷

Finally, in *Field v. Mans*,⁵⁰⁸ the Justices disagreed not on interpretive method, but on the application of the law to the facts.

The circuit courts of appeal were split over the level of reliance required under the fraud exception to discharge.⁵⁰⁹ As in *Grogan v. Garner*,⁵¹⁰ the statute contained a gap –

⁵⁰¹ *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494 (1986); see *infra* notes 583-94 and accompanying text.

⁵⁰² *Kelly v. Robinson*, 479 U.S. 36, 46-47 (1986); see *supra* notes 427-40 and accompanying text.

⁵⁰³ *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 553 (1990); see *supra* notes 441-49 and accompanying text.

⁵⁰⁴ *Dewsnup*, 502 U.S. at 433-34 (Scalia, J., dissenting) (emphasis added).

⁵⁰⁵ *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989), which is one of the Court’s most highly criticized five-to-four opinions, is discussed *infra* at notes 629-52 and accompanying text.

⁵⁰⁶ *Dewsnup*, 502 U.S. at 434-35 (Scalia, J., dissenting).

⁵⁰⁷ Indeed, this result is essentially what occurred in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), in which Justice Scalia, writing for the majority, held that the Bankruptcy Code’s fraudulent transfer provisions could not be used to set aside a non-collusive foreclosure sale that had been conducted in accordance with state law. See *infra* notes 606-24 and accompanying text.

⁵⁰⁸ *Field v. Mans*, 516 U.S. 59 (1995).

⁵⁰⁹ *Id.* at 59.

⁵¹⁰ *Grogan v. Garner*, 498 U.S. 279 (1991); see discussion *supra* text accompanying note 140.

it did not expressly state what type of reliance was required.⁵¹¹ The Court held that the exception required “justifiable reliance,” which it defined as being a lower standard than “reasonable reliance,” but a higher standard than “actual reliance.”⁵¹² The Court reasoned that, when Congress uses a term that had a settled meaning under the common law (i.e., the term “fraud”), Congress intends to incorporate the common law meaning.⁵¹³ The Court concluded that, under the common law in effect in 1978 (when the relevant provision was enacted), a party was required to show justifiable reliance in order to prove fraud.⁵¹⁴ In essence, the Court defined a Bankruptcy Code term by reference to its established pre-Code, common law meaning.⁵¹⁵

Justice Ginsburg joined the majority and agreed with its reasoning, but wrote separately solely to highlight the need to determine causation on remand.⁵¹⁶

Justice Breyer dissented, joined by Justice Scalia.⁵¹⁷ The dissenters agreed that justifiable reliance was the proper standard.⁵¹⁸ They argued, however, that the bankruptcy court had, in fact, applied a justifiable reliance standard, even though it had used the phrase “reasonable reliance.”⁵¹⁹

The questions raised in *Kelly*, *Davenport*, and *Dewsnup* concerning the scope of and relationship between the plain meaning rule and the pre-Code canon arose again in the final minor split.

d. Justices Scalia’s and Thomas’s concurrence with Justice Stevens’s dissent

⁵¹¹ *Field*, 516 U.S. at 63 & n.4, 69-70; *see also* 11 U.S.C. § 523(a)(2)(A) (1994) (setting forth the fraud exception).

⁵¹² *Field*, 516 U.S. at 59.

⁵¹³ *Id.* at 69, 73.

⁵¹⁴ *Id.* at 64, 69-72; *see also id.* 64-66 (considering the fraud exception’s history).

⁵¹⁵ The creditor argued that the existence of other provisions that required reasonable reliance suggested that the fraud exception required only actual reliance. The Court disagreed, reasoning that negative pregnant structural arguments such as these were at their weakest when the result was at odds with textual pointers such as the use of a common law term. *Id.* at 75-76.

⁵¹⁶ *Field*, 516 U.S. at 78 (Ginsburg, J., concurring).

⁵¹⁷ *Id.* at 79.

⁵¹⁸ *Id.* at 79-80.

⁵¹⁹ *Id.* at 80-82; *see also id.* at 82-84 (arguing that the bankruptcy court’s use of the phrase “reasonable reliance” should not have warranted reversal because no one had used the phrase “justifiable reliance” in the lower court arguments, the term “justifiable” would not have been obvious to a bankruptcy judge, and remand would create unnecessary expense and delay).

Bank of America National Trust & Savings Assoc. v. 203 North LaSalle Street Partnership,⁵²⁰ was the final minor split of the 1986 through 1998 Terms. *LaSalle*, which is the Court's most recent Bankruptcy Code decision, represents a culmination of the Court's bankruptcy jurisprudence, in several ways.

First, the separate opinions are based upon disputes concerning interpretive method. Second, these disputes relate to the major interpretive elements that have caused rifts among the Justices in other cases, including what constitutes plain meaning, when the Court may consider legislative history (if ever), and what role pre-Code law and practice should play in Bankruptcy Code interpretation. Third, the Justices who have carried the banner for more formalistic interpretation (Justices Scalia and Thomas) and more flexible interpretation (Justice Stevens), concurred and dissented in *LaSalle*. Fourth, *LaSalle* raised a hotly contested issue that has widely split the circuit courts of appeal⁵²¹ and that has come before the Court three times without a definitive resolution.⁵²²

In *LaSalle*, the Court once again considered, and once again refused to determine, whether the so-called new value corollary (or exception) to the absolute priority rule had survived the enactment of the Bankruptcy Code.⁵²³

Because the Bankruptcy Code's language was "inexact," the Court did not rely solely upon the text.⁵²⁴ The Court, nevertheless, declined to rely upon an out of context reading of seemingly absolute statements in legislative history.⁵²⁵ Instead, the majority examined the pre-Code judicial development of the absolute priority rule and the new value corollary.⁵²⁶ It characterized the corollary as an "observation" that the Court had made in dictum in a pre-Code case.⁵²⁷ *LaSalle*, in its own dictum, seemed to embrace this "observation" when it stated that:

⁵²⁰ *Bank of America Nat'l Trust. & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411 (1999).

⁵²¹ *See, e.g., id.* at 1416; *see also* sources cited *supra* at note 237.

⁵²² *See* *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (discussed *supra* at notes 236-48 and accompanying text); *In re Bonner Mall Partnership*, 2 F.3d 899 (9th Cir. 1993), *cert. granted sub nom.*, U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 510 U.S. 1039, *motion to vacate denied and appeal dismissed as moot*, 513 U.S. 18 (1994).

⁵²³ *See LaSalle*, 119 S. Ct. at 1422-24 (concluding that it was unnecessary to decide whether the new value exception remained viable because the elements of any such exception had not been satisfied); *see also Ahlers*, 485 U.S. 197 (same; discussed *supra* at notes 236-48 and accompanying text); 11 U.S.C. § 1129(b)(2)(B) (1994) (setting forth the conditions under which a plan will be "fair and equitable" to a dissenting class of unsecured claims).

⁵²⁴ *See LaSalle*, 119 S. Ct. at 1417.

⁵²⁵ *Id.* at 1421 n.25.

⁵²⁶ *Id.* at 1417.

⁵²⁷ *Id.* at 1417-18. *See* *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 116 (1939).

[t]he upshot is that this history does nothing to disparage the possibility apparent in the statutory text, that the absolute priority rule now on the books as subsection [1129] (b)(2)(B)(ii) may carry a new value corollary. Although there is no literal reference to new value in the phrase on account of such junior claim, the phrase could arguably carry such an implication in modifying the prohibition against receipt by junior claimants of any interest under a plan while a senior class of nonconsenting creditors goes less than fully paid.⁵²⁸

This passage suggests that, when old equity receives property in exchange for a new contribution, it does not violate the absolute priority rule because old equity does not receive property “on account of” its prior equity interest.⁵²⁹ The Court found that this interpretation, which was suggested by the text, context, and practical considerations,⁵³⁰ was consistent with Bankruptcy Code policy because it read section 1129 “as intended to reconcile the two recognized policies underlying Chapter 11, of preserving going concerns and maximizing property available to satisfy creditors”⁵³¹

Nevertheless, the Court concluded that old equity would be receiving property “on account of” its old interest if it received the exclusive opportunity to acquire the new ownership interest.⁵³² Stated simply, the opportunity to acquire ownership is valuable “property,” similar to a purchase option, for which someone might pay. Even if the ownership is acquired for market value (like an option exercised at market value), the exclusive right to buy has value.

Because the old equity holders in *LaSalle* had, in fact, been given the exclusive opportunity to acquire the new equity interest, the Court concluded that the plan did not satisfy the elements of any new value corollary that might have survived the enactment of the Bankruptcy Code.⁵³³ The Court declined to offer suggestions on the type of marketing or bidding that would meet the requisite opportunity for competition.⁵³⁴

Justice Thomas, in a concurrence that Justice Scalia joined, agreed that the plan should not be confirmed.⁵³⁵ These two formalist Justices wrote separately, however, to

⁵²⁸ *LaSalle*, 119 S. Ct. at 1419.

⁵²⁹ *Id.* at 1416.

⁵³⁰ *Id.* at 1413. The Court mentioned that a huge tax liability would be imposed if anyone other than the former partners acquired the property, but the Court did not take this into consideration in its analysis. *Id.* at 1415 n.11.

⁵³¹ *Id.* at 1413.

⁵³² *Id.* at 1422.

⁵³³ *Id.* at 1411.

⁵³⁴ *Id.* at 1424.

⁵³⁵ *See LaSalle*, 119 S. Ct. at 1424 (Thomas, J., concurring).

object to the Court's "approach to interpretation."⁵³⁶ They advocated textual interpretation in place of the Court's more flexible reliance on history and pre-Code practice.

First, they argued that the Bankruptcy Code's text does not expressly authorize pre-petition equity holders to receive or retain property in exchange for an infusion of new value.⁵³⁷ Rather, it provides that a plan is fair and equitable if either the objecting senior class is paid in full or no junior class retains any property "on account of" its junior interest.⁵³⁸ After consulting two dictionaries, the concurring Justices concluded that the "common understanding" of the phrase "on account of" denoted some type of causal relationship between the junior interest and the property retained.⁵³⁹ Applying this definition, they concluded that the equity holders undoubtedly received property on account of their prior interests.⁵⁴⁰

Second, they launched a more general criticism in which they complained that:

[t]he majority also underestimates the need for a clear method for interpreting the Bankruptcy Code. It extensively surveys pre-Code practice and legislative history, . . . but fails to explain the relevance of these sources to the interpretive question apart from the conclusory assertion that the Code's language is "inexact" and the history is "helpful." . . . This sort of approach to interpretation of the Bankruptcy Code repeats a methodological error committed by this Court in *Dewsnup v. Timm*.⁵⁴¹

Dewsnup's approach to statutory interpretation enables litigants to undermine the Code by creating "ambiguous" statutory language and then cramming into the Code any good idea that can be garnered from pre-Code practice or legislative history.⁵⁴²

The concurrence argued that the Court should not refer to pre-Code practice unless the statute truly is ambiguous.⁵⁴³ Even then, the concurring Justices suggested that

⁵³⁶ *Id.*

⁵³⁷ *Id.* at 1424.

⁵³⁸ *Id.*

⁵³⁹ *Id.* at 1424 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 13 (2d ed. 1987) (defining "by reason of" and "because of") and WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 13 (1976) (defining "for the sake of," "by reason of," and "because of")).

⁵⁴⁰ *Id.* at 1424 (concluding that the plan violated the fair and equitable requirement because a rejecting senior class was not paid in full but a junior class would receive property on account of its interest).

⁵⁴¹ *Id.* at 1425 (citations omitted).

⁵⁴² *Id.*

⁵⁴³ *Id.* at 1425 (acknowledging that the Court had found ambiguity in *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986), but suggesting that instances of ambiguity were rare:

the Court should not engraft onto the Bankruptcy Code concepts developed in a pre-Code era because the Bankruptcy Code had substantially changed pre-Code law.⁵⁴⁴

Recall that Justice Scalia raised three principal complaints in his *Dewsnup v. Timm*⁵⁴⁵ dissent. First, he complained that the Court had creating ambiguity where none existed. Second, he argued that the Court should have applied a holistic, textual analysis. Third, he complained that the Court had rejected the plain meaning in favor of pre-Code practice.⁵⁴⁶ Justice Scalia had agreed, in his *Dewsnup* dissent, that the Court could consider pre-Code practice if the Bankruptcy Code's language was ambiguous.⁵⁴⁷ When Justices Scalia and Thomas, in *LaSalle*, criticized the Court for applying a method like the one the Court had applied in *Dewsnup*, they were complaining that the Court found ambiguity where there was none. In *LaSalle*, however, the dissenters read the language narrowly to avoid finding ambiguity. This observation suggests that Justices Scalia and Thomas embrace a more formalistic view of what it means for the language to be plain.⁵⁴⁸

In striking contrast, Justice Stevens's *LaSalle* dissent reflects impatience with the Court's continued refusal to resolve the new value question.⁵⁴⁹ First, he argued that the Court should have held, rather than merely observed in dictum, that the holder of a junior interest does not receive property "on account of" his prior interest when he receives property based upon adequate new value.⁵⁵⁰ To Justice Stevens, this result was obvious because the Court had unequivocally accepted the new value corollary in pre-Code case law.⁵⁵¹

Second, Justice Stevens argued that the Court's objections to the plan because of lack of bidding were "unsupported by either the text of 11 U.S.C. § 1129(b)(2)(B)(ii) or the record in this case."⁵⁵² According to Justice Stevens, the sole issue should have been

"Even assuming the relevance of pre-Code practice in those rare instances when the Code is truly ambiguous . . .").

⁵⁴⁴ *Id.* at 1425 (noting that the Bankruptcy Code had made significant changes in both the substantive and procedural laws of bankruptcy, and arguing that "[h]ence, it makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice."); *cf.* *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989) (making a similar argument) (quoted *infra* at text accompanying note 640).

⁵⁴⁵ *Id.* at 420-35; *see supra* notes 490-507 and accompanying text.

⁵⁴⁶ *See Dewsnup v. Timm*, 502 U.S. 410, 420 (1992) (Scalia, J., dissenting).

⁵⁴⁷ *See Dewsnup*, 502 U.S. at 433-34 (Scalia, J., dissenting); *see supra* text accompanying note 507.

⁵⁴⁸ *Cf.* *Patterson v. Shumate*, 504 U.S. 753, 766-67 (1992) (Scalia, J., concurring) (criticizing the majority for engaging in a one-subsection-at-a-time analysis in *Dewsnup*); *see infra* Part IV.A.1.c.2.

⁵⁴⁹ *See LaSalle*, 119 S. Ct. at 1426 (Stevens, J., dissenting).

⁵⁵⁰ *Id.* at 1427.

⁵⁵¹ *Id.* at 1426.

⁵⁵² *Id.* at 1427.

the fairness of the price. If the price was fair, it should not have mattered whether the old equity or a third party made the offer.⁵⁵³

LaSalle both complicates and clarifies the Court's interpretation of the Bankruptcy Code. It complicates the Court's method because it creates greater uncertainty concerning when the Court will rely upon only the text, and when it will consider pre-Code law. It clarifies the Court's approach because it suggests that the majority of the Court employs an interpretive method that is both less rigid than Justices Thomas's and Scalia's formalist approach, and less dynamic than Justice Stevens's flexible approach. In other words, six of the Justices are more liberal than Justices Scalia and Thomas in their willingness to find ambiguity and to consult Bankruptcy Code history, including pre-Code practice, to clarify that ambiguity. These same Justices, however, are more conservative than Justice Stevens in their reluctance to embrace a definitive rule when the facts allow them to avoid doing so. This conclusion suggests that the Court may have a six-Justice interpretive center, a two-Justice interpretive "right," and a single-Justice interpretive "left."

4. Summary of the minor split decisions

First, the minor split decisions display a continuing strong pattern of disputes among the Justices over interpretive method. Consequently, interpretive method matters to the Justices, particularly to Justices Scalia, Stevens, and Thomas.

Second, these cases reveal more clearly the parameters of these disputes. The principal elements over which the Justices disagree relate to the parameters of the plain meaning canon and the relationship between that canon and the pre-Code canon.

Third, some of these cases reveal an emerging pattern of disputes among the Justices concerning deference to non-bankruptcy, state and federal law or important governmental interests.

Part D considers whether these emerging patterns continue in the major split decisions.

E. The Major Split Decisions

1. Overview

Since the Bankruptcy Code was enacted, the Court has issued only nine major split decisions.

⁵⁵³ *Id.* at 1430. *See also id.* 1427 (arguing that, if an old equity holder receives the new equity for a bargain price, it receives property "on account" of its old interest, but if it receives the new equity on a fair price, it does not receive property "on account" of its old interest); *id.* at 1428-29 (noting that the text does not require competitive bidding).

The Court has decided only two bankruptcy cases by plurality decisions: *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁵⁵⁴ and *Hoffman v. Connecticut Department of Income Maintenance*.⁵⁵⁵

The Court has issued five five-to-four split decisions: *NLRB v. Bildisco & Bildisco*,⁵⁵⁶ *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁵⁵⁷ *United States v. Ron Pair Enterprises, Inc.*,⁵⁵⁸ *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*,⁵⁵⁹ and *BFP v. Resolution Trust Corp.*⁵⁶⁰

In the two remaining major split decisions, three Justices dissented: *Granfinanciera v. Nordberg*,⁵⁶¹ and *California State Board of Equalization v. Sierra Summit, Inc.*⁵⁶²

The Court decided three of these nine cases (*Marathon*, *Bildisco*, and *Midlantic*) before Justice Scalia joined the Court. Because no obvious pattern distinguishes the major split decisions issued before Justice Scalia joined the Court from those issued after he joined the Court, analyzing the opinions based upon when they were decided will not be useful.⁵⁶³

Similarly, there is no clear pattern that distinguishes these cases based upon which Justices authored the majority and dissenting opinions.⁵⁶⁴

Instead, these cases reveal an interesting pattern rooted primarily in the nature of the questions presented. Three of the cases raise constitutional or quasi-constitutional

⁵⁵⁴ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

⁵⁵⁵ *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989).

⁵⁵⁶ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (unanimous on one issue; five-to-four split on one issue).

⁵⁵⁷ *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986).

⁵⁵⁸ *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).

⁵⁵⁹ *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993).

⁵⁶⁰ *BFP v. Resolution Trust Corp.*, 511 U.S. 531, *reh'g denied*, 512 U.S. 1247 (1994).

⁵⁶¹ *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989).

⁵⁶² *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989).

⁵⁶³ The Court issued one plurality decision before Justice Scalia joined the Court (*Marathon*), and one after he joined the Court (*Hoffman*); two five-to-four decisions before Justice Scalia joined the Court (*Bildisco*, *Midlantic*), and three after he joined the Court (*Ron Pair*, *Pioneer*, *BFP*); and both six-to-three decisions after Justice Scalia joined the Court (*Granfinanciera*, *Sierra Summit*).

⁵⁶⁴ Seven different justices wrote the majority opinions (Chief Justice Rehnquist and Justices Blackmun, Brennan, Powell, Scalia, Stevens, and White); nine different justices wrote the dissenting opinions (Chief Justice Rehnquist, former Chief Justice Burger and Justices Blackmun, Brennan, Marshall, O'Connor, Souter, Stevens, and White); and three separate justices wrote the concurring opinions (Chief Justice Rehnquist and Justices O'Connor and Scalia). Five of the justices who wrote majority opinions also wrote dissents (Chief Justice Rehnquist and Justices Blackmun, Brennan, Stevens, and White).

questions. Four involve tensions between the Bankruptcy Code and other law. The remaining two continue the pattern of cases in which the Justices split over interpretive method.

2. The constitutional and quasi-constitutional questions

Each of the two plurality decisions (*Marathon*, *Hoffman*) and one of the two six-to-three splits (*Granfinanciera*) turned on a constitutional or quasi-constitutional question, not a bankruptcy question.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁵⁶⁵ the Court considered the constitutionality of the Bankruptcy Code's original jurisdictional structure, which granted broad powers to non-Article III judges.⁵⁶⁶ Four Justices joined the plurality opinion, which held that the grant was overbroad.⁵⁶⁷ Two Justices joined a concurrence.⁵⁶⁸ Three Justices joined two separate dissents.⁵⁶⁹

In *Hoffman v. Connecticut Department of Income Maintenance*,⁵⁷⁰ the Court considered whether the Bankruptcy Code provided an unmistakably clear waiver of states' immunity from suits filed in bankruptcy courts to recover money damages and, if so, whether Congress had constitutional power to effect such a waiver in a federal statute. Although the four-Justice plurality opinion avoided the constitutional question by holding that the Bankruptcy Code did not provide a clear waiver,⁵⁷¹ all six of the concurring and dissenting Justices would have reached the constitutional question.⁵⁷² This case, like

⁵⁶⁵ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

⁵⁶⁶ *Id.* at 62 (“[W]e turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that article.”).

⁵⁶⁷ *See Marathon*, 458 U.S. 50. Justice Brennan wrote the majority opinion, which Justices Blackmun, Marshall, and Stevens joined. *Id.*

⁵⁶⁸ *See Marathon*, 485 U.S. at 89 (Rehnquist, J., concurring, joined by O'Connor, J.).

⁵⁶⁹ *See Marathon*, 485 U.S. at 92 (Burger, J., dissenting); *Marathon*, 485 U.S. at 92 (White, J., dissenting, joined by Burger, C.J., & Powell, J.).

⁵⁷⁰ *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989).

⁵⁷¹ *Id.* at 104.

⁵⁷² *See Hoffman*, 492 U.S. at 105 (O'Connor, J., concurring); *Hoffman*, 492 U.S. at 105 (Scalia, J., concurring); *Hoffman*, 492 U.S. at 106 (Marshall, J., dissenting, joined by Brennan, Blackmun & Stevens, JJ.); *Hoffman*, 492 U.S. at 111 (Stevens, J., dissenting, joined by Blackmun, J.).

United States v. Nordic Village,⁵⁷³ is best understood as a quasi-constitutional question that arises from the Court’s sovereign immunity jurisprudence.⁵⁷⁴

In *Granfinanciera v. Nordberg*,⁵⁷⁵ the Court held that the Seventh Amendment entitles a person who has not filed a claim against the bankruptcy estate to a jury trial when the trustee sues that person to recover an allegedly fraudulent transfer, even though fraudulent transfer actions are “core proceedings” in bankruptcy cases.⁵⁷⁶

Justice Scalia concurred in the judgment and concurred in the opinion, except for the Court’s discussion of “private rights” and “public rights” for purposes of determining which matters Congress may assign to non-Article III tribunals.⁵⁷⁷

Three dissenting Justices argued that the Seventh Amendment does not prohibit Congress from assigning avoidance power actions to the bankruptcy courts without giving the defendants a right to a jury trial.⁵⁷⁸

3. The Bankruptcy Code interaction with other law cases

⁵⁷³ *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992); *see supra* notes 409-15 and accompanying text.

⁵⁷⁴ For example, even though the plurality did not reach the constitutional question, it applied special interpretive rules adapted for sovereign immunity cases, such as the requirement that Congress make its intention “unmistakably clear” in the text, and the presumption that legislative history is not relevant to determining whether Congress intended to abrogate immunity. *See Hoffman*, 492 U.S. at 101, 104. For a detailed analysis of the sovereign immunity problem in the bankruptcy context, including a discussion of *Hoffman*’s place in the Court’s sovereign immunity jurisprudence, *see* Karen M. Gebbia-Pinetti, *State Sovereign Immunity and the Bankruptcy Code, Part One*, 7 J. BANKR. L. & PRAC. 521 (1998); Karen M. Gebbia-Pinetti, *State Sovereign Immunity and the Bankruptcy Code, Part Two*, 8 J. BANKR. L. & PRAC. 3 (1998).

⁵⁷⁵ *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989).

⁵⁷⁶ *Id.* at 36, 49, 50-61.

⁵⁷⁷ *See Granfinanciera*, 492 U.S. at 65 (Scalia, J., concurring in part and concurring in the judgment).

⁵⁷⁸ *Id.*, at 71 (White, J., dissenting); *id.* at 79-81 (arguing that the majority misinterpreted Seventh Amendment jurisprudence by considering only the nature of the claim and not the forum in which the claim was tried); *id.* at 81-82, 87-90 (arguing that the majority undermined Congress’s power to assign selected causes of action to specialized tribunals); *id.* at 83 (arguing that the majority undermined the bankruptcy scheme); *id.* at 84-86 (disagreeing with the majority’s conclusion that fraudulent transfer actions had been actions at law, rather than in equity, when the Seventh Amendment was enacted); *Id.* at 91 (Blackmun, J., dissenting, joined by O’Connor, J.); *id.* at 91-92 (noting the uncertainty of the historical record concerning whether fraudulent transfer actions were actions at law or in equity); *id.* at 92-95 (agreeing that the bankruptcy court is an equitable tribunal in which a jury would dismantle the statutory scheme; arguing that the question is whether Congress had constitutional power to assign an action to the bankruptcy court without a right to jury trial; suggesting that the answer turns on whether the action involved a public right; concluding that Congress’s designation of core proceedings made those actions public rights; and reasoning that it was not beyond Congress’s power to designate fraudulent transfer actions as core proceedings).

In three of the five-to-four split decisions (*NLRB v. Bildisco & Bildisco*,⁵⁷⁹ *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁵⁸⁰ and *BFP v. Resolution Trust Corp.*⁵⁸¹), and one of the six-to-three split decisions (*California State Board of Equalization v. Sierra Summit, Inc.*⁵⁸²), the Justices disagreed among themselves concerning how to reconcile the Bankruptcy Code and other non-bankruptcy law. In each case, the split arose when one group of Justices took a bankruptcy-centric view and the other group of Justices took a non-bankruptcy-centric view of the question presented.

First, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁵⁸³ the trustee sought to abandon contaminated properties over the objection of two state environmental protection agencies. The agencies demanded a clean-up and argued that abandonment would threaten the public health and safety and violate federal environmental law.⁵⁸⁴

The majority ruled in favor of the states in an opinion that attempted to reconcile the Bankruptcy Code with federal environmental law and policy. The majority relied heavily upon a liberal application of the pre-Code interpretive canon and deference to environmental policy.

First, the Court noted that “[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific,” and that the Court has followed this rule with “particular care” in interpreting bankruptcy legislation.⁵⁸⁵ The Court reasoned that the pre-Code judicially developed abandonment doctrine was subject to well-recognized, judicially developed limitations designed to protect important federal or state interests.⁵⁸⁶ The Court concluded that Congress had not clearly abrogated those limitations on abandonment when it codified the abandonment power.⁵⁸⁷

This reasoning is quite similar to that employed by the *Kelly v. Robinson*⁵⁸⁸ majority. In both cases, the pre-Code practice that the Court adopted embraced a policy of deference to non-bankruptcy law that had a substantial impact on an important governmental interest.

⁵⁷⁹ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

⁵⁸⁰ *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494 (1986).

⁵⁸¹ *BFP v. Resolution Trust Corp.*, 511 U.S. 531, *reh’g denied*, 512 U.S. 1247 (1994).

⁵⁸² *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989).

⁵⁸³ *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494 (1986).

⁵⁸⁴ *Id.* at 496-98; *see* 11 U.S.C. § 554 (1994) (permitting the trustee to abandon certain property).

⁵⁸⁵ *Midlantic*, 474 U.S. at 501.

⁵⁸⁶ *Id.* at 499-501.

⁵⁸⁷ *Id.* at 502-05.

⁵⁸⁸ *See Kelly v. Robinson*, 479 U.S. 36 (1986); *see supra* notes 427-36 and accompanying text.

