

2000

Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions

Karen M. Gebbia-Pinetti

Follow this and additional works at: <http://digitalcommons.chapman.edu/chapman-law-review>

Recommended Citation

Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173 (2000).

Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol3/iss1/7>

This Article is brought to you for free and open access by the Fowler School of Law at Chapman University Digital Commons. It has been accepted for inclusion in Chapman Law Review by an authorized administrator of Chapman University Digital Commons. For more information, please contact laughtin@chapman.edu.

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
<u>A. INTERPRETERS’ OBJECTIVES</u>	11
<u>B. SOURCES</u>	12
<u>1. Internal sources</u>	13
<u>2. Sources that are external but intrinsic to the statute</u>	14
<u>3. Sources that are external and extrinsic to the statute</u>	15
<u>C. INTERPRETIVE CANONS, GUIDES, AND AIDS</u>	16
<u>III. THE BANKRUPTCY CODE IN THE SUPREME COURT</u>	17
<u>A. OVERVIEW</u>	17
<u>B. THE UNANIMOUS DECISIONS</u>	19
<u>1. Overview</u>	19
<u>2. 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><i>Unanimous decisions in the 1986 through 1998 terms</i></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><i>Summary of unanimous decisions</i></u>	42
C.	<u>THE UNANIMOUS WITH CONCURRENCE DECISIONS</u>	45
1.	<u>Overview</u>	45
2.	<u><i>Concurring decisions in the 1981 through 1985 terms</i></u>	46
3.	<u><i>Concurring decisions in the 1986 through 1998 terms</i></u>	48
a.	<u>Single Justice concurrence decisions</u>	48
b.	<u>Multiple Justice concurrence decisions</u>	53
4.	<u><i>Summary of the unanimous with concurrence decisions</i></u>	57
D.	<u>THE MINOR SPLIT DECISIONS</u>	57
1.	<u>Overview</u>	57
2.	<u><i>Minor split decisions in the 1981 through 1985 terms</i></u>	58
3.	<u><i>Minor split decisions in the 1986 through 1998 terms</i></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><i>Summary of the minor split decisions</i></u>	81
E.	<u>THE MAJOR SPLIT DECISIONS</u>	81
1.	<u>Overview</u>	81
2.	<u><i>The constitutional and quasi-constitutional questions</i></u>	83
3.	<u><i>The Bankruptcy Code interaction with other law cases</i></u>	84
4.	<u><i>The interpretive dispute cases</i></u>	90
5.	<u><i>Summary of the major split decisions</i></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><i>Patterns that emerge from the Supreme Court's split and non-split Bankruptcy Code decisions</i></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><i>Patterns of disputes among the Justices</i></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 HAMLIN 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 interpretive 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*, 489 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 interpretive 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 Justice 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 alone⁶⁰⁰

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 interpretive 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 (concurrence 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 not 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.