Second, the Court acknowledged Congress's "undisputed" concern over hazardous waste disposal, and concluded that Congress had not intended to undermine its goal of environmental protection when it expressly codified the abandonment power without also expressly codifying the established common-law restrictions on abandonment.⁵⁸⁹

The dissenters, in contrast, took a bankruptcy-centric view of the question. They argued that the clear text of the Bankruptcy Code allowed abandonment without restrictions,⁵⁹⁰ the scant legislative history did not reflect a congressional intent to limit the abandonment power,⁵⁹¹ and the few pre-Code cases on which the majority relied did not support the Court's conclusion that there were broad, well-established limitations on abandonment before the Bankruptcy Code was enacted.⁵⁹² The dissent further suggested that imposing limits on the abandonment power and forcing the debtor to clean up hazardous waste sites violated the purposes of the Bankruptcy Code.⁵⁹³ Finally, the dissent argued that the Court had improperly employed equitable powers to enforce its own view of sound public policy.⁵⁹⁴

In *NLRB v. Bildisco & Bildisco*,⁵⁹⁵ the Court struggled to reconcile bankruptcy policy with the policies underlying federal labor law. In *Bildisco*, however, unlike *Midlantic*, the Court viewed the non-bankruptcy federal law from a bankruptcy law perspective.

Five Justices concluded that the debtor-in-possession had not committed an unfair labor practice when it had unilaterally modified a collective bargaining agreement before rejecting it. The majority relied heavily on bankruptcy policy, and briefly noted that honoring the Bankruptcy Code's language and policies would not violate labor policy.⁵⁹⁶

The Court reasoned that the authority to reject an executory contract was vital to the "fundamental purpose of reorganization . . . to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."⁵⁹⁷ The Court concluded that allowing the NLRB to pursue an action for unfair labor practices would "run directly counter to the express provisions of the Bankruptcy Code

⁵⁸⁹ *Midlantic*, 474 U.S. at 506.

⁵⁹⁰ *Id.* at 509, 513 (Rehnquist, J., dissenting).

⁵⁹¹ *Id.* at 509-10.

⁵⁹² *Id.* at 510-13.

⁵⁹³ *Id.* at 514-15; *id.* at 508 (arguing that the majority's errors arose, at least in part, from the "Court's failure to discuss even in passing either the nature of abandonment or its role in federal bankruptcy").

⁵⁹⁴ *Id.* at 514-15.

⁵⁹⁵ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

⁵⁹⁶ *Id.* at 534; see 11 U.S.C. § 365(a) (1994) (authorizing the debtor in possession to assume or reject executory contracts); *id.* § 1113 (specifying the treatment of collective bargaining agreements; enacted after *Bildisco*).

⁵⁹⁷ *Bildisco*, 465 U.S. at 528 (citing legislative history).

and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space."⁵⁹⁸

The dissent, in contrast, argued that there was an unavoidable conflict between Bankruptcy Code and the National Labor Relations Act ("NLRA").⁵⁹⁹

Permitting a debtor in possession unilaterally to alter a collective-bargaining agreement in order to further the goals of the Bankruptcy Code seriously undermines the goals of the NLRA. We thus have the duty to decide the issue before us in a way that accommodates the policies of both federal statutes. That cannot properly be done, in the Court's fashion, by concentrating on the Bankruptcy Code alone ⁶⁰⁰

Rather than beginning with the Bankruptcy Code, the dissent relied heavily on the language and policies underlying the NLRA. It concluded that the NLRA's unfair labor practice provisions applied to debtors seeking to modify union contracts in bankruptcy cases.⁶⁰¹ The dissent concluded that, if one were to consider only the NLRA's language and policy, one would necessarily conclude that it was intended to apply in a bankruptcy case.⁶⁰² The dissent then considered whether any Bankruptcy Code provisions or policies altered this conclusion.⁶⁰³

The question then is whether application of § 8(d) would so undermine the goals of the Bankruptcy Code that, despite the deleterious effect on the policies of the NLRA, Congress could not have intended that § 8(d) remain applicable once a bankruptcy petition has been filed.⁶⁰⁴

Applying this labor-law-centric test, the dissent concluded that not applying NLRA section 8(d) in bankruptcy "strikes at the very heart of the policies underlying that section and the NLRA," but that applying NLRA section 8(d) in bankruptcy would not "seriously impair" bankruptcy policies or debtors' prospects for a successful reorganization.⁶⁰⁵

⁵⁹⁸ *Id.* at 532 (citing legislative history).

⁵⁹⁹ *Id.* at 540-42; *see* National Labor Relations Act, 29 U.S.C. § 158 (1994).

⁶⁰⁰ *Id.* at 541.

⁶⁰¹ *Id.* at 535 (Brennan J., dissenting).

⁶⁰² *Id.* at 541-49.

⁶⁰³ *Id.* at 550-53.

⁶⁰⁴ *Id.* at 550.

⁶⁰⁵ *Id.* at 554; *see also id.* at 539-40 (criticizing the majority for inferring intent from the general treatment of executory contracts and from Bankruptcy Code policies without express textual support for the conclusion that the Bankruptcy Code rendered the NLRA inapplicable in bankruptcy).

In *BFP v. Resolution Trust Corp.*,⁶⁰⁶ the Court considered the interaction between bankruptcy law and state foreclosure law. Both the majority and dissent claimed the mantle of plain language. The majority, however, deferred strongly to states' interests, and the dissent appealed to structure, history, and policy to confirm its reading of the text.

The majority held that the price received in a pre-bankruptcy foreclosure sale conducted in accordance with state law was conclusively deemed to constitute the "reasonably equivalent value" of the property for purposes of bankruptcy fraudulent transfer law.⁶⁰⁷ As a result, the trustee could not avoid the sale.

Writing for the majority, Justice Scalia began with a primarily textual analysis that examined the three-word phrase "reasonably equivalent value."⁶⁰⁸ The Bankruptcy Code defined only one of these words, "value."⁶⁰⁹ Justice Scalia reasoned that "reasonably equivalent" could not mean "fair market" or Congress would have used the phrase "fair market," as it did elsewhere.⁶¹⁰ With little textual support, he concluded that the price received at a non-collusive foreclosure sale was "reasonably equivalent" value.⁶¹¹ He did not engage in a substantive, holistic analysis of the purposes of the fraudulent transfer provisions or their role as part of a group of provisions designed to maximize value, equitably distribute assets, and foster rehabilitation. In other words, his analysis was not bankruptcy-centric.

Instead, he based his conclusion primarily on the relationship between state foreclosure law, on the one hand, and fraudulent transfer law (including as embodied in the Bankruptcy Code), on the other hand. Because these two bodies of law had coexisted for centuries, he argued that bankruptcy and fraudulent transfer law were not meant to usurp state law foreclosure processes.⁶¹² As in *Midlantic National Bank v. New Jersey Department of Environmental Protection*⁶¹³ and *Kelly v. Robinson*,⁶¹⁴ the majority deferred to important state interests, despite the Supremacy Clause.⁶¹⁵

Although the *BFP* majority did not cite a pre-Code canon, its review of the historic relationship between foreclosure law and fraudulent transfer law was similar to

⁶⁰⁶ *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

⁶⁰⁷ *Id.*; see 11 U.S.C. § 548(a)(2)(A) (1994) (authorizing the trustee to avoid fraudulent transfers made for less than reasonably equivalent value).

⁶⁰⁸ See *BFP*, 511 U.S. at 535.

⁶⁰⁹ See 11 U.S.C. § 548(d)(2)(A) (1994) (defining "value").

⁶¹⁰ See *BFP*, 511 U.S. at 536-39.

⁶¹¹ *Id.* at 545.

⁶¹² *Id.* at 546.

⁶¹³ *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986).

⁶¹⁴ *Kelly v. Robinson*, 479 U.S. 36 (1986).

⁶¹⁵ See *supra* notes 431-36, 585-89 and accompanying text; *infra* Parts IV.A.1.c.4; IV.A.1.d.

the review the Court undertook in *Midlantic* and *Kelly*, with the support of the pre-Code canon.⁶¹⁶

The dissent⁶¹⁷ castigated the majority for corrupting the statute's plain language. Justice Souter, writing for four Justices, argued that the majority's analysis was both too narrow and too broad.

It was too narrow because it read the text out of context. "Closer familiarity with the text, structure, and history of the disputed provision (and relevant amendments) confirms the soundness of the plain reading," the dissent argued.⁶¹⁸ According to the dissent, the text, viewed in light of the Bankruptcy Code's structure, was plain.⁶¹⁹ The historic development of fraudulent transfer law in the bankruptcy context, particularly including Congress's rejection of an amendment that would have allowed avoidance of foreclosure sales only if such sales were collusive, and Congress's adoption of amendments designed to include foreclosure sales, supported the textual meaning.⁶²⁰ Finally, bankruptcy policy supported the avoidance of foreclosure sales if the price received was too low.⁶²¹

The majority's analysis was too broad because it disingenuously manufactured an ambiguity,⁶²² then used that ambiguity to depart from the plain meaning in order to vindicate important state interests, despite the preemption of state law by federal law.⁶²³

⁶¹⁶ See *supra* notes 431-36, 585-89 and accompanying text.

⁶¹⁷ See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 549 (1994) (Souter, J., dissenting).

⁶¹⁸ *Id.* at 553.

⁶¹⁹ *Id.* at 552 (arguing that the words and meaning were plain); *id.* at 550 n.1 (criticizing the majority for referring to only two uses of the phrase "fair market value" but not referring to the Bankruptcy Code's more than 30 uses of the term "value"); *id.* at 550-51 (agreeing that fair market value was not the proper test, but arguing that the actual price received was neither the only alternative test nor a plausible reading of the statute).

⁶²⁰ *Id.* at 550 n.1 (noting that Congress rejected an amendment that would have allowed avoidance only if the foreclosure sale was collusive); *id.* at 553-55 (elucidating the development of fraudulent transfer law in the context of foreclosure sales; noting that the Bankruptcy Code had been amended to ensure that such sales would be included; and arguing that if non-collusive sales were not covered, then the amendments were superfluous).

⁶²¹ *Id.* at 560-61 (arguing that bankruptcy courts are capable of determining reasonably equivalent value on a case-by-case basis); *id.* at 562-63 (concluding that the plain meaning requires a judicial determination of value, the courts can determine value, and the policies underlying bankruptcy law fully support judicial valuation); *id.* at 563 (arguing that setting aside non-collusive foreclosure sales for low prices is consistent with the policies of maximizing and equitably distributing assets to creditors, and providing a fresh start to debtors, and that these policies apply without regard to the fact that state law does not allow a sale to be set aside for price inadequacy); *id.* at 563 n.15 (criticizing the majority for failing to discuss bankruptcy policy).

⁶²² *Id.* at 562 (accusing the majority of finding the text to be ambiguous and open to policy-based construction; noting that Justice Scalia had complained in his dissent in *Dewsnup v. Timm*, 502 U.S. 410 (1992), that the Court had supplied different meanings to the same terms, and accusing Justice Scalia of doing the same, and worse, in *BFP*).

In *BFP*, as in *Kelly*, the Justices split concerning the interaction between the Bankruptcy Code and other law, and the proper degree of deference, if any, that bankruptcy courts should accord to state or federal law, especially if that law protects important governmental interests.⁶²⁴

Finally, *California State Board of Equalization v. Sierra Summit, Inc.*,⁶²⁵ also involved the application of non-bankruptcy law in the bankruptcy context. The six-Justice majority resolved a conflict among the circuits when it ruled that the states could impose sales and use taxes on bankruptcy liquidation sales.⁶²⁶ These taxes applied because “[n]othing in the plain language of the statute, its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States may impose on the bankruptcy estate.”⁶²⁷

The dissent did not challenge the majority’s reasoning. Instead, it argued that the bankruptcy court’s order prohibiting the state from collecting certain taxes was res judicata because the state had allowed the order to become final and had then attempted to collect the taxes and attack the order collaterally.⁶²⁸

4. The interpretive dispute cases

The final two major split decisions return to the pattern of cases in which the Justices disagreed among themselves over interpretive method.

In *United States v. Ron Pair Enterprises, Inc.*,⁶²⁹ the Court held that Bankruptcy Code section 506(b) entitles non-consensual, oversecured creditors to receive post-petition interest.

The Court viewed the case as one involving a “narrow statutory issue.”⁶³⁰ Often cited, frequently with derision, as the case establishing a rigid, grammatical, plain meaning rule for Bankruptcy Code interpretation, the *Ron Pair* decision ultimately turned on the placement of a comma.

⁶²³ *Id.* at 567 n.19 (arguing that, where the Bankruptcy Code truly is silent or ambiguous, the Court should not read it to depart from prior practice, but that the Court has never required Congress to provide clearer evidence of its intent when the text is already clear); *id.* at 565-69 (noting that *Midlantic*’s deference to important state interests was over a vigorous dissent).

⁶²⁴ *See supra* notes 431-40 and accompanying text.

⁶²⁵ *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989).

⁶²⁶ *Id.* at 854.

⁶²⁷ *Id.* at 853.

⁶²⁸ *See Sierra Summit*, 490 U.S. at 854-57 (Blackmun, J., dissenting, joined by Brennan & Marshall, JJ.).

⁶²⁹ *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).

⁶³⁰ *Id.* at 237.

Section 506(b) provides that “there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.”⁶³¹ Under this provision, only creditors who hold consensual liens are entitled to receive fees, costs, and charges because only those creditors are parties to “agreements.” Because a comma appears after the phrase “interest on such claim,” the Court concluded that interest was allowable without regard to whether the creditor held a consensual lien under an agreement, or a non-consensual lien without an agreement.⁶³²

The Court argued that this analysis of the Bankruptcy Code’s grammatical structure⁶³³ was the “natural reading,”⁶³⁴ “plain language,”⁶³⁵ and “natural interpretation”⁶³⁶ of the statute. The Court based its analysis on a plain meaning canon, which provides that:

[t]he plain meaning of legislation should be conclusive, except in the “rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” . . . In such cases, the intention of the drafters, rather than the strict language, controls.⁶³⁷

Ron Pair offered a restrictive statement of the plain-meaning rule and a sweeping rejection of both legislative history and pre-Code practice.

The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. . . . In this case it is also where the inquiry should end, for where, as here, the statute’s language is plain, “the sole function of the courts is to enforce it according to its terms.” . . . The language before us expresses Congress’ intent . . . with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.⁶³⁸

Applying these interpretive directives, the Court concluded that its plain meaning, grammatical analysis did “not conflict with any other section of the Code, or with any

⁶³¹ 11 U.S.C. § 506(b) (1994).

⁶³² See *Ron Pair*, 489 U.S. at 241-42.

⁶³³ *Id.*

⁶³⁴ *Id.* at 241.

⁶³⁵ *Id.* at 242.

⁶³⁶ *Id.* at 245.

⁶³⁷ *Id.* at 242-43.

⁶³⁸ *Id.* at 241 (citations omitted).

important state or federal interest; nor is a contrary view suggested by the legislative history.”⁶³⁹ Again, note the Court’s nod to competing state and federal interests.

The Court foreclosed any discussion of pre-Code practice with the comment that:

Congress worked on the formulation of the Code for nearly a decade. It was intended to modernize the bankruptcy laws, . . . and as a result made significant changes in both the substantive and procedural laws of bankruptcy. . . . In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.⁶⁴⁰

In an attempt to reconcile this interpretive approach with the interpretive approach of recent cases, the Court argued that both *Midlantic*⁶⁴¹ and *Kelly*⁶⁴² had looked to pre-Code practice only because the language in those cases had been open to interpretation; the literal application of the statute in those cases would have produced a result demonstrably at odds with the intentions of the drafters; the proposed plain meaning interpretations in those cases would have placed bankruptcy law in clear conflict with state or federal laws of great importance; and the pre-Code practice in those cases “reflected policy considerations of great longevity and importance.”⁶⁴³ In *Ron Pair*, in contrast, the majority reasoned that the language was clear, the result was not at odds with the drafters’ intentions, and there were no important, conflicting state or federal laws.⁶⁴⁴

Even though *Ron Pair* rejected pre-Code practice, the Court’s explanation confirms the trend seen in earlier cases of deference to important, competing federal or state interests. The major cases in which the Court has deferred to such interests have been widely split decisions in which the Justices disagreed over the results and the reasoning.⁶⁴⁵

Four dissenting Justices argued that the language was not clear, and that the majority had improperly abandoned the pre-Code practice that the Court had established in *Midlantic*.⁶⁴⁶

⁶³⁹ *Id.* at 243.

⁶⁴⁰ *Id.* at 240-41 (citations omitted).

⁶⁴¹ *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494 (1986).

⁶⁴² *Kelly v. Robinson*, 479 U.S. 36 (1986).

⁶⁴³ *See Ron Pair*, 489 U.S. at 245, 243-46.

⁶⁴⁴ *Id.* at 242; *see also id.* 246-49 (arguing that pre-Code practice was of little assistance anyway).

⁶⁴⁵ *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994); *Midlantic*, 474 U.S. 494 (1986).

⁶⁴⁶ *See Ron Pair*, 489 U.S. at 249 (O’Connor, J., dissenting, joined by Brennan, Marshall, & Stevens, JJ.).

First, the dissenters castigated the majority's reliance on the comma. They quoted Justice Frankfurter's classic statement that: "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."⁶⁴⁷

Second, the dissenters argued that "*Midlantic* counsels against inferring congressional intent to change pre-Code bankruptcy law."⁶⁴⁸ According to the dissenters, even though the statutory language allowing abandonment was "unequivocal," "[t]he rule of *Midlantic* is that bankruptcy statutes will not be deemed to have changed pre-Code law unless there is some indication that Congress thought that it was effecting such a change."⁶⁴⁹ This excerpt suggests that these Justices expect Congress to indicate in the legislative history that it is changing pre-Code law.

The proper application of the pre-Code canon, according to the dissent, is for the Court to determine whether there was a pre-Code practice,⁶⁵⁰ then "look for some indicia that Congress knew it was changing pre-Code law."⁶⁵¹ Because the dissent found no evidence that Congress knew it was changing the pre-Code practice of prohibiting interest on non-consensual claims, the dissent would not have allowed a silent abrogation of this pre-Code practice.⁶⁵²

The dissenters, in essence, took a neutral view of the pre-Code canon. They deemed it appropriate regardless of the nature of the underlying bankruptcy issue. The majority, in contrast, viewed the pre-Code canon as a device for allowing the Court to defer to important non-bankruptcy interests. The majority distinguished *Ron Pair* from *Midlantic* almost exclusively on the basis that *Midlantic* involved a clash between bankruptcy law and an important state or federal law interest, whereas *Ron Pair* presented no such clash.⁶⁵³ In *Midlantic*, the Court justified its deference to important non-bankruptcy interests by reasoning that pre-Code practice had embodied such deference.⁶⁵⁴ The Court followed this same approach in the *Kelly* majority⁶⁵⁵ and the *Davenport* dissent.⁶⁵⁶

⁶⁴⁷ *Id.* at 249 (quoting *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting)); *see also id.* at 249-51 (citing other Supreme Court cases that rejected simplistic, punctuation-based interpretations).

⁶⁴⁸ *Id.* at 251.

⁶⁴⁹ *Id.* at 252.

⁶⁵⁰ *Id.* at 253.

⁶⁵¹ *Id.* at 254.

⁶⁵² *Id.*

⁶⁵³ *See supra* notes 643-44 and accompanying text.

⁶⁵⁴ *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 251-52 (1989).

⁶⁵⁵ *See Kelly v. Robinson*, 479 U.S. 36 (1986); *supra* notes 643-44 and accompanying text.

⁶⁵⁶ *See Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 564 (1990) (Blackmun, J., dissenting); *supra* notes 448-49 and accompanying text.

Justice Blackmun wrote the *Ron Pair* majority, the *Kelly* majority, and the *Davenport* dissent. In the *Ron Pair* majority, he suggested that deference to pre-Code practice would be appropriate not only when the Bankruptcy Code clashed with other state or federal laws of great importance, but also when the Bankruptcy Code's language was not clear. In practice, however, he embraced the plain language when no conflicting laws were at stake (*Ron Pair*), but rejected apparently plain language in favor of pre-Code practice when important, conflicting laws were at stake and pre-Code practice justified deference to those conflicting laws (*Kelly*, *Davenport* dissent). Similarly, the two textualist Justices who joined Justice Blackmun's *Ron Pair* majority opinion have virtually never found ambiguity except when the Bankruptcy Code clashed with other law.⁶⁵⁷

Finally, in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*,⁶⁵⁸ the Court was asked to determine the scope of the Bankruptcy Rule phrase "excusable neglect," for purposes of allowing the late filing of a claim.⁶⁵⁹ Once again, the Justices disagreed over interpretive method.

With the assistance of a collegiate dictionary, the majority defined the "ordinary meaning" of the term "neglect" to include both careless omissions caused by negligence within the party's control and blameless omissions caused by intervening circumstances beyond the party's control.⁶⁶⁰ The Court supported this "flexible" reading by reference to the policies underlying chapter 11, the bankruptcy courts' broad equitable powers,⁶⁶¹ the history of the relevant bankruptcy rules,⁶⁶² and a review of the parallel federal rules.⁶⁶³

The Court then identified a list of equitable factors the Court would consider to determine whether a party's neglect was "excusable." These factors encompassed not only the party's conduct, but also the consequences of the delay in filing, such as prejudice to the debtor and disruption of efficient judicial administration.⁶⁶⁴

⁶⁵⁷ Compare *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1424 (1999) (Thomas, J., concurring, joined by Scalia, J.) (finding no ambiguity in the complicated cramdown provisions that have led to multiple circuit splits and three Supreme Court grants of certiorari); with *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) (per Scalia, J.) (deferring to state foreclosure law).

⁶⁵⁸ *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993).

⁶⁵⁹ Bankruptcy Rule 3003(c)(3) provides, in part, that "the court shall fix and for cause shown may extend that time within which proofs of claim or interest may be filed." FED. R. BANKR. P. 3003(c)(3). Bankruptcy Rule 9006(b)(1) provides that "the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." FED. R. BANKR. P. 9006(b)(1).

⁶⁶⁰ See *Pioneer*, 507 U.S. at 388 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 791 (9th ed. 1983)).

⁶⁶¹ *Id.* at 389.

⁶⁶² *Id.* at 389-92.

⁶⁶³ *Id.* at 392-95.

⁶⁶⁴ *Id.* at 395, 397-98.

The dissent argued that the majority had “replace[d] the straightforward analysis commended by the language of Bankruptcy Rule 9006(b)(1) with a balancing test.”⁶⁶⁵ Bankruptcy Rule 9006 provides that a court “may” permit late filing if there is “excusable neglect.”⁶⁶⁶ According to the dissent, this provision requires that the party first satisfy the threshold standard of “excusable neglect.” If this threshold has been satisfied, then the court might or might not, in its discretion, allow the late filing.⁶⁶⁷ Judicial discretion might include factors such as the consequences of the delay.⁶⁶⁸ If, however, the threshold of excusable neglect has not been satisfied, then the court has no basis for allowing the filing, and the consequences of the delay are not relevant.

The dissent defined the phrase “excusable neglect” as a legal term of art. It referred to a law dictionary, rather than a collegiate dictionary, to determine the accepted meaning of excusable neglect.⁶⁶⁹ It concluded that excusable neglect required that the party’s actions be blameless.⁶⁷⁰ Using reasoning parallel to the pre-Code canon, the dissent adopted this meaning because Congress did not indicate its intent to depart from this established meaning.⁶⁷¹

Ron Pair and *Pioneer* are consistent with the pattern of cases in which the Justices disagree over interpretive method. In each case, the majority and dissent disagreed on what it means for statutory language to be plain, and on where to look for guidance concerning the meaning of the language. Because both of these cases were decided by a deeply divided Court, interpreters should be wary of relying too heavily on either case as a predictor of the Court’s interpretive method in bankruptcy cases. The Justices clearly were not in accord on either the results or the interpretive methods in these two cases. In *Ron Pair*, only five Justices accepted the majority’s grammatical interpretation. Moreover, although the *Ron Pair* majority applied a “plain meaning” rule, it based its holding on presumed legislative intent, not linguistic meaning. Although the majority opinion did not rely upon pre-Code practice, its author, Justice Blackmun, has frequently relied upon pre-Code practice to discern congressional intent, in appropriate cases. Consequently, *Ron Pair* can hardly be considered a shining beacon of textualism.

The *Pioneer* majority also searched for congressional intent. It found intent, however, by examining statutory language, policy, equitable powers, and history. Although it is difficult to reconcile *Pioneer*’s flexible method with *Ron Pair*’s restrictive

⁶⁶⁵ See *Pioneer*, 501 U.S. at 399 (O’Connor, J., dissenting, joined by Scalia, Souter, and Thomas, JJ.); *id.* at 409 (arguing that the majority’s conclusion was inconsistent with plain language and judicial economy); *id.* at 399 (applying a “straightforward analysis,” of the “plain language,” to discern “plain meaning”); *id.* at 403 (arguing that any other reading is unnatural); *id.* at 404, 408 (applying plain language).

⁶⁶⁶ See FED. R. BANKR. P. 9006(b)(1).

⁶⁶⁷ See *Pioneer*, 507 U.S. at 399 (O’Connor, J., dissenting).

⁶⁶⁸ *Id.* at 399-402.

⁶⁶⁹ *Id.* at 402-03 (citing BLACK’S LAW DICTIONARY 566 (6th ed. 1990)).

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.* at 403.

method, four Justices (Rehnquist, White, Kennedy, and Blackmun) joined both majority opinions. Justice O'Connor wrote both the pre-Code practice oriented dissent in *Ron Pair* and the arguably more textual dissent in *Pioneer*. From an interpretive method perspective, perhaps the most principled Justices in these cases were Justice Stevens, who joined the more flexible opinion in each case, as we would expect, and Justice Scalia, who joined the more textual opinion in each case, as we would expect.

5. Summary of the major split decisions

The interpretive approaches the Court applied in the major split decisions should be discounted, to some degree, because the Justices disagreed so strongly over interpretive method. These cases, however, are extraordinarily important because they reveal the parameters of the Justices' internecine disputes over interpretive method.

The major split decisions reflect three distinct interpretive patterns. First, the Justices split widely on constitutional questions. Secondly, the Justices split widely in cases in which the Bankruptcy Code came into conflict with other federal or state laws, particularly when those laws protect important governmental interests. In these cases, the Justices disagree among themselves concerning the interaction among three fundamental interpretive guides: the plain meaning canon, the pre-Code practice canon, and the emerging "canon" of deference to important federal or state laws or governmental interests.

Third, the major split cases that did not involve constitutional questions or clashes with other law (i.e., *Ron Pair* and *Pioneer*) continued the strong trend of cases in which the Justices disagreed over interpretive method, particularly concerning the scope and application of the plain meaning rule.

Part IV examines each of these trends in greater detail.

IV. INTERPRETIVE METHOD AND THE BANKRUPTCY CODE

Does the Court apply the same interpretive method in every Bankruptcy Code case? The answer is "no." Nevertheless, the Court's Bankruptcy Code decisions reveal several strong interpretive patterns. Part IV.A summarizes these patterns. Part IV.B considers what these patterns suggest for interpreters, bankruptcy practitioners, bankruptcy judges, and scholars of interpretive theory.

A. Patterns That Emerge From the Supreme Court's Bankruptcy Code Decisions

Scholars of the Court's bankruptcy jurisprudence generally agree that the Court has not demonstrated any particular bankruptcy ideology, nor much of a sense that it even

understands or cares about the Bankruptcy Code.⁶⁷² Some have argued that the Court's decisions are driven by results;⁶⁷³ others have argued that the decisions are driven by interpretive method, albeit an incoherent method.⁶⁷⁴

Scholars who have examined the Supreme Court's interpretive methods in bankruptcy cases have concluded either that the Court has shifted towards textualism,⁶⁷⁵ has pulled away from textualism,⁶⁷⁶ has employed no consistent, coherent interpretive method,⁶⁷⁷ or has employed whatever method allows the Court to reach its desired result.⁶⁷⁸ Critics have castigated the Court for employing textualism;⁶⁷⁹ for failing to employ textualism;⁶⁸⁰ for ignoring congressional intent;⁶⁸¹ and for failing to develop a coherent bankruptcy ideology.⁶⁸²

Although these studies may seem to be inconsistent, most are accurate, as far as they go. They are limited, however, by two factors. First, they examine only limited

⁶⁷² See, e.g., Lawless, *supra* note 7, at 6; Tabb & Lawless, *supra* note 7, at 825, 827.

⁶⁷³ See, e.g., Lawless, *supra* note 7, at 6, 111; Tabb & Lawless, *supra* note 7, at 826; Tabb, *supra* note 7, at 550-52, 556-58, 570-75.

⁶⁷⁴ See, e.g., Bottrell, *supra* note 55, at 201 (arguing that the Court consistently uses textualism); Cuevas, *supra* note 55, at 438; Weinsch, *supra* note 7, at 1832, 1839-51 (arguing that the Court applied textualism, retreated to pre-Code practice, then returned to textualism)

⁶⁷⁵ See, e.g., Bottrell, *supra* note 55, at 201 (arguing that the Court consistently uses textualism); Carroll, *supra* note 8, at 144-45, 212-15; Cuevas, *supra* note 55, at 438; Lawless, *supra* note 7, at 6; Tabb & Lawless, *supra* note 7, at 879-81; Rasmussen, *supra* note 50; Weinsch, *supra* note 7, at 1832, 1839-51 (arguing that the Court applied textualism, retreated to pre-Code practice, then returned to textualism).

⁶⁷⁶ See, e.g., Lawless, *supra* note 7, at 110; Weinsch, *supra* note 7, at 1839-51.

⁶⁷⁷ See, e.g., Kelch, *supra* note 7, at 291, 293-300 ("[T]he discomfort felt concerning the direction of bankruptcy jurisprudence in the Supreme Court results not from any one theory [of interpretation] propounded by the Court, but, rather, results from the lack of any universal theory, plain-meaning or otherwise."); Klee & Merola, *supra* note 7, at 2; Lawless, *supra* note 7, at 91-95, 107-08; Rasmussen, *supra* note 50, at 553-64; Tabb, *supra* note 7, at 570-75.

⁶⁷⁸ See, e.g., Tabb, *supra* note 7, at 550-52 (describing the Court's bankruptcy opinions as a microcosm of the justices' political leanings; arguing that the Court follows a hierarchy of values, which are sometimes obscured by uneven rules of construction).

⁶⁷⁹ See, e.g., Cuevas, *supra* note 55, at 473-87; Cuevas, *supra* note 8; Klee & Merola, *supra* note 7; Lam, *supra* note 8; Lawless, *supra* note 7, at 100-06; Tabb & Lawless, *supra* note 7, at 827; Tabb, *supra* note 7, at 570-75.

⁶⁸⁰ See, e.g., Carroll, *supra* note 8, at 212-15; Kelch, *supra* note 7, at 291-92, 301-38; Rasmussen, *supra* note 50. See also Bottrell, *supra* note 55, at 201 (predicting that the Court will construe all bankruptcy cases using textualism); Cuevas, *supra* note 55, at 448-73, 487-93 (explaining when to use textualism); Weinsch, *supra* note 7, at 1854-62 (explaining why the Court uses textualism in bankruptcy cases).

⁶⁸¹ See, e.g., Klee & Merola, *supra* note 7.

⁶⁸² See, e.g., Klee & Merola, *supra* note 7, at 1; Lawless, *supra* note 7; Tabb & Lawless, *supra* note 7, at 827, 881-85.

groups of the Court's opinions.⁶⁸³ During any several-year period, the Court may, indeed, have seemed to move toward or away from textualism or to apply an incoherent interpretive method. Second, they focus only on the interpretive methods the Court employed in its majority opinions.

In this comprehensive study of all of the Court's Bankruptcy Code decisions, I have sought to determine the extent to which interpretive method has been a driving force in the Supreme Court's bankruptcy jurisprudence. This study was rooted in the hypothesis that interpreters could learn at least as much, if not more, about the Court's interpretive method by considering the types of issues that caused the Justices to agree and disagree among themselves, as they could learn by examining only the Court's majority opinions. To test this hypothesis, this study focused not simply on the Court's majority opinions, but rather on the extent to which disputes over interpretive method caused Justices to diverge from the majority and write separate concurring or dissenting opinions.

This study has revealed several strong patterns woven throughout the Court's bankruptcy decisions. These patterns emerge when we examine the (i) varied interpretive tools and canons the majority, concurring, and dissenting Justices have employed in the Court's unanimous and split decisions (Part IV.A.1), and (ii) patterns of disputes among the Justices (Part IV.A.2).

1. Patterns that emerge from the Supreme Court's split and non-split Bankruptcy Code decisions

The Court has decided forty-eight Bankruptcy Code cases.⁶⁸⁴ Seven presented constitutional or quasi-constitutional questions (subpart 1.a.). Of the remaining forty-one cases, fourteen were unanimous (subpart 1.b.). In twenty of the twenty-seven non-unanimous cases, Justices wrote separately because they disagreed with the majority's interpretive method (subpart 1.c.). Two of the seven remaining cases involved tensions between the Bankruptcy Code and other law (subpart 1.d.). Three involved governmental claims or enforcement proceedings (subpart 1.e.). The final two cases presented disputes concerning the application of the law to the facts (subpart 1.f.)

⁶⁸³ See, e.g., Botrell, *supra* note 55 (reviewing cases decided in 1991 and 1992); Carroll, *supra* note 8 (reviewing cases decided between 1989 and 1992); Cuevas, *supra* note 55 (reviewing cases decided by the Rehnquist Court up to 1992); Klee & Merola, *supra* note 7 (reviewing cases decided between 1981 and 1987); Lawless, *supra* note 7 (reviewing cases decided in the 1991 through 1995 Terms); Markell, *supra* note 7 (reviewing cases decided in the 1990 through 1993 Terms); Tabb, *supra* note 7 (reviewing cases decided in the 1981 through 1986 Terms); Tabb & Lawless, *supra* note 7 (reviewing cases decided in the 1986 through 1990 Terms); Weinsch, *supra* note 7 (reviewing cases decided prior to 1992).

⁶⁸⁴ See Appendix I, *post*.

a. The constitutional and quasi-constitutional question cases

Seven of these cases involved constitutional or quasi-constitutional questions.⁶⁸⁵ These cases reveal nothing about the Court's methods for interpreting the Bankruptcy Code, itself.⁶⁸⁶

Interestingly, however, these cases represent an inordinately large percentage of the Court's major split decisions.⁶⁸⁷ Three of the seven constitutional questions (43%) caused major splits among the Justices. Five (71%) caused either minor or major splits among the Justices. Six (86%) caused Justices to diverge from the majority opinion (in dissenting or concurring opinions). Only one of the seven cases resulted in a completely unanimous opinion (14%) and only two resulted in opinions in which the Justices all agreed on the result (29%).

In contrast, of the forty-one non-constitutional cases, only six (15%) caused major splits among the Justices. Only nineteen (46%) caused either minor or major splits among the Justices. Twenty-seven (66%) caused Justices to diverge from the majority opinion. Fourteen of the forty-one non-constitutional cases resulted in unanimous opinions (34%), and twenty-two resulted in opinions in which all of the Justices agreed on the result (54%).⁶⁸⁸

In other words, the Justices disagreed among themselves more widely when they considered bankruptcy-related constitutional questions than when they interpreted the Bankruptcy Code.

b. The unanimous cases

⁶⁸⁵ See *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995); *Langenkamp v. Culp*, 498 U.S. 42 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982). See also Appendices III, VI, *post*.

⁶⁸⁶ Whether one might discern in these opinions any insights concerning the Court's views of the role of bankruptcy law in the constitutional scheme is beyond the scope of this article.

⁶⁸⁷ See Appendix III, *post*.

⁶⁸⁸ See Appendix III, *post*.

Viewed another way, of the Court's fifteen unanimous Bankruptcy Code decisions, only one presented a constitutional question (6.66%). Similarly, of the Court's nine unanimous with concurrence cases, only one presented a constitutional question (11.11%). Thus, constitutional questions resulted in an aggregate of only two of the twenty-four non-split decisions (8.33%). Two of the fifteen minor splits presented constitutional questions (13.33%). Three of the nine major splits presented constitutional questions (33.33%). Thus, constitutional questions resulted in an aggregate of five of the twenty-four split decisions (20.83%).

Of the forty-one non-constitutional cases, fourteen were unanimous.⁶⁸⁹ The unanimous opinions appear to have employed three distinct interpretive methods.

Four of these cases relied only on the text of the statute.⁶⁹⁰ All four of these cases were decided after Justice Scalia joined the Court, and three of these cases were written by the Court's leading textualists, Justices Scalia and Thomas.⁶⁹¹ In two of these four cases, however, the Court primarily interpreted a statute other than the Bankruptcy Code.⁶⁹² If these cases were excluded, only two, unanimous, textualist Bankruptcy Code opinions would remain (one written by Justice Scalia, one written by Justice Thomas).⁶⁹³

Ten of the fourteen unanimous opinions relied upon more than the text. Five of these opinions relied upon the text, structure, and history.⁶⁹⁴ The Court decided one of these cases before Justice Scalia joined the Court, and four after he joined the Court.⁶⁹⁵ The other five cases deferred to pre-Code practice.⁶⁹⁶ The Court decided one of these cases before Justice Scalia joined the Court, and four after he joined the Court.⁶⁹⁷

Even if one argued that some of these ten cases were "primarily" textual, and that analysis of "structure" is a holistic way of considering the text, references to history (whether legislative history or broad pre-Code history) remove these cases from the textual fold. Moreover, many of these cases considered structure in a substantive way, which included the broad design, object, and policy of the statute. These cannot be categorized together with the narrow, linguistic, holistic analysis favored by textualists.

⁶⁸⁹ See Appendix III, *post*. Of the fifteen unanimous cases, one raised a constitutional question. The other fourteen involved Bankruptcy Code interpretation questions.

⁶⁹⁰ See *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995); *Rake v. Wade*, 508 U.S. 464 (1993); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992); *Board of Governors of the Fed. Reserve v. MCorp Fin., Inc.*, 502 U.S. 32 (1991); see also *supra* Part III.B.3.b.

⁶⁹¹ Justice Thomas wrote *Rake* and *Holywell*; Justice Scalia wrote *Strumpf*.

⁶⁹² These are *MCorp* and *Holywell*.

⁶⁹³ These are *Rake* (per Thomas, J.) and *Strumpf* (per Scalia, J.).

⁶⁹⁴ See *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998); *Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Grogan v. Garner*, 498 U.S. 279 (1991); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985); see *supra* Parts III.B.3.c, III.B.2.

⁶⁹⁵ The Court decided *Weintraub* before Justice Scalia joined the Court, and *Kawaauhau*, *Fink*, *Johnson*, and *Grogan* after Justice Scalia joined the Court.

⁶⁹⁶ See *Cohen v. de la Cruz*, 523 U.S. 213 (1998); *United States v. Noland*, 517 U.S. 535 (1996); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988); *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983); see *supra* Parts III.B.2, III.B.3.d.

⁶⁹⁷ The Court decided *Whiting Pools* before Justice Scalia joined the Court, and *Cohen*, *Noland*, *Ahlers* and *Timbers* after Justice Scalia joined the Court.

Viewed from the perspective of the Court's unanimous cases, the much-discussed trend toward textualism is weak, at best. Although Justices Scalia and Thomas clearly favor textualism,⁶⁹⁸ textualism rarely draws unanimous support among the Justices.

Instead, the unanimous opinions identify three basic elements of Bankruptcy Code interpretation – the text, structure (linguistic and substantive), and history (including legislative history, broad history, and pre-Code practice). None of these fourteen unanimous cases, however, applied a canon of deference to important federal, state, or governmental interests. Cases involving such interests tend to create rifts among the Justices.

Because the unanimous cases provide little guidance concerning when the Court will choose one interpretive method over another, we next consider whether disputes among the Justices provide any insight into this question.

c. The interpretive dispute cases

In the twenty-seven remaining non-constitutional, non-unanimous cases, one or more Justices wrote a separate opinion.⁶⁹⁹ Disagreements among the Justices over interpretive method caused the separate opinions in at least twenty of these twenty-seven cases, that is, seventy-four percent of the cases in which one or more Justices wrote a separate opinion.⁷⁰⁰ The conclusion that interpretive method lies at the heart of disputes among the Justices in Bankruptcy Code cases is inescapable.

Interestingly, before Justice Scalia joined the Court, only two Bankruptcy Code cases were decided in which a Justice wrote separately to criticize the majority's interpretive method.⁷⁰¹ After Justice Scalia joined the Court, Justices wrote separately to

⁶⁹⁸ See Appendix VI, *post*; Appendix VII, *post*; *infra* Part IV.A.1.c.2, IV.A.2.

⁶⁹⁹ In eight of these cases, one or more justices concurred; in nineteen, one or more justices dissented. See Appendix III, *post*.

⁷⁰⁰ See *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411 (1999); *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995); *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994); *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993); *Barnhill v. Johnson*, 503 U.S. 393 (1992); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992); *Dewsnup v. Timm*, 502 U.S. 410 (1992); *Patterson v. Shumate*, 504 U.S. 753 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *Owen v. Owen*, 500 U.S. 305 (1991); *Toibb v. Radloff*, 501 U.S. 157 (1991); *Union Bank v. Wolas*, 502 U.S. 151 (1991); *Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989); *Kelly v. Robinson*, 479 U.S. 36 (1986); *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986); *Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982).

The separate opinions in *NLRB v. Bildisco & Bildisco*, 456 U.S. 513 (1984) also arguably apply different interpretive methods; however, the foregoing list is limited to those cases in which the separate opinions clearly reflect interpretive disputes.

⁷⁰¹ See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986); *Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982).

criticize the majority's interpretive methods in at least eighteen of the Court's forty bankruptcy cases.⁷⁰²

What do these cases tell us, if anything, about the Court's interpretive method?

1. The Justices care about method

First, the Court's Bankruptcy Code cases reveal that the Justices care about interpretive method. This observation is clear from the large numbers of separate opinions in which the Justices criticize the majority's interpretive methods. It is highlighted when individual Justices struggle to define a coherent interpretive method for the Bankruptcy Code,⁷⁰³ and lament that other Justices' opinions impair interpretive coherence.⁷⁰⁴ Justices Blackmun, Scalia, Stevens, Thomas, and O'Connor have more actively sought to define a desirable Bankruptcy Code interpretive method than have the other Justices.⁷⁰⁵

The problem is not that the Justices have no interest in employing a consistent interpretive method. They likely would prefer nothing more. The Justices are not bankruptcy experts and show little desire to become bankruptcy experts. They are forced to review bankruptcy cases because there is no other forum for resolving splits among the circuit courts of appeal. These splits, which are the single largest source of Supreme

⁷⁰² The pre-Justice Scalia interpretive disputes represent 25% of the cases decided before Justice Scalia joined the Court. The interpretive dispute cases decided after Justice Scalia joined the Court represent 45% of the cases decided after Justice Scalia joined the Court. If we exclude the constitutional cases from this calculation, we discover that justices wrote separately because of disputes over interpretative method in six of the eight non-constitutional concurrences (75%), and six of the seven non-constitutional concurrences after Justice Scalia joined the Court (85.7%). Similarly, justices wrote separately because of interpretive disputes in fourteen of the nineteen aggregate non-constitutional dissents (74.7%), and twelve of the sixteen non-constitutional dissents after Justice Scalia joined the Court (75%), and two of the three non-constitutional dissents before Justice Scalia joined the Court (66.7%). See Appendix III, *post*.

⁷⁰³ See, e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1424 (1999) (Thomas, J., concurring, joined by Scalia, J.) (quoted *supra* text accompanying note 542); *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) (per Blackmun, J.) (quoted *supra* text accompanying notes 487-88); *Dewsnup*, 502 U.S. at 417, 433-34 (1992) (Scalia, J., dissenting) (quoted *supra* text accompanying note 504); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 565 (1990) (Blackmun, J., dissenting, joined by O'Connor, J.) (quoted *supra* text accompanying note 448); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-43 (1989) (per Blackmun, J.) (quoted *supra* text accompanying notes 637-40); *Ron Pair*, 489 U.S. at 249-54 (O'Connor, J., dissenting) (quoted *supra* text accompanying notes 647-51).

⁷⁰⁴ See, e.g., *LaSalle*, 119 S. Ct. at 1424 (Thomas, J., concurring, joined by Scalia, J.) (quoted *supra* text accompanying note 542; criticizing the majority's interpretive method); *Dewsnup*, 502 U.S. at 422-23 (Scalia, J., dissenting) (quoted *supra* text accompanying notes 498-99; castigating the Court for applying a "one-subsection-at-a-time" approach); *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring) (quoted *supra* text accompanying note 322; castigating the Court for applying divergent interpretive methods); *Davenport*, 495 U.S. at 565 (Blackmun, J., dissenting, joined by O'Connor, J.) (quoted *supra* text accompanying note 448, criticizing the Court's interpretive method).

⁷⁰⁵ See *supra* notes 703, 704.

Court bankruptcy cases, often arise from the circuit courts' use of conflicting interpretive methods.⁷⁰⁶ Although bankruptcy experts might prefer that the Court take a substantive, policy-oriented view of the Bankruptcy Code, the Court likely would prefer simply to view the Bankruptcy Code as a statute subject to accepted interpretive rules. Many of the Justices are striving to achieve just this goal. The analysis in Part III of this article reveals that most of the Justices decide bankruptcy cases based upon principles of statutory interpretation, rather than substantive bankruptcy policy. The problem is that the Justices disagree among themselves concerning what those interpretive rules should be.

The Justices have been unable to convince each other of the wisdom of their varied interpretive approaches. Let us consider the status of the Justices' efforts to define the parameters of the three interpretive elements identified in the unanimous opinions: text, structure, and history.

2. The statutory text

All of the Justices agree that, in some cases, the text alone answers the interpretive question. Different Justices, however, hold different views concerning when the text alone is determinative.⁷⁰⁷

As previously noted, the Court issued four unanimous textual opinions.⁷⁰⁸ Appendix VI reveals that, in eleven other cases, the Court issued a primarily textual majority opinion, but one or more Justices responded with a separate, non-textual concurrence or dissent.⁷⁰⁹ In other words, the Court decided fifteen of its forty-one non-constitutional cases by textual opinions (37%) and twenty-six by non-textual opinions (63%). In eight of the fifteen textual opinions, either Justice Scalia or Justice Thomas wrote the majority opinion.⁷¹⁰ Justice Blackmun wrote two of the seven remaining

⁷⁰⁶ See Appendix II, *post*; see, e.g., *Patterson v. Shumate*, 504 U.S. 753 (1992).

⁷⁰⁷ See Appendix VI, *post*; Appendix VII, *post*.

⁷⁰⁸ See *supra* note 690.

⁷⁰⁹ See *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995); *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993); *Barnhill v. Johnson*, 503 U.S. 393 (1992); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *Owen v. Owen*, 500 U.S. 305 (1991); *Toibb v. Radloff*, 501 U.S. 157 (1991); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989); *Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982); see also Appendix VI, *post*; Appendix VII, *post*.

⁷¹⁰ See *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995) (per Scalia, J.); *Things Remembered*, 516 U.S. 124 (per Thomas, J.); *Nobelman*, 508 U.S. 324 (per Thomas, J.); *Rake v. Wade*, 508 U.S. 464 (1993) (per Thomas, J.); *Germain*, 503 U.S. 249 (per Thomas, J.); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992) (per Thomas, J.); *Taylor*, 503 U.S. 638 (per Thomas, J.); *Owen*, 500 U.S. 305 (per Scalia, J.).

textual majority opinions.⁷¹¹ No other Justice wrote more than one textual majority opinion.⁷¹²

In eight of the twenty-six cases decided by non-textual majority opinions (31%), one or more Justices wrote a textual concurrence or dissent.⁷¹³ Justice Scalia wrote four of these separate, textual opinions (one of which Justice Souter joined), Justice Thomas wrote two (one of which Justice Scalia joined), Justice O'Connor wrote one (which Justices Scalia, Thomas, and Souter joined), and Justice Marshall wrote one (which Justice Stevens joined).⁷¹⁴

These cases reflect a substantial number of textual majority opinions and separate opinions, despite the very limited numbers of bankruptcy cases in which the Justices have unanimously applied textual interpretation. These cases also confirm that Justices Scalia and Thomas have written most of the textual opinions, and that textual interpretation has significantly impaired the Court's ability to reach accord in bankruptcy cases.

Three issues drive the Justices' disputes concerning the application of textual interpretation. First, what degree of inexactitude is required to trigger consultation of sources other than the text? Will the Court limit its inquiry to the text if the language is clear, unambiguous, plain, free of a scrivener's error, or consistent with the drafters' intent? Second, how does the Court determine whether the language is, in fact, plain (or unambiguous, et cetera)? Third, if the language meets whatever clarity test the Court applies, is the interpreter prohibited from looking beyond the text, discouraged from looking beyond the text, or encouraged to look beyond the text but cautioned that little weight will be given to sources that contradict the text?

Let us consider how the interpretive guidelines advocated by different Justices answer these three questions.

First, the formalists search for the meaning of the text rather than the intentions of the drafters. Consistent with this narrow focus, they employ interpretive rules that are designed to squeeze as much meaning as possible from the words, in order to obviate any need to look beyond the words. They prohibit interpreters from considering sources other

⁷¹¹ See *Toibb*, 501 U.S. 157; *Ron Pair*, 489 U.S. 235.

⁷¹² See *Rash*, 520 U.S. 953 (per Ginsburg, J.); *Barnhill*, 503 U.S. 393 (per Rehnquist, C.J.); *Board of Governors of the Fed. Reserve v. MCorp Fin., Inc.*, 502 U.S. 32 (1991) (per Stevens, J.); *Davenport*, 495 U.S. 552 (per Marshall, J.); *Geiger*, 454 U.S. 354 (per curiam).

⁷¹³ See *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411 (1999) (Thomas, J., concurring joined by Scalia, J.); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 215 n.†, 229 (1996) (Thomas, J., concurring in part and dissenting in part; Scalia, J., declining to join part of the opinion); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 399 (1993) (O'Connor, J., dissenting, joined by Scalia, Souter, & Thomas, JJ.); *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992) (Scalia, J., dissenting, joined by Souter, J.); *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring); *Union Bank v. Wolas*, 502 U.S. 151, 163 (1991) (Scalia, J., concurring); *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 67 (1990) (Scalia, J., concurring); *Kelly v. Robinson*, 479 U.S. 36, 53 (1986) (Marshall, J., dissenting, joined by Stevens, J.)

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), is excluded because, although both the majority and dissent claim to have applied plain meaning, each considered sources other than the text. See *supra* notes 606-23.

⁷¹⁴ See *supra* note 713.

than the text unless the text is ambiguous, they require a high level of ambiguity, and they rarely find ambiguity. More specifically, Justice Thomas employs a prohibitive test. He will not look beyond the language if the language is “clear” or “unambiguous.”⁷¹⁵ Justice Scalia also employs a prohibitive test. He will not look beyond the language unless there is a “scrivener’s error” that produces “an absurd result.”⁷¹⁶ Justice Scalia’s test, on its face, appears to be more restrictive than Justice Thomas’s test.⁷¹⁷ Justices Thomas and Scalia are far less willing to find ambiguity than are the other Justices.⁷¹⁸

Second, at the other end of the spectrum, Justice Stevens searches for congressional intent or statutory purpose. To ensure that the apparent meaning of the text accurately conveys such intents or purposes, he encourages the Court to consider sources other than the text if the statute contains “some uncertainty.”⁷¹⁹ He will find “sufficient ambiguity” to consult sources other than the text⁷²⁰ far more readily than will Justices Thomas and Scalia. Moreover, Justice Stevens seems to advocate a permissive test under which the Court may consult non-textual sources even when the language is “plain.” In those cases, however, the party encouraging the Court to adopt a meaning contrary to the plain text will carry an “exceptionally heavy” burden.⁷²¹

The other Justice’s views lay somewhere between these two extremes. Like Justice Stevens, they generally claim to be searching for congressional intent or statutory purpose. They are more willing than Justice Stevens, however, to apply a plain meaning rule. Such a rule presumes that the plain text accurately conveys Congress’s intent and prohibits examination of other sources if the language is plain. Nevertheless, they are more reluctant than Justices Thomas and Scalia to find (or force) a “plain” meaning when

⁷¹⁵ See, e.g., *Rake v. Wade*, 508 U.S. 464, 471 (1993) (per Thomas, J.) (reasoning that, if the language is clear, the courts’ sole function is to enforce the text); *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (reasoning that, if the language is unambiguous, judicial inquiry is complete). See also *Central Trust Co. v. Official Creditors’ Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 359-60 (1982) (per curiam) (reasoning that, if the language is plain, the courts’ sole function is to enforce the text).

⁷¹⁶ See *Union Bank v. Wolas*, 502 U.S. 151, 163 (1991) (Scalia, J., concurring).

⁷¹⁷ This test seems to require more than mere ambiguity. It clearly requires more than merely “some uncertainty.” Cf. *infra* note 719.

⁷¹⁸ See, e.g., *Bank of America Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1426 (1999) (Thomas, J., concurring, joined by Scalia, J.) (finding the language to be plain even though the new value question has caused wide splits among the circuit courts, the Court has granted certiorari in three new value cases, and the Court has never definitively resolved the new value question).

⁷¹⁹ See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring) (urging the Court to consider legislative history whenever there is “some uncertainty” about the meaning).

⁷²⁰ See *Nobelman v. American Sav. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J., concurring) (consulting legislative history to resolve a textual anomaly); *Toibb v. Radloff*, 501 U.S. 157, 167 (1991) (Stevens, J., dissenting) (arguing that the use of the word “only” introduced “sufficient ambiguity” to look beyond the text); *Central Trust Co. v. Official Creditors’ Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 360 (1982) (Stevens, J., dissenting).

⁷²¹ See *Union Bank v. Wolas*, 502 U.S. 151, 155-56 (1991); see also *Patterson v. Shumate*, 504 U.S. 753, 760-65 (1992) (per Blackmun, J.) (applying the *Wolas* “heavy burden” test).

the language is the subject of serious dispute (among the Justices, the advocates, or the lower courts). Some of the Justices are particularly reluctant to find plain meaning to be determinative if the text conflicts with established judicial practices. Consequently, the Court's opinions that rely solely upon the Bankruptcy Code's text typically are the product of a voting block comprising the two textualist Justices, who rarely look beyond the text, and several legal process Justices, who embrace a plain meaning rule in their search for intent or purpose. For example, three of the sitting Justices (Chief Justice Rehnquist and Justices Scalia and Kennedy) joined the textual opinion in *United States v. Ron Pair Enterprises, Inc.*⁷²² The late Justice Blackmun wrote *Ron Pair*. Justice White, who also joined the *Ron Pair* majority, is no longer on the Court. Arguably, the three remaining *Ron Pair* majority Justices together with Justice Thomas (who later joined the Court) create a textualist block that would prohibit the Court from looking beyond the text except in the "rare" case in which "literal" application of the language will produce a result "demonstrably at odds with the intentions of its drafters."⁷²³ Justice Blackmun, however, also wrote decidedly non-textual opinions, including two of the Court's strongest pre-Code practice opinions,⁷²⁴ one of which Chief Justice Rehnquist and Justice Kennedy also joined.⁷²⁵ These opinions urge the Court to be chary of finding the text to be plain if the text seems to be inconsistent with established prior practices or policies. Notice that Justice Blackmun's "demonstrably at odds with the intentions of its drafters" test in *Ron Pair* is not a textualist interpretive device; rather, it is device for discerning congressional intent. Cases such as this reflect that, although all of the Justices have joined or written a "textual" opinion, the non-textualist Justices (i.e., all of the sitting Justices except Justices Scalia and Thomas) typically have done so only when they are convinced that the plain meaning accurately embodies Congress's intent.

Similar incongruous results appear when we consider which Justices joined textual and non-textual opinions in other cases. For example, five Justices joined both the heavily pre-Code majority in *Kelly v. Robinson*, in which the Court deferred to state criminal restitution proceedings, and the anti-pre-Code majority in *Pennsylvania Department of Public Welfare v. Davenport*, in which the Court declined to defer to such proceedings.⁷²⁶

The import of these cases is unclear. Perhaps the incongruity arises simply because cases that implicate pre-Code law or tensions between the Bankruptcy Code and other law present more difficult interpretive issues. The Justices' comments on

⁷²² *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).

⁷²³ *Id.* at 240-45.

⁷²⁴ See *Dewsnup v. Timm*, 502 U.S. 410 (1992) (per Blackmun, J., joined by Rehnquist, C.J., & Kennedy, O'Connor, Stevens, & White, JJ.); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 564-74 (1990) (Blackmun, J. dissenting, joined by O'Connor, J.); see also *Patterson v. Shumate*, 504 U.S. 753, 760-65 (1992) (per Blackmun, J.) (applying the *Wolas* "heavy burden" test).

⁷²⁵ See *Dewsnup*, 502 U.S. 410.

⁷²⁶ See *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *Kelly v. Robinson*, 479 U.S. 36 (1986). Chief Justice Rehnquist and Justices Brennan, Scalia, and White joined the majority opinions in both *Kelly* and *Davenport*. See *supra* note 447.

interpretive method often address the relationship between the plain meaning canon and the pre-Code canon.⁷²⁷ Perhaps a solid core of Justices (i.e., Justices Thomas, Scalia, and Stevens, and, perhaps to a lesser extent, Blackmun and O'Connor) care more about interpretive method than do the other Justices. Perhaps the other Justices are more willing to join an opinion if they agree with the result, even if they do not agree with the method. If this latter supposition is true, however, it is not clear what criteria those Justices use to determine that the result is correct, if the criteria is not that the Court applied the proper interpretive method.

Although many of the Court's textual bankruptcy opinions embrace the prohibitive test of the standard plain meaning rule, other opinions shy from this rule in favor of two alternatives. The first allows the Court to consult other sources, but subjects the parties to a heavy burden to demonstrate that Congress intended a result other than the result the language suggests. The second, which presents the greatest area of discord, urges the Court to be wary of finding the language to be plain if the language conflicts with prior practice. Parts IV.A.1.c.4 and IV.A.1.d examine the relationship between the plain meaning rule and the pre-Code canon.

3. Structure and policy

The Court's holistic (or structural) canons contain both linguistic and substantive components. Both components urge interpreters to examine the entire statute to determine the meaning of a particular phrase. Structural analysis presents an intriguing challenge for textualists because it considers only internal sources of meaning – i.e., the words of the statute. Its broad examination of the text, however, raises questions concerning how internal, textual “meaning” should be defined. Textualists argue that interpreters should not consult sources external to the statute (such as legislative history) to discern congressional intent or statutory purpose because only the enacted text is law. External sources, therefore, are not democratically legitimate sources of meaning. Because structural analysis consults only internal sources of meaning, it obviates this concern. Structural analysis is a critical aspect of interpretation that holds great promise for reconciling the tension between “text” and “policy,” particularly in the context of a comprehensive statute such as the Bankruptcy Code. To date, however, structural analysis has received inadequate attention in the modern interpretative debate.

The linguistic component urges the Court to read words to mean the same thing throughout the Bankruptcy Code.⁷²⁸ When Justice Thomas engages in holistic analysis, he focuses primarily on this aspect of holistic interpretation.⁷²⁹ This is consistent with a formalist search for textual meaning.

⁷²⁷ See, e.g., *Dewsnup v. Timm*, 502 U.S. 410, 417-20 (1992) (per Blackmun, J.); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 565 (1990) (Blackmun, J., dissenting); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-43 (1989) (per Blackmun, J.).

⁷²⁸ See, e.g., *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998); *Rake v. Wade*, 508 U.S. 464, 474-75 (1993); *Dewsnup*, 502 U.S. at 420-23 (Scalia, J., dissenting); *Patterson v. Shumate*, 504 U.S. 753, 758 (1992).

⁷²⁹ See, e.g., *Rake*, 508 U.S. at 474-75.

The substantive component contains two elements. The narrower element encourages the Court to consider the substantive effect, rather than just the language, of related Bankruptcy Code provisions.⁷³⁰ Justice Scalia has employed this aspect of holistic interpretation as well as the linguistic aspect of holistic interpretation.⁷³¹

Second, the broader element of the substantive holistic canon encourages the Court to interpret the language in light of the Bankruptcy Code's broader design, object, and policy.⁷³² These two components of the substantive holistic canon suggest that different levels of generality (i.e., the meaning or purpose of the section, the related group of sections, and the Bankruptcy Code as a whole) are important and should be harmonized.

The broader aspect of the substantive holistic canon also suggests that "policy" or "purpose" is an integral part of the statute and that the contraposition of "text" and "policy" is a false dichotomy. The question is not whether to consider policy, but rather, where to find it. The canon suggests that the structure of the statute will reveal its purposes and policies, even if the text does not expressly state those policies. Consequently, interpreters need not consult "external" sources, such as legislative history, to identify a statute's policies. Justices Thomas and Scalia have not advocated this type of holistic analysis. Justice Stevens, however, has.⁷³³

For example, consider the effect of a rule that instructs interpreters to apply the Bankruptcy Code's text but prohibits them from applying unexpressed "policies." One might argue that such a rule prohibits the Court from considering the Bankruptcy Code's policies of rehabilitation or equitable distribution. These policies, however, reveal themselves throughout the language, structure, and design of the Bankruptcy Code, although they are never expressly stated.

When an interpreter considers the discharge provisions or the very existence of chapter 11, how can she help but see the fresh start policy at work? The difference between saying that (i) the text grants certain debtors a discharge, (ii) the text reveals a congressional intent to grant certain debtors a discharge or fresh start, (iii) the purpose of the discharge is to grant certain debtors a discharge or fresh start, and (iv) the Bankruptcy Code embodies a fresh start "policy," is semantic. The same reasoning applies to the "policy" of rehabilitating business debtors (expressed in the structure of chapter 11), the "policy" of equitable distribution (expressed in the automatic stay, avoidance powers, distribution provisions, et cetera), and the "policy" of maximizing value (expressed in avoidance powers, executory contract powers, turnover provisions, et cetera). Of course each of these "policies" is subject to limitations; but those limitations are also found in

⁷³⁰ See, e.g., *Grogan v. Garner*, 498 U.S. 279, 288 n.13 (1991); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

⁷³¹ See, e.g., *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting); *Patterson*, 504 U.S. at 766 (Scalia, J., concurring); *Timbers*, 484 U.S. 365.

⁷³² See *Grogan*, 498 U.S. at 287 n.13.

⁷³³ *Id.*

the Bankruptcy Code's text and structure, such as the provisions prohibiting the discharge of the debtor and of various debts in specified circumstances.⁷³⁴

Consequently, to argue that interpreters may only consult the text and may not consider policy is incongruous. The Bankruptcy Code's policies reveal themselves to anyone who reads the Bankruptcy Code's text and listens closely enough to hear its music. Although bankruptcy experts intrinsically understand how the complicated provisions of the Bankruptcy Code interact, the Supreme Court understands this interaction only when bankruptcy experts clearly explain it to the Court in each case. Absent such an explanation, the Court may be able to locate the use of similar terms throughout the Bankruptcy Code, but bankruptcy experts cannot expect the Court to employ thoughtful, substantive, structural analysis.

4. History, including legislative history and pre-Code practice

The Court's Bankruptcy Code opinions refer to two distinct aspects of the statute's history: legislative history, and broader Bankruptcy Code history. This broader history includes "pre-Code practice" and the development of bankruptcy doctrine over time.

(a) Legislative history

A large number of the Court's decisions have referred to legislative history, at least in passing.⁷³⁵ Very few opinions, however, have engaged in a lengthy and pivotal

⁷³⁴ For example, the existence of chapter 11 signifies a policy of promoting reorganization. Preference avoidance maximizes the estate and fosters equitable distribution. The assumption and rejection of executory contracts fosters reorganization; assumption and assignment preserve value. Provisions on obtaining credit foster reorganization. The automatic stay fosters the fresh start and reorganization, gives the debtor a breathing spell, and prevents a race to the courthouse. Discharge fosters the fresh start, but the exceptions to discharge limit the fresh start to the debtors Congress has deemed unworthy of a fresh start, for policy reasons. Indeed, the overarching bankruptcy policies are so integrated throughout the Bankruptcy Code that it is virtually impossible to identify a single section of the Bankruptcy Code that does not "implement" one or more of these policies. The Bankruptcy Code reflects numerous other, more specific policies, as well. For example, the priority provisions reflect congressional policy determinations to favor certain debts (such as child support) over others.

⁷³⁵ See, e.g., *United States v. Noland*, 517 U.S. 535, 539 (1996); *Patterson v. Shumate*, 504 U.S. 753, 760-62 & n.4 (1992); *Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Johnson v. Home State Bank*, 501 U.S. 78, 85-87 (1991); *Union Bank v. Wolas*, 502 U.S. 151, 156-60 (1991); *Begier v. Internal Revenue Serv.*, 496 U.S. 53, 57, 59 n.3, 61, 63-67 (1990); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 350-52 (1985); *Ohio v. Kovacs*, 469 U.S. 274, 279 n.3, 280 & nn.6-8 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05, 207-09 (1983); *Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 355-56 (1982). In several other cases, the Court considered but rejected appeals to legislative history because the history did not support the parties' arguments, or was inconsistent with the text and broader history. See, e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1421 n.25 (1999); *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 218-21 (1998); *Noland*, 517 U.S. 542; *United*

analysis of legislative history.⁷³⁶ In bankruptcy cases, the Court generally prefers to engage in a tracing of the historical development of bankruptcy doctrines (through broad history and pre-Code practice) rather than to rely upon isolated statements in the legislative history.⁷³⁷

Not surprisingly, Justice Scalia has written concurring opinions objecting to the use of legislative history in Bankruptcy Code interpretation. These opinions, however, found no joiners.⁷³⁸ Justice Stevens tends to consult legislative history to confirm textual meaning even when other Justices find no need to consult sources other than the text. He wrote one concurring opinion objecting to the Court's failure to examine legislative history, but this concurrence went without joiners.⁷³⁹

Disputes over legislative history have not created the level of histrionics typically seen in other fields of law. In the bankruptcy context, at least, the tension between text and pre-Code practice has apparently surpassed the tension between text and legislative history as a flash point for interpretive disputes among the Justices.

(b) Broad history and pre-Code practice

Broad history and pre-Code practice play a significant role in Bankruptcy Code interpretation.

In a significant number of the Court's non-constitutional bankruptcy opinions, the Court considered the broad history of the Bankruptcy Code provisions in issue, but did not expressly refer or defer to pre-Code practice.⁷⁴⁰ In these cases, the Court typically examined prior law, amendments, and judicial interpretations, and considered how the relevant bankruptcy doctrine had developed over time.

In approximately one-fourth of the Court's non-constitutional Bankruptcy Code cases, the Court expressly considered pre-Code practice as part of its review of the Bankruptcy Code's history.⁷⁴¹ Five of these were unanimous decisions.⁷⁴² In addition, in

Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 380 (1988); *cf.* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) (stating that consultation of legislative history was "hardly necessary").

⁷³⁶ *But see Begier*, 496 U.S. 53 (consulting the legislative history of the Bankruptcy Code and Internal Revenue Code).

⁷³⁷ *See, e.g., supra* Part III.B.3.c, d; *infra* Part IV.A.4.b.

⁷³⁸ *See, e.g., Wolas*, 502 U.S. at 163 (Scalia, J., concurring); *Begier*, 496 U.S. at 67 (Scalia, J., concurring).

⁷³⁹ *See, e.g., Nobleman v. American Sav. Bank*, 508 U.S. 324, 332 (1993) (Stevens, J., concurring).

⁷⁴⁰ *See, e.g., Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998); *Field v. Mans*, 516 U.S. 59 (1995); *Patterson v. Shumate*, 504 U.S. 753 (1992); *Grogan v. Garner*, 498 U.S. 279 (1991); *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

⁷⁴¹ *See Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1417-19 (1999) (dictum); *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 221 (1996); *United States v. Noland*, 517 U.S. 535, 539 (1996); *Dewsnup v. Timm*, 502 U.S. 410, 417-20 (1992); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202-

two cases in which the Court did not defer to pre-Code practice, dissenters argued that Court should have deferred to pre-Code practice.⁷⁴³

Broad history and pre-Code practice appear to exist on a continuum of the same line of interpretive inquiry. An interpreter examines both as part of a progression that considers the provisions of prior law (either the Bankruptcy Act or prior versions of the Bankruptcy Code), judicial interpretations of those provisions, judicial doctrines created to fill gaps in prior law, prior congressional action (including enactment of the Bankruptcy Code and of amendments to the Bankruptcy Code), and judicial interpretations of the Bankruptcy Code.

The Justices disagree, however, concerning whether and when the Court should consult broad history or pre-Code law.⁷⁴⁴ These disputes are particularly evident in tensions between the plain meaning canon and pre-Code practice. Some Justices discount the text if the text seems to be inconsistent with pre-Code practice and Congress has not expressly stated in the legislative history that it intended to alter pre-Code practice.⁷⁴⁵ Others consider pre-Code practice only if the text contains a gap or ambiguity.⁷⁴⁶

For example, in *Kelly v. Robinson*,⁷⁴⁷ the Court relied upon pre-Code practice to defer to state criminal processes.⁷⁴⁸ In contrast, in *Pennsylvania Department of Public Welfare v. Davenport*⁷⁴⁹ the Court embraced the same pre-Code canon that it had applied in *Kelly*, but concluded that Congress had, indeed, evinced in the language an intent to

05 (1988); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988); *Kelly v. Robinson*, 479 U.S. 36, 44-49 (1986); *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 208 (1983).

⁷⁴² See *Cohen*, 523 U.S. 213; *Noland*, 517 U.S. 535; *Ahlers*, 485 U.S. 197; *Timbers*, 484 U.S. 365; *Whiting Pools*, 462 U.S. 198.

⁷⁴³ See *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 565 (1990) (Blackmun, J., dissenting); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 249-55 (1989) (O'Connor, J., dissenting).

⁷⁴⁴ A comprehensive analysis of the Court's approach to pre-Code practice is beyond the scope of this article.

⁷⁴⁵ See, e.g., *Dewsnup*, 502 U.S. 410 (per Blackmun, J.); *Davenport*, 495 U.S. at 565 (Blackmun, J., dissenting); *Ron Pair*, 489 U.S. at 249-55 (O'Connor, J., dissenting).

⁷⁴⁶ See, e.g., *LaSalle*, 119 S. Ct. at 1424 (Thomas, J., concurring); *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting).

⁷⁴⁷ *Kelly v. Robinson*, 479 U.S. 36 (1986).

⁷⁴⁸ *Id.*

⁷⁴⁹ *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

alter the pre-Code practice of deference to state criminal processes.⁷⁵⁰ Both cases were decided over strident dissents.⁷⁵¹

Similarly, in *Dewsnup v. Timm*,⁷⁵² the majority rejected a seemingly “plain” textual meaning because that meaning conflicted with pre-Code practice, and Congress had not clearly evinced an intent to change pre-Code practice.⁷⁵³ The *Dewsnup* dissent castigated the Court for deferring to pre-Code practice when the text was clear.⁷⁵⁴

These disputes have left the lower courts without adequate guidance concerning the Court’s perspective on pre-Code practice. A striking demonstration of this confusion occurred in 1991 in the Fifth Circuit case of *Phoenix Mutual Life Insurance Company v. Greystone III Joint Venture (In re Greystone III Joint Venture)*.⁷⁵⁵ In *Greystone*, the court was asked to consider whether the so-called “new value exception” to the “absolute priority rule” had survived the enactment of the Bankruptcy Code.⁷⁵⁶ When Congress enacted the Bankruptcy Code, it modified the absolute priority rule, but made no express mention of the exception. In an opinion that relied on a perceived trend toward textualism in the Supreme Court,⁷⁵⁷ the Fifth Circuit held that “[n]either in the Code’s language, nor in the context of a previous, different reorganization law, nor in legislative history, nor in policy is there room for a ‘new value exception’ to the absolute priority rule now defined by § 1129(b)(2)(B).”⁷⁵⁸

Less than two months later, however, the Supreme Court issued its opinion in *Dewsnup*,⁷⁵⁹ which relied heavily on pre-Code practice. Within forty-three days after the Court issued *Dewsnup*, the Fifth Circuit had received a petition for rehearing, granted it, and issued a terse withdrawal of the portion of its *Greystone* opinion that had resolved the absolute priority question.⁷⁶⁰ Although the Fifth Circuit did not expressly state the reason

⁷⁵⁰ *Id.*

⁷⁵¹ See *Davenport*, 495 U.S. at 564 (Blackmun, J., dissenting); *Kelly*, 479 U.S. at 53 (Marshall, J., dissenting).

⁷⁵² *Dewsnup v. Timm*, 502 U.S. 410 (1992).

⁷⁵³ *Id.*

⁷⁵⁴ *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting).

⁷⁵⁵ *Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274 (1991), *modified on reh’g*, 995 F.2d 1284 (5th Cir. 1992).

⁷⁵⁶ For a discussion of absolute priority and the new value exception, see *supra* notes 236-48, 520-34 and accompanying text.

⁷⁵⁷ See *Greystone*, 948 F.2d at 1281-84 (original opinion prior to modification on rehearing) (issued November 19, 1991).

⁷⁵⁸ *Id.* at 1284.

⁷⁵⁹ *Dewsnup v. Timm*, 502 U.S. 410 (1992) (issued January 15, 1992).

⁷⁶⁰ *Greystone*, 995 F.2d 1274, *modified on reh’g*, 995 F.2d at 1284 (“In withdrawing this portion of the panel opinion we emphasize that the bankruptcy court’s opinion on the ‘new value exception’ to the

for withdrawing the opinion, Judge Jones, the author of the original opinion, identified *Dewsnup* as the culprit in her dissent from the rehearing.⁷⁶¹ She noted that:

[h]ow one should approach issues of a statutory construction arising from the Bankruptcy Code has been clouded, in my view, by *Dewsnup v. Timm* [citation omitted]. Nevertheless, in reaffirming what I wrote about the “new value exception” in Part IV of the original opinion, and therefore in voting against a rehearing, I would hope to stand with Galileo, who, rebuffed by a higher temporal authority, muttered under his breath, “Eppur si muove.” (“And yet it moves.”).⁷⁶²

Eight years later, Justices Scalia and Thomas commented on *Greystone* in their concurrence in *Bank of America National Trust & Savings Ass’n v. 203 North LaSalle Street Partnership*.⁷⁶³ They noted that the interpretive confusion created by *Dewsnup* apparently had prompted the Fifth Circuit to withdraw its decision on the new value issue, and argued that the majority’s interpretive method in *LaSalle* “only thickens the fog.”⁷⁶⁴

The relationship between plain meaning and pre-Code practice is complicated by the fact that many of the clashes between these two canons have arisen when Bankruptcy Code was in tension with other state or federal law.⁷⁶⁵ Part IV.A.1.d considers the Court’s use of the pre-Code practice canon to defer to important state or federal laws or governmental interests.

(c) The interaction with other law cases

Finally, there are seven remaining non-constitutional, non-unanimous cases.⁷⁶⁶ Two of these cases involved a clash between the Bankruptcy Code and other law.⁷⁶⁷

absolute priority rule has been vacated and we express no view whatsoever on that part of the bankruptcy court’s opinion.”).

⁷⁶¹ *Id.* at 1285 (Jones, J., dissenting) (voting against rehearing, reaffirming the original opinion, which she had written, and arguing that *Dewsnup* had clouded the approach to statutory construction of the Bankruptcy Code).

⁷⁶² *Id.* at 1285 (Jones, J., dissenting).

⁷⁶³ *Bank of America Nat’l Trust & Sav. Ass’n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1424 (1999) (Thomas, J., concurring, joined by Scalia, J.).

⁷⁶⁴ *Id.* at 1426.

⁷⁶⁵ *See, e.g.,* *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *Kelly v. Robinson*, 479 U.S. 36 (1986); *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Protection*, 474 U.S. 494 (1986).

⁷⁶⁶ *See* *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996); *Field v. Mans*, 516 U.S. 59 (1995); *Farrey v. Sanderfoot*, 500 U.S. 291 (1991); *United States v. Energy Resources Co.*, 495 U.S. 545 (1990); *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989); *Ohio v. Kovacs*, 469 U.S. 274 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

Three involved governmental tax claims or enforcement proceedings.⁷⁶⁸ Two involved disputes concerning the application of the law to the facts.⁷⁶⁹

In addition to the two bankruptcy/other law cases that did not lead to interpretive disputes, at least four of the Court's interpretive dispute split decisions also involved tensions between the bankruptcy and other law.⁷⁷⁰ Similarly, in addition to the three governmental interest cases that did not lead to interpretive disputes, several of the cases that did give rise to interpretive disputes also involved governmental tax claims and enforcement proceedings.⁷⁷¹ This Part will compare all of these interaction with other law and governmental interest cases.

First, in the six cases in which the Bankruptcy Code came into tension with other state or federal law, the Court resolved these tensions as follows:

*Midlantic National Bank v. New Jersey Department of Environmental Protection*⁷⁷² presented a tension between the bankruptcy abandonment power and environmental law. The Court identified a pre-Code canon that limited the abandonment power, and used the pre-Code canon to defer to environmental law.⁷⁷³

*Ohio v. Kovacs*⁷⁷⁴ presented a tension between bankruptcy law and environmental law. The Court declined to defer to environmental law, and did not use a pre-Code canon.⁷⁷⁵

*Kelly v. Robinson*⁷⁷⁶ presented a tension between bankruptcy and criminal restitution law. The Court identified a pre-Code practice of deference to criminal

⁷⁶⁷ See *Kovacs*, 469 U.S. 274 (involving bankruptcy law versus environmental law); *Bildisco*, 465 U.S. 513 (involving bankruptcy law versus labor law).

⁷⁶⁸ See *Reorganized CF & I*, 518 U.S. 213 (involving the definition of excise tax and subordination of a tax penalty); *Energy Resources*, 495 U.S. 545 (involving trust fund taxes); *Sierra Summit*, 490 U.S. 844 (involving state taxation of liquidation sales).

⁷⁶⁹ See *Field*, 516 U.S. 59; *Farrey*, 500 U.S. 291; Part IV.A.1.e.

⁷⁷⁰ See *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *Kelly v. Robinson*, 479 U.S. 36 (1986); *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986).

⁷⁷¹ See *United States v. Noland*, 517 U.S. 535 (1996); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992); *Board of Governors of the Fed. Reserve v. MCorp Fin., Inc.*, 502 U.S. 32 (1991); *Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990); *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

⁷⁷² *Midlantic*, 474 U.S. 494.

⁷⁷³ *Id.*

⁷⁷⁴ *Ohio v. Kovacs*, 469 U.S. 274 (1985).

⁷⁷⁵ *Id.*

processes, and applied the pre-Code canon to defer to state criminal restitution law.⁷⁷⁷

*Pennsylvania Department of Public Welfare v. Davenport*⁷⁷⁸ presented a tension between bankruptcy and criminal restitution law. The Court declined to defer to criminal restitution law. The Court cited the pre-Code canon, but concluded that Congress had evinced in the Bankruptcy Code's language its intent to alter the pre-Code practice of deference to state criminal processes.⁷⁷⁹

*NLRB v. Bildisco & Bildisco*⁷⁸⁰ presented a tension between bankruptcy and labor law. The Court declined to defer to labor law, and did not identify any pre-Code practice of deference to labor law.⁷⁸¹

*BFP v. Resolution Trust Corp.*⁷⁸² presented a tension between bankruptcy avoidance powers and state foreclosure law. The Court, using reasoning analogous to the pre-Code canon, found that the two bodies of law had coexisted for centuries. Therefore, the Court found that bankruptcy fraudulent conveyance law could not be used to set aside a regularly conducted state foreclosure sale.⁷⁸³

These cases reveal a three-to-three split. Three common factors characterize the three cases in which non-bankruptcy law trumped bankruptcy law. First, in each of these cases, the Court relied heavily on a pre-Code practice of bankruptcy law deference to the other law.⁷⁸⁴ In other words, the Court essentially assumed that Congress knew of this deferential practice and intended to continue this practice. This type of finding was critical because each case presented a tension between bankruptcy law and state law. The Supremacy Clause⁷⁸⁵ makes federal law superior to state law. The Court, therefore, could only defer to state law if the federal law, itself, embodied a policy or practice of deference. Each case preserved state law, despite the Bankruptcy Code. Second, in each

⁷⁷⁶ *Kelly v. Robinson*, 479 U.S. 36 (1986).

⁷⁷⁷ *Id.*

⁷⁷⁸ *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

⁷⁷⁹ *Id.*

⁷⁸⁰ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

⁷⁸¹ *Id.*

⁷⁸² *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

⁷⁸³ *Id.*

⁷⁸⁴ *See BFP*, 511 U.S. 531; *Kelly v. Robinson*, 479 U.S. 36 (1986); *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986).

⁷⁸⁵ *See* U.S. CONST. art. VI.

of these cases, the Court employed non-bankruptcy-centric reasoning. Third, in each of these cases, the Court's holding favored a governmental entity. In *Kelly*, the Court permitted the state to force a restitution order.⁷⁸⁶ In *Midlantic*, the Court prohibited the trustee from abandoning polluted property. Two state environmental agencies, that might otherwise have incurred the costs of cleanup, had opposed abandonment.⁷⁸⁷ In *BFP*, the Court's refusal to set aside the foreclosure sale favored both the buyer (a private party) and the federal governmental successor to the saving and loan association that had conducted the foreclosure sale (the Resolution Trust Corporation).⁷⁸⁸

In contrast, in the three cases in which the Court held that bankruptcy law trumped non-bankruptcy law, the Court employed bankruptcy-centric reasoning and found no pre-Code practice of deference.⁷⁸⁹ In all three cases, the Court ruled against a governmental entity.

For example, compare *Bildisco* and *Midlantic*. In *Bildisco*, bankruptcy policy, supported by an arguably plain reading of the Bankruptcy Code, overcame labor law policy. In *Midlantic*, environmental policy, incorporated through a pre-Code canon, overcame an arguably plain reading of the Bankruptcy Code. *Bildisco* allowed a debtor to modify a union contract without complying with labor law. *Midlantic* allowed a debtor to abandon property only if it first complied with environmental law. The Bankruptcy Code allowed rejection of contracts without an express exception for union contracts,⁷⁹⁰ just as the Bankruptcy Code allowed abandonment of property without an express exception for polluted property.⁷⁹¹ The only significant distinction between these cases is that, in *Midlantic*, the Court identified a pre-Code practice of deference to environmental law. In other words, according to the Court, deference to environmental law was codified as a limitation on the abandonment power. In contrast, the concept of rejecting contracts was codified without a policy of deference to labor law.⁷⁹²

⁷⁸⁶ *Kelly*, 479 U.S. 531.

⁷⁸⁷ *Midlantic*, 474 U.S. 494.

⁷⁸⁸ *BFP*, 511 U.S. 531.

⁷⁸⁹ See *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *Ohio v. Kovacs*, 469 U.S. 274 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

Similarly, in those cases that implicated state law, but in which the Court found no direct conflict between the Bankruptcy Code and state law and no important state interest, the Court uniformly subordinated the state law to the Bankruptcy Code. See *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998) (state law grace period for perfection of security interests versus Bankruptcy Code grace period for avoiding preferential perfection); *Patterson v. Shumate*, 504 U.S. 753 (1992) (state spendthrift trust law implicated in legislative history of exclusion from debtors' estate of beneficial interests in certain trusts); *Owen v. Owen*, 500 U.S. 305 (1991) (state law definition of exempt property versus Bankruptcy Code lien avoidance provision). None of these cases involved governmental entities.

⁷⁹⁰ See 11 U.S.C. § 365 (1994); cf. *id.* § 1113 (enacted after *Bildisco*).

⁷⁹¹ *Id.* § 554.

⁷⁹² After *Bildisco*, however, Congress promptly amended the Bankruptcy Code to add special rules for the rejection of collective bargaining agreements. See 11 U.S.C. § 1113 (1994).

Unfortunately, no easy formula exists by which interpreters can determine whether the Court will discover a pre-Code practice of deference to other laws. Following the Court's approach in *Kelly* and *Midlantic*, one might search pre-Code bankruptcy cases for judicial expressions of a policy of deference. This approach would not, however, have enabled an interpreter to predict the result in *BFP*, in which the Court deferred to state foreclosure law simply because such law had co-existed for centuries with fraudulent transfer law. Bankruptcy law and labor law have also co-existed, yet the Court in *Bildisco* declined to defer to labor law. These interpretive problems arise because the Justices hold conflicting views concerning the role of pre-Code practices in Bankruptcy Code interpretation and concerning how to reconcile the Bankruptcy Code with other state or federal law. The challenge of discerning the Justices' views on these interpretive issues is further complicated by the fact that some Justices who generally reject appeals to pre-Code practice (notably Justices Scalia and Thomas),⁷⁹³ will go to interpretive extremes to defer to state law.⁷⁹⁴ This deference apparently is rooted in some ill-defined, unarticulated, and doctrinally suspect notion of federalism.

The cases in which the Court considered a governmental tax claim or enforcement proceeding arguably show more consistent interpretive patterns. Although some commentators have suggested that the Court defers unreasonably to governmental claims, the cases suggest a coherent jurisprudence.

The government won all three of the cases in which the debtor argued that bankruptcy law exempted the estate from compliance with governmental enforcement proceedings, and the one case in which the debtor sought to recover trust fund tax payments that the debtor could not have recovered out of bankruptcy.⁷⁹⁵ The government also won the two cases in which the debtor sought to subordinate governmental tax claims.⁷⁹⁶ The government was not, however, exempt from the Bankruptcy Code's turnover provision.⁷⁹⁷ Similarly, in one case, the Court held that the government's interest in designating payments as non-trust-fund taxes did not overcome the debtor's interest in designating payments as trust fund taxes.⁷⁹⁸ These cases suggest that the Bankruptcy Code does not exempt the estate from complying with governmental

⁷⁹³ See, e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, Ltd.*, 119 S. Ct. 1411 (1999).

⁷⁹⁴ See, e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

⁷⁹⁵ See *Holywell Corp. v. Smith*, 503 U.S. 47 (1992) (holding that bankruptcy did not exempt the trustee of a reorganization trust from filing returns and paying taxes); *Board of Governors of the Fed. Reserve v. MCorp Fin., Inc.*, 502 U.S. 32 (1991) (holding that the stay did not bar a Federal Reserve Board enforcement proceeding against debtor bank holding company); *Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990) (holding that the debtor could not recover as preferential transfers tax payments that had been made from trust funds); *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989) (holding that bankruptcy did not exempt the estate from state taxes on liquidation sales).

⁷⁹⁶ See *United States v. Noland*, 517 U.S. 535 (1996); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996).

⁷⁹⁷ See *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

⁷⁹⁸ See *United States v. Energy Resources Co.*, 495 U.S. 545 (1990).

enforcement proceedings, and that the government's status as tax collector neither exempts it from Bankruptcy Code rules (such as turnover) nor subjects it to special burdens (such as equitable subordination).

(d) The application of the law cases

Only two of the cases in which Justices wrote separate opinions involved neither constitutional questions, nor conflicts with non-bankruptcy law, nor interpretive disputes.⁷⁹⁹ In both of these cases, Justices wrote separately because they questioned the application of the law to the facts.⁸⁰⁰

In summary, the Court's Bankruptcy Code cases reveal that interpretive disputes drive most of the Court's separate opinions. Interpretive disputes among the Justices in these cases have generally followed predictable patterns. Part 2 summarizes these patterns.

=S3

2. Patterns of disputes among the Justices @

First, although no single Justice has consistently applied the same interpretive method in each case, certain Justices favor textual interpretation while other Justices favor more flexible interpretive methods. Second, particular Justices disagree regularly with the other Justices over interpretive method.

First, Appendix VI records the interpretive method used in each decision that each Justice joined.⁸⁰¹ Appendix VII, which summarizes the data from Appendix VI, reveals each Justice's rates of joining textual, non-textual, and pre-Code practice cases.⁸⁰²

Not surprisingly, Appendix VII shows that Justices Thomas and Scalia joined textual opinions at a higher rate (60%), than any other Justice. Justice Souter (at 50%) was not far behind.⁸⁰³

At the other end of the spectrum, Justices Stevens (15%) and Brennan (14%) joined textual opinions far less frequently than the other Justices. Former Chief Justice Burger and Justices Ginsburg, Marshall, and Powell joined textual opinions in 17-21% of the cases in which they participated.⁸⁰⁴

⁷⁹⁹ See *Field v. Mans*, 516 U.S. 59 (1995); *Farrey v. Sanderfoot*, 500 U.S. 291 (1991).

⁸⁰⁰ See *Farrey*, 500 U.S. at 301-04 (Kennedy, J., concurring); *Farrey*, 500 U.S. at 300 n.4 (Scalia, J., declining to join a portion of the opinion); *Field*, 516 U.S. at 78 (Ginsburg, J., concurring); *Field*, 516 U.S. at 79 (Breyer, J., dissenting).

⁸⁰¹ See Appendix VI, *post*.

⁸⁰² See Appendix VII, *post*.

⁸⁰³ *Id.*

⁸⁰⁴ *Id.*

In the center, leaning toward textualism, we find Justices Kennedy (42%) and White (37%), and Chief Justice Rehnquist (37%). Justices O'Connor (32%), Breyer (30%) and Blackmun (29%) lean slightly further away from textualism.⁸⁰⁵

The Justices' rates of joining opinions that defer to pre-Code practice reflect a similar, but slightly less regular, pattern.

At the textualist end, Justices Thomas, Scalia, and Souter joined pre-Code practice opinions in only 14-15% of the cases in which they participated. Justice White joined pre-Code practice opinions in 17% of his cases. Former Chief Justice Burger did not join any pre-Code practice opinions.⁸⁰⁶

Justices Powell, Ginsburg, Brennan, and Breyer joined pre-Code practice opinions in 40-50% of the cases in which they participated.⁸⁰⁷

The six remaining Justices, Chief Justice Rehnquist and Justices Kennedy, O'Connor, Blackmun, Marshall, and Stevens joined pre-Code practice opinions in 20-29% of the cases in which they participated.⁸⁰⁸

In summary, Justices Scalia, Thomas, and Souter have generally joined textual, anti-pre-Code practice opinions. Justices Ginsburg, Powell, and Brennan have generally joined non-textual, pre-Code practice opinions. Justice Stevens is strongly non-textual, but less strongly pre-Code practice oriented. The remaining Justices fall in the center of this spectrum.⁸⁰⁹

Although these data reveal individual Justices' interpretive proclivities, they also reflect that none of the Justices have joined exclusively textual or exclusively non-textual opinions. We can either accuse the Justices of interpretive dishonesty, or we can surmise that even the textualists occasionally find enough ambiguity to consult sources other than the text, and that even the non-textualists occasionally find the text to be so plain that no reference to other sources is appropriate. Some Justices clearly lean toward textualism while others lean away from textualism. The Justices' varied interpretive preferences clearly cause many of the Court's split decisions in bankruptcy cases and contribute to the sense that the Court has no coherent interpretive strategy.

Second, Appendix IV records whether each Justice joined a majority, concurring, or dissenting opinion in each case.⁸¹⁰ Appendix V, which summarizes the data from

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.*

⁸¹⁰ See Appendix IV: Distribution of Justices' Opinions in Supreme Court Bankruptcy Code Cases [hereinafter, "Appendix IV"], *post*. The form of this Appendix is borrowed, with gratitude, and with alterations, from Professors Tabb and Lawless. See Tabb, *supra* note 7, at 583; Tabb & Lawless, *supra* note 7, at 892.

Appendix IV, shows each Justice's rate of dissent and divergence (i.e., joining a non-majority opinion) in the Court's Bankruptcy Code cases.⁸¹¹

Not surprisingly, Appendix V reveals that Justices Stevens and Scalia diverged from the majority frequently. Justice Scalia joined non-majority opinions in 25% of the cases in which he participated. Justice Stevens joined non-majority opinions 33% of his cases. Justice Ginsburg is the only other sitting Justice who diverged from the majority opinion in more than 25% of the cases in which she participated. The retired Justices who joined non-majority opinions in more than 25% of the cases in which they participated are Justices Brennan, Blackmun, and Marshall.⁸¹²

At the other end of the spectrum, Former Chief Justice Burger, Chief Justice Rehnquist, and Justices Powell, Kennedy, and Thomas diverged from the majority in fewer than 10% of the cases in which they participated.⁸¹³

Filling in the center were Justices Souter, White, and O'Connor, who diverged from the majority in 13-18% of their cases.⁸¹⁴

A review of the Court's separate opinions demonstrates that Justices Scalia and Stevens not only joined separate opinions more frequently than most of the other Justices, but that they also typically authored those separate opinions. Consider the cases in which only one Justice wrote a separate opinion (concurrency or dissent).

After Justice Scalia joined the Court,⁸¹⁵ the Court issued ten cases in which a single Justice diverged from the majority's opinion.⁸¹⁶ In eight of these cases, the lone Justice was Justice Scalia or Stevens.⁸¹⁷ In the other two cases, Justice Thomas dissented, in part, from a Justice Souter opinion and Justice Blackmun dissented from a Justice White opinion.⁸¹⁸

⁸¹¹ See Appendix V: Supreme Court Justices' Dissent and Divergence Rates in Bankruptcy Code Cases [hereinafter, "Appendix V"], *post*.

⁸¹² *Id.*

⁸¹³ *Id.*

⁸¹⁴ *Id.*

⁸¹⁵ Before Justice Scalia joined the Court, there was only one case in which a single justice wrote a separate opinion. See *Ohio v. Kovacs*, 469 U.S. 274 (1985) (Justice O'Connor joined the majority but also wrote a separate concurrence).

⁸¹⁶ See *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997) (per Ginsburg, J., with Stevens, J., dissenting); *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) (per Souter, J., with Thomas, J., concurring in part and dissenting in part); *Nobelman v. American Sav. Bank*, 508 U.S. 324 (1993) (per Thomas, J., with Stevens, J., concurring); *Patterson v. Shumate*, 504 U.S. 753 (1992) (per Blackmun, J., with Scalia, J., concurring); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (per Thomas, J., with Stevens, J., dissenting); *Owen v. Owen*, 500 U.S. 305 (1991) (per Scalia, J., with Stevens, J., dissenting); *Toibb v. Radloff*, 501 U.S. 157 (1991) (per Blackmun, J., with Stevens, J., dissenting); *Union Bank v. Wolas*, 502 U.S. 151 (1991) (per Stevens, J., with Scalia, J., concurring); *Begier v. Internal Revenue Serv.*, 496 U.S. 53 (1990) (per Marshall, J., with Scalia, J. concurring); *United States v. Energy Resources Co.*, 495 U.S. 545 (1990) (per White, J., with Blackmun, J., dissenting).

⁸¹⁷ See *supra* note 816 (*Rash*, *Nobelman*, *Patterson*, *Taylor*, *Owen*, *Toibb*, *Wolas*, *Begier*).

⁸¹⁸ See *supra* note 816 (*Reorganized CF&I*, *Energy Resources*).

A similar pattern emerges from the cases in which two Justices wrote or joined separate opinions.

Before Justice Scalia joined the Court, the Court issued only one seven-to-two decision.⁸¹⁹ Justice Stevens wrote the dissent, which Justice Marshall joined.⁸²⁰

After Justice Scalia joined the Court, the Court issued seven seven-to-two decisions.⁸²¹ In four of these, either Justice Scalia or Justice Stevens wrote the dissent.⁸²² In two, either Justice Stevens or Justice Scalia joined a dissent that another Justice wrote.⁸²³ In the seventh case, Justice Blackmun wrote a dissent, which Justice O'Connor joined.⁸²⁴ In an eighth case, Justice Stevens dissented and Justices Scalia and Thomas concurred.⁸²⁵

The cases in which three or four Justices diverged from the majority, which often involved constitutional questions or tensions between the Bankruptcy Code and other law rather than pure interpretive disputes, do not reflect such a clear pattern of divergence.⁸²⁶

⁸¹⁹ See *Central Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc.*, 454 U.S. 354 (1982) (per curiam).

⁸²⁰ See *Geiger*, 454 U.S. at 360 (Stevens, J., dissenting, joined by Marshall, J.).

⁸²¹ See *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995) (Stevens, J., dissenting, joined by Ginsburg, J.); *Field v. Mans*, 516 U.S. 59, 79 (1995) (Breyer, J., dissenting, joined by Scalia, J.); *Barnhill v. Johnson*, 503 U.S. 393, 403 (1992) (Stevens, J., dissenting, joined by Blackmun, J.); *Dewsnup v. Timm*, 502 U.S. 410, 420 (1992) (Scalia, J., dissenting, joined by Souter, J.); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 39 (1992) (Stevens, J., dissenting, joined by Blackmun, J.); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 564 (1990) (Blackmun, J., dissenting, joined by O'Connor, J.); *Kelly v. Robinson*, 479 U.S. 36, 53 (1986) (Marshall, J., dissenting, joined by Stevens, J.)

⁸²² See *supra* note 821 (*Celotex*, *Barnhill*, *Dewsnup*, *Nordic Village*).

⁸²³ See *supra* note 821 (*Field*, *Kelly*).

⁸²⁴ See *supra* note 821 (*Davenport*).

⁸²⁵ See *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. Partnership, Ltd.*, 119 S. Ct. 1411, 1424, 1426 (1999).

⁸²⁶ See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 131 (1995) (Ginsburg, J., concurring, joined by Stevens, J.); *Things Remembered*, 516 U.S. at 129 (Kennedy, J., concurring, joined by Ginsburg, J.) (presenting a jurisdictional question); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring), *Germain*, 503 U.S. at 256 (O'Connor, J., concurring, joined by White & Blackmun, JJ.) (presenting a jurisdictional question); *Farrey v. Sanderfoot*, 500 U.S. 291, 301 (1991) (Kennedy, J., concurring, joined by Souter, J.) (presenting a dispute over application of the law); *Granfinanciera v. Nordberg*, 492 U.S. 33, 65 (1989) (Scalia, J., concurring); *Granfinanciera*, 492 U.S. at 71 (White, J., dissenting), *Granfinanciera*, 492 U.S. at 91 (Blackmun, J., dissenting, joined by O'Connor, J.) (presenting a constitutional question); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 105 (1989) (O'Connor, J., concurring); *Hoffman*, 492 U.S. at 105 (Scalia, J., concurring), *Hoffman*, 492 U.S. at 106 (Marshall, J., dissenting, joined by Brennan, Blackmun & Stevens, JJ.); *Hoffman*, 492 U.S. at 111 (Stevens, J., dissenting, joined by Blackmun, J.) (presenting a constitutional question); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 89 (1982) (Rehnquist, J., concurring, joined by O'Connor, J.); *Marathon*, 458 U.S. at 92 (Burger, C.J., dissenting); *Marathon*, 458 U.S. at 92 (White, J., dissenting, joined by Burger, C.J. & Powell, J.) (presenting a constitutional question); *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) (Blackmun, J., concurring joined by Brennan & Marshall, JJ.)

In summary, the Justices disagree among themselves concerning what interpretive method is proper for the Bankruptcy Code. Most apparently, Justice Stevens favors more flexible interpretation, while Justices Scalia and Thomas favor textual interpretation. The other Justices tend to be less textual than Justices Thomas and Scalia but also less flexible than Justice Stevens. The Justices struggle not only to determine when textual interpretation resolves a case, but also when the Court should consult and defer to pre-Code laws or practices. As a result of these interpretive disputes among the Justices, the Court does not act as a body when it interprets Bankruptcy Code cases. Consequently, it often appears to be shifting between competing interpretive methods.

B. Advice for Courts, Advocates, and Interpreters

How can this study help interpreters achieve greater certainty during this time of upheaval in interpretive theory?

First, an understanding of the Court's interpretive methods should help interpreters predict the Court's rulings in future cases. Predictability is important not only for advocates who argue before the Court but also for lower courts, advocates who argue before the lower courts, and attorneys who counsel clients concerning how to proceed in the face of open bankruptcy law questions. The Court's opinions provide these players not only with substantive rules of law, but also with guidance concerning how the Court will interpret the Bankruptcy Code. The interpretive methods the Court employs are inextricable from the Court's rationale. Consequently, when lower courts reach conflicting rulings by applying different interpretive methods (such as text versus legislative history), an examination of the Court's interpretive approach in bankruptcy cases may help predict which of the lower court decisions will be overruled. Of course, the lower courts cannot always follow the interpretive approach that the Court's bankruptcy decisions seem to suggest. For example, even if a bankruptcy judge concludes that the Court would not rely heavily upon legislative history, the judge may be bound by a circuit precedent that relies heavily on legislative history.

Second, this study should allow interpreters to determine whether deficiencies in the Court's interpretive approach have resulted in either "bad" decisions or split decisions. Whether an interpreter sees deficiencies will depend upon her perspective. For example, a bankruptcy expert may argue that the Court has issued "bad" decisions or split decisions because some Justices failed to appreciate the unique characteristics and structure of the Bankruptcy Code. An interpretive theory expert may argue that the Court has issued "bad" decisions or split decisions because some Justices employed interpretive methods that violate basic precepts of interpretive theory. However one might define errors in the Court's Bankruptcy Code decisions, this study invites critics to open a two-way dialogue with the Court. One aspect of this dialogue, obviously, lies in the Court's

(presenting a constitutional question); *but see* *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 399 (1993) (O'Connor, J., dissenting, joined by Scalia, Souter & Thomas, JJ.) (presenting an interpretive dispute); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 249 (1989) (O'Connor, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) (presenting an interpretive dispute).

guidance to lower courts and interpreters concerning how to interpret the Bankruptcy Code. The other aspect lies in critics' response. If interpreters understand how the Court interprets bankruptcy cases, and see flaws in the Court's approach, those interpreters have an opportunity to improve the Court's bankruptcy jurisprudence by communicating their concerns to the Court. For example, critics can write law review articles that comment on the Court's interpretive deficiencies. Critics can also attempt to obviate bad decisions in future cases by writing amicus briefs that explain to the Court (for example) how the Bankruptcy Code's substantive structure mandates a certain result or how interpretive theory mandates a certain result.

This study has revealed that text, structure, and history are relevant to Bankruptcy Code interpretation.

First, the Justices disagree concerning when to look beyond the text. Cases in which one or more Justices insist that the meaning is plain and that no other sources should be examined usually split the Court. In contrast, cases in which the Court confirms apparent textual meaning through an analysis of the Bankruptcy Code's structure and the development of bankruptcy doctrine over time, more often result in unanimous or near-unanimous opinions. Consequently, interpreters are well-advised to consider the text in the context of the Bankruptcy Code's structure and the development of bankruptcy doctrine.

Second, as for structure, the Court's jurisprudence is not yet adequately developed. The Court's bankruptcy opinions show an interest in structural analysis, but do have always display a sophisticated understanding of the substantive interactions among different provisions of the Bankruptcy Code. Even the textualist Justices are willing to consider the Bankruptcy Code's structure, as part of their holistic interpretation of the Bankruptcy Code, although Justice Thomas tends to focus almost exclusively on linguistic structure. The Justices will consider the Bankruptcy Code's design, if they perceive that design within the Bankruptcy Code's language. They are less willing to consider unsupported appeals to "good policy." Consequently, interpreters should locate bankruptcy "policy" not in external pronouncements, but rather, in the substantive structure of the Bankruptcy Code. The Court's most thoughtful decisions understand the substantive structure, or music, of the Bankruptcy Code. Some of these opinions have benefited from the guidance of briefs submitted by leading bankruptcy luminaries.⁸²⁷ Several of the opinions in which the Court failed to engage in a thoughtful analysis of the substantive structure of the Bankruptcy Code were decided without the benefit of such input.⁸²⁸

Third, as for history, the Court's Bankruptcy Code opinions (particularly those decided after Justice Scalia joined the Court) generally disfavor a detailed parsing of legislative history. They do, however, often engage in a thoughtful analysis of how the

⁸²⁷ See, for example, the Court's unanimous opinions in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988) (some of the bankruptcy experts on the briefs or otherwise involved were A. Bruce Schimberg, J. Ronald Trost, Shalom L. Kohn, Frank R. Kennedy, Thomas H. Jackson, Harvey R. Miller, Martin Bienenstock, Richard Levin, Kenneth N. Klee, and Raymond T. Nimmer), and *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (some of the bankruptcy experts on the briefs were David A. Epstein and David F. Heroy).

⁸²⁸ See, e.g., *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (no nationally recognized bankruptcy experts on the briefs).

Bankruptcy Code's current text and structure are consistent with the development of bankruptcy doctrine over time.

As for the pre-Code canon, its future is unclear. Many cases consider pre-Code practice as a part of the Bankruptcy Code's broad history. It is clear from the Court's Bankruptcy Code opinions that pre-Code practices are most relevant when the Bankruptcy Code's text is ambiguous, the pre-Code practices were well-established, and the Bankruptcy Code has not obviously and significantly altered those practices. The complicated relationship between the plain meaning rule, pre-Code practice, and "policies" of deference to state and federal law or important governmental interests, however, seriously cloud attempts to define a coherent pattern in the Court's pre-Code jurisprudence. The Court's seemingly inconsistent decisions in this area may also have been affected by federalism concerns and state's interests philosophy of some of the more conservative Justices.

In summary, interpreters seeking to understand the Court's likely ruling in future cases would be well-advised to engage in a thoughtful analysis of the text and structure of the Bankruptcy Code. They should also examine the development of bankruptcy doctrine, including pre-Code practices, but they should be cautious about relying heavily on pre-Code practices if those practices were not well-established or the Bankruptcy Code seems to have altered those practices. In those situations, interpreters must examine the substantive structure of the Bankruptcy Code to determine how the Bankruptcy Code modified pre-Code practices. Interpreters should consult legislative history to enhance their understanding of the development of bankruptcy doctrine; however, they should be chary of relying heavily on detailed analyses of specific statements in the legislative history. Finally, although the Court frequently refers to bankruptcy policy, its recent Bankruptcy Code opinions generally mention policy only in a supporting role, usually refer only to bankruptcy's two over-arching policies (fresh start/rehabilitation and equitable distribution), and often ground those policies in the Bankruptcy Code's structure.

Advocates, lower court judges, and bankruptcy scholars can, and should, help the Court better understand the music of the Bankruptcy Code. They can accomplish this through thoughtfully written briefs, opinions, and law review articles that place the text of disputed Bankruptcy Code provisions in the context of the linguistic and substantive structure of the Bankruptcy Code. They should also place the text in the context of the development of bankruptcy doctrine over time. When bankruptcy judges write bankruptcy opinions, particularly concerning controversial bankruptcy issues, they are encouraged to elaborate each of these elements (text, context, development of bankruptcy doctrine). Bankruptcy judges have a profound depth of understanding of the Bankruptcy Code. Even if they believe that the text answers a question, they can educate the higher courts, which lack such expertise, by explaining why the text is consistent with the Bankruptcy Code's linguistic and substantive structure and with the development of bankruptcy doctrine over time.

Finally, the bankruptcy bar (which includes several official organizations of diverse groups of bankruptcy attorneys) should consider becoming more involved in Supreme Court bankruptcy cases (for example, by submitting amicus briefs).

V. CONCLUSIONS AND RECOMMENDATIONS

This study has demonstrated that the Court does not apply a single interpretive method in its Bankruptcy Code cases. Nevertheless, this study reveals several strong interpretive patterns that should guide interpreters. Interpreters should study these patterns to enhance their understanding of the Court's interpretive methods. Advocates, judges, and scholars who study these patterns and address the varied elements of bankruptcy interpretation in their briefs, opinions, and scholarly works can help the Court better understand the music of the Bankruptcy Code.

Having identified the Court's current interpretive practices, we must next consider whether the Court's somewhat inconsistent group of interpretive practices provides a desirable method of Bankruptcy Code interpretation. This can be done by considering what interpretive methods seem well-suited to a complex statute with the unique characteristics of the Bankruptcy Code, and by determining whether either the Court's current practices or practically desirable practices satisfy the complicated requirements of interpretive theory.

ENVIRONMENTAL JUSTICE INDEX II

Denis Binder¹

Five years ago, I compiled an index of environmental justice cases.² The time has come to update this index in light of the substantial increase in environmental justice litigation.

The goal is to again present an index of primary case law. For consistency purposes, I have only included cases published in the *West Reporter System*, *West Law*, or in loose-leaf services because they are readily available in law libraries. I have not included jury verdicts³ and unpublished trial court opinions.

Law review articles⁴ and other secondary authority⁵ lie outside the scope of this index. The secondary literature is both extensive and excellent.⁶ This index also excludes the developing area of state statutes⁷ and administrative law materials, such as regulations and hearings.⁸

With these premises in mind, certain observations are in order. First, the case law has truly multiplied geometrically in the preceding five years. The original index included a number of historical cases, which may not have, on the surface, presented environmental justice issues,⁹ perhaps because such legal arguments were unavailable earlier. Cases, of course, have to be pled with recognized causes of action. Today, litigation is widely pursued throughout the judicial system with a significant number of state cases.

Second, certain long-standing problems, such as freeway siting disputes, are still with us, as are attempts to exclude minority developments from affluent communities.

Third, a wide variety of causes of action are now alleged. Significantly, as with other actions against local governmental bodies, 42 U.S.C. § 1983 has become a very

¹ Professor, Chapman University School of Law.

² Denis Binder, *Index of Environmental Justice Cases*, 27 URB. LAW. 163 (1995).

³ One of the most famous examples is a jury in Louisiana awarding \$2.5 billion in punitive damages to residents of a predominately black neighborhood in New Orleans. The case involved no deaths, limited property damages, and mostly minor injuries, such as sore throats and burning eyes, when a railroad tank car ignited, causing a chemical fire which burned for 1 ½ days. 1,000 residents were evacuated. See Pamela Coyle, *Making a Case for Change*, 83 A.B.A. J. 38.

⁴ For listings of law review articles, see especially Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121 (1994); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Claims*, 24 ECOLOGY L.Q. 1, 3 n.1 (1997); and Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulations*, 76 DENV. U.L. REV. 1, nn. 1 & 5 (1998).

⁵ See especially KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS AND COMMENTARY ON ENVIRONMENTAL LAW AND PRACTICE (1995).

⁶ See e.g., Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1 (1995); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1988); Robert M. Collin and Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speak for Themselves*, 13 J. ENVTL. L. & LIT. 37 (1998); and Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J.L. & COM. 597 (1996).

⁷ See Been & Gupta, *supra* n.3 at 4, n.7.

⁸ See, e.g., "In the Matter of the Appeal of the People United for a Better Oakland," Bay Area Air Quality Management District Docket No. 3165 (April 2, 1998).

⁹ See especially *Nicholson v. Conn. Halfway House, Inc.*, 218 A.2d 383 (Conn. 1968).

popular cause of action. Indeed, much of the litigation involving local disputes has been filed in federal court utilizing federal causes of action. Title VI of the Civil Rights Act of 1964 is also very popular, as are various constitutional theories.

In presenting the cases this year I have listed cases not only by the nature of the factual dispute, but, also by specific causes of action. I accept at face value both the facts and causes of action pled. The goal is to simply present a ready reference of published litigation, and not act like an umpire in assessing the success of the claims.¹⁰

One final caveat is in order. While attempting to be inclusive, I recognize that some cases may have been overlooked. If so, they will be included in subsequent indices.¹¹

NATURE OF DISPUTE

DENIAL OF PERMITS

Fountain Church of God in Christ v. Charter Township of Scio, 40 F. Supp. 2d 899 (E.D. Mich. 1999) (churches);

Jackson v. City of Auburn, Ala., 41 F. Supp. 2d 1300 (M.D. Ala. 1999) (duplexes);

Woodwind Estates, Ltd. V. Gretkowski, 39 F. Supp. 2d 537 (M.D. Pa. 1999) (subdivisions).

DISCRIMINATORY ENFORCEMENT OF HEALTH AND SAFETY CODES

Barnes Found. v. Township of Lower Merion, 982 F. Supp. 970 (E.D. Pa. 1997);

Contreras v. City of Chicago, 920 F. Supp. 1370 (N.D. Ill. 1996); *aff'd in part*, 119 F.3d 1286 (7th Cir. 1997).

DISCRIMINATORY ENFORCEMENT OF ZONING LAWS

Riley v. Town of Bethlehem, 44 F. Supp. 2d 451 (N.D.N.Y. 1999).

DISPARATE PROVIDING OF PUBLIC SERVICES

Hawkins v. Town of Shaw, Miss., 437 F.2d 1286 (5th Cir. 1971);

Johnson v. City of Arcadia, Fla., 450 F. Supp. 1363 (M.D. Fla. 1978).

FAIR HOUSING ACT/COMMUNITY LENDING

Jones v. Office of the Comptroller of the Currency, 983 F. Supp. 197 (D.D.C. 1997).

HIGHWAYS

Bryant v. N. J. Dep't of Transp., 1 F. Supp. 2d 426 (D.N.J. 1998);

Bryant v. N. J. Dep't of Transp., 998 F. Supp. 438 (D.N.J. 1998);

Bryant v. N. J. Dep't of Transp., 987 F. Supp. 343 (D.N.J. 1998);

¹⁰ Cf. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n.*, 449 F.2d 1109, 1119 (D.C. Cir. 1971).

¹¹ All suggestions for inclusion in future indices will be greatly appreciated. We have included cases in this index which were omitted in the earlier index. See, e.g., *Detroit Branch, NAACP v. City of Dearborn*, 434 N.W.2d 444 (Mich. 1988), *leave to appeal denied*, 433 Mich. 906 (1989).

Jersey Heights Neighborhood Ass'n v. Glendening, 2 F. Supp. 2d 772 (D. Md. 1998), *aff'd in part, rev. in part*, 174 F.3d 180 (4th Cir. 1999).

HIGHWAY SOUND BARRIERS

Tolbert v. Ohio Dep't of Transp., 172 F.3d 934 (6th Cir. 1999).

INDUSTRIAL FACILITY

A to Z Paper Co., Inc. v. Carlo Ditta, Inc., 720 So. 2d 703 (La. Ct. App. 1998) (cement plant).

LOCAL OPPOSITION TO TOWNHOUSES/PUBLIC HOUSING

Township of South Fayette v. Allegheny County Hous. Auth., 27 F. Supp. 2d 582 (W.D. Pa. 1998).

LOW INCOME HOUSING

Tyler v. Cisneros, 136 F.3d 603 (9th Cir. 1998).

PUBLIC HOUSING

Glendale Neighborhood Ass'n v. Greensboro Hous. Auth., 956 F. Supp. 1270 (M.D.N.C. 1996);

Township of South Fayette v. Allegheny County Hous. Auth., 27 F. Supp. 2d 582 (W.D. Pa. 1998).

REFUSAL TO ANNEX PREDOMINATELY AFRO-AMERICAN HOUSING PROJECT

Burton v. City of Belle Glade, 966 F. Supp. 1178 (S.D. Fla. 1997);

West Dallas Coalition for Env'tl. Justice v. United States, 29 ENV'T'L L. REP. 20, 420, 1998 WL 892122 (N.D. Tex. 1998);

West Dallas Coalition for Env'tl. Justice v. United States, 1999 WL 102810 (N.D. Tex. 1999).

RESIDENTIAL HOME FOR MENTALLY RETARDED

De Jesus-Keolamphu v. Village of Pelham Manor, 999 F. Supp. 556 (S.D.N.Y. 1998).

RESTRICTING USE OF CITY PARKS TO RESIDENTS

Detroit Branch, NAACP v. City of Dearborn, 434 N.W.2d 444 (Mich. 1988), *leave to appeal denied*, 447 N.W.2d 751 (Mich. 1989); 433 Mich. 906 (1989).

STATE ENVIRONMENTAL POLICY ACTS

Chinese Staff & Workers Ass'n v. City of New York, 502 N.E.2d 176 (N.Y. 1986) (Luxury condominium that would displace low-income residents).

STATE LAW SUITS

Alabama:

Horn v. City of Birmingham, 718 So. 2d 694 (Ala. 1998).

Louisiana:

A to Z Paper Comp., Inc. v. Carlo Ditta, Inc., 720 So. 2d 703 (La. Ct. App. 1998).

Texas:

Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Env'tl. Justice, 962 S.W.2d 288 (Tex. Ct. App. 1998).

URBAN RENEWAL

Hispanics United of DuPage County v. Village of Addison, Ill., 988 F. Supp. 1130 (N.D. Ill. 1997) (judicially approved settlement).

WASTE FACILITIES

Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915 (1998), 118 S. Ct. 2296, *dismissed as moot*, 524 U.S. 974 (1998), 119 S. Ct. 22 (permit revoked);

Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Env'tl. Justice, 962 S.W.2d 288 (Tex. Ct. App. 1998);

Horn v. City of Birmingham, 718 So. 2d 694 (Ala. 1998) (settlement/attorney fees);

South Bronx Coalition for Clean Air, Inc. v. Conroy, 20 F. Supp. 2d 565 (S.D.N.Y. 1998).

CAUSES OF ACTION/CLAIMS PLED

FIRST AMENDMENT

Barnes Foundation v. Township of Lower Merion

Burton v. City of Belle Glade

Contreras v. City of Chicago

FOURTH AMENDMENT

Contreras v. City of Chicago

FIFTH AMENDMENT

Hill v. City of Houston

West Dallas Coalition for Environmental Justice v. United States

EIGHTH AMENDMENT

Hill v. City of Houston

THIRTEENTH AMENDMENT

Burton v. City of Belle Glade

FOURTEENTH AMENDMENT – Due Process Clause

Barnes Foundation v. Township of Lower Merion

Contreras v. City of Chicago

Hill v. City of Houston
Riley v. Town of Bethlehem
Tyler v. Cisneros

FOURTEENTH AMENDMENT – Equal Protection Clause

Barnes Foundation v. Township of Lower Merion
Burton v. City of Belle Glade
Contreras v. City of Chicago
Hill v. City of Houston
Jackson v. City of Auburn, Alabama
Jersey Heights Neighborhood Association v. Glendening
Riley v. Town of Bethlehem

FIFTEENTH AMENDMENT

Burton v. City of Belle Glade

COMMERCE CLAUSE:

Riley v. Town of Bethlehem

42 U.S.C. § 1981

De Jesus-Keolampho v. Village of Pelham Manor
Foundation Church of God in Christ v. Charter Township of Scio
Riley v. Town of Bethlehem
Tolbert v. State of Ohio Department of Transportation
Woodwind Estates, Ltd. v. Gretkowski

42 U.S.C. § 1982

Foundation Church of God in Christ v. Charter Township of Scio
Riley v. Town of Bethlehem
Tolbert v. State of Ohio Department of Transportation
West Dallas Coalition for Environmental Justice v. United States

42 U.S.C. § 1983

Barnes Foundation v. Township of Lower Merion
Burton v. City of Belle Glade
Contreras v. City of Chicago
De Jesus-Keolamphu v. Village of Pelham Manor
Foundation Church of God in Christ v. Charter Township of Scio
Hill v. City of Houston
Jackson v. City of Auburn, Alabama
Jersey Heights Neighborhood Association v. Glendening
Riley v. Town of Bethlehem
Tolbert v. Ohio Department of Transportation
Tyler v. Cisneros
Woodwind Estate, Ltd. v. Gretkowski

42 U.S.C. § 1985

De Jesus-Keolamphu v. Village of Pelham Manor
Hill v. City of Houston
Riley v. Town of Bethlehem

42 U.S.C. § 1986

Hill v. City of Houston

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Bryant v. New Jersey Department of Transportation
Burton v. City of Belle Glade
Chester Residents Concerned for Quality Living v. Seif
De Jesus-Keolamphu v. Village of Pelham Manor
Hispanics United of DuPage County v. Village of Addison, Illinois
Jersey Heights Neighborhood Association v. Glendening
South Bronx Coalition for Clean Air, Inc. v. Conroy

FAIR HOUSING ACT

De Jesus-Keolamphu v. Village of Pelham Manor
Glendale Neighborhood Association v. Greensboro Housing Authority
Hispanics United of Du Page County v. Village of Addison, Illinois
Jackson v. City of Auburn, Alabama
Jersey Heights Neighborhood Association v. Glendening
Jones v. Office of Comptroller of the Currency

ADMINISTRATIVE PROCEDURE ACT

Glendale Neighborhood Association v. Greensboro Housing Authority
Jones v. Office of the Comptroller of the Currency
Tyler v. Cisneros
West Dallas Coalition for Environmental Justice v. United States

FEDERAL AID TO HIGHWAY ACT

Jersey Heights Neighborhood Association v. Glendening

NATIONAL HISTORIC PRESERVATION ACT

Tyler v. Cisneros

RESOURCE CONSERVATION AND RECOVERY ACT

West Dallas Coalition for Environmental Justice v. United States

NEPA

Jersey Heights Neighborhood Association v. Glendening
South Bronx Coalition for Clean Air, Inc. v. Conroy
Tyler v. Cisneros

VOTING RIGHTS ACT

Burton v. City of Belle Glade

STATE CLAIMS

Bryant v. New Jersey Department of Transportation (New Jersey)

De Jesus-Keolamph v. Village of Pelham Manor (New York)

Foundation Church of God in Christ v. Charter Township of Scio (Michigan)

Hill v. City of Houston (Texas)

Jersey Heights Neighborhood Association v. Glendening (Maryland)

Riley v. Town of Bethlehem

South Bronx Coalition for Clean Air, Inc. v. Conroy (New York)

Woodwind Estates, Ltd. V. Gretkowski (Pennsylvania)

THE ENDANGERED SPECIES ACT’S APPLICATION TO ISOLATED SPECIES:
A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE?

by Jeanine A. Scalero¹

TABLE OF CONTENTS

<u>I. INTRODUCTION</u>	2
<u>II. THE ENDANGERED SPECIES ACT</u>	3
<u>III. THE COMMERCE CLAUSE POWER</u>	6
<u>A. History of Commerce Clause Jurisprudence</u>	6
<u>B. <i>United States v. Lopez</i></u>	9
<u>1. Majority And Concurring Opinions</u>	10
<u>2. The Dissent:</u>	13
<u>3. The Modern Understanding</u>	14
<u>IV. COMMERCE CLAUSE JURISPRUDENCE IN ENVIRONMENTAL LEGISLATION</u>	16
<u>A. Before <i>Lopez</i></u>	16
<u>B. Post <i>Lopez</i> Challenges</u>	18
<u>C. Attack on Isolated Wetlands</u>	20
<u>V. FEDERAL JURISDICTION OVER ISOLATED SPECIES UNDER THE TAKE BY HABITAT MODIFICATION PROVISION</u>	22
<u>A. Before <i>Lopez</i></u>	22
<u>B. After <i>Lopez</i>: <i>Home Builders v. Babbitt</i></u>	23
<u>1. The Majority Opinion:</u>	24
<u>2. Judge Henderson’s Concurrence:</u>	26
<u>3. Judge Sentelle’s Dissent:</u>	27
<u>VI. ISOLATED ENDANGERED SPECIES SHOULD BE PROTECTED UNDER THE ENDANGERED SPECIES ACT</u>	28
<u>A. Challenges To Isolated Endangered Species:</u>	28
<u>1. Areas of Traditional State Concern</u>	30
<u>2. Economic Activities</u>	32
<u>B. Isolated Species Link to Interstate Commerce Is Found in Biodiversity</u>	33

¹ Associate, Cadden, Fuller & Burkhalter LLP, Irvine; J.D., Chapman University School of Law, 1999; B.A., California State University, Fullerton, 1991. The author wishes to thank Professors Craig Anthony (Tony) Arnold and Denis Binder for their guidance in this research project. The author would also like to thank Joseph Horvath for his assistance with research and editing.

<u>C. Cumulative Effects Doctrine:</u>	36
<u>VII. CONCLUSION</u>	38

I. INTRODUCTION

The Endangered Species Act² (“ESA”) celebrated its 25th anniversary on December 28, 1998. The Act was passed overwhelmingly by a Congress that sought to protect such creatures as the bald eagle. However, the Act is under renewed attack as private landowners, incensed by government control of their property, seek to have portions of the Act declared unconstitutional.

The constitutional basis for many environmental statutes, including the ESA, is the Commerce Clause, which grants Congress the authority to regulate activities that affect interstate commerce.³ This clause has historically been broadly construed until the recent Supreme Court decision of *United States v. Lopez*.⁴ The *Lopez* decision narrowed the reach of the Commerce Clause by requiring Congress to show a substantial effect on interstate commerce in order for federal laws to withstand constitutional attack.⁵

The ESA’s application to isolated species is ripe for constitutional challenge. Isolated species are those which are indigenous to a specific geographic region, and are nonmigratory. Opponents may argue that these species cannot have a “substantial effect” on interstate commerce if they are not moving across state lines. A recent decision from the Fourth Circuit, *United States v. Wilson*,⁶ rejected the application of the Clean Water Act⁷ (“CWA”) to an isolated wetland for lack of a substantial effect on interstate commerce.⁸ In contrast, a panel of the United States Court of Appeals for the D.C. Circuit recently upheld application of the ESA to an isolated species in *National Association of Home*

² Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

³ U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

⁴ *United States v. Lopez*, 514 U.S. 549 (1995).

⁵ *Id.* at 559.

⁶ *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

⁷ Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994).

⁸ *Wilson*, 133 F.3d at 258.

Builders v. Babbitt.⁹ Unfortunately, the value of this decision as precedent remains to be seen, since the two judges in the majority failed to agree upon a rationale under Commerce Clause authority, and the third judge dissented.

This Note discusses whether the ESA should apply to isolated endangered species, after *Lopez*'s limitation on congressional Commerce Clause power. Section II outlines the relevant provisions of the ESA. Section III then reviews the history of the Commerce Clause, including *Lopez*. Section IV summarizes Commerce Clause jurisprudence in environmental legislation before and after *Lopez*. Section V discusses federal jurisdiction over isolated species and the "take by habitat modification" provision. Finally, section VI provides an analysis of why Congress can and should regulate isolated species under the ESA.¹⁰

II. THE ENDANGERED SPECIES ACT

The Endangered Species Act was enacted by Congress in 1973 as a vehicle for conserving endangered and threatened species and their ecosystems.¹¹ The goal of the Act was not only to prevent the extinction of animal and plant species caused by man's influence on their ecosystems, but also to restore the species as viable components of their ecosystems.¹² The ESA reflects congressional recognition of the multitude of benefits of species preservation. Congress stated that the ESA was necessary because "fish, wildlife, and plants are of esthetic, ecological, educational, historical,

⁹ National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

¹⁰ But see David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365, 366 (1998) (arguing that Congress does not have the power to regulate isolated species under the Endangered Species Act).

¹¹ 16 U.S.C. § 1531(b) (1994); see also *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738 (D. Idaho 1996) (noting that the Endangered Species Act "is a comprehensive statutory scheme aimed at conserving endangered and threatened species and the ecosystems on which they depend"); *Palila v. Hawaii Dep't of Land and Natural Resources*, 649 F. Supp. 1070, 1076 (D. Haw. 1986) (arguing that one of the main purposes of the Endangered Species Act was to conserve and preserve ecosystems upon which endangered species depend).

¹² H.R. REP. NO. 95-1625, at 3 (1978), reprinted in 1978 U.S.C.C.A.N. 9453.

recreational, and scientific value to the Nation and its people.”¹³ Congress had the authority to enact the ESA under the Commerce Clause, because of the link between these values and interstate commerce.¹⁴

The 1973 Act repealed the Endangered Species Conservation Act of 1969,¹⁵ broadened federal responsibilities to list species, and increased federal authorization and programs to ensure their survival.¹⁶ The impetus for the renewed Act was congressional concern about rapidly deteriorating fish, wildlife and plant habitats, the indiscriminate utilization of plants and animals, and the increasing numbers of species threatened with extinction.¹⁷ Congress expressed concern not only about hunting and direct destruction or exploitation of endangered species, but also development, which destroys habitats and leads to the extinction of species.¹⁸ Because of economic growth, various species had already become extinct and other species were rapidly decreasing in numbers and in danger of extinction.¹⁹

To implement the ESA section 4 directs the Secretary of Commerce or Interior to establish a list of species determined to be “endangered” or “threatened,” and to designate the critical habitat of the species, based upon the best scientific data available.²⁰ The U.S. Fish and Wildlife Service (“FWS”) now lists 1,217 endangered and threatened plants and animals in the United States alone.²¹ The Secretary must also describe activities, in the Secretary’s opinion, which would adversely affect such habitat. Furthermore, section 7(a)(2) requires all federal agencies to work with the Secretary to ensure that their activities will not “jeopardize the continued existence of any endangered species or threatened

¹³ 16 U.S.C. § 1531(a)(3).

¹⁴ John C. Nagle, *The Commerce Clause Meets The Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 184-86 (1998).

¹⁵ Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

¹⁶ See H.R. REP. NO. 95-1625, at 3.

¹⁷ *Id.*

¹⁸ Craig Anthony Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 5-6 (1991).

¹⁹ 16 U.S.C. §§ 1531(a)(1), (2) (1994); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1979) (stating that the plain intent of Congress, in enacting the ESA, was to halt and reverse the trend towards species extinction, whatever the cost).

²⁰ 16 U.S.C. § 1533(a).

²¹ Division of Endangered Species, U.S. Fish & Wildlife Serv., *Listings and Recovery Plans for Endangered and Threatened Species* (last modified Nov. 30, 1999) <<http://www.fws.gov/>

species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary,” to be critical.²²

Even though the ESA is a federal regulatory scheme, certain provisions of the Act have significant state and local effects. The provision thought to be most susceptible to invalidation on Commerce Clause grounds is section 9(a)(1)(B). Section 9 specifically forbids any person from “taking” endangered species.²³ “Persons” include private individuals and entities, as well as federal, state, and local, governments and officials.²⁴ The ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁵ The FWS by regulation further defines “harm” to mean an act “which actually kills or injures wildlife.”²⁶ Such acts include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”²⁷ This regulation is commonly referred to as the “take by habitat modification” provision. It is this provision which is heavily criticized as an encroachment on private land development rights.²⁸

To lessen the impact, section 10(a) offers private landowners the opportunity to carry out a project by obtaining an incidental take permit. If a developer wants to build in an area inhabited by an endangered species, and the action may result in the incidental taking of that species, the developer must submit a comprehensive habitat conservation plan (“HCP”) to the FWS to obtain an incidental take permit.²⁹ The FWS scrutinizes the plan and hears public comment. The FWS will issue a permit if: (1) the taking will be incidental to an otherwise lawful activity; (2) the applicant will minimize and mitigate

r9endspp/boxscore.html>. For a complete listing of all the endangered and threatened wildlife, please see 50 C.F.R. § 17.11(h) (1999).

²² 16 U.S.C. § 1536(a)(2).

²³ 16 U.S.C. § 1538(a)(1)(B).

²⁴ 16 U.S.C. § 1532(13).

²⁵ 16 U.S.C. § 1532(19).

²⁶ 50 C.F.R. § 17.3 (1999).

²⁷ *Id.*

²⁸ Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 306-15, (1997); see also Arnold, *supra* note 18, at 2, 7-13; *Landowners Equal Treatment Act: Hearings on H.R. 1142 Before the House Comm. on Resources*, 106th Cong. 60 (1999) (testimony of Nancie G. Marzulla, Defenders of Property Rights); Frances C. James, *Lessons Learned From a Study of Habitat Conservation Planning*, 49 BIOSCIENCE 871 (1999).

the impacts of the taking; (3) there will be adequate funding for the conservation plan, and; (4) the taking will not appreciably reduce the likelihood of species survival.³⁰

Even though, land use has historically been a matter of local control,³¹ sections 9 and 10 grant the federal government extensive authority over private land use. Since almost 80% of all protected species have some or all of their habitat on privately owned land,³² the federal government's influence over local land use is immense. This growing influence under the authority of statutes like the ESA has been referred to by scholars as the "quiet federalization" of land use.³³ Further, the government influence is reinforced by the Act's strict penalties. For example, the penalties for violating section 9(a)(1)(B), as set out in section 11, include criminal penalties of a fine up to \$50,000, and imprisonment for one year.³⁴

III. THE COMMERCE CLAUSE POWER

A. History of Commerce Clause Jurisprudence

Article I, section 8, of the United States Constitution creates a federal government of enumerated powers.³⁵ James Madison stated that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."³⁶ This scheme was adopted to ensure the protection of our fundamental liberties and reduce the risk of tyranny.³⁷ The tripartite structure of the federal government prevents the accumulation of excessive power in any one branch, and similarly, a healthy balance of

²⁹ 16 U.S.C. § 1539(a).

³⁰ *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985).

³¹ Arnold, *supra* note 18, at 2.

³² James, *supra* note 28, at 871.

³³ Arnold, *supra* note 18, at 3 (citing F. BOSSELMAN ET AL., *FEDERAL LAND USE REGULATION* (1977)).

³⁴ 16 U.S.C. § 1540(b).

³⁵ U.S. CONST., art. I, § 8.

³⁶ *THE FEDERALIST* NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

³⁷ *United States v. Lopez*, 514 U.S. 549, 552 (1995)

power between state and the federal government reduces the risk of tyranny from both. It is this tension between federal and state power that ensures the promise of liberty.³⁸

Under this structure, Congress has been delegated the enumerated power “to regulate Commerce with foreign Nations, and among the several States.”³⁹ Throughout the history of Commerce Clause jurisprudence, courts struggled to define “commerce.” Nevertheless, this power became “one of the most prolific sources of national power.”⁴⁰

To understand Commerce Clause power today, one must look at the early decisions interpreting the Clause, beginning in 1824 with *Gibbons v. Odgen*, which gave rise to the “effects doctrine.”⁴¹ In *Gibbons*, the Court held that Congress had not only the power to regulate interstate commerce but also the power to regulate intrastate activities that affected interstate commerce.⁴² Justice Marshall held that only activities “which are completely within a particular State, which do not affect other States,” fall outside the Commerce Clause power.⁴³ This principle was followed in *Houston East & West Texas Railway v. United States*, where the Court allowed Congress to set intrastate railway rates, because the rates had a negative impact on interstate commerce.⁴⁴ The Court held that the intrastate rates had “a close and substantial relation” to interstate traffic.⁴⁵

The protection of public morals also became possible via the Commerce Clause. For instance, *Champion v. Ames* gave rise to the “bar doctrine” when it upheld the Federal Lottery Act of 1895 which proscribed the transportation of lottery tickets interstate.⁴⁶ Justice Harlan, writing for the majority, held that Congress’s power included the power to prohibit items from moving within the flow of commerce.⁴⁷

³⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991); *Lopez*, 514 U.S. at 576.

³⁹ U.S. CONST., art. I, § 8, cl. 3.

⁴⁰ *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534 (1949).

⁴¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

⁴² *Id.* at 186-98.

⁴³ *Id.* at 195.

⁴⁴ *Houston E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 355 (1914).

⁴⁵ *Id.*

⁴⁶ *Champion v. Ames*, 188 U.S. 321 (1903).

⁴⁷ *Id.* at 362-63.

A more restrictive view of the Commerce Clause was seen in *A.L.A. Schechter Poultry Corp. v. United States*, which held that once an article was no longer in the stream of commerce, Congress may not regulate it.⁴⁸ The Court distinguished between “direct” and “indirect” effects. Activities that affected interstate commerce directly were within Congress’s power; and activities that affected interstate commerce indirectly were beyond Congress’s reach.⁴⁹ *Carter v. Carter Coal Co.* distinguished between production and commerce, holding that there was no direct relation between the two, even though the goods produced would later move across state lines.⁵⁰

Expansion of the Commerce Clause power returned in 1937, with the decision in *NLRB v. Jones & Laughlin Steel Corp.*⁵¹ The Court held that Congress could regulate labor relations, when a labor stoppage of intrastate manufacturing operations would have a substantial effect on interstate commerce.⁵² The Court abandoned prior distinctions between “direct” and “indirect” effects on interstate commerce;⁵³ and rejected precedent which would not allow regulation in areas commonly left to state control, such as production and manufacturing.⁵⁴

United States v. Darby also upheld the Fair Labor Standards Act, which set minimum wage and maximum hours for employees engaged in the production of goods for interstate commerce.⁵⁵ The Court held that, while manufacturing was not itself interstate commerce, the shipment of manufactured goods was such commerce; and the prohibition of its shipment was a regulation of commerce. The Court stated that “[t]he power to regulate commerce is the power ‘to prescribe the rule by which commerce is to be governed.’”⁵⁶

The peak of Commerce Clause power was in 1942 with the decision in *Wickard v. Filburn*.⁵⁷ The holding in *Wickard* allowed Congress to regulate the amount of wheat an individual farmer could

⁴⁸ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁴⁹ *Id.* at 544-47.

⁵⁰ *Carter v. Carter Coal Co.*, 298 U.S. 238, 303 (1936).

⁵¹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁵² *Id.*

⁵³ *A.L.A. Schechter Poultry*, 294 U.S. at 544-47.

⁵⁴ *Carter*, 298 U.S. at 304; *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

⁵⁵ *United States v. Darby*, 312 U.S. 100 (1941).

⁵⁶ *Id.* at 113 (citations omitted).

⁵⁷ *Wickard v. Filburn*, 317 U.S. 111 (1942).

raise under the Agricultural Adjustment Act of 1938, by looking at the “cumulative effects” of home produced wheat on the sales of wheat in commerce.⁵⁸ The Court held “that [an individual’s] own contribution to the demand for wheat may be trivial by itself where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”⁵⁹ *Wickard* marked the Court’s adoption of the cumulative effects doctrine.

Social issues were again regulated pursuant to the Commerce Clause in 1964. In *Heart of Atlanta Motel v. U.S.*, the congressional statute which guaranteed equal access to public places survived a Commerce Clause challenge.⁶⁰ The Court held that only a “rational basis” was required for Congress to find that discrimination placed a burden upon interstate commerce.⁶¹ In *Katzenbach v. McClung*, the Civil Rights Act of 1964 was similarly held not to violate the Constitution by imposing the legislation on a restaurant whose interstate activities were limited to the purchase of out-of-state beef.⁶² The decreased spending arising from a refusal to serve blacks was found to have a close-enough connection to interstate commerce.⁶³

Congressional power under the Commerce Clause was very broad throughout much of this century. The “effects doctrine,” the “bar doctrine,” the “cumulative effects doctrine,” and the “rational basis doctrine” allowed Congress to regulate activities very expansively. As subsection B, *infra*, explains, *Lopez* demonstrably limited this expansive power.

B. United States v. Lopez

For the first time in over sixty years, the Supreme Court declined to further extend Congress’s Commerce Clause power in *United States v. Lopez*.⁶⁴ Alfonso Lopez, Jr. was a twelfth grade student who was convicted of possessing a firearm in a school zone in violation of the Gun-Free School Zones

⁵⁸ *Id.* at 128-29.

⁵⁹ *Id.* at 127-28.

⁶⁰ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

⁶¹ *Id.* at 252-53, 258.

⁶² *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964).

⁶³ *Id.* at 304.

⁶⁴ *Lopez*, 514 U.S. at 549.

Act of 1990 (“Gun-Free Act”).⁶⁵ Under the Gun-Free Act, Congress made it a federal offense for “any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”⁶⁶ The Court held in a five-to-four decision that the possession of a firearm in a school zone did not substantially affect interstate commerce and exceeded the authority of Congress “[t]o regulate Commerce ... among the several States”⁶⁷ Thus, the Court departed from the rational basis standard traditionally employed in Commerce Clause cases.⁶⁸

1. Majority And Concurring Opinions

Chief Justice Rehnquist delivered the majority opinion for the Court and Justices O’Connor, Scalia, Kennedy and Thomas joined. Justices Kennedy and Thomas filed concurring opinions. According to the majority, the Gun-Free Act neither regulated a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce.⁶⁹ Following the lead in *Maryland v. Wirtz*, which reaffirmed that “the power to regulate commerce, though broad indeed, has limits,”⁷⁰ the Court identified “three broad categories of activity that Congress may regulate under its commerce power.”⁷¹ First, Congress can regulate the use of the channels of interstate commerce.⁷² Second, Congress can regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come from intrastate activities.⁷³ Third, Congress can regulate those activities having a substantial effect on interstate commerce.⁷⁴

⁶⁵ *Id.*

⁶⁶ *Id.* at 551 (citing 18 U.S.C. § 922(q)(1)(A)).

⁶⁷ *Id.* at 551.

⁶⁸ *Id.* at 557 (citations omitted).

⁶⁹ *Id.* at 551.

⁷⁰ *Id.* at 557 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196-97 (1968), holding that the de minimis character of individual instances arising under a statute is of no consequence, only when the general regulatory statute bears a substantial relation to commerce).

⁷¹ *Id.* at 558 (citations omitted).

⁷² *Id.* (citations omitted). “‘[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.’” *Id.* (citation omitted).

⁷³ *Id.* (citations omitted).

⁷⁴ *Id.* at 558-59 (citations omitted).

The Court determined that only the third category applied in *Lopez*'s case and defined three areas of inquiry to determine whether the regulated activity "substantially affects" interstate commerce: 1) whether the statute controls a commercial activity, or an activity necessary to the regulation of some commercial activity; 2) whether the statute contains a jurisdictional nexus requirement, which would ensure that the activity in question affects interstate commerce; and 3) whether the rationale to uphold the statute has a logical stopping point.⁷⁵

The *Lopez* majority held that the Gun-Free Act failed each of these three "substantial effects" tests. First, the Court found that Section 922(q) was a criminal statute that had no relation to "'commerce' or any sort of economic enterprise" and was not an essential part of a larger regulation of economic activity.⁷⁶ Thus, the activity sought to be regulated—possession of a gun in a local school zone—was not sufficiently connected to a commercial transaction, and hence, could not substantially affect interstate commerce. The Court even distinguished the holding in *Wickard* as being sufficiently connected to an economic activity, since the consumption of home-grown wheat competed with wheat in commerce.⁷⁷

Second, the Gun-Free Act failed because it lacked a jurisdictional element through which a case-by-case inquiry could establish the requisite nexus between the firearm possession in question and interstate commerce.⁷⁸ Congress could not regulate mere possession of firearms, without finding a connection to interstate commerce. The government's failure to establish a substantial connection was echoed in the legislative history. The Court noted that, "the Government concede[d] that '[n]either the statute nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'"⁷⁹

The government had argued that gun possession in school zones could result in violent crimes which would affect interstate commerce by increasing the "costs of crime," and thereby raise insurance

⁷⁵ *Id.* at 559-65.

⁷⁶ *Id.* at 561.

⁷⁷ *Id.* at 560-61 ("Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

⁷⁸ *Id.* at 561.

⁷⁹ *Id.* at 562 (citation omitted).

rates. Violent crime could also affect people's decisions to travel, based upon their perception of the amount of crime in a given area. Finally, the presence of guns in schools might threaten the educational process by tainting the learning environment. In turn, this could reduce the productivity of citizens, which would have an adverse affect on the economic well-being of the nation.⁸⁰ The Court rejected these "costs of crime" and "national productivity" reasonings as having no logical stopping point:

=XT

. . . [I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.⁸¹

Because mere possession of a gun in a school zone did not by itself have a substantial effect on interstate commerce, the Gun-Free Act exceeded Congress's Commerce Clause authority. Additionally, the Court sought to reaffirm the distinction of "what is truly national and what is truly local," which implied that the Commerce Clause should also be limited by concepts of federalism and state sovereignty.⁸²

The concurring opinion of Justice Kennedy, in which Justice O'Connor joined, placed more emphasis on these federalism concerns. When the activity sought to be regulated is non-commercial in nature, Kennedy would evaluate whether the regulation enters an area traditionally regulated by the states. Justice Kennedy was concerned that if the federal government regulated entire areas of traditional state concern, having nothing to do with the regulation of commercial activities, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."⁸³ Since the Gun Free Act was not regulating a commercial activity and entered an area traditionally of state concern, education and crime, Justices Kennedy and O'Connor joined in the Court's holding.⁸⁴

⁸⁰ *Id.* at 563-64.

⁸¹ *Id.* at 564.

⁸² *Id.* at 567.

⁸³ *Id.* at 577 (citations omitted).

⁸⁴ *Id.* at 568.

Justice Thomas would limit Congress's Commerce Clause power even further. In his concurrence, he warned that the "substantial effects" test is still too broad. Justice Thomas was "aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test."⁸⁵ He advocated a return to the "original understanding of the Commerce Clause."⁸⁶

2. The Dissent

Justices Stevens, Souter and Breyer filed dissenting opinions, and Justices Stevens, Souter and Ginsburg joined in Justice Breyer's opinion. Justice Stevens disagreed with the majority's conclusion that gun possession was not a commercial activity. He reasoned that guns were both articles of commerce and articles that could be used to restrain commerce, and that their possession was the consequence of commercial activity.⁸⁷ Justice Souter felt the majority took "a backward glance" to the jurisprudence of the past sixty years.⁸⁸ He objected to the distinction between commercial and noncommercial activities as creating the same problems which led the Court to reject the distinction between direct and indirect effects.⁸⁹

Justice Breyer based his dissent on three principles. First, that the power to regulate commerce included the power to regulate local activities so long as they significantly affected interstate commerce.⁹⁰ Second, that a court should consider not just the effect of a single act, but also its cumulative effects.⁹¹ Third, that the Constitution mandates that courts defer to congressional findings, both because the Constitution delegates the commerce power to Congress and because the

⁸⁵ *Id.* at 596.

⁸⁶ *Id.* at 601.

⁸⁷ *Id.* at 602-03.

⁸⁸ *Id.* at 608.

⁸⁹ "The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly." *Id.* "[T]oday's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case." *Id.* at 614-15.

⁹⁰ *Id.* at 615.

⁹¹ *Id.* at 616.

determination requires “empirical judgment” more properly left to the legislature.⁹² Justice Breyer determined that Congress could have rationally found, based upon reports and hearings, that “violent crime in school zones,” through its effect on the “quality of education,” significantly affects “interstate commerce.”⁹³

Justice Breyer cited three legal problems that the majority opinion created. First, the holding was contrary to modern Supreme Court cases that upheld congressional actions, despite indirect connections to interstate commerce, that were less significant than the effect of school violence.⁹⁴ Second, the majority’s holding was irreconcilable from its holdings with earlier cases by making the critical distinction between “commercial” and non-commercial “transactions[s].”⁹⁵ Despite the distinction, Justice Breyer felt that education would fall on the commercial side of the line.⁹⁶ The final legal problem he identified was that the holding created legal uncertainty in an area of law that seemed reasonably well-settled.⁹⁷

3. The Modern Understanding

Several basic rules may be drawn from the *Lopez* decision. First, Congress can regulate three categories of activity: (1) the use of the channels of commerce; (2) the instrumentalities of commerce; and (3) activities that substantially affect commerce.⁹⁸ Additionally, *Lopez* reaffirmed *Wickard* concerning Congress’s ability to regulate a purely intrastate activity if it is part of a class of activities that, taken as a whole, has a substantial “cumulative effect” on interstate commerce.⁹⁹ However, there are

⁹² *Id.* at 616-17.

⁹³ *Id.* at 618-19.

⁹⁴ *Id.* at 625.

⁹⁵ *Id.* at 627 (citations omitted). “[T]his approach fails to heed this Court’s earlier warning not to turn ‘questions of the power of Congress’s upon ‘formula[s]’ that would give ‘controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce.’” *Id.* at 627-28 (citing *Wickard v. Filburn*, 317 U.S. 111, 120 (1942)). *See also* *United States v. Darby*, 312 U.S. 100, 116-17 (1941).

⁹⁶ *Lopez*, 514 U.S. at 629.

⁹⁷ *Id.* at 630.

⁹⁸ *Id.* at 558-59.

⁹⁹ *Id.* at 560-61; *Wickard*, 317 U.S. at 124.

suggestions in *Lopez* that Congress will be granted less deference when regulating activities that are not commercial¹⁰⁰ or areas of traditional state concern.¹⁰¹ Nevertheless, “[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.”¹⁰²

The value of *Lopez* as precedent to future Commerce Clause challenges is clearly uncertain.¹⁰³ *Lopez* was a five-to-four decision, generating six different legal opinions. The *Lopez* majority did not reverse the past sixty years of Commerce Clause jurisprudence. In fact, Justice Thomas warned that consideration of stare decisis prevented such a result.¹⁰⁴ Justices Kennedy and O’Connor believe the Commerce Clause could regulate noncommercial activities having a nexus to interstate commerce, so long as the regulation does not impinge upon state sovereignty.¹⁰⁵ Thus, the majority’s return to a commercial/noncommercial distinction may not withstand the tests of time. Perhaps the Court was simply not willing or ready to further extend the Commerce Clause into the areas of crime and education, areas that traditionally have been regulated by the states.¹⁰⁶ When the Court was ready to regulate racial relations, it had no problem extending the Commerce Clause to attain that end.¹⁰⁷

¹⁰⁰ *Lopez*, 514 U.S. at 560.

¹⁰¹ *Id.* at 552-53.

¹⁰² *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276 (1981); *see also* *Gibbs v. Babbitt*, 31 F. Supp. 2d 531, 534 (E.D.N.C. 1998) (“Even after *Lopez* placed limits on the Commerce Clause as a grant of Congressional authority, a reviewing court need only determine ‘whether a rational basis existed for concluding that a regulated activity’ substantially affects interstate commerce.” (citing *Lopez*, 514 U.S. at 557)).

¹⁰³ *Nagle*, *supra* note 14, at 176 (“Whether *Lopez* marks a dramatic shift in Commerce Clause jurisprudence or is instead destined to be a ‘but see’ citation remains to be seen.”).

¹⁰⁴ *Lopez*, 514 U.S. at 601 n.8 (“Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.”).

¹⁰⁵ *Id.* at 568-83.

¹⁰⁶ *Id.* at 564; *see also* *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820, 828-29 (4th Cir. 1999), *cert. granted sub nom.* *Brzonkala v. Morrison*, 144 L. Ed. 2d 842 (1999), *and cert. dismissed sub nom.* *United States v. Morrison*, No. 99-5, 99-29 (R46-018), 2000 U.S. LEXIS 2518, at *1 (Apr. 5, 2000); *United States v. Kirk*, 70 F.3d 791, 795-97 (5th Cir. 1995), *cert. denied*, 118 S. Ct. 47 (1997).

IV. COMMERCE CLAUSE JURISPRUDENCE IN ENVIRONMENTAL LEGISLATION

A. Before *Lopez*

Over the past twenty-five years, Congress has enacted numerous laws pursuant to the Commerce Clause to protect the environment and natural resources. For example, Congress can regulate pollution under the Surface Mining Control and Reclamation Act,¹⁰⁸ manage and dispose of hazardous wastes under the Resource Conservation and Recovery Act (“RCRA”),¹⁰⁹ and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),¹¹⁰ protect water quality under the CWA,¹¹¹ protect air quality under the Clean Air Act (“CAA”),¹¹² and protect endangered species under the ESA.¹¹³

Prior to *Lopez*, the Court granted the traditional broad deference to Congress’s Commerce Clause authority when interpreting environmental legislation. In *Hodel v. Virginia Surface Mining & Reclamation Ass’n.*, Congress prohibited surface coal miners from mining private land except with a permit in accordance with the standards of the Surface Mining Control and Reclamation Act.¹¹⁴ The

¹⁰⁷ See *supra* notes 60-63 and accompanying text.

¹⁰⁸ 30 U.S.C. §§ 1201-1328 (1994).

¹⁰⁹ 42 U.S.C. §§ 6901-6992k (1994).

¹¹⁰ 42 U.S.C. §§ 9601-9675 (1994). Under CERCLA, whenever a spill or release of a hazardous substance occurs on private land, the owners of the land, as well as former owners, transporters, and disposers of the hazardous waste, can be held liable for the entire cost of clean up. *Id.*

¹¹¹ See *supra* note 7.

¹¹² 42 U.S.C. §§ 7401-7671q (1994).

¹¹³ See *supra* note 2.

¹¹⁴ *Hodel*, 452 U.S. at 264.

Court held that the Act did not violate the Commerce Clause as regulating the use of private lands. The Court reasoned that it must defer to congressional findings that a regulated activity affects interstate commerce, if there was a rational basis for the finding.¹¹⁵ The congressional findings were that (1) surface coal mining had a substantial effect on interstate commerce; (2) coal was an article of commerce; and (3) Congress could have rationally concluded that the reclamation standards and permit requirements were necessary to protect interstate commerce in coal.¹¹⁶ Thus, the commerce power was found “broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State.”¹¹⁷

The Endangered Species Act was also construed broadly. In *United States v. Billie*, the Endangered Species Act survived a First Amendment freedom of religion challenge and was upheld as applying to the hunting of the Florida panther by Indians on Seminole reservations.¹¹⁸ The court held that Indian reservation hunting rights were not absolute when a species, such as the Florida panther, was in danger of extinction.¹¹⁹ In *Delbay Pharmaceuticals, Inc. v. U.S. Department of Commerce*, the court recognized the judicial deference paid to congressional power under the Commerce Clause, even in light of the due process limitations of the Fifth Amendment.¹²⁰ In *Delbay*, a permit issued for the importation of a substance derived from endangered species, pursuant to the economic hardship exception to the Endangered Species Conservation Act of 1969, did not give plaintiffs the right to sell the substance in interstate commerce in violation of the Endangered Species Act of 1973.¹²¹ The court reasoned that if there was a continued market for the substance, it may encourage the illegal taking of the endangered species to supply the market.¹²² Thus, the court held that Congress had the power

¹¹⁵ *Id.* at 276. ““Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States, or with foreign nations.”” *Id.* at 277 (citing *Fry v. United States*, 421 U.S. 542, 547 (1975)).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 282.

¹¹⁸ *United States v. Billie*, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987).

¹¹⁹ *Id.*

¹²⁰ *Delbay Pharm., Inc. v. U.S. Dep’t of Commerce*, 409 F. Supp. 637, 645 (D.D.C. 1976).

¹²¹ *Id.* at 642 (“The 1973 Act prohibits not only the importation of endangered species, but also makes it unlawful to ‘sell or offer for sale in interstate or foreign commerce’ an endangered species.”). *Id.* at 640 (citing 16 U.S.C. § 1538(a)(1)(F)).

¹²² *Id.* at 642.

under the Commerce Clause to exclude from the channels of interstate commerce those products whose movements between the states Congress deemed harmful to the national welfare.¹²³

B. Post-Lopez Challenges

Ironically, most environmental laws appear to be surviving Commerce Clause attacks in light of *Lopez*-based challenges upon findings that the particular activity in question substantially affects interstate commerce.¹²⁴ The primary reason is that most of the central provisions of major federal environmental laws regulate industrial or commercial activity, rather than non-commercial individual activity.

So far, species protection has fared well since *Lopez*. In 1996, in *United States v. Bramble*, an individual was convicted of possessing eagle feathers and challenged Congress's authority under the Bald Eagle Protection Act.¹²⁵ The court upheld the Act¹²⁶ against a Commerce Clause challenge, reasoning that "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; further interstate travel for the purpose of observing or studying eagles; or further commerce in beneficial products derived either from eagles or from analysis of their genetic material."¹²⁷ The court held that laws governing intrastate activities would be upheld if they regulated a class of activities which substantially affects interstate commerce.¹²⁸ The court also held that it was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade the statute, and to take a large quantity of birds.¹²⁹

In 1997, *Building Industry Association of Superior California v. Babbitt* held that the listing of fairy shrimp as endangered under the ESA did not exceed the federal Commerce Clause power or

¹²³ *Id.* at 645.

¹²⁴ *See infra* notes 125-142 and accompanying text.

¹²⁵ *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996).

¹²⁶ 16 U.S.C. §§ 668-668d (1994).

¹²⁷ *Bramble*, 103 F.3d at 1481.

¹²⁸ *Id.*

violate the Tenth Amendment.¹³⁰ Plaintiffs argued that there was no nexus between the fairy shrimp and interstate commerce and that the listing interfered with state and local sovereignty over land use, and did not “substantially affect” interstate commerce as required by *Lopez*.¹³¹ The court distinguished the ESA from the statute in *Lopez* as directly and expressly regulating “the import, export and sale of listed species in interstate commerce.”¹³² The court looked at congressional legislative history and determined that species preservation substantially affects the national economic interest.¹³³ Furthermore, the court found plaintiffs’ position untenable since “[a]ccording to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce Clause to protect it. But when that same species becomes more scarce and its population reduced to a single state, Congress’s hands are suddenly tied.”¹³⁴

In 1998, in *Gibbs v. Babbitt*, plaintiffs sought a declaration that all federal regulations relating to the taking of red wolves on private land were invalid as exceeding the Tenth Amendment.¹³⁵ The court held that the wolves were clearly articles in interstate commerce and had a substantial effect on interstate commerce due to their tourism value.¹³⁶ It was irrelevant that the threat to the wolf-related commerce came from the intrastate takings of wolves.¹³⁷

However, challenges to some environmental regulations have been successful. In *United States v. Olin Corp.*,¹³⁸ the court invalidated an application of CERCLA requiring the clean-up of a twenty-acre solid waste management site because the pollution at that site did not affect interstate commerce.¹³⁹ In applying *Lopez* to CERCLA, the court held that *Lopez* requires that the statute regulate economic activity which substantially affects commerce and contain a jurisdictional element which ensures that the

¹²⁹ *Id.* at 1480.

¹³⁰ *Building Indus. Ass’n of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997).

¹³¹ *Id.* at 906.

¹³² *Id.* at 907.

¹³³ *Id.*

¹³⁴ *Id.* at 908.

¹³⁵ *Gibbs v. Babbitt*, 31 F. Supp. 2d 531 (E.D.N.C. 1998).

¹³⁶ *Id.* at 535.

¹³⁷ *Id.*

¹³⁸ *United States v. Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996).

¹³⁹ *Id.* at 1533; 42 U.S.C. §§ 9606(a), 9607(a) (1994).

statute affects commerce.¹⁴⁰ The court found that since the plant being regulated was no longer operational, it did not qualify as economic.¹⁴¹ The court further held that, despite the fact that CERCLA did not contain a jurisdictional element, the activity in question had no effect on interstate commerce since there was no evidence that the contaminants at the site traveled across state lines.¹⁴² However, the CWA has been attacked as an abuse of congressional Commerce Clause power when applied to isolated wetlands.

C. Attack on Isolated Wetlands

The purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁴³ Section 404 of the CWA requires a permit for the “discharge of dredged or fill material into navigable waters.”¹⁴⁴ This section has been attacked as an abuse of congressional Commerce Clause power when applied to isolated wetlands. Isolated wetlands, unlike adjacent wetlands, have no hydrological connection to any body of water.¹⁴⁵ Isolated wetland regulation has primarily been upheld based on the wetland’s use or potential use as a habitat for migratory birds.¹⁴⁶ In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the court reaffirmed the CWA’s ability to regulate isolated intrastate wetlands that provide a habitat for migratory birds. The rationale was that the cumulative degradation of intrastate

¹⁴⁰ *Olin Corp.*, 927 F. Supp. at 1532.

¹⁴¹ *Id.* at 1533.

¹⁴² *Id.*

¹⁴³ 33 U.S.C. § 1251(a) (1994).

¹⁴⁴ 33 U.S.C. § 1344(a) (1994).

¹⁴⁵ *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, 1314 (7th Cir. 1992) (“By their very definition, isolated wetlands have no relationship or interdependence with any other body of water.”), *vacated*, 975 F.2d 1554 (7th Cir. 1992), *and amended by* 999 F.2d 256 (7th Cir. 1993). The Court has recognized the importance of regulating waters that together form an “integral part of the aquatic environment.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985).

¹⁴⁶ *See infra* notes 147-148 and accompanying text.

waters could have a substantial effect on interstate commercial interests relating to those birds.¹⁴⁷

Further, in *United States v. Hallmark Construction Company*, the court held that the regulation of intrastate isolated wetlands based on their actual or potential use by migratory birds did not exceed Congress's power under the Commerce Clause.¹⁴⁸

However, section 404 of the CWA was invalidated as applied to isolated wetlands that did not provide a habitat for migratory birds in *United States v. Wilson*.¹⁴⁹ In *Wilson*, the developers were convicted of knowingly discharging fill material and excavated dirt into wetlands without a permit, in violation of the CWA.¹⁵⁰ The defendants appealed and challenged the authority of the Army Corps of Engineers' regulation, which defined waters of the United States to include those waters whose degradation "could affect" interstate commerce.¹⁵¹

The Court of Appeals for the Fourth Circuit agreed and held that the regulation required neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable or interstate waters.¹⁵² The court noted that, "[w]ere this

¹⁴⁷ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 998 F. Supp. 946, 949-52 (N.D. Ill. 1998) [hereinafter *Cook County*]; see also *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260-61 (7th Cir. 1993) (holding that the potential use of wetlands by migratory birds was sufficient to support jurisdiction because "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds" and the "cumulative loss of wetlands has reduced populations of many bird species").

¹⁴⁸ *United States v. Hallmark Constr. Co.*, 14 F. Supp. 2d 1069, 1075 (7th Cir. 1998).

¹⁴⁹ *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

¹⁵⁰ *Wilson*, 133 F.3d at 253.

¹⁵¹ *Id.* at 255; see 33 C.F.R. § 328.3(a) (1993). The CWA defines navigable waters as "the waters of the United States." 33 U.S.C. § 1362(7). By regulation, the Army Corps of Engineers ("Corps") further defines this to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of 'which could' affect interstate or foreign commerce." 33 C.F.R. § 328.3(a) (1993). In a preamble to this regulation, the Corps explains that the term "other waters" includes those which "are or would be used as habitat by other migratory birds which cross state lines." 51 Fed. Reg. 41,217 (Nov.13, 1986). This is commonly known as the "migratory bird rule."

¹⁵² *Wilson*, 133 F.3d at 255

regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because . . . it would appear to exceed congressional authority under the Commerce Clause.”¹⁵³

Thus, under *Wilson*, if a wetland is truly isolated, meaning that it is neither connected to navigable waters nor connected to interstate commerce (such as providing a habitat for migratory birds), Congress cannot regulate it. Similar to isolated wetlands, isolated species are seemingly not connected to interstate commerce. Because the ESA speaks of the importance of every species, including isolated ones, the decision in *Wilson* may lend support for opponents who would like to weaken application of the ESA’s “take by habitat modification provision” to isolated species having no connections to interstate commerce.¹⁵⁴

V. FEDERAL JURISDICTION OVER ISOLATED SPECIES UNDER THE “TAKE BY HABITAT” MODIFICATION PROVISION

VI.

A. Before *Lopez*

Judicial decisions interpreting federal jurisdiction over isolated species under the Commerce Clause before *Lopez* are scarce. The most notable case is *Palila v. Hawaii Department of Land and Natural Resources*, where the regulation of an isolated species was upheld.¹⁵⁵ *Palila* was the first case to deal with the “take by habitat modification” provision of the ESA.¹⁵⁶

In *Palila*, the state of Hawaii was sued for failing to protect the Palila bird population by refusing to eradicate the feral sheep population that was threatening the critical habitat of the Palila.¹⁵⁷ The state challenged application of the ESA to the Palila habitat since the bird neither moved interstate

¹⁵³ *Id.*

¹⁵⁴ See *infra* note 232 and accompanying text.

¹⁵⁵ *Palila v. Hawaii Dep’t of Land and Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979).

¹⁵⁶ *Id.* at 992.

¹⁵⁷ *Id.* at 987.

nor inhabited federal lands.¹⁵⁸ However, the court held that the Commerce Clause and the Treaty Power gave Congress the ability to preempt state control over an endangered species, even when the species was indigenous to that state.¹⁵⁹

=XT

Congress has determined that protection of any endangered species anywhere is of the utmost importance to mankind, and that the major cause of extinction is destruction of natural habitat. In this context, a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.¹⁶⁰

After *Lopez*'s enunciation of the "substantial effects" test, one may question the validity of the holding in *Palila*. To preserve a species, based upon "the possibilities of interstate commerce" in that species, by interfering with local land use appears to run afoul of *Lopez*. Nevertheless, shortly after *Lopez*, the Supreme Court denied a petition for certiorari in *National Association of Home Builders v. Babbitt*, which seemed to address the concern raised in *Wilson*, but as applied to isolated species.¹⁶¹

B. After Lopez: Home Builders v. Babbitt

Home Builders is a significant victory not only for a rare species of a fly, but also for the protection of isolated endangered species in general. However, the effect of this decision still remains to be seen. The three judges on the D.C. Circuit deciding the case offered three different explanations for why the ESA could or could not protect the fly's habitat.

The Delhi Sands Flower-Loving Fly ("Fly"), was listed as an endangered species in 1993.¹⁶² This rare species, belonging to the "mydas flies" family, visits flowers in search of nectar, and pollinates

¹⁵⁸ *Id.* at 992.

¹⁵⁹ *Id.* at 995.

¹⁶⁰ *Id.* at 944-95 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978)).

¹⁶¹ *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) [hereinafter *Home Builders*].

¹⁶² *Id.* at 1044.

nearby native plants.¹⁶³ The Fly is truly isolated. There are currently only eleven known populations of the Fly, all within an eight-mile radius, in the soils of San Bernardino and Riverside Counties, California.¹⁶⁴

This dispute arose when San Bernardino County decided to build a hospital and was forced to alter its plans because the chosen site was determined by the FWS to contain the Fly's habitat.¹⁶⁵ The County filed suit when the FWS informed the County that their plan of redesigning a nearby intersection to improve emergency vehicle access to the hospital would likely constitute a "taking" of the Fly, under the ESA section 9(a)(1)(B)'s "take by habitat modification" provision.¹⁶⁶

The appellants¹⁶⁷ challenged application of section 9(a)(1), which makes it unlawful for any person to "take any [endangered or threatened] species within the United States or the territorial sea of the United States,"¹⁶⁸ to the Delhi Sands Flower-Loving Fly.¹⁶⁹ They argued that the federal government does not have the authority to regulate the use of nonfederal lands in order to protect the Fly, which is found only within a single state.¹⁷⁰ The district court disagreed and held that the application of section 9(a)(1) to the Fly was a valid exercise of Congress's Commerce Clause power. The rationale of the D.C. Circuit, which affirmed by a vote of 2 to 1, is summarized below.¹⁷¹

1. The Majority Opinion

Judge Wald, writing the majority opinion, held that section 9(a)(1) of the ESA was clearly not a regulation of the instrumentalities of interstate commerce or of persons or things in interstate commerce.¹⁷² Instead, she upheld the ESA as within Congress's authority to regulate the use of the

¹⁶³ *Id.* at 1043-44.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1043.

¹⁶⁶ *Id.*

¹⁶⁷ National Association of Home Builders of the United States, the Building Industry Legal Defense Fund, the County of San Bernardino, and the City of Colton, California. *Id.*

¹⁶⁸ 16 U.S.C. § 1538(a)(1).

¹⁶⁹ *Home Builders*, 130 F.3d at 1045.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1043.

¹⁷² *Id.* at 1046.

“channels of interstate commerce” and as an activity which “substantially affect[s] interstate commerce.” Judge Wald relied upon the first and third categories of activity discussed in *Lopez*.¹⁷³

Judge Wald held that the ESA as applied was a proper exercise of Congress’s power over the channels of interstate commerce for two reasons. First, section 9(a)(1) is necessary to control the transport of endangered species into interstate commerce.¹⁷⁴ Judge Wald analogized that the prohibition against takings of endangered species was similar to the prohibition against the transfer and possession of machine guns.¹⁷⁵ The prohibition on “taking” endangered species intrastate was necessary to control interstate trafficking of the endangered species. However, no evidence was present of trafficking in the Fly.

Second, Judge Wald held that the prohibition against taking endangered species is permitted to keep the channels of interstate commerce free from immoral and injurious uses.¹⁷⁶ This rationale has been used before, such as in *Heart of Atlanta Hotel*, where the Supreme Court upheld the prohibition on racial discrimination in places of public accommodation, which served interstate travelers, against a Commerce Clause challenge.¹⁷⁷ Congress has the authority to regulate local activities if those activities might have a substantial and harmful effect upon commerce.¹⁷⁸

The court also held that section 9(a)(1) falls under the category of activities that substantially affects interstate commerce.¹⁷⁹ The court reasoned that Congress could rationally conclude that section 9(a)(1) substantially affects interstate commerce by preventing the destruction of biodiversity.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1047. “By regulating the market in machineguns, including regulating intrastate machinegun possession, Congress has effectively regulated the interstate trafficking in machineguns.” *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)).

¹⁷⁶ *Id.* at 1048. Congress used its authority “to prevent the eradication of an endangered species by a hospital that is presumably being constructed using materials and people from outside the state and which will attract employees, patients, and students from both inside and outside the state. Thus, like regulations preventing racial discrimination or labor exploitation, regulations preventing the taking of endangered species prohibit interstate actors from using the channels of interstate commerce to “promote or spread[] evil, whether of a physical, moral or economic nature.” *Id.* (citations omitted).

¹⁷⁷ *See supra* notes 60-61.

¹⁷⁸ *See supra* notes 41-45 and accompanying text.

¹⁷⁹ *Home Builders*, 130 F.3d at 1049.

Biodiversity is a term biologists use to describe the number, variability and variety of life on Earth.¹⁸⁰ Each time an extinction occurs, the pool of wild species diminishes.¹⁸¹ The court reviewed the legislative history of the ESA, which reflects the value of preserving genetic diversity and the potential for future commerce related to or derived from that diversity.¹⁸² The court rationalized that a decrease in biodiversity would have a substantial effect on interstate commerce because natural resources that could otherwise be used for commercial resources would be diminished.¹⁸³

Further, section 9(a)(1) controls the adverse effects of interstate competition that would result from states lowering endangered species protection standards in order to attract development.¹⁸⁴ In *Darby*, the Court upheld federal wage and hour laws because “such regulations were necessary to prevent states with higher regulatory standards from being disadvantaged by states with lower regulatory standards.”¹⁸⁵ This argument has merit, despite the concurring and dissenting opinions to the contrary. If states were allowed to impose lower environmental regulations, they would unfairly compete with states that imposed more stringent environmental regulations by attracting and retaining corporate investment.¹⁸⁶

2. Judge Henderson’s Concurrence

Judge Henderson voted to uphold application of the Act on the ground that the potential loss of biodiversity itself would have a substantial effect on the ecosystems and as a result, interstate commerce.¹⁸⁷ She rationalized that everything in the environment is interconnected and that the loss of one species, even an intrastate one, would substantially affect interstate commerce. She disagreed with

¹⁸⁰ ROGER L. DiSILVESTRO, RECLAIMING THE LAST WILD PLACES, A NEW AGENDA FOR BIODIVERSITY 23-25 (1993).

¹⁸¹ *Home Builders*, 130 F.3d at 1052-54.

¹⁸² *Id.* at 1050-51.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1054-56.

¹⁸⁵ *United States v. Darby*, 312 U.S. 100, 114 (1941).

¹⁸⁶ This has been termed the “race-to-the-bottom” argument. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977).

¹⁸⁷ *Home Builders*, 130 F.3d. at 1058.

Judge Wald's theory that an endangered species has a substantial effect on interstate commerce by virtue of its potential medical or economic value; she wrote that any possible value was too uncertain.¹⁸⁸ She also disagreed with Judge Wald that this was a regulation of the use of interstate commerce channels because the Fly did not move between states either on its own or through human agency.¹⁸⁹

3. Judge Sentelle's Dissent

Judge Sentelle did not agree that Congress can regulate the Fly, which is neither commerce nor interstate. He reasoned that section 9(a)(1), analogous to the statute in *Lopez*, does not regulate commerce.¹⁹⁰ He disagreed, as did Judge Henderson, that section 9(a)(1) was a regulation of the channels of interstate commerce. Judge Sentelle did not agree that a statute which prevents the destruction of local flies, which are neither articles of commerce nor travelling interstate, is keeping the channels of commerce free from their interstate transportation.¹⁹¹

Whether or not the activity substantially affected commerce was the only category under *Lopez* that Judge Sentelle arguably felt could have permitted Congress to regulate the Fly. However, by applying the subsidiary inquires of the test enunciated in *Lopez*, he felt that section 9 did not substantially affect commerce.¹⁹² First, the regulation did not control a commercial activity or an activity necessary to the regulation of some commercial activity. Second, section 9 did not require that the regulated activity affect interstate commerce or provide for a jurisdictional nexus. Third, Judge Sentelle felt that section 9

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1057-58. "In support [Judge Wald] cites decisions upholding regulation of commercially marketable goods, such as machine guns and lumber, and public accommodations. In each case, the object of regulation was necessarily connected to movement of persons or things interstate and could therefore be characterized as regulation of the channels of commerce." *Id.* (citations omitted).

¹⁹⁰ *Id.* at 1062.

¹⁹¹ *Id.* at 1063 ("[P]reventing habitat destruction contributes nothing to the goal of eliminating the fly, or any other endangered species, from the channels of commerce.").

¹⁹² *Id.* at 1063-64.

had no logical stopping point.¹⁹³ Further, he criticized Judge Henderson's reliance on *Wickard v. Filburn*. He stated that *Maryland v. Wirtz* rejected the expansive reading of *Wickard* and held that "neither here nor in *Wickard* has the court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."¹⁹⁴

From the unfortunately confusing result in *Home Builders* we are left to determine whether future challenges of the ESA's application to isolated species may be defeated through *Lopez*'s limitation to the Commerce Clause.

VII. ISOLATED ENDANGERED SPECIES SHOULD BE PROTECTED UNDER THE ENDANGERED SPECIES ACT

A. Challenges To Isolated Endangered Species

Opponents to the ESA will argue that when section 9 applies to a purely isolated species, that species should not be subject to federal control. Their argument, along the lines of Sentelle's dissent, will be that isolated species, like isolated wetlands, have no connections to interstate commerce and thus do not have a substantial effect on interstate commerce.

Clearly, Congress has the authority to regulate the takings of wildlife when they are articles of commerce.¹⁹⁵ However, just because a species is isolated and does not move across state lines, does not lessen the argument. An irrational distinction would exist if the federal government could regulate the spotted owl because it is located in Washington, Oregon and California, but not the Palila bird because it is indigenous to Hawaii. The fact that a species has been listed as endangered or threatened actually increases the likelihood that the species is found in only one state. Species capable of considerable

¹⁹³ *Id* at 1064 ("As I understand her argument, because of some undetermined and indeed indeterminable possibility that the fly might produce something at some undefined and undetermined future time which might have some undefined and undeterminable medical value, which in turn might affect interstate commerce at that imagined future point, Congress can today regulate anything which in turn might advance the pace at which the endangered species becomes extinct.").

¹⁹⁴ *Id.* at 1066 (citing *Wirtz*, 392 U.S. at 196 n.27). *But see supra* note 70 and accompanying text.

geographic movement are often not threatened or endangered. The FWS, for example, requires evidence of geographical isolation and/or genetic differentiation when determining whether a species should be listed on the basis that it is a distinct population segment.¹⁹⁶ Furthermore, almost one-half of all threatened and endangered species are found in only one state.¹⁹⁷

Isolated species may have just as great an impact on interstate commerce as nonisolated species. The isolated Malayan pit viper might seem of little importance to developers or commerce. Yet studies on the venom of one species of these vipers led to the discovery of the angiotensin system that regulates blood pressure in human beings. Once that system was known it became possible to devise a molecule that alters blood pressure. This compound, which is the preferred prescription drug for hypertension, brings the Squibb Company \$1.3 billion annually in sales.¹⁹⁸ Madagascar, the most isolated of the great islands of the world,¹⁹⁹ is home to the rosy periwinkle, a pink five-petaled flower, which produces two alkaloids, vinblastine and vincristine, that cure most victims of two of the deadliest of cancers, Hodgkin's disease and acute lymphocytic leukemia.²⁰⁰ The income from manufacturing and selling "these two substances exceeds \$180 million per year."²⁰¹

Aside from requiring that isolated species have a substantial effect on interstate commerce, *Lopez* has opened the door to challenging environmental legislation under two additional theories: (1) that the activity is an area of traditional state concern;²⁰² and (2) that the regulated activity is not "economic,"²⁰³ and, hence, does not have a substantial effect on interstate commerce.

¹⁹⁵ See *supra* notes 120-122, 125 & 127-129.

¹⁹⁶ *Southwest Ctr. for Biological Diversity v. Babbitt*, 926 F. Supp. 920, 924-25 (D. Ariz. 1996).

¹⁹⁷ *Home Builders*, 130 F.3d at 1052-54.

¹⁹⁸ Thomas E. Lovejoy, *Biodiversity: What Is It?*, in *BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES* 7, 9 (Marjorie L. Reaka-Kudla et al. eds., 1997).

¹⁹⁹ EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 267 (1992).

²⁰⁰ *Id.* At 283.

²⁰¹ *Id.*

²⁰² *Lopez*, 514 U.S. at 555-57.

²⁰³ *Id.* at 560.

1. Areas of Traditional State Concern

The regulation of wildlife has historically been at the federal level. Thus, courts will most likely not hold that the federal government is entering an area of traditional state concern in its regulation of wildlife. More importantly, the Supreme Court has held that the federal government has the authority to regulate wildlife.²⁰⁴ However, the “take by habitat modification” provision of section 9 is more troubling.

Opponents believe this provision, as applied to isolated species, is unconstitutional because of its impact on local land use, which traditionally is an area of state concern.²⁰⁵ Without this provision, however, the ESA would be a hollow attempt at species protection. A species habitat is vital to its viability; and habitat destruction is by far the biggest problem facing endangered species today.²⁰⁶ In *Lopez*, the Court determined that the Gun-Free Act was not an essential part of a larger regulation of economic activity. Section 9, on the other hand, is an essential provision which furthers the main goals of the ESA, which is to protect threatened and endangered species. Thus, any effect on local land use is incidental to the main goals of the ESA. Furthermore, the fact that the regulation of a species’ habitat affects local land is not a prima facie case for a constitutional challenge under the Commerce Clause. *Wickard* held that incidental local effects did not matter so long as the matter being regulated has an effect on interstate commerce.²⁰⁷ While section 9 does not aim to regulate local land use, it may displace local land use regulation, with significant costs to private landowners—costs that may far exceed any potential benefit from saving a particular listed species.

However, the Act’s prohibition on the taking of species is not absolute, since incidental takings by agencies or private landowners may be allowed as long as mitigation measures are taken. Thus, private landowners may be permitted to pursue some economic activity on their land, even though such

²⁰⁴ See *Douglas v. Seacoast Prods.*, 431 U.S. 265, 284 (1977) (criticizing the notion that states owned uncaptured wildlife within their borders as a “19th-century legal fiction” (citing *Geer v. Connecticut*, 161 U.S. 519, 539-40 (1896) (Field, J., dissenting))).

²⁰⁵ See *supra* note 28 and accompanying text.

²⁰⁶ See DiSILVESTRO *supra* note 180, at 31 (“Without proper habitat—whether it be virgin forest, open grassland, the bottom of the sea, or the human intestine—no species can survive.”).

²⁰⁷ *Wickard*, 317 U.S. at 119-20.

activity may incidentally take a listed species.²⁰⁸ Many incidental take permits are being granted and development is moving forward.²⁰⁹ For example, in San Bruno, California, in exchange for the permit to develop certain areas and destroy 14% of the habitat of an endangered butterfly, a substantial area of privately owned habitat was to be conveyed to the County of San Mateo.²¹⁰ Similar permits have been granted in many circumstances across the nation.²¹¹

The statute in *Lopez* also entered an area traditionally left up to the states—education and criminal law. For the Court, the argument articulated in support of the Gun Free Act in *Lopez*, that a poor learning environment would have a substantial effect on commerce, too broadly extended the Commerce Clause. If left unchecked, Congress could regulate school curriculum or family relations—as those have as much of a link to commerce as the statute in *Lopez*.²¹² In contrast, the ESA’s habitat modification provision’s effects on a landowner’s rights is the furthest it can go. Not all species will affect land use, only those species which have been listed as endangered or threatened. As pointed out by biologists, this number is very small in comparison to the number of species actually inhabiting Earth.²¹³ Additionally, as discussed *supra*, a landowner can take an endangered species (and effectively destroy their habitat) so long as he or she first obtains an incidental take permit.

²⁰⁸ See Richard E. Webster, *Habitat Conservation Plans Under the Endangered Species Act*, 24 SAN DIEGO L. REV. 243 (1987). For a thorough discussion of the conflicts between landowners and the ESA see Michael J. Bean, *The Endangered Species Act and Private Land: Four Lessons Learned from the Past Quarter Century*, 28 ENVTL. L. REP. (ENVTL. L. INST.) 10,701 (Nov. 1998).

²⁰⁹ As of May 2000, there were 305 incidental take permits issued and listed on the U.S. Fish & Wildlife Service web site. U.S. Fish & Wildlife Serv., *Habitat Conservation Plans* (visited May 10, 2000) <http://ecos.fw.gov/hcp_report/hcp_summary.html?region=9&module=421>; see also *Land and Money Mitigation Requirements in Endangered Species Act Enforcement: Hearings Before the House Comm. on Resources*, 106th Cong. 5 (1999) (statement of Jamie Clark, Dir. U.S. Fish and Wildlife Serv.); see *supra* notes 194-203 and accompanying text.

²¹⁰ See Webster, *supra* note 208, at 250.

²¹¹ See U.S. Fish & Wildlife Serv., *supra* note 209 (listing habitat conservation plans and the corresponding incidental take permits).

²¹² *Lopez*, 514 U.S. at 564.

²¹³ See Lovejoy, *supra* note 198, at 7 (noting that the number of species currently described is 1.4 million, while current estimates of the total number of species run from 10 to 100 million).

2. Economic Activities

Section 9 regulates many activities that also can be challenged as not being economic in nature. However, even the *Lopez* majority conceded that any activity could be looked at as commercial.²¹⁴ Thus, the economic/noneconomic distinction presents obvious difficulties in application. Nevertheless, species protection has already been tied to activities which are economic.²¹⁵ Whether a species has economic value in drawing tourism,²¹⁶ in the commercial sale of the species or its parts,²¹⁷ or in travel associated with scientific study, Congress has a variety of commercial concerns giving it the constitutional authority to regulate even isolated species.

When confronted with a species that does not have actual, but only potential, links to commerce, as in the Delhi Sands Flower-Loving Fly case, the effect on interstate commerce becomes less apparent. However, habitat modification that occurs incident to commercial development, as seen in *Home Builders*, is economic. Problems arise when the private landowner wants to make improvements to his land and is confronted with a Section 9 violation because the construction will likely destroy the habitat of an endangered species. This scenario is significantly different from the construction of the hospital in *Home Builders*, which is arguably a commercial activity.

A residential landowner building a pool or tennis court on his land, for example, can hardly be characterized as engaging in commerce. However, as law professor and scholar John Copeland Nagle points out, it depends on which question you are asking.²¹⁸ For example, if the test is whether or not the pool will have a substantial effect on commerce, the answer will most likely be no. Similarly, if one asks whether an isolated species will have a substantial effect on commerce, the answer will also most likely be no. However, if one asks the question whether isolated endangered species as a class will have a substantial effect on commerce, the answer is obviously yes. Thus, the reason for the confusion is that everyone is asking different questions. If the focus remains on the regulated class of entities—endangered species—which have already been tied to economic activities, courts may then eliminate the

²¹⁴ *Lopez*, 514 U.S. at 565-66.

²¹⁵ See *supra* note 179.

²¹⁶ See *supra* notes 135-137.

²¹⁷ See *supra* notes 125, 127-129.

²¹⁸ See Nagel, *supra* note 14, at 180-92.

tenuous problem of tying a private individual landowner's actions to interstate commerce. Thus, the constitutional analysis should stay focused on the species, not the landowners filing suit.

B. Isolated Species Link to Interstate Commerce Is Found in Biodiversity

Conflicts between humans and other species are inescapable—the homes, buildings, churches, schools, museums, stadiums, and roads we all use are built on land which species inhabit.²¹⁹ However, if the protection of endangered species is seen as the protection of biodiversity, then restrictions which seem only trivial may finally be understood. Because of the importance of biological and ecosystem diversity to the well-being of the nation and also interstate commerce, it is appropriate to regulate endangered species under the Commerce Clause—even isolated ones.²²⁰

The term biodiversity encompasses diversity at all levels of organization. Biologists often refer to biodiversity as the “number, variability, and variety of life on Earth.”²²¹ Biodiversity is important at three distinct levels: species diversity; ecosystem or habitat diversity, and finally genetic diversity.²²² Paradoxically, the term “biodiversity” symbolizes biologists’ lack of knowledge about the natural world.²²³ No one really knows for sure how many species there are, or how many are lost on Earth.

²¹⁹ See DAVID S. WILCOVE, *THE CONDOR’S SHADOW, THE LOSS AND RECOVERY OF WILDLIFE IN AMERICA* 5 (1999) (“There can be little doubt that humans have essentially reconfigured the American landscape. Today, more than 85 percent of the virgin forests of the United States have been logged, 90 percent of the tallgrass prairies have been plowed or paved, and 98 percent of the rivers and streams have been dammed, diverted, or developed. In the process, hundreds of species have vanished completely, many others have declined to the point of endangerment, and still others are drastically reduced in number.”). See also R. EDWARD GRUMBINE, *GHOST BEARS, EXPLORING THE BIODIVERSITY CRISIS* 9 (1992) (discussing how humans can move away from an adversarial relationship with nature by understanding biological diversity and learning to live within ecological limits); NILES ELDREDGE, *LIFE IN THE BALANCE: HUMANITY AND THE BIODIVERSITY CRISIS* 140 (1998) (“By transforming grasslands and forests into farmlands, cities, suburbs, and shopping mall complexes, we humans are not simply displacing ecosystems elsewhere, but rather actively destroying them, shrinking the habitat necessary to support a vast range of species.”).

²²⁰ See *supra* notes 29-30 and accompanying text.

²²¹ DAVID TAKACS, *THE IDEA OF BIODIVERSITY, PHILOSOPHIES OF PARADISE* 48 (1996) (quoting Jane Lubchenco).

²²² *Id.* at 46 (quoting Peter Brussard).

²²³ *Id.* at 83.

While the number of species currently described is 1.4 million, current estimates of the total number of species run from 10 to 100 million. But ignorance about biodiversity may have severe consequences. Biologists warn of the latent value of undiscovered foods, medicines and industrial products.²²⁴ It has been estimated that less than 5% of the species on earth have been tested for either food or pharmaceutical potential.²²⁵ Biological resources still provide the raw materials for food, most pharmaceuticals, clothing and shelter. The loss of species and genetic diversity diminishes the pool of biological resources available for human consumption. Since extinctions are irreversible, the present losses of diversity will result in future generations inheriting a biologically impoverished world, with potentially significant social, health and economic consequences.²²⁶ Although the National Biological Diversity Conservation and Environmental Research Act did not pass through Congress, the Act contained significant findings regarding biodiversity:

=XT

. . .

(5) reduced biological diversity may have serious consequences for human welfare as resources for research and agricultural, medicinal, and industrial development are irretrievably lost;

(6) reduced biological diversity may also endanger the functioning of ecosystems and critical ecosystem processes that moderate climate, govern nutrient cycles and soil conservation and production, control pests and diseases, and degrade wastes and pollutants;

(7) reduced biological diversity will diminish the raw materials available for scientific and technical advancement, including the development of improved varieties of cultivated plants and domesticated animals;

²²⁴ *Id.* at 87. “It is just enormously stupid to throw away the parts. I mean, why destroy something that is irreplaceable and just throw it away when we don’t even understand what it’s all about?” *Id.* at 89 (quoting Hugh Iltis). “It’s pretty stupid to be destroying things that we may be dependent upon and that we can’t recover.” *Id.* (quoting Jane Lubchenco); “[A] ‘gigantic gamble with the future of civilization’ to think that human survival does not depend on diversity of populations of nonhuman species.” *Id.* (quoting Gretchen Daily and Paul Ehrlich).

²²⁵ *Id.*

²²⁶ *Id.*

...²²⁷

Ensuring a wide genetic base is fundamental to maximizing the utility of biotechnology in agriculture and medicine.²²⁸ For example, in agriculture, genetic resources are critical for improving crops. Improved breeds of crops derived from a diverse gene pool of wild plants have accounted for about half of the increase in productivity in U.S. agriculture. Annually these improved crops account for about \$1 billion to U.S. agriculture.²²⁹ In medicine, plant and animal species remain an important source of pharmaceutical ingredients. Plant extracts are used in about 25% of the prescription drugs used in the United States, with a market value totaling \$15 billion annually.²³⁰ Discoveries for the advancement of medicine may constitute one of the most powerful ways biodiversity can contribute to human society. For example, *Penicillium* mold at one time was valued for what it did to flavor blue cheeses, but this later paled in comparison when it led to the discovery of antibiotics.²³¹ These are only a few examples, but they clearly show that an isolated species' contribution to biodiversity can have a "substantial effect" on interstate commerce.

The legislative proceedings during 1973 for the Endangered Species Act are similarly filled with expressions of concern over the risk that might lie in the loss of any endangered species.²³² Congress was very concerned about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on the planet.²³³ In explaining the need for legislation, the House Committee on Merchant Marine and Fisheries stated:

=XT

As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply. . . we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable.

²²⁷ National Biological Diversity Conservation and Environmental Research Act, H.R. REP. NO. 102-259, pt. 1, at 1 (1991).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See Lovejoy, *supra* note 198, at 9.

²³² *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174-77 (1979).

²³³ *Id.* at 178-79.

...

From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

...

Who knows, or can say, what potential cures for cancer . . . may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious.²³⁴

These comments reflect congressional concern for biodiversity, and ultimately the possible benefits that biodiversity may bring to humanity.

C. Cumulative Effects Doctrine

Even under the strictest application of *Lopez*, provided one applies *Wickard's* cumulative or aggregate effects doctrine in evaluating section 9 challenges, the economic or substantial effect of any one species is immaterial. By applying this doctrine to environmental legislation, most statutes will likely survive a constitutional challenge. Extension of Commerce Clause authority over local activity, where that activity has minimal or no impact on commerce, is constitutional if, in the aggregate, the class of activity substantially affects interstate commerce.²³⁵ Section 9 takings, through habitat modification by a private landowner, should be regulated as a class of activities, the regulation of which is necessary to effectuate the purpose of the ESA—the preservation of endangered species.

In enacting the ESA, Congress sought to protect all endangered and threatened species because “species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and

²³⁴ *Id.* at 178 (citation omitted). *But see* J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Law Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555 (1995) (arguing that as presently structured, the ESA does not get where biodiversity conservation policy says we should be headed).

²³⁵ *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

scientific value to the Nation and its people.”²³⁶ All of these utilitarian values have an effect on commerce—billions of dollars are spent annually on food, tourism, medicine, advances in science, and so on. Thus, when viewed in the aggregate, the cumulative effects of habitat destruction will likely have a substantial effect on interstate commerce.

Most environmental statutes are upheld based upon their “cumulative effects.” In the decision of, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, a federal court reaffirmed the congressional authority to regulate isolated intrastate wetlands providing a habitat for migratory birds.²³⁷ The court held that the cumulative degradation of intrastate waters could have a substantial effect on interstate commercial interests relating to those birds.²³⁸ Under this rationale, it does not matter whether or not the actual birds themselves substantially affected commerce. In fact, the destruction of one isolated wetland is not likely to have a substantial effect on commerce; the court looked to the cumulative effect of intrastate wetland destruction.

Similarly, it may be difficult to prove the effect on interstate commerce of one isolated species with no apparent ties to economic activity. In fact, if the whooping crane disappeared tomorrow, society probably would not feel its effects. But if species protection was conducted on a case-by-case basis, most species would not have a substantial effect on commerce. However, the cumulative effect of these decisions *would* have a substantial effect on commerce. Thus, if species protection under the ESA has any meaning at all, it must be viewed in the aggregate.

When looked at from this perspective, it does not matter if scientists ever traveled to see the Delhi Sands Flower-Loving Fly; or if the Fly traveled between the states; or if the Fly is exhibited in a museum in another state. These arguments only point to the tenuousness of the links that the Fly has to commerce. If one looks to the fundamental purpose of the ESA, it is to protect endangered species. Since all species are necessary for the preservation of biodiversity, a loss of such diversity will substantially affect interstate commerce.

²³⁶ 16 U.S.C. § 1531(a)(3) (1994).

²³⁷ Cook County, 998 F. Supp. 946 (1998).

²³⁸ *Id.* at 949-52.

Finally, courts should not make value judgments between which species should and should not be saved.²³⁹ Biologists and naturalists would be loath to put into the hands of the courts the ultimate decision of a particular specie's effect on agriculture, science, society, and ultimately commerce. Courts simply are not equipped to make these types of determinations. Judge Sentelle would make such a determination for the Fly. But it is not the Fly's demise but the total loss of biodiversity that substantially affects commerce. Only under this logic can all species be protected—even isolated ones.

VII. CONCLUSION

Whether *Lopez* presents a real threat to environmental regulation can only be tested with time. Nevertheless, even under the broadest reading of *Lopez*, most of the central provisions of major federal environmental laws will be upheld based upon principles of stare decisis. Further, because environmental laws generally regulate commercial activities that are not “areas of traditional state concern” they will have a greater chance of meeting constitutional muster. Undoubtedly, as provisions of the Act encroach more and more on private land development rights, the Act's constitutionality will continue to be challenged.

Congress may regulate isolated species under the Commerce Clause. The new test for constitutionality enunciated in *Lopez* is whether the regulated activity has a substantial impact on interstate commerce. Additionally, *Lopez* reaffirmed the holding in *Wickard*, concerning Congress's ability to regulate a purely intrastate activity if it is part of a class of activities that, taken as a whole, has a substantial “cumulative effect” on interstate commerce.²⁴⁰ The protection of isolated species should be upheld under the Commerce Clause by applying this rationale. The loss of one species may not be substantial, but the cumulative effects of the loss of all species, which decreases biodiversity, will have a substantial effect on interstate commerce.

²³⁹ See generally John C. Nagle, *Playing Noah*, 82 MINN. L. REV. 1171 (1998) (arguing that the “Noah Principle” is a reaffirmation of the Endangered Species Act's goal to save all species).

²⁴⁰ *Lopez*, 514 U.S. at 560-61; *Wickard*, 317 U.S. at 124.

When we chip away at the biodiversity of our planet, we chip away at our potential for knowing more about, and surviving better in the world. Forgetting about the aesthetic reasons for preservation, there are pragmatic reasons as well. Even people who have little regard for the spiritual and emotional benefits of biodiversity protection cannot ignore the fundamental benefits that wild species bring to our daily lives, such as food, medicine and even jobs. While one species may seem to have no intrinsic worth whatsoever, its value in terms of biodiversity may well be incalculable.